40th Year Anniversary of the Dow Chemical Award

BERNARD HANOTIAU[1], LEONARDO OHLROGGE[2]

Dow Chemical award – Group of companies doctrine – Multi-party arbitration – Non-signatory parties – Implied consent – Third parties

Summary

This article addresses the legacy of the Dow Chemical award, a landmark decision and one of the most discussed decisions in the context of multi-party arbitration over the last forty years. This is because the Dow Chemical award is said to be the origin of the so-called "group of companies doctrine", an alleged non-consensual theory that sparked an intense discussion on the extent of consent and its interpretation. Nevertheless, contrary to what has been affirmed, the Dow Chemical case did not create a basis for extending the arbitration agreement to non-signatory parties irrespective of consent. Whilst the arbitral tribunal in the Dow Chemical indeed found that it had jurisdiction over non-signatory parties, the decision was not based solely on the fact that the companies of the same group formed a single unity. Rather, the arbitrators relied on the parties' implied consent and found that the non-signatories appeared to be true parties to the arbitration agreements. Accordingly, since its outset the notion of a group of companies doctrine is a misconception. It is merely a misleading concept obscuring what is in reality the assessment of the parties' consent.

[1] Partner at Hanotiau & van den Berg. Professor emeritus of the law school of Louvain University (Belgium) and visiting professor at NUS University (Singapore). Member of the ICCA Advisory Board and of the Council of the ICC Institute and a member of the ICC International Arbitration Commission.

[2] Senior associate at MLL Meyerlustenberger Lachenal Froriep. Ph.D. from the University of St. Gallen and LL.M. from the University of Frankfurt.

Introduction

This year marks the 40th anniversary of the interim award in ICC Case No. 4131, worldwide known as the Dow Chemical case.[3] The award was rendered on 23 September 1982 by a distinguished arbitral tribunal seated in France and presided by Mr Pieter Sanders with Mr Berthold Goldman and Mr Michel Vasseur as co-arbitrators. The Dow Chemical case became a landmark and one of the most discussed decisions in the context of multi-party arbitration over the last forty years. This is because the Dow Chemical award is said to be the origin of the so-called "group of companies doctrine", an alleged non-consensual theory that sparked an intense discussion on the extent of consent and its interpretation. Nevertheless, contrary to what has been affirmed, the Dow Chemical case did not create a basis for extending the arbitration agreement to non-signatory parties irrespective of consent. Whilst the arbitral tribunal in the Dow Chemical award indeed found that it had jurisdiction over non-signatory parties, the decision was not based solely on the fact that the companies of the same group formed a single unity. Rather, the arbitrators relied on the parties' implied consent and found that the non-signatories appeared to be true parties to the arbitration agreements. Accordingly, since its outset, the notion of a group of companies doctrine is a misconception. It is merely a misleading concept obscuring what is in reality the assessment of the parties' consent. Therefore, references to it should be avoided.

The Arbitral Award

The arbitration arose out of a dispute concerning two agreements with ICC arbitration clauses for the distribution of thermal isolation products in France. The first agreement was entered, on the one hand, by Dow Chemical (Venezuela) which later assigned it to Dow Chemical AG (Switzerland), a subsidiary of Dow Chemical Company (USA), and, on the other hand, a French company which later assigned the contract to Isover St. Gobain (France). The second agreement was entered into by Dow Chemical Europe (Switzerland), a subsidiary of Dow Chemical AG, and three companies which later assigned the contract also to Isover St. Gobain. Both contracts provided that the deliveries could be made by Dow Chemical France, another company of the group.

The arbitration proceedings were commenced by four companies of the Dow Chemical group: the formal parties to the agreements, Dow Chemical AG

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3 ICC Case No. 4131, Interim Award, 23.09.1982, in Yearbook Commercial Arbitration 1984, Vol. IX, pp. 131-137. The award was originally rendered in French (Journal du droit international, 1983, pp. 899-905, with note by DERAINS, pp. 905-907).

and Dow Chemical Europe, and by the non-signatories, Dow Chemical France and the holding Dow Chemical Company. The respondent Isover St. Gobain raised a jurisdictional objection arguing that the arbitral tribunal lacked jurisdiction over the latter two as they were not parties to the arbitration agreements (Dow Chemical France and Dow Chemical Company).

The arbitral tribunal first addressed which law should be applied to decide upon the scope of the arbitration agreements. Based on the principle of autonomy of the arbitration agreement, the arbitral tribunal held that the arbitration clauses were not necessarily governed by French law, which was the law selected by the parties to govern the merits of the dispute. Since they are considered separate agreements, the arbitration clauses might be governed by their own sources of law. The arbitral tribunal stated further that it would decide the issue based on the intention of the parties in light of the circumstances of the case as well as the usages of international trade.

As to the subjective scope of the arbitration agreements, the arbitral tribunal found to have jurisdiction over the non-signatories Dow Chemical Company and Dow Chemical France. Notably, the arbitral tribunal did not base its decision solely on the fact that the companies were members of a group. Rather, it found that the non-signatories appeared to be true parties to the contracts. It concluded that this was the intention of the parties, both of the claimants and of the companies which were eventually succeeded by the respondent. The arbitral tribunal followed a two-step approach to determine the subjective scope of the arbitration agreements. First, it analysed the factual circumstances underpinning the negotiation, performance and termination of the agreements. Second, it considered what bearing the circumstance that the companies belonged to the same group should have in that context. Throughout both stages, the arbitral tribunal focused on the parties' intentions.

When analysing the circumstances of the case, the arbitral tribunal found that both non-signatories played an important role in the agreements' negotiation, performance and termination. It also held that parties on both sides did not attach the slightest importance to which company would sign the agreements. To the contrary, the companies of the Dow Chemical group involved in the distribution in France understood to be contracting with the distributors. Likewise, the distributors also understood to be contracting with all companies of the sellers' group. With regard to Dow Chemical France, the arbitral tribunal stated that this was at the center of the negotiations and performed the agreements. As for the holding Dow Chemical Company, the arbitral tribunal found that it owned the trademarks under which the products would be marketed in France and had absolute control of the subsidiaries, such that no contractual relationship would be possible without its approval. The

arbitral tribunal also relied on the fact that Isover St. Gobain had applied for the joinder of Dow Chemical Company into court proceedings in France by arguing that the latter decided and conceived the modalities of the manufacturing and distribution of the products to be distributed. Thus, the arbitral tribunal held that the non-signatories were also entitled to arbitrate because this was in accordance with the parties' intention when they entered into the contracts. Their intention was also evidenced by their roles during performance.

It was only after the arbitral tribunal reached the conclusion that the non-signatories were also parties to the agreements that it proceeded to the analysis of the impact that the existence of a corporate group might have upon the arbitration agreements. In this regard, it is important to mention that the arbitral tribunal found that an arbitration agreement signed by certain companies should be binding on other entities of the group only where the latter seem to be true parties to the arbitration agreement by virtue of their participation in the negotiation, performance and termination of the contract and if this corresponds to the parties' intent.

It should be stressed that this was not the first decision to consider that parties that had not formally entered into the agreements fell within the subjective scope of the arbitration clauses. The Dow Chemical award referred to two decisions rendered in ICC Cases Nos. 1434[4] and 2375[5]. According to the arbitral tribunal, these two awards progressively created case law which should be taken into account as they considered the economic reality of the group of companies and the needs of international commerce. In both cases the non-signatories were considered parties to the arbitration clauses because these were entered into by related entities with the purpose of binding the whole group. Importantly, the arbitral tribunal in the Dow Chemical case did not build on such decisions to formulate a non-consensual legal basis for binding non-signatories. Rather, the arbitral tribunal stuck to the consensual character of arbitration and put the consensual requirement at the forefront. The fact that

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4 ICC Case No. 1434, Award, 1975, Journal du droit international, 1976, pp. 978-989. The arbitral tribunal concluded that it was the intention of a state company to enter into contracts with a group of companies, being of no importance which ones as long as the agreements were performed. The broad designation of the parties in the agreements reflected such intent. The arbitral tribunal further stated that not much importance should be given to the wording of the agreements and that a literal interpretation of the contracts would not be in accordance with the parties' mutual intentions. Therefore, the non-signatory companies of the group could not hide behind the literal text of the contracts.

5 ICC Case No. 2375, Award, 1975, Journal du droit international, 1976, pp. 973-978. The arbitral tribunal held that the signatory parties clearly concluded an agreement intending to bind themselves and their subsidiaries. It further added that all companies were indissolubly linked and committed under the agreement.

the Dow Chemical companies were part of the same group was indeed economically relevant, but the arbitral tribunal considered it as an element indicating consent, rather than replacing it.

Setting Aside Proceedings

Isover St. Gobain initiated setting aside proceedings before the Paris Court of Appeal, which rejected the request and upheld the award in its judgment of 21 October 1983.[6] The Court of Appeal found that the arbitral tribunal had correctly decided based on the parties' common intentions that both the holding Dow Chemical Company and Dow Chemical France had been true parties to the agreements even though they had not signed the contracts in dispute. The Court of Appeal further added that the arbitral tribunal had incidentally referred to the notion of "group of companies", whose existence was not strongly contested by the appellant. Accordingly, the decision of the Court of Appeal confirmed the arbitral award entirely based on consent.

Dow Chemical Legacy

The Dow Chemical award was a very significant decision for international arbitration. However, its importance does not lie in the creation of a controversial basis for extending the arbitration agreement to third parties irrespective of their consent – which it did not create as shown below. Rather, the Dow Chemical was an important case because of the arbitral tribunal's flexible approach towards the assessment of consent, giving particular relevance to its implied form. The award was a milestone in the multi-party arbitration context as it played a key role in the development of what is the majority view in case law and literature today with respect to the analysis of the subjective scope of the arbitration agreement. As explained above, the arbitrators found that the arbitration agreement directly entered by certain companies might bind other entities of their group if the latter appear to be true parties to the arbitration agreement because of their participation in the negotiation, performance or termination of the agreement provided that this is in accordance with the parties' intentions. Nowadays this is the prevailing view worldwide[7], but it was not forty

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6 Dow Chemical Group v. Isover Saint-Gobain, Paris Court of Appeal, 21.10.1983, in Revue de l'Arbitrage, 1984(1), pp. 98-114.

7 REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, Oxford University Press, para. 2.49; YOUSSEF, The Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Groups of Companies, in HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, Kluwer Law International, p. 76. Recent arbitral awards and

years ago when arbitration clauses were interpreted more narrowly. The arbitration award was therefore instrumental in the transition from a restrictive interpretation of consent focusing on its express manifestation to a more flexible approach attaching the necessary relevance to implied consent and more attentive to the needs of complex contractual scenarios.

Whilst previous decisions had reached the same result, the Dow Chemical award became more prominent because it provided a more elaborate reasoning with respect to the interplay between consent and the economic reality of groups of companies to which several awards and court decisions later referred.[8] The arbitral tribunal did not ignore the fact that there is a natural tension between corporate groups and the consensual nature of arbitration and found that international arbitration should be responsive to the needs of international commerce. Nevertheless, it did not rule out the consensual requirement, but rather found consent in the parties' involvement in the agreements.

No Creation of a Group of Companies Doctrine

Over the last forty years much has been written about the so-called group of companies doctrine, a theory allegedly originated from the Dow Chemical case used to bind third parties to an arbitration agreement. However, no consensus has been reached as to what should be understood under the group of companies doctrine. Neither its concept nor its contours are clear. An analysis of literature and case law reveals that completely opposite conclusions have been drawn from the Dow Chemical award. On the one hand, the group of companies doctrine has been criticized and its application has been rejected by courts and arbitrators that considered the group of companies doctrine a non-consensual basis for extending the arbitration agreement to companies of the same group irrespective of the parties' intent. From this perspective, the theory would be a

court decisions confirm that consent is still the overriding element to determine which parties fall within the scope of the arbitration agreement: Court of Appeal of São Paulo, Ap. 0035404-55.2013.8.26.0100, 1st Commercial Chamber, 26.08.2015; Swiss Federal Court, 4A_646/2018, 17.04.2019; Swiss Federal Court, 4A_636/2018, 24.09.2019; Court of Appeal of Paris, Société CNAN v. Société CTI, 23.06.2015, in Revue de l'Arbitrage, 2017(2), pp. 597-604.

8 Société Sponsor A.B v. Lestrade, Pau Court of Appeal, France, 26.11.1986, with note by CHAPELLE, pp. 153-161; ICC Case No. 5281, Award, 28.04.1989, in ASA Bulletin, 1989, Vol. 7(3), 313-333; ICC Case No. 6610, Interim Award, 1991, in Yearbook Commercial Arbitration 1994, Vol. XIX, pp. 162-166; Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan, Supreme Court of the United Kingdom, 15.11.2010, A contribution by the ITA Board of Reporters, Kluwer Law International, with note by FLETCHER; CAM Santiago Case No. A-2765-2016, Award, 27.11.2017, A contribution by the ITA Board of Reporters, Kluwer Law International.

violation of the consensual nature of arbitration. On the other hand, some commentators take the view that consent is at the heart of the group of companies doctrine. They see in it a basis for finding implied consent based on objective patterns. In light of these conflicting views, the term group of companies doctrine is clearly ambiguous. Hence, it is not surprising that discussions regarding the existence and applicability of such theory quite often lack clarity.

Not only equivocal, the group of companies doctrine is also a dispensable concept. The idea that the Dow Chemical award created a non-consensual basis for extending the arbitration agreement is a misconception. As shown above, the decisions rendered by the arbitral tribunal and the Paris Court of Appeal actually rely on consent. They did not give origin to a theory allowing the extension of the arbitration agreement beyond consent. Group of companies doctrine is therefore a misleading name. It gives to understand that non-signatory parties might be bound to an arbitration agreement signed by other parties based solely on the existence of a corporate link between them.[9] Again, this is not true. The theory in this sense never existed. It should also be noted that it is often said that the group of companies doctrine has limited acceptance outside France. This is not completely accurate since French courts do not embrace such a theory.[10] In France, the arbitration agreement can bind additional parties only to the extent that the consent requirement has been met.[11] This is yet another example that the discussion about the group of companies doctrine is fraught with inaccuracies.

Furthermore, had the group of companies doctrine a consensual nature, it would be only an unnecessary term adding complexity to what is in fact the assessment of the parties' intent. Attaching any consensual requirement to the theory would render it meaningless. Consent is the fundamental and utmost requirement in any case. If there is consent, there is jurisdiction so that no further requirements would be necessary. In other words, if there is express or implied consent, then the party will be a true party to the arbitration agreement without needing to resort to any theory. This does not only apply to cases where

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9 VOSER, Multi-party Disputes and Joinder of Third Parties, in VAN DEN BERG (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, Vol. 14, Kluwer Law International, p. 376; WAINCYMER, Procedure and Evidence in International Arbitration, 2012, Kluwer Law International, pp. 522 et seqq.

10 DEVOLVÉ/POINTON/ROUCHE, French Arbitration Law and Practice, 2nd ed., 2009, Kluwer Law International, para. 128; ICC Case No. 15116, Interim Award, 2008, in Yearbook Commercial Arbitration 2014, Vol. XXXIX, pp. 159-168; ICC Case No. 11405, Award, 2001, unpublished, quoted in HANOTIAU, Consent to Arbitration: Do We Share a Common Vision?, in Arbitration International, Vol. 27, 2011(4), p. 546.

11 Société Kis France et autres v. Société Générale et autres, Paris Court of Appeal, France, 31.10.1989, in Revue de l'Arbitrage, 1992(1), pp. 90-93.

the companies are from the same group, but also where companies are completely dissociated from one another.[12]

The existence of a group of companies is therefore only a factual element that might indicate consent towards multi-party arbitration. It is certainly a factor to be taken into account when analysing the parties' intentions, but it is not a decisive element by itself.[13] Consent remains the preponderant criterion.[14]

Even though one might be tempted to draw a formula from the findings of the Dow Chemical award and similar decisions, this is not recommended.[15] In the end, the analysis of the parties' intent is a factual exercise. Consent or lack thereof is ascertained based on the factual circumstances of the case and evidence on the record. There is no shortcut that might simplify a rigorous analysis.[16] As shown below, reliance on the group of companies doctrine has proved to be counterproductive. It adds an extra layer of complexity to what is at its core the analysis of consent.[17] This is not necessary and only leads to confusion. Moreover, there is no need to refer to the group of companies doctrine, as non-signatory issues may and should be resolved by reliance on implied consent only.[18]

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12 This is another example of terminological inaccuracy regarding the concept of group of companies. MANTILLA-SERRANO, Multiple Parties and Multiple Contracts: Divergent or Comparable Issues?, in HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, Kluwer Law International, p. 12.

13 DERAINS, Is there A Group of Companies Doctrine?, in HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, Kluwer Law International, p. 143.

14 According to ZUBERBÜHLER, group of companies doctrine is often used as an umbrella term for all the non-signatory scenarios where the fact of a corporate relationship among signatory and non-signatory parties plays an important role. He further adds that decisions show that the finding of an (implied) consensus remains key in binding non-signatories to an arbitration clause (ZUBERBÜHLER, Non-Signatories and the Consensus to Arbitrate, in ASA Bulletin, 2008, Vol. 26, p. 25).

15 See more in HANOTIAU, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study, 2nd ed., 2020, Kluwer Law International, para. 245.

16 *WILSKE*/SHORE/AHRENS, The "Group of Companies Doctrine" – Where is it *Heading*?, in American Review of International Arbitration, Vol. 17, 2006(1), pp. 87-88.

17 PCA Case No. 2011-09, Decision on Jurisdiction, 25.07.2012, Arbitrator Intelligence Materials, para. 331: "The Respondents insist that Mongolian law does not recognize the so-called 'group of companies doctrine'. In this respect, the Tribunal observes that the Claimants do not rely on this doctrine. The Tribunal further notes that no clear submissions have been made as to the content of any such doctrine. In the Tribunal's view, the mere existence of a group of companies cannot affect the scope of the arbitration clause. As stated above, the relevant inquiry is into the common intention of the Parties, as manifested through their conduct in the negotiation, performance, and termination of the contract".

18 Whilst suggesting that the application of group of companies by Indian courts risks undermining the consensual nature of arbitration, some commentators found that:

Conclusion

The Dow Chemical award is a landmark decision. It provides clear reasoning as to the fundamental role played by consent in determining the subjective scope of the arbitration agreement in multi-party arbitration. In this case, the arbitrators decided that companies might be bound by the arbitration agreement entered into by other entities of the same group if the non-signatory companies appear to be true parties to the arbitration agreement by virtue of their involvement in the negotiation, performance or termination of the underlying contract. The Dow Chemical award did not create a basis for extending the arbitration agreement to third parties irrespective of their consent. In fact, exactly the opposite holds true. The arbitrators found that an arbitration clause might bind a party that has not formally entered into the agreement only insofar this is in accordance with the parties' mutual intentions. This contradiction puts the existence of a so-called group of companies doctrine into question.

In forty years, the term group of companies doctrine has proved to be misleading and the idea of such a theory a misconception. The fact that two companies are part of the same group does not serve as a basis for the extension of the arbitration agreement on its own. Whether a party can invoke or be bound by an arbitration clause is a matter of consent which shall be ascertained case by case based on factual elements. This does not mean that the existence of a group of companies is irrelevant. Quite the contrary, it is certainly an element to be considered in the analysis of parties' intentions, but not decisive per se.

When determining the scope of the arbitration agreement, there is no shortcut that can substitute the assessment of the existence of consent based on the evidence on the record. References to the group of companies doctrine should be avoided – for good. They serve no purpose and only take the focus away from what really matters: the factual circumstances evidencing consent or lack thereof.

"Eschewing the doctrine will not create a void in jurisprudence. To the contrary, the principle of implied consent may be sufficient to bind non-signatories based on their conduct or other attendant circumstances that demonstrate intent". (PRASAD/CAHER/IRANI, The Group of Companies Doctrine – Assessing the Indian Approach, in Indian Journal of Arbitration Law, Vol. IX, 2020(2), pp. 33-50).