



Extending the arbitration agreement to non-signatories

parent companies, affiliates, controlling
individuals, guarantors, other third parties

ASA below 40 Seminar, 21 October 2011, Andrea Meier

Extension of the arbitration agreement

- What it is: a matter of substantive law
- What it is for: extending the arbitration agreement and the contract
- Where it is used: group of companies, state-owned/controlled companies
- Why it is controversial: the French group of companies doctrine

The group of companies doctrine (I)

Is the group of companies doctrine a French nightmare haunting the arbitration world?

“Nachtmahr”, Johann Heinrich Füssli (1802)



The group of companies doctrine (II)

- The roots: **Dow Chemical**, ICC Interim Award of 23 September 1982, Case No. 4131
- The Dow Chemical test: existence of a group of companies and a “*mutual intention of all parties*” to be bound by the arbitration agreement
- Reception of the doctrine

The Swiss approach to the group of companies doctrine

- Intervention theory

Butec (DFT 29 January 1996)

X S.A.L, Y S.A.L. and A vs. Z Sarl
(DFT 16 October 2003, 129 III 727)

X v. Y Banka and Z
(DFT 20 September 2005, 4P.48/2005)

- Intervention must show intention to be bound by the arbitration agreement ... see Dow Chemical!

Other concepts applied under Swiss law

- Apparent mandate
China National (DFT 1 September 1993)
- Piercing the corporate veil
ALPHA S.A. vs. BETA & Co. (ad hoc award of 1991)
- (De facto) guarantee
X Ltd vs. Y and Z S.p.A.
(DTF 19 August 2008, 4A_128/2008)

Requirements of form in Switzerland

- Article 178 I PILA: text requirement
- The creative approach of the Swiss Federal Tribunal (DFT 129 III 727)
 - Requirement of form only applies to original parties!

What do the English say?

- Reluctance of English courts to extend an arbitration agreement within a group of companies
- English Commercial Court in **Peterson Farms Inc.:**
“The group of companies doctrine forms no part of English law!”

Outside of the group of companies: other third parties

- What is left outside of the group of companies constellation?
 - mainly state-owned or controlled companies
 - similar problems and principles as for group of companies

Take-aways

1. The group of companies doctrine is not a French nightmare (if properly applied)
2. The Swiss have their own “group of companies doctrine” (intervention theory)
3. Both concepts require conduct showing intention to be bound by the arbitration agreement
4. Form requirements can seriously hamper a party’s extension hopes ... but not in Switzerland!