Challenges to Jurisdiction and Non-Signatories in Arbitration

Janet Walker

Osgoode Hall Law School of York University, jwalker@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/all_papers

Repository Citation
http://digitalcommons.osgoode.yorku.ca/all_papers/233

This Conference Paper is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in All Papers by an authorized administrator of Osgoode Digital Commons.
Challenges to Jurisdiction and Non-Signatories
Janet Walker*

I—Typical challenges to jurisdiction:

• subject matter of dispute not arbitrable
e.g. dispute involves public law

• clause inoperative
  e.g. institution or arbitrator does not exist

• clause does not cover the dispute
  e.g. dispute does not relate to the contract

• clause does not bind the parties
  e.g. one party is a non-signatory

II—Non-signatories generally not bound

an agreement “signed by the parties” New York Convention, art II/Model Law, art 7(2)

but…

exceptions based on five (or six) theories:

• incorporation by reference
• assumption
• agency
• veil piercing/alter ego
• equitable estoppel
• third party beneficiaries

* Professor, Osgoode Hall Law School, Global Visiting Professor, NYU School of Law, jwalker@yorku.ca

Denney v BDO Seidman LLP 412 F 3d 58, 71 (2nd Cir 2005) (five exceptions)
InterGen NV v Grina, 344 F 3d 134, 146 (1st Cir 2003) (third-party beneficiaries)
III—Non-signatories - Canadian view

Party autonomy/read the contract:

- *Kaverit Steel and Crane Ltd v Kone Corp* (1992) 87 DLR (4th) 129 (Alta CA) (referral to arbitration of some parties in multi-party matter mandatory despite inconvenience)

- *SimEx Inc v IMAX Corp* [2005] OJ No 5389 (Ont CA) (choice of court clause in transfer agreement applicable not arbitration clause in initial contract)

- *Xerox Canada Ltd v MPI Technologies Inc* [2006] OJ No 4895 (Ont SCJ) (addition of wholly owned subsidiary’s parent proper where other party did not distinguish between them prior to dispute and sought discovery of parent)

- *Rampton v Eyre* 2007 ONCA 331 (Ont CA) (major shareholder of party unable to invoke arbitration clause, but other objections to clause rejected)

IV—Who decides? Two approaches…

- **US: a question of arbitrability** for the courts (unless “clear and unmistakable evidence” of party intent)
  
  

- **Canada: Kompetenz-kompetenz**—the arbitral tribunal may rule on its own jurisdiction…. Model Law, art 16(1)
  
  *Masterfile Corp v Graphic Images, Inc* [2002] OJ No 2590 (arbitrator appointed to determine whether objecting party was bound as signatory)