



ILE

LEX SPECULUM

VOLUME 1 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



ILE LEX SPECULUM

APIS – 3920 – 0036 | ISBN – 978-81-964391-3-2

(Free Publication and Open Access Journal)

Journal's Home Page – <https://ls.iledu.in/>

Journal's Editorial Page – <https://ls.iledu.in/editorial-board/>

Volume 1 and Issue 1 (Access Full Issue on – <https://ls.iledu.in/category/volume-1-and-issue-1-of-2023/>)

## Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

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## THE FORCED JOINDER OF A NON-SIGNATORY TO AN INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDING

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**Best Citation** – UPANSHU SHETTY, THE FORCED JOINDER OF A NON-SIGNATORY TO AN INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDING, *ILE LEX SPECULUM (ILE LS)*, 1 (1) of 2023, Pg. 32-37, APIS – 3920 – 0036 | ISBN – 978-81-964391-3-2.

### The Legal Intricacies of a Joinder of a 3<sup>rd</sup> Party to an International Commercial Arbitration Proceeding with special reference to SIAC Rules, 2016.

*Arbitration is an increasingly popular method for resolving disputes between parties in various industries and sectors. However, as disputes often involve multiple parties with complex relationships and contractual arrangements, questions may arise regarding the appropriate scope of the arbitration proceedings. Under the 2016 Rules of the Singapore International Arbitration Centre (SIAC), a third party may be joined in an arbitration proceeding under certain circumstances. This article explores the threshold for establishing a third party's obligation to be bound by the arbitration agreement. Ultimately, the article seeks to provide a comprehensive understanding of the principles and considerations that guide the joinder of third parties in arbitration proceedings under the 2016 SIAC Rules.*

The Supreme Court recently in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) Laid down the foundation for a forced joinder of a third party to an arbitration Proceeding. This was due to the Agency Doctrine rather than the Group Of Companies Doctrine. The Supreme Court's ruling in *ONGC Ltd. vs. Discovery Enterprises (P) Ltd.* (2022) establishes that a party who has not signed an arbitration agreement can still be held to it through the principle of direct estoppel. This prevented the party from enjoying the advantages of a contract while refusing to fulfil the obligation to engage in arbitration. The High Court In this case laid down that This "direct

benefit" must fulfil 2 criteria. It must, firstly it must emerge from and be attributable to the agreement itself and not any other relation and secondly, the knowledge to exploit the same must be present. The court here, thus enforced a form of the doctrine of alter ego. As per this doctrine, the "corporate veil" behind which a non-signatory hides must be "pierced" and the controlling party should be made bound by the agreement with its subsidiary, or agent. Traditional principles of agency law also bind a non-signatory to an arbitration agreement. Wherein the wrongdoing by the agent related to a contract containing an arbitration clause will cause the non-signatory principal will be bound by it. This has been supported by a number of arbitral awards and national court decisions.

Under Rules 7.8 and 7.10 of the 2016 Rules of SIAC, a third party may be joined in an arbitration proceeding under two circumstances: either the non-party to be joined should be prima facie bound by the arbitration agreement; or all parties, including the non-party, should have consented to the joinder<sup>35</sup>. The threshold for establishing this *prima facie* obligation is set very low, the court only needs to consider whether an arbitration clause exists and if it concerns the third party sought to be joined<sup>3637</sup>. The guiding

<sup>35</sup> Singapore International Arbitration Rules, 2016.

<sup>36</sup> Andrea Meier, COMMENTARY ON THE ICC RULES, INTRODUCTION TO ARTICLES 7-10 ICC RULES, IN *ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 6-70* (Manuel Arroyo ed., Kluwer Law International 2013).

principles are of procedural fairness and efficiency behind the prima facie test.

As per an initial draft of the 2016 Rules, it was concluded that the following two conditions were to be considered for an application of Joinder under Rule 7.8(a)<sup>38</sup>. These may be used as the guiding principles in the present case.: If the joinder is necessitated in the interest of fairness, expediency and economic considerations *and* if the claim(s) arise in relation to or out of the same transaction or series of transactions<sup>39</sup>.

Another Major Contention would be that the relation of the third party should be unique. If the signatory actually works as an agent for the Non signatory to carry out the function undertaken by the third party, the *doctrine of alter ego* applies. Where one party consistently acts entirely on behalf of, and at the direction of, another party a general agency relationship will be found<sup>40</sup>. Such a general agency will bind the principal in all agreements executed by the agent, including arbitration agreements<sup>41</sup>.

Also, a joinder would be allowed if it were in the interests of fairness and justice as it would afford a right of audience to all the stakeholders concerned.

In certain Scenarios, the *doctrine of alter ego* must be applied<sup>42</sup>. As per this doctrine, the “corporate veil” behind which a non-signatory hides must be “pierced” and the controlling party should be made bound by the agreement with its subsidiary, or agent<sup>43</sup>. The doctrine of piercing the corporate veil has been used to justify joining a third party to the arbitration

where there is such unity of interest and ownership that separate personalities of the corporations no longer exist<sup>44</sup>. The doctrine does not require looking at parties’ intentions to be bound by the arbitration agreement, but rather looks to overriding considerations of equity and fairness which mandate disregarding an entity’s separate legal identity in certain circumstances<sup>45</sup>. The corporate veil may also be pierced where a parent dominates and controls a subsidiary<sup>46</sup>. Courts have permitted extending an arbitration agreement to state entities that exercised *total dominion and control* over the signatory party.<sup>47</sup> The corporate veil may also be lifted where it is just and necessary or equitable to do so<sup>48</sup>. Thus, in various forms of nationalisations and takeovers, a joinder would fulfil these criteria. Keeping this in view multi-party proceedings are often forced by the courts because of the better representation afforded to the third party concerned<sup>49</sup>.

The preparatory history of the SIAC Rules shows that ‘whether the claims arising in relation to the additional party arose out of the same transaction or series of transactions’ is a factor in deciding joinder<sup>50</sup>. Similarly, courts have allowed joinder where the additional party being joined was inextricably linked to a party to the arbitration in its function and management<sup>51</sup>. Where the issue sought to be resolved with the additional party is inextricably intertwined with an agreement containing an

<sup>37</sup> 2 John Choong et al, *A Guide to the SIAC Arbitration Rules*, 116 (OUP, 2018).

<sup>38</sup> Draft SIAC Arbitration Rules (2016).

<sup>39</sup> 2 John Choong et al, *A GUIDE TO THE SIAC ARBITRATION RULES*, 118 (OUP, 2018).

<sup>40</sup> E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, 269 F. 3d 187, 198 (3rd Cir. 2001); Pan E. Exploration Co. v. Hufo Oils, 855 F. 2d 1106, (1988); House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc., 468 F. 2d 64 (1972).

<sup>41</sup> 5 G. BORN & P. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 199-201 (Kluwer Arbitration 2011).

<sup>42</sup> Richard Bamforth, *Joining Non-Signatories to an Arbitration: Recent Developments*, 3(3) *The In-House Perspective* 17, 19 (2007).

<sup>43</sup> David Powles, *The “See-through” Corporate Veil*, 40(3) *THE MODERN LAW REVIEW* 339, 340 (1977); Stephen Bull, *Piercing The Corporate Veil—in England and Singapore*, *SINGAPORE JOURNAL OF LEGAL STUDIES* 24, 25 (2014).

<sup>44</sup> *Oriental Commercial & Shipping Co. (U.K.), Ltd. v. Rosseel, NV*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985).

<sup>45</sup> *First Natl. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983).

<sup>46</sup> *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F. 3d 24, 26 (2d Cir. 1993); *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F. 2d 131, 138-39 (2nd Cir. 1991).

<sup>47</sup> *Bridas S.A.P.I.C. v. Govt. of Turkmenistan*, 345 F. 3d 347, 356-57 (2003).

<sup>48</sup> *Mubarak v. Mubarak*, [2001] EWHC (Fam) 1 FLR 673, 682. (Eng.); *InterGen NV v. Grina*, 344 F. 3d 134, 149 (1st Cir. 2003); *McCarthy v. Azure*, 22 F. 3d 351, 362-63 (1st Cir. 1994); Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party - Who Is A Proper Party in An International Arbitration Before the American Arbitration Association?*, 89, 90, 34 GEO. WASH. INT’L L. REV. 84, 88 (2002).

<sup>49</sup> Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 *CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW* 341, 344 (1990).

<sup>50</sup> Public Consultation on Draft SIAC Investment Arbitration Rules (2016) <http://www.siac.org.sg/our-arbitrators/113-resources/press-releases/press-release-2016/469-public-consultation-on-draft-siac-investment-arbitration-rules>.

<sup>51</sup> *P.R. Shah, Shares & Stock Broker (P) Ltd. v. B.H.H Securities (P) Ltd.*, (2012) 1 SCC 594.

arbitration clause, and the non-signatory is closely related to the signatory to that agreement, joinder is permitted<sup>52</sup>.

The group of companies' doctrine allows a tribunal to join a third party to the arbitration if the intent and behaviour of the parties shows that there was an intent to create an integrated contractual relationship subject to one single arbitration<sup>53</sup>. Even where the transaction is carried out through multiple agreements, and not a single agreement, they can be linked if they all formed part of one composite transaction and the performance of one was intrinsically linked to the others<sup>54</sup>. Further, the doctrine is also applicable where the companies, though separate legal entities, formed a single economic reality and any distinction between them is only cosmetic<sup>55</sup>. This becomes apparent where the parent exercises deep and pervasive control over the subsidiary<sup>56</sup>. The parent entity's involvement in the performance and termination of a contract to which a subsidiary is party is sufficient to satisfy the threshold and justify joining the parent to arbitration<sup>57</sup>. Traditional principles of agency law may bind a non-signatory to an arbitration agreement<sup>58</sup>. An agent, or a similar representative, may in certain circumstances legally bind another party by its acts. Where the wrongdoing by the agent related to a contract containing an arbitration clause, the non-signatory principal will be bound by it<sup>59</sup>. This has been supported by a number of arbitral awards<sup>60</sup> and national court decisions<sup>61</sup>.

Even so there are strong arguments to be made against a joinder. The root of them is that an arbitration proceeding is fundamentally dependent on the parties and is the preferred mode of dispute resolution due to the autonomy they extend to the parties of a contract themselves and thus party autonomy plays a huge role. The parties can choose to customize the arbitral proceedings as per their own requirements and be listed down in the contract itself.<sup>62</sup> A forced joinder would only defeat the purpose of arbitration. The parties also have a right to enter an agreement with whomsoever they wish to, another fundamental tenet of the freedom of contract. This right is a part of the parties' autonomy and should be respected. Hence, any inclusion of a third party without taking the consent of the existing parties would invariably infringe upon this autonomy and thus, would be counterproductive.

In arbitration, the agreement to arbitrate is the only source from which the arbitral tribunal may derive its jurisdiction<sup>63</sup>. Jurisdiction of the tribunal is fundamental, as awards rendered without proper jurisdiction have no legitimacy<sup>64</sup>. The arbitral tribunal's jurisdiction is limited to issues between the parties to an arbitration agreement<sup>65</sup>. The power derived by this tribunal is from the agreement between the parties and thus jurisdictional questions are raised on awards involving the 3<sup>rd</sup> parties. This is also in accordance with the New York Convention and the UNCITRAL guidelines which do not promote a restriction on the parties' choices<sup>66</sup>.

<sup>52</sup> MS Dealer Serv. Corp. v. Franklin, 177 F. 3d 942 (1999).

<sup>53</sup> W. Laurence Craig et al., *International Commercial Arbitration: International Chamber of Commerce 99*, 100 (OUP 1997).

<sup>54</sup> Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

<sup>55</sup> Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

<sup>56</sup> *Id.*

<sup>57</sup> *Gouvernement du Pakistan - Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company*, [CA], 09/28533 (2011).

<sup>58</sup> *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F. 2d 4, 31-32(1981).

<sup>59</sup> *Paracor Finance Inc. v. General Electric Capital Corporation*, 96 F. 3d 1151, (1995).

<sup>60</sup> Hosking, *Non-Signatories and International Arbitration in the United States: The Quest for Consent*, 20 *ARB. INT'L* 289, 292 (2004).

<sup>61</sup> *Keytrade U.S.A Inc. v. Ain Temouchent M/V*, 404 F. 3d 891, 896-97 (2005); 14 HARVEY MCGREGOR, *MCGREGOR ON DAMAGES*, 151, 226-227 (Sweet & Maxwell 1980); *Hester Int'l Corp. v. Fed. Rep. of Nigeria*, 879 F. 2d

170, 176 (5th Cir. 1989); *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F. 2d 4, (1981); *Herlofson Mgt A/S v. Ministry of Supply, Kingdom of Jordan*, 765 F. Supp. 78 (S.D.N.Y. 1991).

<sup>62</sup> Hanotiau, *International Arbitration in A Global Economy: The Challenges of the Future*, 28 *JOURNAL OF INTERNATIONAL ARBITRATION* 89 (2011).

<sup>63</sup> GIRSBERGER & VOSER, *INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES* pg.64 Nomos Verlagsgesellschaft 2021.

<sup>64</sup> Gotanda, John Y., *An Efficient Method for Determining Jurisdiction in International Arbitrations*.

<sup>65</sup> Gary. B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION* p. 276 (Kluwer Law International 2014); Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 *N.Y.U. J. INT'L. & POL.* 175 (1995); *Dalimpex v Janicki*, (2003) 172 *O.A.C.* 312 (CA).

<sup>66</sup> N. Voser, *Multi-party Disputes and Joinder of Third Parties*, 50 *YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE* 343, 358 (AJ van den Berg ed., 2009).

If one considers the Principles of agency law, in most legal systems they require proof that the principal granted the agent the authority to enter into the specific contractual relationship in question<sup>67</sup>. This is because an arbitration agreement is separable from the substantive contract, and therefore, needs to be specifically approved by the principal<sup>68</sup>. Courts have rejected binding parties based on agency if there is insufficient evidence that the state had granted the international organization power to bind the state to an arbitration agreement<sup>69</sup>.

Further, the mere status of an entity as agency or instrumentality of a foreign state is insufficient to subject the foreign state to arbitration for agency or instrumentality's wrongdoings. Agency has to be determined by a fact-based inquiry into the level of control over the day-to-day operations of the instrumentality<sup>70</sup>. Another reason why courts often resort to multi-party proceedings is because of the better representation afforded to the third party concerned<sup>71</sup>. But this becomes an issue when there is a difference in the motives and the pladings of the parties that are to be joined. Thus, the effectiveness of the arbitration itself is taken into question.

In summary, a third party may be joined in an arbitration proceeding if they are prima facie bound by the arbitration agreement or if all parties, including the non-party, consent to the joinder. The doctrine of alter ego, group of companies' doctrine, and traditional principles of agency law may be used to establish a third party's obligation to be bound by the arbitration agreement. Factors such as procedural fairness, efficiency, economic considerations, and whether the claims arise in relation to the same transaction or series of transactions may also

be considered. Conversely, the rights of party autonomy and the restrains on th usage of the agency doctrine prohibit such forced joinders. Ultimately, the decision to join a third party will depend on the specific circumstances of each case.

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