

Piercing the Veil of Consent: Comparative Perspectives on Non-Signatory Participation in Arbitration

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Abstract: -

This article examines how arbitration law deals with situations where parties that did not sign an agreement are still drawn into the process. The doctrine of consent lies at the heart of arbitration, distinguishing it from adjudicatory processes imposed by law. Yet, modern commercial realities have increasingly blurred the boundaries of consent, compelling arbitral tribunals and courts to recognize the participation of non-signatories in arbitral proceedings. This article explores the doctrinal, judicial, and comparative dimensions of non-signatory participation in arbitration, focusing on the tension between contractual autonomy and equitable necessity. This article examines the doctrine underpinning arbitral consent, the traditional contractual basis of arbitration agreements, and the complex challenge posed by non-signatories to such agreements in the context of corporate groups. Focusing on the recent Indian Supreme Court judgment in *ASF Buildtech v Shapoorji Pallonji*, the article explores how different jurisdictions (common law and civil law) handle the question of non-signatory participation, assesses their theoretical and policy justifications, and proposes a comparative framework for reconciling consent with commercial reality.

Keywords: -

pacta sunt servanda, Non-signatory participation, group of companies doctrine, alter ego, consent in arbitration.

Introduction:

At the heart of commercial relations lies the contract, the foundational instrument through which parties define their rights, duties, and expectations. Rooted in the principle of *pacta sunt servanda* that agreements must be kept the contract represents the voluntary expression of will that binds the parties to its terms. In the context of private international commerce, contracts not only allocate risks and rewards but also designate the mechanisms for resolving potential disputes. Increasingly, parties choose arbitration as their preferred forum for dispute resolution, valuing its flexibility, neutrality, and enforceability under international instruments such as the New York Convention, 1958.

The arbitration agreement whether a clause within a broader contract or a separate agreement serves as the cornerstone of the arbitral process. It embodies the principle of consent, which constitutes the very foundation of arbitral jurisdiction. Without consent, an arbitral tribunal lacks authority to adjudicate the rights and obligations of a party. As such, arbitration is traditionally conceived as a creature of contract: it binds only those who have agreed to it, whether expressly or by clear implication.

However, the practical reality of modern commerce often challenges this pure doctrinal model. Complex corporate structures, group enterprises, and multifaceted contractual arrangements mean that entities not formally signatory to the arbitration agreement may nonetheless play a pivotal role in the underlying transaction. This raises a profound question: Can and should an arbitral tribunal extend the arbitration agreement to a non-signatory, such as a parent, subsidiary, or affiliate company, which has not formally consented to arbitrate?

Under company law, each corporation possesses a separate legal personality, a principle famously articulated in *Salomon v. A. Salomon & Co Ltd*¹. This separation shields sister and parent companies from liabilities arising from the acts of their affiliates. Yet, in practice, corporate groups often function as a single economic entity, sharing management, financing, and control. When disputes arise within such interconnected networks, one company may seek to rely on the arbitration clause signed by another within the same corporate family. Tribunals and courts are then faced with the delicate task of determining whether to pierce the corporate veil or otherwise extend the arbitration agreement to the non-signatory entity.

The doctrinal tension is evident: arbitration's legitimacy is grounded in consent, while the realities of commercial practice sometimes necessitate an extension of arbitral jurisdiction to non-signatories to prevent abuse or multiplicity of proceedings. Legal systems across jurisdictions have responded to this dilemma with differing levels of flexibility. Common law courts tend to uphold the sanctity of consent, allowing extensions only through doctrines such as agency, estoppel, or assumption. By contrast, certain civil law jurisdictions, most notably France, have developed the "group of companies doctrine," under which a non-signatory may be bound by or benefit from an arbitration agreement if it participated actively in the negotiation, performance, or termination of the contract, reflecting an implied consent derived from the economic reality of the relationship.

This article seeks to explore these competing principles and approaches through a comparative lens, analyzing how different legal systems reconcile the sanctity of consent with the commercial realities of group enterprises. It aims to examine whether, and to what extent, the "veil of consent" in arbitration can be pierced to include non-signatories without undermining the foundational autonomy of arbitration.

Conceptual Foundations: Consent, Arbitration Agreements and Company Law

A. The Principle of Consent in Arbitration

Arbitration derives its legitimacy from the consent of the parties². Without such consent, an arbitral tribunal lacks jurisdiction to bind a party. This principle is recognised across jurisdictions and embedded in Article V(1)(a) of the New York Convention, which allows refusal of enforcement if the arbitration agreement is invalid or inapplicable to a party. The consensual nature of arbitration thus differentiates it from judicial adjudication and ensures its contractual autonomy³.

B. The Arbitration Agreement as Contractual Instrument

The arbitration clause is not merely procedural; it is a **jurisdiction-granting covenant** binding only those who consent⁴. Under Section 7 of the Indian Act, consent may be express or implied through exchange of written communication or conduct. However, as English courts reiterated in *Dallah v Government of Pakistan*⁵, jurisdiction cannot rest on presumed consent.

C. Company Law and the Separate Legal Personality of Corporate Entities

Company law treats every corporation as a separate legal entity, an enduring principle from *Salomon v Salomon* (1897). Nevertheless, in practice, group companies often act as a single economic enterprise⁶. Transactions may be negotiated by one entity but performed by another, blurring boundaries between signatories and affiliates.

Arbitration tribunals and courts have thus grappled with whether to “pierce the corporate veil” or extend the arbitration clause to affiliates when justice or commercial coherence demands it.

D. The Challenge of Non-Signatory Participation

When a non-signatory entity becomes involved in arbitration proceedings either as a party to a counterclaim, a third-party claimant or respondent, or by being impleaded by the tribunal, the neat

2. Born 2021, p 1337

3. Lew, Mistelis & Kröll 2003,

4. Redfern & Hunter 2022,

5. [2010] UKSC 46

6. Gower & Davies 2021,

7. Stavros L. Brekoulakis 2010, *Third Parties in International Commercial Arbitration*

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D. The Challenge of Non-Signatory Participation

When a non-signatory entity becomes involved in arbitration proceedings either as a party to a counterclaim, a third-party claimant or respondent, or by being impleaded by the tribunal, the neat paradigm of consent is disturbed. The key questions then become:

- On what legal basis can a non-signatory be bound or benefit from an arbitration agreement to which it is not a signatory?
 - Are there recognised doctrines (such as agency, assignment, estoppel, assumption, veil-piercing, group of companies) that justify such participation without eroding the principle of consent?
 - How far can tribunals or courts extend the arbitration agreement without undermining its legitimacy?
- These questions form the core of the present inquiry.

Doctrinal Foundations of Non-Signatory Participation:

1. Group of Companies Doctrine:

Originating from the seminal decision in *Dow Chemical v. Isover Saint Gobain*⁸, this doctrine allows an arbitration agreement signed by one company to bind its affiliates when they form part of the same economic group and have participated in the negotiation or performance of the contract. The rationale rests on the shared commercial intent and collective participation of entities within a corporate family. French courts, particularly the *Cour de Cassation*, have consistently upheld this approach, emphasizing economic reality over legal formalism.

In India, this doctrine was expressly recognized in *Chloro Controls (India) Pvt. Ltd. v. Severn Trent Water Purification Inc.*⁹ [], where the Supreme Court allowed non-signatories within a group of companies to be bound by the arbitration clause, provided there was a direct involvement in the transaction and a composite commercial purpose. This marked a significant departure from strict consent-based interpretations, aligning Indian law closer to the French model.

2. **Agency and Representation:**

Under common law, an agent can bind a principal to an arbitration agreement if the agency relationship and authority are clearly established. English jurisprudence, particularly in

8. ICC Case No. 4131, 1982

9. (2013) 1 SCC 641

*Peterson Farms Inc. v. C&M Farming Ltd.*¹⁰, adopts a conservative stance, rejecting the group of companies doctrine and insisting on clear evidence of agency or authorization. Indian courts, however, have applied agency principles in conjunction with broader equitable doctrines, as seen in *MTNL v. Canara Bank*¹¹, where the Court allowed composite arbitration involving related entities.

3. **Estoppel and Participation:**

The doctrine of estoppel prevents a non-signatory from denying the applicability of an arbitration clause if they have knowingly derived benefits from the contract or participated in its performance. U.S. courts have extensively developed this principle, notably in *Thomson-CSF, S.A. v. American Arbitration Association*¹², establishing circumstances under which a non-signatory can be compelled to arbitrate. Similarly, Singaporean jurisprudence in *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd.*¹³ acknowledges estoppel where non-signatories have acted in a manner implying consent.

4. **Alter Ego and Veil-Piercing:**

This doctrine allows tribunals to disregard the separate legal personality of a corporation when it is used to evade legal obligations or perpetrate fraud. In the U.S., the *alter ego* principle is rooted in equity, allowing courts to bind a parent company to the obligations of its subsidiary. Indian courts have applied this doctrine cautiously, as seen in *ONGC v. Discovery Enterprises Pvt. Ltd.*¹⁴, stressing the need for clear evidence of misuse of corporate form. Alter ego and veil-piercing allow a non-signatory to be bound by an arbitration agreement when a company's separate legal identity is misused to evade obligations or commit fraud, ensuring justice by looking beyond formal corporate structures.

5. **Third-Party Beneficiary Doctrine:**

Where a non-signatory is an intended beneficiary of the contract, it may be bound by or claim the benefit of the arbitration clause. This approach finds support in French and U.S. law but remains nascent in India. The principle is increasingly relevant in multi-tier supply chain and construction contracts.

10. [2004] EWHC 121 (Comm)

11. [(2020) 12 SCC 767]

12. 64 F.3d 773

13. [2014] SGHCR 17

14. 2022 INSC 482

Comparative Jurisdictions: A Doctrinal Overview

1. **France:**

France has embraced the **group-of-companies doctrine**, most notably in *Dow Chemical France v Isover Saint Gobain*¹⁵, recognising implied consent where a parent company actively participated in negotiation and

performance of the contract. Swiss and German courts similarly allow implied consent where conduct demonstrates intent to be bound¹⁶.

2. United Kingdom:

English law remains anchored in privity of contract. In *Peterson Farms*, the High Court rejected the group of companies doctrine, affirming that only parties who have expressly consented to arbitration can be bound. However, English courts recognize exceptions through agency, estoppel, and assignment where consent can be inferred. In *Dallah*¹⁷ and *Peterson Farms Inc v C&M Farming Ltd.*¹⁸, tribunals were reminded that the “group of companies” doctrine is not part of English law. Only recognised doctrines, agency, assignment, or estoppel can bind non-signatories¹⁹. But the bar remains relatively high: the court carefully examines whether the non-signatory manifested intent to be bound, or whether the signatory company held the non-signatory out as agent.

3. United States:

U.S. courts have developed a multifaceted approach, allowing non-signatory participation through doctrines of estoppel, agency, alter ego, and incorporation by reference. The Federal Arbitration Act (FAA) underlines the enforceability of arbitration agreements but allows equitable doctrines to expand their reach. The *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC* (2020) case reaffirmed that non-signatories could invoke arbitration under international conventions where domestic law permits.

The United States adopts a more flexible approach through its “federal substantive law of arbitrability.” In *Thomson-CSF SA v American Arbitration Ass’n*²⁰, the court allowed non-signatory inclusion under theories of assumption, alter ego, or estoppel. This reflects the equitable maxim that a party cannot benefit from a contract while rejecting its arbitration clause²¹.

15. ICC Case No 4131 (1982)

16. <https://share.google/FwcCgW8uXzvN1mnmS>

17. [2010] UKSC 46

18. [2004] EWHC 121

19. *Russell on Arbitration 2023*

20. 64 F.3d 773 (2d Cir 1995)

21. *Born 2021*

4. Singapore:

Singapore’s approach balances consent with commercial practicality. The *Court of Appeal in Larsen Oil and Gas Pte Ltd. v. Petroprod Ltd.*²² recognized that non-signatories could be bound where their conduct demonstrates implied consent. The Singapore International Arbitration Act adopts a modern, UNCITRAL-consistent interpretation of consent.

The Indian Approach: ASF Buildtech and Beyond

The Indian Supreme Court has progressively embraced a balanced approach to non-signatory participation. Earlier cases such as *Chloro Controls (2013)*²³ and *Cox & Kings Ltd v SAP India Pvt Ltd.*²⁴ (adopted the group-of-companies doctrine where the composite transaction and conduct indicated mutual intention.

In *ASF Buildtech Private Ltd v Shapoorji Pallonji & Co Pvt Ltd.*²⁵, the Court addressed whether the arbitral tribunal could implead non-signatory affiliates under Section 16 of the 1996 Act. The dispute arose from a construction agreement between Shapoorji Pallonji and Black Canyon SEZ Pvt Ltd, part of the ASF Group. The claimant sought

to join ASF Buildtech and ASF Insignia SEZ as additional respondents, arguing a composite economic transaction and shared performance obligations.

The Supreme Court affirmed that arbitral tribunals have competence to determine their own jurisdiction, including the status of non-signatories (*para 48*). However, it upheld the tribunal's refusal to implead ASF Buildtech because there was insufficient evidence of intent or participation linking the non-signatories to the arbitration agreement (*ibid, para 73*). The Court reiterated that joinder is exceptional, guided by facts, conduct, and composite purpose, and must never dilute the requirement of consent.

This decision aligns India with the moderate international trend, recognising implied consent through participation (as in France and Singapore) while preserving the doctrinal sanctity of consent (as in England). The Court also criticized the Arbitration Bill 2024 for not addressing impleadment of non-signatories, urging legislative clarity.

Challenges and Reviews:

Despite doctrinal evolution, several challenges persist:

1. **Doctrinal Ambiguity:** Lack of legislative clarity under the Arbitration and Conciliation

22. [2011] SGCA 21

23. 1 SCC 641

24. 2023) 7 SCC 497

25. (2025 INSC 616)

26. <https://24law.in/story/supreme-court-criticises-arbitration-bill-2024-for-ignoring-power-to-implead-non-signatories-urges>

Act, 1996 leads to inconsistent judicial interpretations. It affirms that tribunal competence to decide jurisdiction under Section 16 includes the question of impleadment of non-signatories.

2. **Due Process Concerns:** Non-signatories may be deprived of notice or opportunity to present their case.

3. **Jurisdictional Overreach:** Excessive reliance on equitable doctrines risks undermining consent, the very foundation of arbitration.

4. **Comparative Inconsistency:** Divergent approaches among jurisdictions complicate enforcement of awards involving non-signatories under the New York Convention.

5. **Draft Bill 2024 Silence:** The proposed reforms fail to address this issue, reflecting the legislature's cautious approach. The Court also criticized the proposed Arbitration & Conciliation Bill, 2024 for failing to explicitly address the power of implement of non-signatories and urged legislative amendment.

From a comparative perspective, the Indian stance aligns with more flexible civil law jurisdictions (France etc.) while retaining respect for consent, akin to English and U.S. jurisprudence.

Proposed Hierarchy of Legitimacy for Non-Signatory Participation:-

Based on comparative law and recent Indian cases, tribunals and courts can follow this hierarchy when deciding if a non-signatory should be included in arbitration:

1. **Explicit Consent** – The non-signatory has clearly agreed to arbitrate, for example by signing the contract, being named in it, or expressly accepting its terms.

2. **Assignment or Novation** – The non-signatory has taken over the rights or obligations of a signatory, effectively stepping into their place.

3. **Agency or Third-Party Beneficiary** – The non-signatory acts on behalf of a signatory or is an intended beneficiary of the contract, showing a close link to the agreement.

4. **Group of Companies or Composite Transaction** – The non-signatory is part of the same corporate group and has actively participated in negotiating, performing, or benefiting from the contract, indicating implied consent to arbitrate.
5. **Veil-Piercing or Alter Ego** – In exceptional cases, when separate legal identity is misused to avoid responsibilities or commit fraud, the tribunal may disregard corporate separateness to ensure fairness and justice.

This hierarchy helps maintain the balance between respecting consent and addressing the practical realities of modern commercial relationships.

Under this framework, Arbitral Tribunals should proceed with the following steps:

- Identify whether the arbitration agreement exists and is valid as between the signatories.
- Determine whether the non-signatory has manifested intent to be bound or has entered the transaction in such a way to make exclusion unconscionable.
- Assess whether the commercial reality (group-structure, common management, financing, participation) supports extending the arbitration clause.
- Ensure that consent remains the core; non-signatory participation should not become routine but exceptional and justified by factual matrix.
- Provide clear reasoning and findings on the connection between the non-signatory and the contract/arbitration clause.

Conclusion:

The evolution of non-signatory participation in arbitration reveals the constant tension between contractual consent and commercial reality. While classical doctrine limits arbitration to signatories, modern practice recognizes that complex corporate and multi-party transactions often blur these boundaries. Comparative jurisprudence reflects a continuum from France's liberal, economically grounded approach to England's strict consent-based model with jurisdictions like India and Singapore striving for a pragmatic balance.

The Indian Supreme Court's decision in *ASF Buildtech Pvt Ltd v Shapoorji Pallonji & Co Pvt Ltd* (2025) marks a significant step, reinforcing arbitral competence while safeguarding the voluntary nature of arbitration. Looking ahead, legislative clarity on the joinder and impleadment of non-signatories under the Arbitration and Conciliation Act, 1996 is vital for greater coherence and predictability. The legitimacy of arbitration ultimately rests on preserving genuine consent while accommodating commercial complexity. The "veil of consent" should be pierced only when there is clear evidence of participation, benefit, or control, ensuring that necessary flexibility does not compromise the core consensual basis of arbitration.

References:

1. [1897] AC 22
2. *Born* 2021, p 1337
3. *Lew, Mistelis & Kröll* 2003,
4. *Redfern & Hunter* 2022,
5. [2010] UKSC 46
6. *Gower & Davies* 2021,
7. *Stavros L. Brekoulakis* 2010, *Third Parties in International Commercial Arbitration*
8. ICC Case No. 4131, 1982
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