

When is Three a Crowd: Can a Stranger to an Arbitration Participate in Enforcement Proceedings for the Award?

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Introduction

In general, only the parties to an arbitration may participate in proceedings to enforce the resulting arbitral award. Are there exceptions to this? If so, under what circumstances can a third party apply to be added to the enforcement proceedings? What legal test should be applied under Singapore's new Rules of Court 2021 ("**ROC 2021**")? If the third party is unsuccessful in its application, when should the Court exercise its discretion to allow the third party to be added as an interested non-party instead?

These issues arose for consideration in *DFD v DFE and another* [2023] SGHCR 23 ("**DFD**"), where an unsecured creditor ("**Trustee**") of a party to the arbitration sought to be added to proceedings to resist enforcement of an arbitration award ("**Enforcement Challenge Application**"). The addition was opposed by the claimant ("**Claimant**"), i.e. the party which had successfully obtained permission from the High Court to enforce the award on an *ex parte* basis.

The Court considered the approach to be taken under the ROC 2021, finding that the existing case law relating to the Rules of Court 2014 ("**ROC 2014**") continued to be relevant. It therefore had to determine whether it was "just and convenient" for the Trustee to be added, which involved whether the Trustee had a sufficient legal interest in the present proceedings. Ultimately, the Court held it was not appropriate to allow the addition of the Trustee as either a party or an interested non-party to the Enforcement Challenge Application.

The Claimant was successfully represented by [Kelvin Poon, SC](#) (Head, International Arbitration) and [Devathas Satianathan](#) (Partner, International Arbitration) as instructed counsel.

Factual Background

The dispute revolved around the bankruptcy of the Second Defendant and its primary remaining asset, being certain shares in a company ("**Shares**"). In essence, the Second Defendant had two creditors that sought to be paid from the proceeds of the sale of the Shares:

1. The Claimant, whose claim arose from a Guarantee Agreement under which the Second Defendant had guaranteed a debt owed by the First Defendant to the Claimant and pledged the Shares as security. To elaborate on the steps taken by the Claimant:
 - a. The Claimant exercised its right to call upon the security and directed the Second Defendant to transfer the Shares to a company "Q" as its nominee, which it did ("**Transfer**").
 - b. The Claimant then commenced arbitral proceedings against the Defendants. Among other matters, the tribunal ruled in its award ("**Award**") that the Claimant had "the priority right of compensation for the proceeds from the discount, auction and sale of [the Shares] held by [the Second Defendant]".
 - c. The Claimant then obtained permission of the High Court to enforce the Award against the Defendants.
2. The Trustee, who was the trustee for the bondholders of certain Bonds that the Second Defendant had issued but failed to redeem upon maturity. To elaborate on the Trustee's position:
 - a. The Trustee obtained summary judgment against the Second Defendant in "Orsinia" for the total amount due under the Bonds ("**Orsinian Proceedings**"). The Orsinian Proceedings were based on the Trustee's argument that the Second Defendant had engaged in a fraud designed to keep the Shares out of reach of the Second Defendant's genuine creditors ("**fraud case theory**").
 - b. It also successfully filed a bankruptcy petition against the Second Defendant in "Ruritania", resulting in the Second Defendant being declared bankrupt in Ruritania and brought under the administration of a curator ("**Curator**"). The Curator filed the Enforcement Challenge Application, similarly relying on the fraud case theory among other grounds.
 - c. Having discovered that the Transfer had taken place, the Trustee obtained a *Mareva* injunction against the Second Defendant and Q before the Singapore courts, resulting in the freezing of the Shares.

In the present proceedings ("**Intervention Application**"), the Trustee sought to be added as a party to the Enforcement Challenge Application under O 9 r 10(1) of the ROC 2021. This provision states that "*The Court may add or remove one or more claimants or defendants, give permission for a defendant to issue a third party notice in accordance with Order 10, or give directions for the originating process to be served on any person who may have an interest in the action.*"

Decision of the High Court

The Court first considered the appropriate approach to take to the addition of parties under the ROC 2021. It agreed with the parties that the existing case law relating to the joinder of parties under the Rules of Court 2014 ("**ROC 2014**") provided at least the starting point for the approach under the ROC 2021, as the reasons for the court to be slow in

allowing the addition of superfluous parties continued to apply. Accordingly, there were at least two available routes for the addition of a party under O 9 r 10(1): by satisfying the "necessity" test or the "just and convenient" test.

On the facts, the Court agreed with the parties that the applicable test was whether it was "just and convenient" for the Trustee to be added as a party. This comprised two elements:

1. a non-discretionary element requiring the Trustee to have a *legal* interest and not a mere commercial interest in the outcome of the proceedings; and
2. a discretionary element, in this case whether the Trustee should be prevented from participating in the proceedings on the grounds of maintaining the confidentiality of the arbitration.

As an alternative, the Court also considered whether it should exercise its discretion to permit the Trustee to participate as a non-party in the proceedings under O 9 r 22(3) of the ROC 2021. The provision states that "*The Court may invite any natural person or entity who has an interest or is able to assist in the issues in the case to give the person's or entity's views in writing on specific issues.*"

"Just and convenient" test

Legal or commercial interest

The Trustee contended that it would be prejudiced if the Award were permitted to be enforced as the Claimant would gain a *prima facie* priority right over the Shares. However, this prejudice essentially amounted to that suffered by a creditor which found itself with a bad debt – which would be a paradigmatic case of a mere commercial interest. It is not generally contemplated that a creditor in an insolvency should have a direct hand in the insolvent company's recovery of assets, which is a task for the liquidator (in this case, the Curator). There was no reason that the Curator, with information from the Trustee, would not be able to conduct the Singapore proceedings competently and diligently.

Avoiding re-litigation of issues, inconsistent outcomes

Another consideration in favour of the addition of the Trustee to the proceedings was to avoid re-litigating issues and inconsistent outcomes from different proceedings. This was insufficient to overcome the issue of the Trustee having a mere commercial interest in the proceedings.

Discretionary element: protecting confidentiality of arbitration

As the Trustee could not satisfy the non-discretionary element of the "just and convenient" test, it was unnecessary for the Court to consider the discretionary element. The Court nonetheless noted that Curator had already disclosed the Award and related documents and considered herself entitled to share any future affidavits filed in the Enforcement Challenge Application with the Second Defendant. As such, the Trustee's participation would not compromise the confidentiality of the arbitration, as it had already been lost as against the Trustee.

Participation as a non-party

The Court also declined to exercise its discretion to invite the Trustee to participate in the present proceedings as an interested non-party under O 9 r 22(3) of the ROC 2021. It was not clear how the Trustee could assist the Court in ways that the Curator could not. Nor was it apposite for the Court to allow the Trustee's participation as a non-party merely to ensure that the Court's decision would be binding on the Trustee.

Concluding Remarks

DFD illustrates that the Court's approach under the ROC 2021 is consistent with its approach in ROC 2014 – it would be slow to add superfluous parties to proceedings. For a third party to succeed in being added to the proceedings, it must demonstrate that it has a sufficient legal interest, rather than a mere commercial interest. Where the party's interest is insufficient, the role of a non-party is not necessarily readily available as a fallback merely because it has some interest in the proceedings.

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