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IN THE SHADOWS OF SIGNATURES: NON SIGNATORIES AND ARBITRATION'S EVOLUTION

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ABSTRACT:

Over the past years, many commercial disputes have often preferred arbitration over "traditional" dispute resolution mechanisms. While it is often deemed a swifter process, it is not without its loopholes. One of which is the question as to whether non-signatories who are parties to a dispute can be included in the arbitration when multiple agreements are involved. Section 8 of the Arbitration and Conciliation Act,1996 states that consent is a pre-requisite for including parties to an arbitration. However, the phrase "person claiming through or under" in section 45 lies at the centre of the debate since it creates a level of ambiguity in the matter. This question was answered in the 2023 judgment delivered by a five-judge bench. This article traces the stance of the Indian and International courts in this issue by looking at past judgments and also diving into the interpretation put forth in the case of Cox and Kings Ltd. v SAP India (p) Ltd.

INTRODUCTION:

One of the primary requisites for arbitration is party autonomy wherein parties consciously choose arbitration as the mechanism for dispute resolution rather than approaching state courts/tribunals. Therefore, the rule of thumb of arbitration is that only parties who have consented to arbitration can be made parties to an arbitration proceeding. But what is the scope or relevance of this rule in corporate transactions involving national or international group companies where there are multi-party or multi-agreement arrangements?

Parent companies choose to enter into agreements through their subsidiaries for regulatory, taxation or strategic reasons, including avoiding liability. There are, of course, several recognised legal bases in international arbitration for non-signatories to be bound by or take advantage of and therefore impliedly consent to arbitration[1]. One such basis is the Group of Companies Doctrine. As per the doctrine, a non-signatory party can be bound by or take advantage of an arbitration agreement entered into by its sister concerns, if the circumstances prove that the common intention of the parties was to include both, the signatories as well as the non-signatories[2].

This doctrine was first famously recognised by the International Criminal Court (ICC) Court of Arbitration in the Dow Chemicals[3] case in the 1980s. Wherein the tribunal relied on the doctrine to bind non-signatories to arbitration.

[1] Gary Born, *International Commercial Arbitration* (3d ed. Wolters Kluwer 2020) 280–81; *see also* Hanna Roos, 'Agency as a mechanism for compelling a non-signatory to join arbitral proceedings (*Kluwer Arbitration Blog* 21 December, 2009) (Last accessed 12/11/2023)

[2] Singh, V. P., Jha, A., & Vidyarthi, A. (2023). India's tryst with the group of companies doctrine: The end or the beginning of a new dawn? *Arbitration International*, *39*(1), 109-124. https://doi.org/10.1093/arbint/aiad010.

[3] Dow Chemical v Isover Saint Gobain, ICC Award No. 4131

SINGLE ECONOMIC REALITY:

Nowadays, it's quite common for companies to carry out their transactions through subsidiaries resulting in the formation of company groups, functioning and operating in a synchronised manner wherein the parent company usually controls the coordinated actions of the entire group resulting in what has been termed as a single economic reality. However, the mere existence of a group of companies could not in itself justify the extension of the contract to non-signatories. It is imperative to note that in the Dow Chemical case, the parent company exercised significant control over the subsidiaries resulting in a tight group structure.

As per the tribunal, the following requisites have to be demonstrated by the group to qualify for the application of the doctrine:

- Strong financial and organisational links amongst the companies involved in the business transaction.
- Unity of financial orientation derived from common power.
- Cumulative participation by the parties in the negotiation, performance and termination of the contract
- Mutual intention to bind non-signatories in the contract [4]

EFFECT ON PARENT COMPANIES

Interim relief under sections 9 and 17 of the Act:

In the landscape of Indian business practices, setting up a separate entity, typically a wholly owned subsidiary or a special purpose vehicle (SPV), stands as a customary approach to oversee and sustain a project as outlined within the terms and conditions of the concession agreement. This dedicated entity, often referred to as the concessionaire, comes under the ownership of the parent company that secures victory in the bid. However, suppose circumstances arise leading to the termination of the SPV's agreement. In that case, its expulsion from the project, or its failure to comply with the specified terms, repercussions might be faced by the parent company. One such consequence could involve being disqualified from participating in future tenders for a stipulated duration. These issues tend to escalate particularly during conflicts between the Concession Authority and the SPV, affecting the parent company's eligibility to bid for other projects. Even if, at a later stage, a tribunal deems the exclusion of the parent company unlawful or unjustifiable, the fallout remains substantial, with missed opportunities due to the entanglement with the SPV's complications.

The standard modus operandi involves the establishment of a distinct entity like an SPV, primarily to ensure effective management and sustenance of a project as per the agreed concession terms in India. The entity, generally known as the concessionaire and owned by the parent company emerging victorious in the bid, serves this purpose. Nevertheless, complications can arise if the SPV's agreement faces termination, expulsion from the ongoing project, or non-compliance with the specified terms. Consequences for the parent company may include disqualification from participating in future tender processes for a set duration. These issues tend to exacerbate during disputes between the Concession Authority and the SPV, ultimately impacting the parent company's ability to engage in bids for other projects. The repercussions persist, regardless of any later rulings by a tribunal that might consider the exclusion of the parent company as unlawful or unjust. This scenario results in missed opportunities for the parent company, attributed to its association with the intricate difficulties faced by the SPV.

When an award is enforced and the SPV is a debtor, what happens? Though only on the narrow grounds of consent and performance of the contract, the Indian Court's decisions in *Cheran Properties Limited v. Kasturi & Sons*. Limited and Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited have already opened the door for the enforcement of awards against non-signatories to the arbitration agreement. Nonetheless, it follows naturally that the arbitral award—for which the SPV is an award-debtor—can be enforced against the parent business if the latter establishes the SPV in order to carry out a project and receives the income earned by the SPV.

[4] Dow Chemical (n-3)

CONCEPTION AND EVOLUTION OF THE DOCTRINE:

Due to the complications of the multi-faceted issues arising out of commercial transactions, Indian courts and tribunals often rely on the doctrine to extend the application of the arbitral agreement over members within a company group India's tryst with the doctrine began in 2010 with the Chloro controls case[5], where the extent of section 45 of the Arbitration act was put under the microscope along with closely examining whether non-signatories can be made parties to an arbitration.

INTERNATIONAL JURISPRUDENCE:

As discussed above, the doctrine was first espoused in this case by the ICC in *Dow Chemicals v Isover Saint Gobain*[6]. The dispute revolved around two contracts signed between Dow Chemicals AG and Dow Chemicals Europe, two subsidiaries of the Dow Chemical Company (based in the US) with Isover Saint Gobain for the distribution of thermal insulation products. Consequently, during business cooperation amongst the parties, it was Dow Chemical France, yet another subsidiary of Dow Chemical Company, which was not a signatory to the aforementioned contracts, which discharged the delivery obligations on behalf of its sister concerns since both the contracts said that any subsidiary can deliver the products under the said contracts.

Subsequently, when disputes arose among the parties of the contracts concerning its performance, Dow Chemicals AG, Dow Chemicals France, Dow Chemicals Europe and Dow Chemical Company brought action against Isover Saint Gobain in the ICC Court of Arbitration, the jurisdiction which was challenged by the respondent on the grounds that two of the four claimants i.e. Dow Chemical France and Dow Chemical Company, were not signatories to the distribution contracts containing the arbitration clauses. The ICC Tribunal rejected this contention in its interim award and held that even though each individual member of the Dow Chemical Group has a separate legal identity, it was incumbent upon the Tribunal to assess and consider the elements and factors surrounding the business cooperation amongst the parties to the said distribution contracts.

After doing so, the ICC Tribunal came to a finding that Dow Chemical France and Dow Chemical Company could indeed invoke arbitration against Isover since:

(i) both had played a central role in negotiating the said distribution contracts;

(ii) the assent of Dow Chemical Company, being the parent company and the owner of all relevant trademarks being used by its subsidiaries (without any licence agreements), was essential to consummate the deal; and

(iii) Dow Chemical France was by and large responsible for discharging the obligations of its sister concerns under the said distribution contracts.[7]

It was observed that through these factors (a three-pronged test) it can be concluded that the signatories to the distribution contracts had impliedly consented to the non-signatories being a part of the overall business transaction.

It also took into consideration the existence of the Dow Company Group of which the non-signatories were members. Owing to this the ICC Tribunal came to the conclusion that they operated as a *single economic reality* and held as follows:

> *'Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*

[5] Chloro Controls(I) P.Ltd vs Severn Trent Water Purification (2013)1 SCC 641

[6] Dow Chemicals (n 3)

[7] https://www.scconline.com/blog/post/2022/10/19/the-group-of-companies-doctrine-defending-an-endangered-species-of-the-indian-arbitration-law

Considering that in the absence of such a showing, the tribunal did not allow the application of the arbitration clause; but that in the present case, the circumstances and the documents analyzed above show that such application conforms to the mutual intent of the parties."[8]

The court further elucidated on determining the intent of the parties to the contract to bind non-signatories by stating that,

'The Paris Court of Appeal, in its above-mentioned order of dismissal of the appeal preferred by Isover, had observed that: [Arbitral Tribunal] ha[d], for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved, that Dow Chemical France and Dow Chemical Company have been parties to these agreements although they did not actually sign them and that therefore the arbitration clause applied to them as well."[9]

INDIAN JURISPRUDENCE:

Initially, India had a very restrictive approach towards arbitration. Over the past decade, there was a shift in perspective and courts were more receptive towards arbitration. In the instances where the doctrine has been recognised, the courts relyupon the phrase *"if a party to the arbitration agreement or any person claiming through or under him"* present in sections 8, 45 and 54 of the Arbitration and Conciliation Act, 1996[10] ("The Act"). However, this view evolved only in the year 2013 whereas, before that the courts had refused to recognize the doctrine.

Sukanya Holdings v. Jayesh H Pandya[11] is the first case wherein the doctrine came up in Indian jurisprudence. The dispute had arisen between multiple parties in relation to the same transaction. However, all these parties were not signatories to the contract containing the arbitration clause. The Supreme Court held that non-signatories cannot be parties to a single arbitral proceeding. It was further held by the court that causes of action cannot be bifurcated in an arbitration and therefore arbitral proceedings could only be restricted to the parties to the agreement.

"In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."[12]

Section 8 of The Act says *"in a matter which is the subject matter of the agreement".* This was interpreted in a way where express consent is gathered. When the dispute is commenced as to a matter which lies outside the agreement among parties that are non-signatories, there section 8[13] shall not apply.

Over the years, multiple precedents have come up wherein the doctrine and the circumstances for the application of the doctrine have evolved and its scope has widened.

The case of Chloro Controls v. Severn Trent Water Purification[14] marked a pivotal moment in Indian jurisprudence as the Hon'ble Supreme Court, for the first time, acknowledged the application of the group of companies doctrine in the country. This landmark case involved a dispute between Chloro Controls (India) Pvt Ltd. (appellant) and Severn Trent Water Purification (respondent) arising from a joint venture agreement. Notably, the court, drawing inspiration from international jurisprudence, faced the decision of either embracing a pro-arbitration stance,

[8] Dow Chemicals (n 3),136,137
[9] Yves Derains, "Is There a Group of Companies Doctrine?"(Kluwer Law International, 2010) pp. 131, 133, Ch. 7
[10] Arbitration and Conciliation Act, 1996, S 8,45 and 54
[11] (2003) 5 SCC 531
[12] (2003) SCC OnLine SC 523
[13] S.8, Arbitration and Conciliation Act, 1996
[14] (2013) 1 SCC 461

allowing the inclusion of non-signatories in the arbitration process, or adopting a traditional approach that restricted arbitration to only the signatories.

In its deliberation, the court scrutinized Section 45[15] of the Arbitration and Reconciliation Act, observing that the language of the section supported arbitration referral when a valid, enforceable, and operative agreement existed among the parties. The interpretation of the expression "person claiming through or under" in Section 45 became pivotal. The court asserted that this section extended beyond the parties to the agreement and could involve any person claiming through or under the signatory. Thus, if it could be established that a person fell within this category, the matter could be referred to arbitration.

The court established certain prerequisites for the application of the group of companies doctrine, including a direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter, the agreement being a composite transaction, the transaction being of a composite nature, and whether a composite reference of such parties would serve the ends of justice.

Subsequently, in *Cheran Properties Ltd. v. Kasturi & Sons Ltd*[16]., the court extended the application of the group of companies doctrine, this time in the context of an arbitral award. Reference was made to the Group of Companies Doctrine (GOCD), emphasizing its role in facilitating the fulfillment of mutually held intent between the parties, whether signatories or non-signatories. Section 7(4) of the Arbitration and Conciliation Act was cited, recognizing a signed document containing an arbitration clause as one of the modes of forming an arbitration agreement. However, the court acknowledged the role of implied consent in extending arbitration agreements to non-signatories, citing *Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.*[17]

Furthermore, the court in Cheran Properties highlighted the evolving perspective that the requirement for an arbitration agreement to be in writing, as stated in Section 7, did not necessarily exclude the possibility of binding third parties who were not signatories to the agreement between the contracting entities. This interpretation aligned with the evolving academic literature and adjudicatory trends, indicating situations where an arbitration agreement between two or more parties could bind other parties as well.

In the more recent *ONGC Ltd v Discovery Enterprises (P) Ltd*[18]. case, the Supreme Court, during its examination of the circumstances qualifying the application of the doctrine, identified factors to be considered. These included the mutual intent of the parties, the relationship of a non-signatory to a party that is a signatory to the agreement, the commonality of the subject matter, the composite nature of the transaction, and the performance of the contract. However, it is worth noting that in 2023, the Supreme Court expressed the need for a further examination of the applicability of the group of companies doctrine. The court questioned the correctness of its earlier decisions where the doctrine was relied upon to bind non-signatories to arbitration.

In the subsequent *Cox and Kings Ltd. v SAP India Ltd*[19]. case, the Supreme Court continued its exploration of the group of companies doctrine, further assessing its application in binding non-signatories to arbitration. It was observed that the perspective laid out in the chloro controls case was a perspective of *economics and convenience rather than law*[20]

In the case, Justice Surya Kant opined that the court's approach towards the validity of the doctrine has been inconsistent and needed clarification by a larger bench. The following questions of law were highlighted to seek clarification:

a) *"Whether the Group of Companies Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision;*
b) *Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principle of 'single economic reality';*

[15] S.45, Arbitration and Conciliation Act, 1996
[16] (2018) 16 SCC 413
[17] (2015)13 SCC 477
[18] (2022) 8 SCC 42
[19] (2022) 8 SCC 1
[20] Cox and Kinds Ltd v SAP India (p) ltd., (2022) 8 SCC 1 Para 52

c) *Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties;*
d) *Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent.*[21]*"*

The Supreme Court, in its verdict on December 7, 2023 upheld the validity of the doctrine. In this landmark decision by a 5-Judge Bench, the court addressed the erroneous aspects of the Chloro Controls case's approach to the group of companies doctrine, particularly its reliance on the phrase 'claiming through or under' in Section 8 of the Arbitration Act. The court clarified that Section 2(1)(h) and Section 7 of the Arbitration Act encompass both signatory and non-signatory parties within the definition of parties. The conduct of non-signatory parties can indicate consent to be bound by arbitration agreements, and the requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatories.

The court emphasized that the group of companies doctrine is founded on the corporate separateness of entities, determining the common intention of non-signatories to the arbitration agreement. The principle of alter ego or piercing the corporate veil is not a basis for applying the doctrine. It affirmed the independent existence of the doctrine, stemming from a harmonious reading of Section 2(1)(h) and Section 7 of the Arbitration Act. To apply the doctrine, cumulative factors laid down in ONGC Ltd. v. Discovery Enterprises (P) Ltd. (2022) 8 SCC 42 must be considered, and the principle of a single economic unit alone cannot invoke the doctrine. The court underscored the utility of the doctrine in complex transactions involving multiple parties and agreements, advocating for its retention in Indian Arbitration Jurisprudence.

CONCLUSION:

In the realm of arbitration, the foundational principle of party autonomy prevails, emphasizing the importance of consent from involved parties. However, the landscape becomes intricate in the context of corporate transactions, particularly those involving national or international groups with multifaceted agreements. The Group of Companies Doctrine emerges as a pivotal instrument in international arbitration, breaking the conventional mold by allowing non-signatory parties to be bound by or benefit from arbitration agreements.

The evolution of this doctrine finds its roots in international jurisprudence, notably highlighted in the Dow Chemicals case by the International Criminal Court (ICC) Court of Arbitration. This recognition paved the way for its application in India, with the Chloro Controls case marking a significant juncture. The Indian judiciary, drawing inspiration from global legal trends, deliberated on the applicability of the doctrine, acknowledging its potential to include non-signatories in arbitration proceedings.

Crucial requisites were laid down by the courts, establishing a framework for the application of the Group of Companies Doctrine. Factors such as a direct relationship to the signatory, commonality of subject matter, the composite nature of the transaction, and the mutual intention to bind non-signatories were deemed essential. Cheran Properties Ltd. v. Kasturi & Sons Ltd. further extended the doctrine in the context of arbitral awards, emphasizing implied consent and challenging the notion that the requirement for a written arbitration agreement excludes the possibility of binding third parties.

The ONGC Ltd v Discovery Enterprises (P) Ltd. case and subsequent Cox and Kings Ltd. v SAP India Ltd. case added layers to the exploration of the doctrine, with the Supreme Court scrutinizing circumstances and factors determining its applicability. However, the judiciary, even in 2023, signaled a need for a deeper examination of the doctrine's applicability, questioning the validity of its earlier decisions.

The impact of the Group of Companies Doctrine on parent companies, especially concerning interim relief under Sections 9 and 17 of the Arbitration and Conciliation Act, unravels complexities. The creation of separate entities, such as special purpose vehicles (SPVs), is a common practice, but disputes involving these entities can have far-reaching consequences for the parent company. The enforcement of arbitral awards against non-signatories, including parent companies, introduces a layer of accountability that extends beyond the immediate contractual parties.

[21] 2023 INSC 1051, p.5

India's journey with the Group of Companies Doctrine began with the Chloro Controls case in 2010, signifying a shift in the country's arbitration landscape. The doctrine, once met with skepticism, gained recognition, emphasizing the dynamic nature of Indian courts in adapting to evolving legal principles. The Sukanya Holdings v. Jayesh H Pandya case was a pivotal moment, setting the stage for acknowledging the doctrine and its application in multi-party disputes.

In conclusion, the Group of Companies Doctrine stands as a testament to the adaptability of arbitration principles in addressing the complexities of contemporary corporate transactions. As India continues to grapple with the nuances of this doctrine, its journey reflects the evolving nature of arbitration jurisprudence and the ongoing quest for a delicate balance between party autonomy and the exigencies of multi-party, multi-agreement arrangements.