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# GROUP OF COMPANIES DOCTRINE

The applicability of the doctrine in the Indian context.

## COX AND KINGS LTD. V. SAP INDIA PVT. LTD.

2023 SCC OnLine SC 1634

**Brief Overview:**

A constitutional bench of the Hon'ble Supreme Court while answering a reference made by a three-judge bench vide the judgment titled **Cox and Kings Ltd. v. SAP India Pvt. Ltd.**[1], determined the applicability of the "*Group of Companies*" doctrine to proceedings under the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**').

This decision of the court has put quietus to an essential question of law pertaining to the validity and applicability of "Group of Companies" doctrine (hereinafter referred to as "**the doctrine**") in Indian arbitration context.

**Past developments:**

Over the past two decades the law on joinder of non-signatory parties has evolved substantially. A significant development took place through the judgment delivered in ***Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc***[2] Accordingly, the evolution as discussed below, has broadly been classified into two phases: **Pre-Chloro Controls** and **Post-Chloro Controls** phase.

**Pre-Chloro-Controls Phase:**

In the Pre-Chloro Controls era, the Supreme Court construed 'parties' by limiting it only to the signatories to the arbitration agreement. This was reflected in the judgment of ***Sukanya Holdings v. Jayesh H Pandya***[3] wherein the High Court had rejected an application under section 8 of the Act against non-signatories on the ground that the non-signatories were not parties to the arbitration agreement. The decision was also upheld in appeal by the Hon'ble Supreme Court wherein the Court stated that there is no provision under the Arbitration Act stipulating the required approach where some parties to the suit are not parties to the arbitration agreement.

In summary the Pre-Chloro Controls phase had the following three precepts:

(i) arbitration could be invoked at the instance of a signatory to the arbitration agreement only in respect to disputes with another signatory party;

(ii) the court would adopt a strict interpretation of the provisions of the Arbitration Act, particularly the unamended Section 8 which only allowed reference of "parties" to an arbitration agreement; and

1 (2022) 8 SCC 1
2 (2013) 1 SCC 641
3 (2003) 5 SCC 531 2003 INSC 230

(iii) there was an emphasis on formal consent of the parties, thereby excluding any scope for implied consent of the non-signatories to be bound by an arbitration agreement.

**Post-Chloro Control Phase:**

The position ascribed in the above-mentioned precepts underwent a significant change in the *Chloro Controls* judgment. In this matter, the Court had allowed the joinder of non-signatory parties based on the Doctrine.

Please note that this decision was rendered in the context of Section 45 of the Arbitration Act, relating to enforcement of foreign award and part II of the Arbitration Act.

The court in the matter had reviewed the language of Section 45 of the Arbitration Act and held that the expression “any person” reflects a legislative intent of enlarging the scope beyond ‘parties’ who are signatories to the arbitration agreement to include non-signatories.

The court accepted that arbitration is possible between a signatory to an arbitration agreement and a third party or non-signatory claiming through a party. The court further expounded that the “intention of the parties” is the underlying principle for the application of the Group of Companies doctrine.

The court held that a non-signatory could be subjected to arbitration “without their prior consent” in “exceptional cases” based on four determinative factors:

i. A direct relationship to the party which is a signatory to the arbitration agreement;

ii. A direct commonality of the subject-matter and the agreement between the parties being a composite transaction;

iii. The transaction being of a composite nature where performance of the mother agreement may not be feasible without the aid, execution, and performance of supplementary or ancillary agreements for achieving the common object and collectively have a bearing on the dispute; and

iv. A composite reference of such parties will serve the ends of justice.

**The Developments Post-Chloro Controls:**

In the aftermath of Chloro Controls judgment, the Law Commission of India published a Report in 2014 recommending amendments to the Arbitration Act (246th Report).

The Commission observed that the phrase "claiming through or under" as used and understood in Section 45 of the Act is absent in the corresponding provision of Section 8 of the Act. To cure this anomaly, it was suggested that the definition of 'party' under Section 2(1)(h) be amended to also include the expression "a person claiming through or under such party." After which the legislature amended Section 8 to bring it in line with Section 45 of the Arbitration Act by the 2015 amendment act. The amended Section 8(1) provided that "a party to an arbitration agreement or any person claiming through or under him" could seek a reference to arbitration. However, the legislature did not bring about any change in the language of Section 2(1)(h) or Section 7 of the Act

Accordingly, with *Chloro Controls* judgment in place and after amendment to Section 8 of the Arbitration Act, many decisions discussed the Group of Companies doctrine to join the non-signatory persons or entities to arbitration agreements. These decisions are as follows:

1. Cheran Properties v. Kasturi and Sons Ltd (2018) 16 SCC 413;
2. Ameet Lalchand Shah v. Rishabh Enterprises (2018) 15 SCC 678;
3. Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited (2019) 7 SCC 62;
4. Mahanagar Telephone Nigam Ltd v. Canara Bank (2020) 12 SCC 767; and
5. Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises (2022) 8 SCC 42.

## Origin of the Group of Companies Doctrine:

The application of the doctrine in arbitration law mainly originated from the decisions rendered by international arbitral tribunals. The origin of the doctrine is primarily attributed to several arbitration awards rendered mainly in France.

The most prominent among them remains an interim award delivered more than four decades ago by an ICC tribunal in the *Dow Chemicals v. Isover Saint Gobain* case[4] in France. The application of the doctrine was also seen in the english case of *Peterson Farms INC v. C & M Farming Limited*[5]. The case of *Manuchar Steel Hong Kong Limited v. Star Pacific Line Pte. Ltd*[6]. of Singapore also applied the doctrine.

[4] Dow Chemical v. Isover Saint Gobain, Interim Award, ICC Case No. 4131, 23 September 1982
[5] [2004] EWHC 121 (Comm)
[6] [2014] SGHC 181

**Applicability of the Group of Companies Doctrine:**

*Consent-based theories:*

Generally, consent based theories such as agency, novation, assignment, operation of law, merger and succession, and third-party beneficiaries have been applied in different jurisdictions to bind non-signatories to an arbitration agreement.

*Non-consent-based theories*:

In exceptional circumstances, non-consensual theories such as piercing the corporate veil or alter ego and estoppel have also been applied to bind to bind a non-signatory party to an arbitration agreement.

The Group of Company's doctrine is one such consent-based doctrine which has been applied, albeit controversially, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement.

**Separateness of corporate personality:**

The judgment clearly explained the meaning of "Group of Companies" in the Indian context as "an agglomeration of privately held and publicly traded firms operating in different lines of business, each of which is incorporated as a separate legal entity, but which are collectively under the entrepreneurial, financial, and strategic control of a common authority, typically a family, and are linked by trust-based relationships forged around a similar persona, ethnicity, or community."[7]

Citing ***Tata Engineering and Locomotive Co Ltd*** *v.* ***State of Bihar***[8], The Hon'ble Court reiterated that in exceptional circumstances, the separateness of corporate personality may be ignored by courts and the veil of a corporation can be lifted where fraud is intended to be prevented or trading with an enemy is sought to be defeated.

However, since the companies in a group have separate legal personality, the mere presence of common shareholders or directors cannot mandate that the subsidiary company will be bound by the acts of the holding company. Legally, the rights and liabilities of a parent company can only be transferred to the subsidiary company, and vice versa, if there is a strong legal basis for doing so.

[7] Jayati Sarkar, 'Business Groups in India' in Asli Coplan, Takashi Hikino, and James Lincoln (eds) The Oxford Handbook of Business Groups (2010) 299
[8] (1964) 6 SCR 885

**'Group Of Companies Doctrine'- meaning and effect:**

The "Group of Companies" doctrine is used in the context of companies which are related to each other by virtue of their being a part of the same corporate group.

The doctrine is used to bind a non-signatory company within a group to an arbitration agreement which has been signed by another member(s) of the group[9].

Although the existence of a group of companies is a necessary condition, it is not the sufficient condition to determine the intention of the parties. In addition to the existence of a group of companies, the conduct of the signatory and non-signatory parties must be such that indicates their mutual intention to make the non-signatory a party to the arbitration agreement.

**The determination of "mutual intention":**

After a detailed analysis of the concept of the doctrine, the Hon'ble Court under para 110 of the judgment referred to ***Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd[10].***, which laid down the cumulative factors to be considered in deciding whether a company within a group of companies is bound by the arbitration agreement:

i. The mutual intent of the parties;
ii. The relationship of a non-signatory to a party which is a signatory to the agreement;
iii. The commonality of the subject-matter;
iv. The composite nature of the transactions; and
v. The performance of the contract.

Further, the court clarified that in order to determine the legal relationship between the signatory and non-signatory parties, factors such as the presence of commercial relationships, strong organizational links and financial links between the signatory and non- signatory parties are other factors must be considered cumulatively and not in isolation. Accordingly, the principle of "single economic entity" cannot be solely used as a sole basis to invoke the group of companies doctrine.

**Relevance of "involvement" of a non- signatory party:**

The court under paragraph 121 of the judgment categorically highlighted the relevance of the involvement of the non-signatory party in the negotiation,

[9] UNCITRAL, 'Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form of arbitration agreement: Report of the Secretary General' A/CN.9/WG.II/WP.108/Add.1 (26 January 2000)
[10] (2022) 8 SCC 42

performance, or termination of a contract:

1. By being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement;
2. the conduct of the non- signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and
3. the other party has legitimate reasons to rely on the appearance created by the non- signatory party so as to bind it to the arbitration agreement.

**Threshold Standard:**

The court observed under paragraph 127 of the judgment that a balance must be achieved between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes incidentally involved. Accordingly, the factors laid down under *Discovery Enterprises* (*supra*) must be applied to determine whether the non-signatory intended to be bound by the contract containing the arbitration agreement.

The intention of the non-signatory can be determined by analysing whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is insufficient to constitute consent to the underlying contract, let alone the arbitration agreement.

Further, the burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.

**'Lifting The Corporate Veil': the basis for 'Group of Companies' doctrine?**

Drawing a parallel between the Group of Companies doctrine and the principle of veil piercing or alter ego, the Hon'ble Court under paragraph 104 of the judgment relied upon the judgment delivered in the case of ***Cheran Properties Ltd v. Kasturi and Sons Ltd.***[11] wherein the distinction between the Group of Companies doctrine and the principle of corporate veil piercing or alter ego was clarified.

The principle of alter ego disregards the corporate separetness and the intenstions of the parties in view of the overriding considerations of equity and good faith.

[11] (2018) 16 SCC 413

In contrast, the group of companies doctrine facilitates the identification of the intention of the parties to determine the true parties to the arbitration agreement without disturbing the legal personality of the entity in question.

In light of the above, the court held that the principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine.

**The Group of Companies doctrine: an independent concept:**

The Court further made the following findings:

1. The typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation;

2. person "claiming through or under" can assert a right in a derivative capacity, that is through the party to the arbitration agreement, to participate in the agreement;

3. the persons claiming through or under do not possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest; and

4. mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party.

**Party and Persons "claiming through or under" are distinct:**

The phrase "claiming through or under" has neither been used in Section 2(1)(h) nor in Section 7 of the Arbitration Act, which is in light of the concept of party autonomy and party independence, which requires the party to provide consent to submit their disputes to arbitration.

In contrast, a person "claiming through or under" a party to an arbitration agreement is merely standing in the shoes of the original party to the extent that it is merely agitating the right of the original party to the arbitration agreement.

Therefore, under the Arbitration Act, concept of "parties" is distinct from the concept of "claiming through or under" a party to the arbitration agreement.

**Whether the phrase "claiming through or under" in Section 8 includes the Group of Companies doctrine?**

The court observed that the phrase "claiming through or under" is used in the context of successors in interest that can only assert rights in a derivative capacity and substitute the signatory party to the arbitration agreement.

On the other hand, the purpose of Group of Companies doctrine is to bind a non-signatory to the arbitration agreement. Therefore, the said doctrine can be used independently to bind a non-signatory party to the arbitration agreement regardless of the phrase "claiming through or under" as appearing in Sections 8 and 45 of the Arbitration Act.

**Whether the "Group of Companies" doctrine, as expounded by *Chloro Controls* (supra) and subsequent judgments, is valid in law?**

The Court held under paragraph 147 of the judgment that the approach of reflected in matter titled ***Chloro Controls*** (supra) to the extent that it traced the Group of Companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract and commercial law**.**

As regards the question of whether the "Group of Companies" doctrine as expounded by ***Chloro Controls*** (supra) and subsequent judgments is valid in law, the court under paragraph 148 of the judgment held that the doctrine must be retained as it has important utility in determining the mutual intention of the parties in the context of complex transactions involving multiple parties and multiple agreements. Moreover, the doctrine must be structured with due regard to the concepts of party autonomy and consent to arbitrate.

The court also concluded that the observations made in the series of judgments post the *Chloro Controls* (supra) pertaining to the group of companies doctrine were rendered in light of the facts and circumstances of each case. Therefore, while interpreting the same, the rule of harmonious construction must be applied.

The court further categorically reiterated the general legal proposition that even non-signatory persons or entities can be bound by an arbitration agreement. The basis for such joinder stems from the harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act.

**The Standard of determination at the Referral Stage – Sections 8 And 11**

The court took cognizance of the concept of competence-competence under section 16 of the Arbitration Act and observed that the question as to whether the non-signatory party is indeed a party to the arbitration agreement, should be determined by the arbitral tribunal based on the doctrine as well as the facts and circumstances of each case, with due regards to principles of natural justice. The courts must refrain from interfering at the referral stage.

**Power of the Courts to issue directions under Section 9**

The Group of Companies doctrine is based on determining the mutual intention to join the non-signatory as a "veritable" party to the arbitration agreement. Once a

tribunal comes to the determination that a non-signatory is a party to the arbitration agreement, such non-signatory party can apply for interim measures under Section 9 of the Arbitration Act.

**Judgement delivered by Justice D. Y. Chandrachud, Chief Justice of India**

In summary, the Hon'ble Court concluded that the definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties and the conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement. Moreover, the requirement of a written arbitration agreement under Section 7 of the Act does not exclude the possibility of binding non-signatory parties under the Arbitration Act as the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement.

Moreover, the Hon'ble Court emphasized that the underlying basis for the application of the Group of Companies doctrine rests on maintaining the corporate separateness of group companies while determining the common intention of the parties to bind the nonsignatory party to the arbitration agreement. Notably, the principle of alter ego or piercing the corporate veil cannot be the basis for the application of the Group of Companies doctrine. The Group of Companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act.

The Hon'ble Court specified that to apply the Group of Companies doctrine, the courts or tribunals, have to consider all the cumulative factors laid down in *Discovery Enterprises*. The principle of single economic unit cannot be the sole basis for invoking the Group of Companies doctrine. Lastly, the Hon'ble Court held that in *Chloro Controls* to the extent that it traced the Group of Companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law.

**Separate Concurring Judgment delivered by Justice Narasimha:**

In view of the above, while concurring with the judgment delivered by the Hon'ble Chief Justice, Justice PS Narasimha penned a separate judgment with the following reasoning and conclusions:

1. An arbitration agreement must be in writing but need not be signed by the parties;

2. In determining whether a a non-signatory is a party to an arbitration agreement, the court or arbitral tribunal must interpret the express language

used in the arbitration agreement, along with surrounding circumstances of the formation, performance, and discharge of the contract;

3. The mutual intention of the parties must be gathered from well-established principles: Group of Companies doctrine is one such principle. Even the precedents on the doctrine, national and international, look to additional factors beyond the non-signatory being in the same group of companies, such as direct relationship with the signatory parties, commonality of subject-matter, composite nature of transaction, and interdependence of the performance of the contracts to determine mutual intent;

4. Since the fundamental issue before a court or arbitral tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b) to enable a court or arbitral tribunal to determine the true intention and consent of the non-signatory parties to refer the matter to arbitration;

5. The judgment also highlighted that expression 'party' in Section 2(1)(h) and Section 7 of the Arbitration Act is distinct from "persons claiming through or under them"; and

6. Further, it was clarified that the expression "claiming through or under" in Sections 8 and 45 is concerned with instances of succession and derivative rights. Accordingly, it does not enable a non-signatory to become a party to the arbitration agreement. Therefore, the judgment delivered in *Chloro Controls* (supra) was held to be erroneous to that extent.

**Conclusion:**

While the doctrine was being referred to by the Hon'ble Supreme Court in several cases, yet in this case, the doctrine was called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy and separate legal personality. However, the Hon'ble Supreme Court by way of the present landmark judgment brought about a reconciliation between the Group of Companies doctrine and well settled legal principles of corporate law and contract law. The objective of the doctrine is to determine the common intention of the parties, while maintaining the corporate separateness of the group companies. Employing the doctrine as a means to identify the mutual intent of the parties to bind the non-signatory party to the arbitration agreement is a welcome step in the context of Indian arbitration jurisprudence. Application of the doctrine would also give effect to mutual intent and party autonomy.