Kluwer Arbitration Blog

India's Tryst with the Group of Companies Doctrine: Harbinger or Aberration?

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This blog previously carried a post ("previous post") on the Indian Supreme Court's ("SC") progressive approach to binding non-signatories to an arbitration agreement in Ameet Lalchand Shah and Others v Rishabh Enterprises and Another ("Ameet Lalchand"). The present post briefly discusses another aspect of this approach in context of Cheran Properties Limited v Kasturi and Sons Limited and Others ("Cheran Properties"), which was incidentally decided just nine days prior to Ameet Lalchand.

In Cheran Properties, the SC held that an arbitral award can be enforced against a non-signatory based on facts and circumstances. The case involved a domestic arbitration under a share purchase agreement ("SPA"). The award was sought to be enforced against the appellant, Cheran Properties, which was not a signatory to the arbitration agreement contained in the SPA and was a nominee of one of the signatories, an individual by the name of KC Palanisamy ("KCP"). The SPA expressly recorded the right of KCP and/or his nominees to transfer their shareholding to any other person of their choice. Pursuant to the SPA, 95% of the shares was transferred to Cheran Properties. Prior to the dispute arising, KCP sent a letter to the opposite signatory party ("KSL") as the authorised signatory of Cheran Properties, stating that in pursuance of the SPA, "our Group Companies, by themselves and/or by their nominees have agreed to purchase shares…" and requesting KSL to execute share transfer deeds "in the following names…[including Cheran Properties]".

As in Ameet Lalchand, the SC in Cheran Properties took recourse to Chloro Controls India Private Limited v Severn Trent Water Purification Inc. ("Chloro Controls"), this time relying upon the 'group of companies' doctrine, which was recognised for the first time by the SC in Chloro Controls. To the best of the author's knowledge, there appears to be no other reported decision where Indian courts have considered enforcing an arbitral award against a non-signatory on basis of this doctrine.

The SC noted that the doctrine facilitates fulfillment of a mutually held intention between parties, where circumstances indicate that the intention was to bind both signatories and non-signatories (affiliates) – "the effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory".

The SC was cognisant of the exceptional nature of the doctrine and held that its application turns on construction of the arbitration agreement, and circumstances surrounding conclusion and

performance of the parent contract. Applying the law to the facts, the SC found that Cheran Properties was conscious of and accepted the terms of the SPA, which specifically provided that KCP's nominees would be bound by it. This would include the arbitration agreement contained in the very same agreement and therefore, Cheran Properties was bound by the arbitral award. It acted as KCP's nominee at all material times and this was unequivocally confirmed by KCP's letter to KSL in which KCP indicated, as its authorised signatory, that the group of companies agreed to purchase the shares.

While Ameet Lalchand focussed on identifying the principal/mother agreement in a network of agreements that contained an arbitration clause (which was similar to the facts in Chloro Controls), Cheran Properties focussed on identifying the mutual intention of parties to bind signatories and non-signatories that are related to each other in a corporate structure and where only one agreement is involved. The SC expressly clarified that interpretation of the Chloro Controls dictum could not be restricted to the parent-ancillary agreements situation.

The SC also clarified that the material legal provision in Cheran Properties was section 35 of the Arbitration Act, 1996, and not sections 8 or 45 as contended by Cheran Properties, since the case dealt with a post-award situation. Section 35 clearly stipulates that an arbitral award shall be final and binding on the parties and persons claiming under them. The expression "persons claiming under them" widens the net of those who are bound by an arbitral award – it is a "legislative recognition [that] an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings". Cheran Properties derived its capacity or position from KCP and was therefore bound by the arbitral award.

It is not often that the group of companies doctrine is applied in the arbitration context. The doctrine must be distinguished from 'piercing the corporate veil', which arbitral tribunals and courts have often done and approved to bind non-signatories, such as shareholders, to arbitration agreements and awards. The doctrine, on the other hand, involves binding a distinct legal entity on account of it being a part of an undivided economic reality or being inseparable from the signatory such that its participation and acquiescence is deemed.

Perhaps the leading arbitration decision on the doctrine is Dow Chemical – here, an ICC interim award that was upheld by the Paris Court of Appeals permitted non-signatories to contracts containing arbitration agreements to raise claims along with the signatories. It was held that Dow Chemicals, one of the non-signatories, was the parent company of the signatories and had participated in the conclusion, performance and termination of the contracts. The arbitral tribunal and court affirmed existence of the mutual intention to bind the non-signatories and implied consent of the non-signatories to the disputed contracts. While a detailed analysis of the doctrine in case law is beyond the scope of this post, what can be deduced from Dow Chemical and subsequent decisions is that (1) willingness to bind non-signatories varies greatly across civil and common law jurisdictions (see previous posts on this blog here and here); and (2) when the doctrine is applied, mutual intention and consent (express or implied) of the non-signatory are vital touchstones.

In the limited repository of decisions on the doctrine in the arbitration context, where does Cheran Properties stand? Admittedly, the SC did not undertake much of a nuanced or principled analysis of the doctrine. Given KCP's express nomination of Cheran Properties and language of "our Group Companies" in his letter, as well as the wording of section 35, the SC did not have to assess the relationship between KCP and Cheran Properties from a group company perspective or Cheran

Properties' conduct in the conclusion and performance of the SPA in much detail. Arguably, given Cheran Properties' nominee status combined with section 35, did the SC have to refer to the doctrine at all? Likewise, if either or both of these factors were absent, would the SC have paid more attention to the group company aspect and potentially delineated some test or principles?

While these are academic questions worth pondering, they should not dilute the significance of a decision on a doctrine of limited and fairly reluctant acceptance in the arbitration context. In its limited discussion, the SC struck the right notes by emphasising the touchstones of mutual intention and implied consent of Cheran Properties to the SPA. The decision gives effect to the express stipulation in section 35 and has positive implications for reducing roadblocks to the enforcement of arbitral awards and consequently, upholding commercial contracts and agreements in India.

Interestingly, the Madras High Court subsequently applied the doctrine to refer non-signatories [SEI Adhavan ("Adhavan") and SunEdison India] to a SIAC arbitration; however, no reference was made to Cheran Properties. The Court's key observations were: (1) it was undisputed that the non-signatories and one of the signatories [SunEdison Holding ("SunEdison")] constituted a single economic reality and all transactions pertained to a project undertaken by Adhavan; (2) "for the convenience sake, the group of companies divided the work between themselves to carry out different activities among which the project is one"; (3) the undertaking executed by SunEdison, which contained the arbitration clause, expressly reflected that Adhavan was its alter ego, evidenced by its appointment as SunEdison's agent and other provisions; (4) the undertaking was prepared by SunEdison's President who controlled all operations of Adhavan; and (5) the arbitration clause clearly envisaged the non-signatories and SunEdison in one basket. The Court referred to Chloro Controls, holding that it read the doctrine into section 45 of the Arbitration Act (referring parties to international arbitration). However, while the Court cited Ameet Lalchand on the point that Chloro Controls applies to section 8, (referring parties to domestic arbitration), in my opinion, Cheran Properties ought to have been cited given it is on the doctrine and would have aided the building of jurisprudence on the doctrine in India.

Nevertheless, the decision is a positive development and combined with Cheran Properties, bodes well for the application and acceptance of the doctrine in India. The decisions reinforce India's progressive approach to binding non-signatories to arbitration agreements and awards, and to arbitration in general, and also reflect the commercially pragmatic and pro-arbitration attitude of Indian courts.

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