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India's Affair with the 'Group of Companies' Doctrine Continues

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Introduction

In a previous post, I had surmised whether the Indian courts' tryst with the group of companies doctrine ("**Doctrine**") in the arbitration context is a harbinger or aberration. If the Indian Supreme Court ("**SC**") decisions in *Reckitt Benckiser v. Reynders Label Printing*, decided on 1 July 2019 ("***Reynders Label***"), and *MTNL v. Canara Bank*, decided on 8 August 2019 ("***MTNL***") are any indication, it appears that the tryst is steadily evolving into an affair. The decisions reinforce India's pro-arbitration outlook and at the same time clarify the parameters to employ the Doctrine to bind non-signatories to arbitration.

Non-Signatory Member of A Group of Companies Cannot be *Ipso Facto* Bound by Arbitration

Reynders Label involved a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") to appoint a sole arbitrator. The question was whether there was a clear mutual intention of the signatory parties to the agreement ("**Agreement**") and the arbitration agreement contained therein to bind the non-signatory party. The signatory first respondent was a party to the Agreement and the non-signatory second respondent was a Belgian company. Both respondents were members of the same group of companies. Therefore, if the non-signatory was held bound by the arbitration agreement, the arbitration would become an international commercial arbitration as opposed to a domestic commercial arbitration, governed by different provisions of the Act.

In order to determine the existence of mutual intention, the SC examined whether it was manifest from the indisputable inter-parties correspondence, culminating in the Agreement, that the transactions between the petitioner and first respondent were essentially undertaken within the group of companies. Apart from alluding to the Doctrine as expounded in *Chloro Controls* and relied upon in *Cheran Properties*, the SC predominantly engaged with the Doctrine in the factual matrix. Therefore, it concerned itself with the inter-parties correspondence to analyse if the second respondent played a role in negotiating the Agreement and consequently, whether it was bound by the arbitration agreement by virtue of Section 7(4)(b) of the Act according to which an arbitration agreement can be concluded *via* exchange of correspondence.

The petitioner primarily relied upon correspondence from one Mr Frederik Reynders, who it claimed was the promoter of the second respondent and therefore, represented it in the negotiations. Since the second respondent was the disclosed principal of the first respondent, it was bound by the arbitration agreement, which was an integral component of the Agreement. On the other hand, the second respondent (i) submitted a counter-affidavit stating that Mr Reynders was an employee of the first respondent and could not represent or bind the second respondent to any legal obligation; (ii) argued that there was no privity of contract and that it was not involved in the negotiation, execution or enforcement of the Agreement; and (iii) argued that both respondents were merely members of the same group of companies sharing a common parent/holding company but otherwise were distinct legal entities operating independently. There was no relationship, such as that of a parent-subsidiary, between them.

The SC held that the second respondent was not a party to the Agreement and, consequently, the arbitration agreement:

> "Thus, respondent No.2 was neither the signatory to the arbitration agreement nor did [it] have any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever. If the main plank of the applicant, that Mr. Frederik Reynders was acting for and on behalf of respondent No.2 and had the authority of respondent No.2, collapses, then it must necessarily follow that respondent No.2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if respondent No.2 happens to be a constituent of the group of companies of which respondent No.1 is also a constituent, that will be of no avail. For, the burden is on the applicant to establish that respondent No.2 had an intention to consent to the arbitration agreement and be party thereto". (paragraph 9, emphasis supplied)

Although this made the arbitration a domestic arbitration for which the SC did not have jurisdiction to appoint an arbitrator, the SC appointed the arbitrator since the first respondent had no objection to this. It is pertinent to note that the SC dismissed the review petition filed by the petitioner against this decision.

Parties' Conduct and Intention to be Examined to Apply Doctrine

In *MTNL*, the issue was whether the non-signatory subsidiary ("**CANFINA**") was bound by the arbitration agreement entered into between its parent company ("**Canara Bank**") and MTNL. Interestingly, while the factual matrix was relatively straightforward to even intuitively conclude that CANFINA was bound by the arbitration agreement, the SC engaged with the Doctrine in decent depth. Briefly, the facts were that MTNL placed bonds with CANFINA under a MoU Agreement. Due to a liquidity crunch, Canara Bank purchased certain value of the bonds issued by MTNL on behalf of CANFINA. Subsequently, MTNL cancelled the bonds as a result of which disputes arose. Canara Bank objected to CANFINA being made a party to the arbitration agreement.

The SC observed that:

- The parent or subsidiary entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group to be bound by that agreement. Similarly, an arbitration agreement is governed by the same principles.
- However, a non-signatory can be bound by an arbitration agreement on the basis of the Doctrine, where the parties' conduct evidences their clear mutual intention to bind the signatory and non-signatory. Such an intention can be evidenced *via* the non-signatory's engagement in the negotiation or performance of the contract or any statements made by it indicating its intention to be bound by the agreement.
- The SC identified three critical factors: (i) non-signatory's direct relationship with the signatory; (ii) direct commonality of the subject matter; and (iii) composite nature of the transaction between the parties. The SC further noted that the Doctrine has also been invoked in arbitration where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit or reality.

Applying the aforementioned principles, the SC concluded that CANFINA was bound by the arbitration agreement:

> "It will be a futile effort to decide the disputes only between MTNL and Canara Bank, in the absence of CANFINA, since undisputedly, the original transaction emanated from a transaction between MTNL and CANFINA – the original purchaser of the Bonds. […] There is a clear and direct nexus between the issuance of the Bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties. Therefore, CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings. Given the tri-partite nature of the transaction, there can be a final resolution of the disputes, only if all three parties are joined in the arbitration proceedings […]". (paragraph 10.9, emphasis supplied)

In addition, the SC noted that (i) a Committee of Disputes had referred all three parties to arbitration, pursuant to which a sole arbitrator was appointed; (ii) Canara Bank itself had circulated a draft arbitration agreement in which it had mentioned itself and CANFINA on one side and MTNL on the other side; and (iii) CANFINA had participated in all proceedings thus far and was represented by separate counsel. Accordingly, the SC concluded that CANFINA had given implied or tacit consent to being impleaded in the arbitral proceedings, which was evident from the parties' conduct.

Implications of the Decisions

These decisions, in my opinion, are significant. They have generated or renewed discussion about the Doctrine, which will lead to more awareness and debate about its application to arbitrations, both in theory and practice. This in turn will persuade practitioners and parties to be careful about how they draft and interpret arbitration clauses where entities of a same group of companies are involved or could be potentially involved in the underlying transaction/contract.

MTNL in particular is significant because it engages with the Doctrine at a jurisprudential level and expressly predicates its decision on it: "*We invoke the Group of Companies doctrine, to join*

Respondent No. 2 – CANFINA i.e. the wholly owned subsidiary of Respondent No. 1 – Canara Bank, in the arbitration proceedings pending before the Sole Arbitrator" (paragraph 11). It does not cite *Cheran Properties*, which is unfortunate as discussing and/or applying it would have aided the larger goal of cultivating jurisprudence on the Doctrine. This, however, does not dilute *MTNL*'s importance.

Both decisions reinforce fundamental factors that are to be considered in applying the Doctrine, such as mutual intention, direct commonality of subject matter and composite transaction. They also provide greater clarity about different factual scenarios in which the Doctrine could potentially be attracted and applied. This is particularly important given the Doctrine's application is heavily predicated on the underlying facts and circumstances. Accordingly, they reinforce India's dynamic and commercially pragmatic approach to arbitration and to binding non-signatories to arbitration. Internationally, uptake of the Doctrine to bind non-signatories is rare, with the exception of civil law courts to a certain extent, as compared to "traditional" devices such as piercing the corporate veil, agency and estoppel (see previous posts on this blog here and here). Therefore, India's affair with the Doctrine could prove instructive for other jurisdictions.

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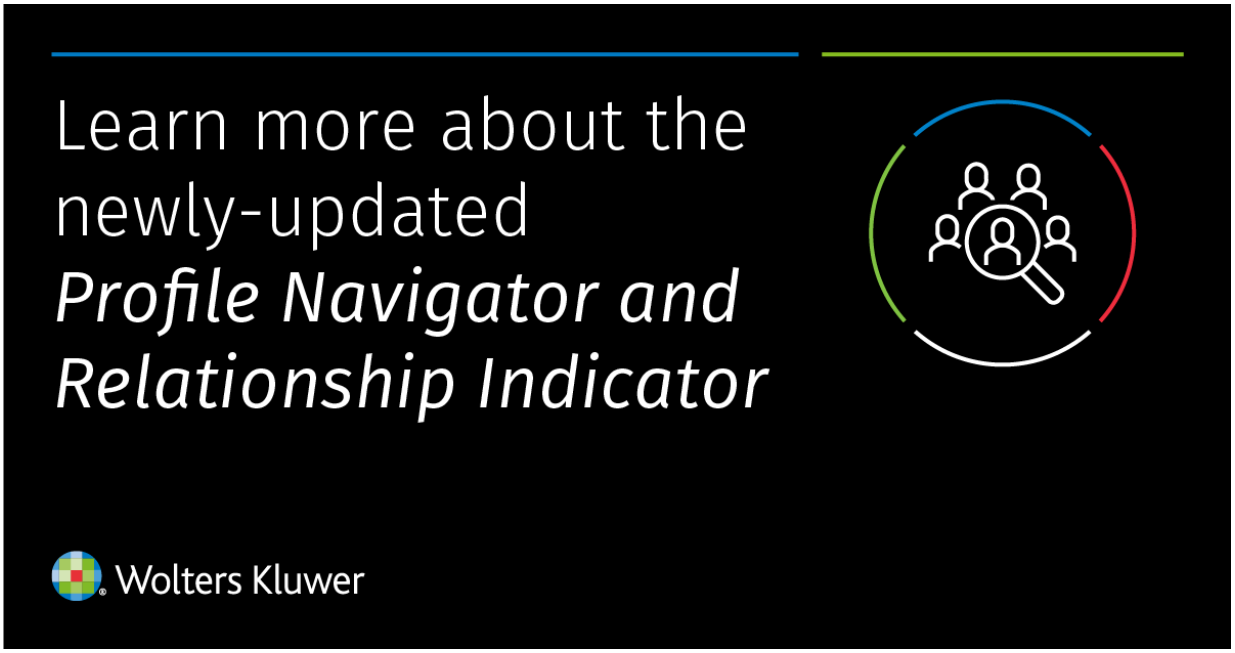

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