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Indian Supreme Court Endorses the Application of the 'Group of Companies' Doctrine to Join Non-Signatories

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The Indian Supreme Court in Cox & Kings Ltd. v. Sap India Pvt. Ltd. & Anr has ruled that non-signatories to an arbitration agreement can be considered parties to an arbitration under the 'Group of Companies' doctrine in India. The judgment has laid down the contours of this doctrine in the Indian context, and we analyse its key takeaways and practical implications in this post.

The Group of Companies doctrine, as discussed in previous posts in the blog here, put simply, envisages making a non-signatory 'group company' (*i.e.*, a company that is a part of companies linked together in formal or informal structures under the control of a parent company), of a signatory to the arbitration agreement if a common intention to do so is discernable. The intention is ascertained through a host of factors such as participation in negotiations, performance or termination of the contract. Detractors of the doctrine argue that it militates against established principles such as privity of contract, separate legal personality and party autonomy, while its proponents argue that it is a consent-based doctrine with benefits such as avoiding multiplicity of proceedings or fragmentation of disputes.

Having originated in France, the Group of Companies doctrine found acceptance in the Indian jurisprudence more than a decade ago, when a 3-judge bench of the Supreme Court, in Chloro Controls v. Severn Trent Water Purification Inc, observed that under the doctrine, a non-signatory group company could be bound by an arbitration agreement if a mutual intention of all the parties to do so can be discerned. However, the doctrine has not been applied uniformly by courts in India, as discussed previously in this Blog here. Recognising these anomalies, a 3-judge bench of the Supreme Court in Cox & Kings Ltd v. SAP India Pvt. Ltd & Anr questioned the legal basis for the application of the doctrine in India and its contours, and referred the matter to a larger bench of 5 judges. In India, the Supreme Court is the final court of appeal. However, if a ruling in an earlier case is doubted by another Supreme Court bench with the same number of judges, the issue is referred to a larger bench for determination.[1)] A bench constituting five or more judges is referred to as a Constitution Bench.

Key Findings of the Constitution Bench

The Constitution Bench highlighted that group companies are a "*modern reality of economic life and business organization*" created for several purposes, such as facilitating international trade,

avoiding tax liabilities, limiting liability on the parent corporation, etc. After tracing the origin and the application of the doctrine in different jurisdictions, the Constitution Bench drew support from Article 7 of the UNCITRAL Model Law and Article 2 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") to hold that the definition of "parties" under Section 2(1)(h) read with Section 7 of the Indian Arbitration and Conciliation Act 1996 ("**Indian Arbitration Act**") can include both signatories and non-signatories. The crucial factor, the Constitution Bench noted, is whether the parties and the non-signatory intended to be bound by the arbitration agreement.

Noting that the Group of Companies doctrine is a consent-based doctrine, the Constitution Bench opined that a modern approach must be adopted to determine 'consent' by considering commercial realities. It held that the conduct of the non-signatory may indicate implied consent to be a party to the underlying contract. Transposing such consent to the arbitration agreement, it noted, is a legal fiction created to accommodate commercial realities, such as different companies getting involved in various stages of negotiation, execution and performance of a contract. The Constitution Bench held that a tribunal or court deciding whether a non-signatory is a party will have to cumulatively consider (i) the mutual intent of the parties; (ii) the relationship of a non-signatory to the signatory party of the agreement; (iii) the commonality of the subject matter; (iv) the composite nature of the transaction; and (v) the performance of the contract, as laid down in the 2022 Supreme Court judgement of Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd.

In *Chloro Controls*, the applicability of the Group of Companies doctrine was traced to the language used in Sections 8 and 45 of the Indian Arbitration Act, which deal with a court's power to refer parties to arbitration on the application of a party or "any person claiming through or under" such party. The Constitution Bench held this to be erroneous and ruled that the Group of Companies doctrine has an independent existence in Indian jurisprudence and is not a part of any provision of the Indian Arbitration Act. While expounding the contours of the Group of Companies doctrine, the Constitution Bench also placed some safeguards, cautioning courts and tribunals to not apply the doctrine merely because a non-signatory is a part of a corporate group.

Avoiding Roadblocks at the Referral Stage

Keeping in line with the *Kompetenz Kompetenz* principle, Indian law (under Section 8 of the Indian Arbitration Act) requires only a prima facie examination of the existence of an arbitration agreement at the referral stage, with a referral court expected to refer the matter to arbitration if it is unable to decide the issue.[2)]

In cases where a non-signatory is sought to be referred to arbitration, the referral proceedings could hit some snags, as the referral court would be faced with an additional and rather complex issue of joinder of non-signatories. Even a *prima facie* examination of this issue would inevitably include a review of the relationship of the parties, the extent of the non-signatory's involvement in the performance of the agreement and other indicators of consent. Addressing this, the Constitution Bench has directed referral courts not to consider such issues at the reference stage and to, instead, refer them for determination by the arbitral tribunal, which can appropriately examine these issues in detail. By doing so, the Constitution Bench has placed an effective guardrail to minimise court intervention and delays prior to the constitution of an arbitral tribunal.

Interim Reliefs Before Courts and ArbitralTribunals

After holding that a non-signatory can be a "party" under the Indian Arbitration Act, the Constitution Bench clarified that such a non-signatory can seek interim reliefs before courts under Section 9 of the Indian Arbitration Act. However, that right would be available to the non-signatory only after a determination by the arbitral tribunal of its status as a party. Practically, the arbitral tribunal is likely to undertake a detailed exercise, including by taking evidence, before arriving at such a decision. Till such time, a non-signatory would be disentitled to seek urgent interim reliefs from the court, even if a referral court under Sections 8 or 45 has dismissed a civil suit based on the "existence" of an arbitration agreement binding such non-signatory.

Based on this rationale, one could argue that an emergency arbitrator will not have the power to order interim reliefs sought by non-signatories who intend to arbitrate as parties. Likewise, even in a situation where a referral court has referred the non-signatories to arbitration, the arbitral tribunal may not be empowered to grant interim reliefs in favour of non-signatories immediately upon its constitution (as is usually the case), as a determination on whether a non-signatory is a party would not have taken place at that stage. In such situations, it is suggested that an arbitral tribunal should exercise its power to grant interim reliefs by considering whether a non-signatory is a party at least on a prima facie basis.

Does the Group of Companies Doctrine Apply at the Enforcement Stage in India?

In Cheran Properties Ltd. v. Kasturi & Sons Ltd., the Supreme Court enforced a domestic award against a non-signatory (which was not a party to the arbitration proceedings) under Section 35 of the Indian Arbitration Act, which provides that "*an arbitral award shall be final and binding on the parties and persons claiming under them respectively.*" The Cheran Properties judgement was previously understood as applying the Group of Companies doctrine to enforce an award against non-signatories (see *Discovery Enterprises & Cox & Kings*).[3)]

While the Constitution Bench did not discuss whether the doctrine can be applied for the first time at the enforcement stage, it clarified that *Cheran Properties* in fact did **not** apply the Group of Companies Doctrine to enforce the award against non-signatories. This clarification is significant. The Group of Companies doctrine is a means of compelling a non-signatory to arbitrate on the basis that it has consented to be bound by the arbitration agreement. That is quite different, however, from directly imposing liability on a non-signatory without giving it an opportunity to contest the case before the arbitral tribunal. The Delhi High Court noted this difference in Tomorrow Sales Agency Pvt. Ltd v. SBS Holdings and Ors, while holding that third party funders who were not parties to the arbitration proceedings would not be liable under the award. The prudent approach therefore is not to apply the Group of Companies doctrine for the first time at the enforcement stage.

Interplay with International Arbitrations

The Group of Companies doctrine is now explicitly recognised as a part of Indian law, and an arbitral tribunal seated outside India may also be called upon to apply this doctrine in some circumstances. An arbitral tribunal considering whether a non-signatory should be a party may choose to apply one among the different laws available to it, such as the law of the seat, law of the arbitration agreement, international principles and law of the main contract.[4] As seen from the recent Court of Appeal judgement in Lifestyle Equities CV v. Hornby Street (MCR) Ltd, a determination of whether a non-signatory is a party may be treated as a 'scope' issue, and the governing law of the arbitration agreement may be applied. An arbitral tribunal may also apply the governing law of the arbitration agreement because the determination may involve an analysis of whether the parties and the non-signatories had consented to the arbitration agreement.[5]

In the absence of an express stipulation of the governing law of the arbitration agreement in jurisdictions such as Singapore[6] and England[7] (both of which are preferred arbitral seats in agreements with Indian governing law), there is a presumption that the parties have chosen the governing law of the main contract to govern the arbitration agreement as well. Such a presumption would be displaced only if the governing law of the main contract invalidates the arbitration agreement.

Parties choosing Indian law as the governing law of their contract (without stipulating a different law governing the arbitration agreement) therefore, must be aware of the possibility of group/affiliate companies being compelled to arbitrate if the conditions stipulated in the judgement are met, even if the arbitral seat is outside India.

Conclusion

The Constitutional Bench's decision in Cox & Kings is a welcome step in India's attempts to be a pro-arbitration jurisdiction in line with international practices. While the Constitution Bench has explained the contours of the doctrine, courts and tribunals must be mindful that arbitration is a consensual mechanism founded on party autonomy and apply the doctrine with due care, ensuring that mere association or involvement with a contract does not result in a non-signatory taking on the obligations of a party to the agreement.

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References

?1 Shah Faesal v. Union of India (2020) 4 SCC 1

?2 Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1

?3 The 3-judge bench in *Cox & Kings* had observed that in *Cheran Properties* the Supreme Court had invoked the Group of Companies doctrine to enforce an arbitral award against non-signatories, and that such invocation "*presents the highest expansion of the Group of Companies Doctrine.*"

?4 Gary B. Born, International Commercial Arbitration ((Kluwer Law International, 3rd Ed, 2021) at p 1611.

?5 See Gary B. Born, International Commercial Arbitration (Kluwer Law International, 3rd Ed, 2021) at p 1568.

?6 BCY v. BCZ [2016] SGHC 249.

?7 Enka v. Chubb [2020] UKSC 38.

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