

# BINDING NATURE OF ARBITRAL AGREEMENT AND AWARD ON NON SIGNATORY PARTY

## Introduction

Arbitration derives its sanctity from the consent of the parties.[1] In the words of the Supreme Court of Texas[2] “consent is the first principle of Arbitration”. [3] International and national laws emphasise the need of consent as a pre-condition to arbitration.[4]

Commercial transactions in today’s world are often multi-layered and hugely complicated and spread across various jurisdictions. This results in the involvement of a number of intermediary parties in the transaction.

Often times such intermediary parties do not have an arbitration clause or a separate arbitration agreement. Commercial Completion of such transactions does not come without its fair share of challenges and disputes.

Such disputes are often brought before dispute resolution forums, which are then endowed with the task of balancing the interests of the stakeholders.

During such dispute resolution, intermediaries which were non signatories to the original agreement get involved as well, which brings forth the question of the binding nature of the arbitration clause or agreement on the intermediaries.

In the recent years, India has witnessed a tremendous growth in arbitration as a means of dispute resolution for a number of reasons. Owing to the Indian Judiciary’s pro-arbitration stance, this growth is consistently nurtured.[5] In disputes that arise out of multilevel and multi jurisdictional transactions, the binding nature of arbitration agreement to non-signatory party often comes into question. With this backdrop this article looks forward to analyse the applicability and binding nature of Arbitration Agreement to non-signatories.



ASMITA

CHAKRABORTY

*The author is a fourth year student pursuing BA.LLB at Chanakya National Law University*



## An International Perspective

This stance is pioneered by the Tribunal in *Dow Chemical's v. Isover Saint Gobain*.<sup>[6]</sup> This case led to the origin of the Group of Companies Doctrine. The cardinal principle of the Group of Companies doctrine is that there must not only be existence of a group of Companies but such companies of the group must be involved in negotiation, termination and performance of Contract.

The Tribunal while upholding the jurisdiction of the Dow chemicals and its subsidiaries (Dow Chemicals along with its subsidiaries had initiated arbitration against Isover) laid down that mere ties between companies did not result in application of the arbitration agreement on the non-signatory parties. The non-signatory parties could only become bound by the arbitration agreement if it could be shown that they played an essential role in conclusion, performance and termination of contract.<sup>[7]</sup> Thus, a third party who is not a signatory to the contract can be made a part of the arbitration proceedings if the Common Intention of the signing parties and the non-signing parties can be interpreted. Common intention here refers to the intention of the non-signatory parties of individually participating, concluding and terminating the respective contract<sup>[8]</sup> which has been signed by the signatory parties.

## Indian Judiciary's Stand On The Issue

The Arbitration and the Conciliation Act, 1996 (hereinafter referred to as Act) saw some major changes which was brought about by the Arbitration and Conciliation (Amendment) Act 2015. Section 2(1)(h) of the Act defined party to mean Parties to Arbitration Agreement. Section 7 of the Act describes what a valid arbitration agreement is and sub clause 1 to Section 7 clearly lays down that an arbitration agreement is an agreement to submit to arbitration by the Parties in case of any or all disputes which arises from a legally enforceable relationship between the parties. Prior to the Amendment Act of 2015 the Supreme Court gave two judgments in this regards.

The Supreme Court in *Sukanya Holdings Pvt Ltd. v. Jayesh H Pandya*<sup>[9]</sup> held that the cause of action leading upto arbitration cannot be bifurcated and an arbitration agreement would only bind those who had agreed to the arbitration agreement.

It further noted that party autonomy is supreme and didn't take into account the intent of the party whatsoever. Ten years later, the Supreme Court in *Chloro Controls India Pvt Ltd. V. Severn Trent Water Purification Inc & Ors*,<sup>[10]</sup> sets a landmark precedent. The judgment in this case not only dilutes the party autonomy to a huge extent but also gives the conclusion that non signatory party alongside signatory parties can be brought under arbitration proceeding. Even though the judgment essentially dealt with the question of binding of arbitration agreement on non- signatory party, the Sukanya Holdings judgment was passed in case of domestic arbitration while the Chloro Controls judgment was passed in relation to foreign arbitral awards. It is important to note that till date the case of Sukanya Holdings has not been overruled.

In 2015 the Arbitration and Conciliation (Amending) Act, 2015 was passed. The Amending Act, 2015 amended section 8 of the parent act, 1996 to replace 'Party' and include a party to arbitration or any party claiming through or under them instead. Post amendment, the Supreme Court considered the issue of inclusion non signatory parties to arbitration agreement in the case of *Ameet Lalchand Shah v. Rishab Enterprise*.<sup>[11]</sup> The Supreme Court considered its previous judgment in Chloro Controls and held that prior to the 2015 amendment Section 8 did not allow the integration of parties under arbitration if it had not been specifically agreed upon by them. However, in the aftermath of the pertinent 2015 amendment to Section 8, owing to the common objective of the three agreements, the non-signatory parties were bound by such agreement.

*AmeetLalchand* was followed by *Cheran Properties v. Kasturi and Sons Ltd. and Ors* <sup>[12]</sup>. Though adjudged on similar lines, *Cheran Properties* case went a step further and concluded that arbitral award may become binding on non-signatory parties if the mutual intention of the parties to bind both signatory and non-signatory parties could be established. It was further observed in this case that Section 35 made an arbitral award enforceable against party or persons claiming under such parties. The latest case which has been decided in this context is that of *MTNL v. Canara Bank*.<sup>[13]</sup> The Supreme Court in this case clearly invoked the Group of Companies Doctrine and also laid down the circumstances in which the group of Doctrine can be invoked by the Courts to bind a non-signatory party. This judgment to some extent fills up the gap left by the *Cheran Property* case.

## Analysis Of The Current Position

The Doctrine of Group of Companies had been invoked in both the previous cases of Cheran Properties and Chloro Controls. Cheran properties went a step further and brought into picture the mutual intention of the parties to bind both signatory and non-signatory parties for an arbitration agreement to be binding on them. However, no comprehensive criteria of what could be construed as mutual intention of the parties to bind were laid down. The most recent case of MTNL has comprehensively listed the few circumstances in which doctrine of Group of Companies can be invoked by the courts to establish whether non-signatory party is to be bound an arbitration agreement. This has filled the gap that had been left open by the Cheran Properties case. However, the whole hearted acceptance of the Group of Companies doctrine in the AmeetLalchand and MTNL has been a major departure from the position that such doctrine holds in the other common law jurisdictions like Singapore, United Kingdom etc.[14] The circumstances laid down in the case like engagement by the non-signatory party in negotiation, performance or termination of contract, express intention of being bound by the contract, direct involvement with signatory parties in composite transactions etc, appear to be quite exhaustive without much scope for misinterpretation. It is however pertinent to note that while a non-signatory party may become bound by an Arbitration agreement due to the group of Companies doctrine, there exists no separate arbitration agreement as mandated by Section 7 of the Act. This implies that a judicial decision can override a statutory provision which has neither been replaced nor repealed.

## Conclusion

The position of the non-signatory party to be bound by an arbitration agreement appears to have become clear through a series of judgments in this regard. Though the judgment in the Sukanya Holdings case has technically not been overruled which was the first judgment in this regard, however its influence has been significantly weakened by the subsequent judgments. Binding a non-signatory party to an arbitration agreement not only makes it difficult for such parties to escape their liability but also makes sure that such non signatory parties do not suffer loss due to the non-existence of arbitration agreement. However, the courts and tribunals while adjudicating such multi-layer dispute claims involving high stakes must proceed cautiously with a detailed and adequate examination of the facts and adjudge each case on their own merit without applying any straight jacket method.

## ENDNOTES

[1] M P Bharucha, SnehaJaisingh & Shreya Gupta, *The Extension of Arbitration Agreement to Non-Signatories- A Global Perspective*, INDIAN J. OF ARB. L. Vol 5 Issue 1 (2016), 35-63 at 35.

[2] *Id.*

[3] *Id.*

[4] Benson Lim, Hogan Lovells & Adrian Uson, *Relooking at Consent in Arbitration*, KLUWER ARB. BLOG (Feb 12, 2019), [http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/?doing\\_wp\\_cron=1590833298.2791590690612792968750](http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/?doing_wp_cron=1590833298.2791590690612792968750).

[5] ShwetaSahu, Ashish Kabra, *India: Supreme Court's Dictum on Reference of Non- Signatories to Arbitration in Domestic Arbitrations*, MONDAQ (May 16, 2018).

[6] Dow Chemical v. Isover St. Gobain, ICC Award No. 4131 [hereinafter "Dow Chemical"]; Dow Chemical v. Isover St. Gobain, Y. B. Comm. Arb. 131.

[7] Soorjya Ganguli, Somdutta Bhattacharya, Radhika Mishra, *India: Binding Non-Signatories to An Arbitration- Charting the Shifting Paradigms*, MONDAQ, 27th November 2019.

[8] Kirstin Schwedt, *When Does an Arbitration Agreement have a Binding Effect on Non Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy*, KLUWER ARB. BLOG, (Jul. 30, 2014), [http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/?doing\\_wp\\_cron=1590834378.9046840667724609375000](http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/?doing_wp_cron=1590834378.9046840667724609375000).

[9] Sukanya Holdings Pvt Ltd. v. Jayesh H Pandya, AIR 2003 SC 2252.

[10] Chloro Controls India Pvt Ltd. v. Severn Trent Water Purification Inc&Ors, (2013) 1 SCC 641.

[11] AmeetLalchand Shah v. Rishab Enterprise, (2018) 15 SCC 678.

[12] Cheran Properties v. Kasturi and Sons Ltd and Ors, (2018) 16 SCC 413.

[13] MTNL v. Canara Bank, Civil appeal Nos. 6202-6205 of 2019, Arising out of SLP (Civil) No. 13573-13576 of 2014.

[14] Dow Chemical, *supra* note 6.