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THE GOOD, THE BAD, THE UGLY: REINING IN THE TUMULTUOUS GROUP OF COMPANIES DOCTRINE

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Introduction

Recently, in *Cox and Kings v. SAP India* ["**Cox & Kings**"],[1] the Supreme Court of India has referred a larger bench to contemplate the application of the Group of Companies Doctrine ["**the doctrine/GoCD**"] in arbitrations. In the Indian Context, the evolution of the doctrine has been capricious in nature. As propounded in *Chloro Controls India v. Severn Water Purification* ["**Chloro Controls**"],[2] the GoCD binds a non-signatory by an arbitration agreement, subject to the existing parties mutually intending that the non-signatory be bound by it. Post Chloro Controls, through several cases, the grounds for invoking the doctrine now encompasses *inter alia* the existence of a direct relationship between the signatory to the arbitration agreement and the non-signatory entity of the group; direct commonality of the subject-matter; composite nature of the transaction between the parties.[3]

In Cox & Kings, the signatory to the mutual agreement was a wholly-owned subsidiary of the non-signatory, and the petitioners instituted arbitration against the non-signatory upon the failure to initiate proceedings against the signatory owing to the signatory's ongoing insolvency proceedings.[4] In lieu of this, the Supreme Court, while acknowledging that after Chloro Controls, several arbitral tribunals and Courts have used GoCD on the basis of economic convenience rather than legal standards, has referred the question of the extent and applicability of the doctrine to a larger bench.[5] Hence, the hot debate on the doctrine was reignited.

Arguably, the doctrine has, in some ways, acted as a lagniappe for the arbitration ecosphere. The dipping numbers of multiple litigations, acting as a one-stop solution for parties aggrieved by group

[1] *Cox & Kings Ltd. v SAP India (P) Ltd*. (2022) SCC OnLine SC 570.
[2] *Chloro Controls India (P) Ltd. v Severn Water Purification Inc.* (2013) 1 SCC 641.
[3] MP Bharucha, Sneha Jaisingh, & Shreya Gupta, 'The Extension of Arbitration Agreements to NonSignatories – A Global Perspective' (2016) 5(1) Indian Journal of Arbitration Law <http://www.ijal.in/wp-content/uploads/2022/02/IJAL-Volume-5_Issue-1_M.P.-Bharucha-et-al.pdf> accessed 31 July 2022.
[4] *Cox & Kings* (n 1), [9] – [10].
[5] ibid.

corporates that avoid their liabilities through their business structures, are some, to name a few.[6] However, the doctrine has ventured into diverse directions, departing from the fundamental concepts. Thereby, revisiting the contours and rationale of the doctrine has become the need of the hour. The authors in this article elucidate the pitfalls of the doctrine such as; the interpretation of the phrase – "*claiming through and under"*; disregard for principles of like mutuality and party autonomy; abusing the term "*exceptional circumstance*", and penurious interpretation of corporate law in arbitration law. The discussion over these defects is supplemented with solutions, followed by concluding remarks.

Unnecessary widening of the amplitude of "*claiming through and under*"

The 246th Law Commission Report,[7] in tandem with the Chloro Controls decision, triggered the 2015 Amendment to the Arbitration and Conciliation Act, 1996 [*"***Arbitration Act***"*],[8] which broadened the scope of section 8 by adding the phrase "*claiming through or under*".[9] The judicial pronouncements, like *Mahanagar Telephone Nigam Ltd v. Canara Bank* ["**MTNL**"],[10] *Cheran Properties v. Kasturi and Sons* ["**Cheran Properties**"],[11] etc., have fostered the wave of nebulous jurisprudence of the doctrine post the amendment. By extending this phrase to reluctant non-signatories, several judgments in an expedient manner inculcated the doctrine within the ambit of section 8 of Arbitration Act.[12] Notably, the decision in *Ameet Lalchand Shah v. Rishabh Enterprises* ["**Ameet Lalchand**"][13] expressly relied upon section 8 while applying the GoCD to bind them to an arbitration agreement.

Pre-amendment, as done in Chloro Controls, section 45 of Arbitration Act, specifically the phrase "*persons claiming through or under*", was used to include non-signatories and apply the doctrine. Now, as exhibited by the Madras High Court in *Abhibus Services v. Pallavan Transport Consultancies*,[14] ["**Abhibus**"] that given the active judicial attempt to match the scope of section 8 with that of section 45 of Arbitration Act and the aid that the 2015 Amendment provided, "*it is possible to refer any party to the arbitration, be it signatory or non-signatory, on a prima facie consideration*" under section 8. Interestingly, while section 45 deals with foreign awards,[15] section 8 provides for the Courts' power

[6] ibid.
[7] Law Commission of India, *Amendments to Arbitration and Conciliation Act 1996*, (Report No 246, 2014) 42, 43.
[8] Arbitration and Conciliation (Amendment) Act 2015.
[9] Arbitration and Conciliation Act, 1996 (the Arbitration Act) s 8.
[10] *Mahanagar Telephone Nigam Ltd v Canara Bank* (2019) SCC OnLine SC 995.
[11] *Cheran Properties Limited v Kasturi and Sons Ltd.* (2018) 16 SCC 413.
[12] *MTNL* (n 10); *Cheran Properties* (n 12).
[13] *Ameet Lalchand Shah & Ors. v Rishabh Enters. & Ors*. (2018) 15 SCC 678 [27].
[14] *Abhibus Services India Pvt. Limited and Ors. v Pallavan Transport Consultancies Services Ltd. & Ors*. (2022) SCC OnLine Mad 796 [70].
[15] The Arbitration Act (n 9), s 45.

to refer parties to arbitration where there is an arbitration agreement in domestic arbitrations.[16] Thus, the purpose of both sections is congruent.

Nevertheless, it is now written in stone that section 8 includes non-signatories to the arbitration agreement, and hence our discussion will be limited to the same. Thus, the contentious question is; what is the scope of the phrase "*claiming through or under*" for invoking the doctrine under section 8? The plain reading of the phrase "*claiming through or under*" would showcase that only a non-signatory who voluntarily institutes a proceeding or initiates a statement of claim on behalf of an existing party to the arbitration clause would be allowed to be bound by the clause. In Cox & Kings, while highlighting this anomaly, the Supreme Court stated that "*claiming through or under*" conveys a "*derivative*" element.[17] Hence, the right of the non-signatory should be contractually derived from the signatory. Only then such right can be extrapolated to the non-signatories. However, in Cheran Properties, the Supreme Court invoked "*claiming under them*" under section 35 of Arbitration Act to enforce an award against a party who had not even participated in the arbitration.[18] This is incorrect as, unlike section 8, section 35 does not pertain to 'parties to the arbitration agreement' at all, which is the fundamental basis of GoCD's application. In *Amazon v. Future Coupons* ["**Amazon-I**"],[19] Future Retail was compelled to arbitrate under section 8, even though it did not claim to join the arbitration but rather was reluctant towards the same. This becomes contrary to the provision's bare perusal, i.e., that the non-signatory, directed to be bound by the arbitration clause, must make a voluntary claim based on a legitimate interest of the party to the clause.

Therefore, restricting the scope of the phrase is required. A sufficient legal or derivative contractual basis must be made a pre-requisite for invoking the doctrine under section 8. In its absence, unnecessary and excessive inclusion of non-signatories will be witnessed.

Disregarding mutuality – Intentions of the parties and abusing "*exceptional circumstances*"

There has been a paradoxical interplay of one of the most essential grounds for considering the applicability of the doctrine, i.e., the *intention of the parties.* In the absence of the same, the non-signatories cannot be impleaded or allowed to implead.[20] The seminal Supreme Court decision of Chloro Controls did lay emphasis on the intention of parties, however, it ironically upheld that in

[16] The Arbitration Act (n 9), s 8.
[17] *Cox & Kings* (n 1) [41].
[18] *Cheran Properties* (n 11) [21] – [22].
[19] *Amazon.Com NV Investment Holdings LLC v Future Coupons (P) Ltd*. (2021) SCC Online Del 1279.
[20] *Chloro Controls* (n 2), [66] – [67].

certain "*exceptional circumstances*", the parties' consent can be dropped, thereby leaving the question as to which entities would be bound to the arbitration up-to judicial discretion.[21] These *exceptional circumstances* are of such wide amplitude that it can include any party who, without any intention to arbitrate, has participated in ancillary terms in furtherance of the contract in question/dispute. The intrinsic relations between the entities of the group corporate, tight corporate structure, posing as a single economic reality, the existence of a mother agreement and several ancillary agreements without whom the performance of the mother agreement will be rendered dysfunctional, are some of the factors that are considered as exceptional circumstances, for applying the doctrine.[22]

The muddled situation occurs when some non-signatories, without much consideration to the law or the fact, are made bound to arbitrate. Cases like Cheran Properties and MTNL have lowered the threshold of proof for 'intent to arbitrate'. In MTNL, the Court, while overlooking the mutual intent of the parties, had applied GoCD on the rationale that "*there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit*" and that the entities in such a group are financially funded by each other.[23] Similarly, in Amazon-I, the Delhi High Court relied heavily on the financial support that Future Coupons received from Future Retail.[24] The Courts have failed to recognise that in the commercial reality of today's corporate world, subsidiaries are often funded by parent companies as a normal course of action. Such an application of the doctrine would create a debacle in the corporate world as the common practice of free flow of funds between entities of group corporate would act as a harbinger of rampant litigations.

Furthermore, in *SEI Adhavan v. Jinneng Clean Energy Technology*,[25] the non-signatories were made bound to an arbitration on the basis of having common central control, common email-ids, and common premises, and the transactions were undertaken in relation to a common project. Dolefully, in Ameet Lalchand, the Court found that many elements in the three disputed agreements, involving a number of parties, are all essential components of the mother agreement and hence, in terms of "*exceptional circumstances*", bound the non-signatories, who were not even members of the same corporate group.[26] Similarly, an aberration from the tenet of consent was

[21] ibid [68].
[22] Manasi Kumar, 'The 'Composite Transaction' and Extension of Arbitration Agreements in India' (2020) 37(3) Journal of International Arbitration 363, 390.
[23] *MTNL* (n 10).
[24] *Amazon-I* (n 19).
[25] *SEI Adhavan v Jinneng Clean Energy Technology* (2018) SCC OnLine Mad 13299 [6.2] – [6.3].
[26] *Ameet lalchand* (n 13), [21] – [23].

seen in *Magic Eye Developers v. Green Edge*[27] and *RV Solutions v. Ajay Kumar Dixit*,[28] where none of the requirements of "*exceptional circumstances*" for applying the doctrine were met.

The nonchalant approach taken by the Courts becomes concerning with misinterpretation of the "*exceptional circumstances*" provided. The doctrine does not apply only to section 8 proceedings, and instead, it has a wider implication, such that on prima facie considerations, Courts can refer non-signatories to arbitration, even under sections 9 and 11.[29] As a consequence of the Courts' lowering the threshold for intent, the non-signatories are left no choice but to be bound by such proceedings without having any consideration of their own. Behind the cloak of "*exceptional circumstances*", the doctrine has usurped the principle of the *audi alterum partem* and has trembled the essence of arbitration agreements.

Misapplications of the Doctrine with Corporate Law

The misapplication of the doctrine with the concept of the corporate veil could be seen in the cases like *Shapoorji Pallonji v. Rattan India* ["**Shapporji**"][30] and Abhibus, wherein the Courts held that the doctrine has to be applied to pierce the corporate veil. The Courts adjudicated these matters on the rationale that such application of the doctrine results in the identification of the true party in interest.[31] The synonymous use of the two concepts is a penurious implementation of corporate law principles in arbitration law. The GoCD, in its true essence, provides for the binding of non-signatories of a corporate group, where they have engaged in express conduct showcasing their intentions to be bound and have benefited from the disputed contract.[32] While the GoCD focuses on the idea of considering the signatory and non-signatory as a single economic reality,[33] the corporate veil, just like the alter ego principle, disregards the concept of a separate legal entity for assigning liabilities to its shareholders.[34] Thus, the GoCD can be said to be congruent to principles of agency, assignment or implied consent.[35] This line of difference has to be drawn between these concepts.

The misapplication of doctrine fails to consider that while multiple agreements combined may result in a single composite transaction, it is frequently the intention to restrict some aspects of the

[27] *Magic Eye Developers (P.) Ltd. v Green Edge Infra Pvt. Ltd. & Ors*. (2020) SCC OnLine Del 597.
[28] *RV Solutions (P.) Ltd. v Ajay Kumar Dixit & Ors*. (2019) 257 DLT 104 [12] – [13].
[29] *Abhibus* (n 15).
[30] *Shapoorji Pallonji and Co. (P) Ltd. v Rattan India Power Ltd*. (2021) SCC OnLine Del 3688.
[31] *Abhibus* (n 14).
[32] Gary Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021).
[33] *MTNL* (n 14).
[34] *Balwant Rai Saluja v Air India* (2014) 9 SCC 407.
[35] Born (n 32).

transaction to particular companies. Hence, the non-signatories should not be forced to take risks that they may not have anticipated at the time of the contracting.

The unanswered question on Section 17

Ostensibly, the High Courts have even failed to grapple with the question of whether the Tribunal has the power of impleading non-signatories under section 17 of Arbitration Act. In Abhibus, the Court answered in negative.[36] However, in Amazon-I, the Court accepted and upheld the decision of the Emergency Arbitrator, who had impleaded a non-signatory therein on the basis of GoCD.[37] Subsequently, in *Amazon v. Future Retail*,[38] the Supreme Court held that the Emergency Arbitrator's award was enforceable under section 17(2) of Arbitration Act. From the above-mentioned cases, it becomes evident that the question of whether the doctrine is covered under section 17 of the Act remains contentious. The same necessitates an in-depth judicial pronouncement that caters to this. Sadly, Cox & Kings misses out on this opportunity.

Proposed Remedies

The panacea to the above-mentioned analysis has a tripartite structure as follows:

i. *The restrictive interpretation of "claiming through or under"*

A solution to the section 8 problem can be drawn from the interpretations of sections 9 and 82(2) of the English Arbitration Act 1996,[39] which is *pari materia* to section 8 of Arbitration Act. Here, in *City of London v. Sancheti*,[40] the English Court noted that "*a mere legal or commercial connection*" to the relevant agreements "*is not sufficient*" to bind a non-signatory within the scope of the phrase "*through or under*". Thus, the phrase is applicable in situations where direct legal relationships with the signatory exists, for instance, contract of assignment, agency, transfer deeds etc. This view is also supported in *Tanning Research Laboratories v. O'Brien*,[41] a decision of the Australian Court, wherein it was noted that "*claiming through or under*" encompasses successors in the interest of and derive their rights through a signatory. Notably, in *Dow Chemical v. Isover-Saint-Gobain* ["**Dow Chemicals**"],[42] the case through which the doctrine stemmed into Chloro Controls,[43] it was the non-signatory who had claimed to be joined in the arbitration through and under the existing party to the proceeding. Hence, while applying the doctrine, the scope of section 8 should be limited to either

[36] *Abhibus* (n 14), [136].
[37] *Amazon-I* (n 19).
[38] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd*. (2021) SCC OnLine SC 557.
[39] Arbitration Act 1996, s 9 and s 82(2).
[40] *The Mayor & Commonalty & Citizens of the City of London v Sancheti* [2008] EWCA (Civ) 1283 [29] – [34].
[41] *Tanning Research Labs. Inc. v O'Brien* (1990) 169 CLR 332 [11].
[42] *Dow Chemical v Isover-Saint-Gobain* (1983) 110 JDI 899.
[43] *Chloro Controls* (n 2).

such voluntary claim to be joined, or a mandatory factor of ascertaining the derivative nature of the contested right in the dispute should be stipulated.

ii. *Limiting the scope of "exceptional circumstances".*

In *Reckitt v. Reynders*,[44] the Court agreed upon a higher threshold of proof for applying the doctrine. This can be described as the 'intent test', wherein the existence of a mother contract and associated auxiliary contracts by themselves does not constitute sufficient grounds to bind a non-signatory. Rather, the rationale behind the complex transaction's structure and the intention of the parties to keep the transaction and liabilities separate across group companies is scrutinised.[45] Interestingly, as done in Dow Chemicals and several ICC Awards, the doctrine should be invoked where the non-signatory exercises absolute control over the signatories.[46] Exceptional circumstances shall be limited to effective participation of the non-signatory in negotiation, conclusion, performance, termination of the disputed contract and/or making statements indicating its intention to be bound by the contract. A similar rationale was endorsed in *PetroAlliance v. Yukos*,[47] where the non-signatory had created an undisputable expectation in the mind of the other party that it was willing to stand in for the signatory.

iii. *Cautious application of principles of corporate law.*

Lastly, instead of misapplying the doctrine and principles of corporate law synonymously, the application of veil piercing or alter ego can be done merely for the identification of duplicitous acts by a third party, post which the doctrine can be applied in its space to bind the non-signatories to arbitration. Therefore, it is imperative that there is no convergence of the concepts of separate legal personality and a single economic entity

Conclusion

The above-mentioned fallacies and suggested remedies accommodate the unanswered questions that plague the doctrine. The Supreme Court referral bench is a ray of hope to calibrate the application of the doctrine that has taken a toll on the basic tenets of arbitration, i.e., party autonomy and mutual consent. This doctrine, if executed, post-appraising these concerns, would have an effect that does justice to both practicability of the case as well as foundational principles of arbitration. Till the referral bench's decision, provisionally, the parties to the arbitration are

[44] *Reckitt Benckiser (India) P Ltd. v Reynders Label Printing* (2019) 7 SCC 62 [9].
[45] *ONGC Ltd. v Discovery Enterprises (P) Ltd*. (2022) SCC OnLine SC 522.
[46] *Dow* (n 42); Interim award in ICC Case No. 4131 of 1982, IX YB Comm. Arb 131 (1984); Award in ICC Case No. 5103 of 1988, 115 JDI (Clunet) 1206 (1988).
[47] *Petro Alliance Services Company Ltd. v Yukos Oil* SCC Case No 108/1997, 2000.

advised to have an explicit clause limiting the scope of parties only to signatories to the arbitration agreement.