WHOSE ARBITRATION IS IT ANYWAY? NON-SIGNATORIES?

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Introduction

Arbitration is a consensual mechanism for dispute resolution, and therefore, the consent to arbitrate is a fundamental and indispensable prerequisite to an arbitration agreement.[1] Ordinarily, parties manifest their intent to be bound by an arbitration agreement by being signatories to the contract containing such an agreement. However, the formal execution or the signature of parties is not a pre-condition for a valid arbitration agreement,[2] and courts and tribunals across various jurisdictions have developed theories to bind non-signatories if circumstances exist to demonstrate their intent to be a party to the arbitration agreement.[3] These theories include both purely consensual theories (e.g., agency, implied consent, assumption, assignment, third party beneficiary) and non-consensual theories (e.g. estoppel, alter-ego).[4] The underlying objective of these theories is to stay true to the commercial realities of modern business transactions, which commonly involve multi-party and multi-agreement arrangements.

Given the increasing number and complexity of commercial transactions between national and international groups of companies, courts and tribunals have been constantly confronted with issues pertaining to binding non-signatories to arbitration, particularly in India.[5] The reason being that for financial, regulatory, taxation and/or other commercial reasons, there is an increasing lack of a clear identity of the companies that sign the agreement and the companies that perform it.[6] Binding non-signatories to arbitration, when the circumstances warrant so, is a reasonable and pragmatic approach as it brings together all the parties that are closely connected and relevant to a disputed transaction or breach before a single forum. Moreover, it also allows affiliated entities or intimately connected parties, who have been materially involved in negotiations and

[1] Gary Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2020) 280–81.
[2] Charlie Caher, Dharshini Prasad and Shanelle Irani, 'The Group of Companies Doctrine - Assessing the Indian Approach' (2021) 9(2) IJAL 33, 34 <http://www.ijal.in/sites/default/files/Vol9Issue2/3_Group_of_Compaies_Doctrine_Assessing_the_Indian_Approach-CharlieCaher_DharshiniPrasad_ShanelleIrani.pdf> accessed 5 July 2021.
[3] cf Born (n 1).
[4] cf Born (n 1).
[5] Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (2nd edn, Kluwer Law International 2020) 95, 96.
[6] ibid.

performance of the concerned contract, to be subjected to and/or benefit from the presence of the arbitration agreement entered into by another affiliated entity. This approach not only ensures cost and time efficiency but also limits parallel litigations in multiple forums and the consequential risk of conflicting decisions.[7] Even from a commercial efficiency or business common sense standpoint, binding non-signatories to arbitration allows related or overlapping disputes arising out of a single integrated transaction between related commercial parties to be resolved in a single forum.

Nevertheless, binding non-signatories to arbitration acts as an exception to the strict principles of 'separate legal personality of a company' and 'privity of contract,' and therefore, it remains a prominent and constantly disputed phenomenon in arbitration law and practice.[8] India is one jurisdiction that has strongly embraced the principles underlying binding non-signatories to arbitration. Indian courts have regularly dealt with this issue and have largely portrayed a general consensus that non-signatories may be bound by an arbitration agreement if the circumstances demonstrate that it was the mutual intention of all parties to bind signatories as well as non-signatories.[9] This article discusses the prevailing position in India with respect to binding non-signatories to arbitration and analyses certain essential questions arising out of the same.

India's tryst with non-signatories

In India, the seminal case with respect to binding non-signatories to arbitration is *Chloro Controls India Pvt. Ltd. v Severn Trent Water Purification Inc.* ["**Chloro Controls**"].[10] In this case, the Supreme Court of India ["**Supreme Court**"] opined that various legal bases arising out of implied/specific consent or judicial determination may be applied to bind a non-signatory to arbitration.[11] The Supreme Court recognised two distinct theories to bind non-signatories to arbitration. The first theory, which includes 'implied consent,' 'third party beneficiaries,' 'guarantors,' 'assignment', and other transfer mechanisms of contractual rights, relies on the discernible intentions of the parties and, to a large extent, on the good-faith principle.[12] This theory applies to both private and public legal entities.[13] The second theory, which includes the legal doctrines of agent-principal relations,

[7] *Ayyasamy v A Paramasivam* (2016) 10 SCC 386 [48]-[50].
[8] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, OUP 2005) 162; Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, OUP 2010) 149.
[9] *Chloro Controls v Severn Trent* (2013) 1 SCC 641 [71]-[72].
[10] ibid.
[11] ibid [103], [107].
[12] ibid [103.1].
[13] *Chloro Controls* (n 9) [103.2].

apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel, does not rely on the parties' intention but rather on the force of the applicable law.[14]

Notably, in *Chloro Controls*, the Supreme Court also adopted the group of companies doctrine, wherein it held that an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns if the circumstances demonstrate that the mutual intention of all the parties was to bind both, signatories as well as non-signatory affiliates.[15] The Supreme Court highlighted that such circumstances could include (i) direct relationship with the party signatory to the arbitration agreement; (ii) direct commonality of the subject matter; (iii) the agreement between the parties being a composite transaction; and (iv) parties, especially the non-signatory, engaging in conduct that demonstrates its consent to be bound by the arbitration agreement.[16] The applicability of the group of companies doctrine was recognised to be premised on gauging the common intention of the parties and examining whether the performance of the agreements in question is intrinsically intermingled or interdependent on each other for achieving a common object.[17]

Chloro Controls was rendered under Section 45 of the Arbitration and Conciliation Act, 1996 ["**Act**"] (Part II), [18] i.e. in respect of foreign seated arbitrations.[19] Subsequent to *Chloro Controls*, the Supreme Court has further developed the principles underlying binding non-signatories to arbitration in several other cases. In *Ameet Lalchand Shah v Rishabh Enterprises* ["**Ameet Lalchand**"], the Supreme Court extended the principles expounded in *Chloro Controls* to an application under Section 8 of the Act (Part I), i.e. in respect of India seated arbitrations.[20] In this case, the Supreme Court ruled that when the agreements are inter-connected, and several parties are involved in a single commercial project, i.e. executed through different agreements, all the parties can be subjected to arbitration.[21] In doing so, the Supreme Court highlighted that courts and tribunals should impart a sense of business efficacy to the commercial understanding of the parties, i.e. reflected in such interconnected agreements.[22]

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[14] *Cheran Properties v Kasturi and Sons* (2018) 16 SCC 413 [28].
[15] *Chloro Controls* (n 9) [71]-[74].
[16] *Chloro Controls* (n 9) [73], [74], [76], [108]; *Cheran Properties* (n 15) [20], [21], [23]-[28].
[17] *Chloro Controls* (n 9) [74].
[18] The Arbitration & Conciliation Act 1996, s 45.
[19] *Chloro Controls* (n 9) [95]-[96].
[20] (2018) 15 SCC 678 [13], [16]-[18], [24]-[35].
[21] ibid [25].
[22] ibid [35]; See also *Ayyaswami* (n 7) [25]; *Cheran Properties* (n 14) [23].

In *Cheran Properties v Kasturi and Sons* ["**Cheran Properties**"], the Supreme Court applied the group of companies doctrine to enforce an award against a non-signatory.[23] In this case, it was opined that the application of the group of companies doctrine requires unravelling, from a layered structure of commercial arrangements, the true essence of the business arrangement and also the intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.[24] The Supreme Court noted that under the group of companies doctrine, a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefitted by the relevant contracts.[25]

Another important case in this regard is *MTNL v Canara Bank* ("**MTNL**").[26] In *MTNL*, the Supreme Court succinctly summarised the principles applicable in the application of the group of companies doctrine.[27] The Supreme Court affirmed that the intention of parties to bind non-signatories needs to be inferred from the terms of the contract,[28] the conduct of the parties and the correspondence exchanged.[29]

In light of these cases, it can be concluded that the different theories to bind non-signatories to arbitration, particularly the group of companies doctrine, are firmly established in the arbitration jurisprudence of India.[30] Incidentally, though in *Chloro Controls,* the Supreme Court had recognised several contractual and non-contractual means to bind non-signatories to arbitration, as evident from the above, the group of companies doctrine has been the foremost route adopted by parties/courts/tribunals in India. Since the adoption of the doctrine in *Chloro Controls*, in most cases concerning non-signatories, the doctrine has either been applied exclusively or in conjunction with other principles such as alter ego and piercing of the corporate veil. For instance, in cases such as *Shapoorji Pallonji and Co Pvt Ltd. v Rattan India Power Ltd* ["**Rattan India**"] and *GMR Energy v Doosan Power* ["**Doosan Power**"],[31] the Delhi High Court applied the group of companies

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[23] *Cheran Properties* (n 14).
[24] *Cheran Properties* (n 14) [23].
[25] ibid [28]; Gary Born, *International Commercial Arbitration*, (2nd edn, Wolters Kluwer 2014) 1448-49.
[26] (2020) 12 SCC 767.
[27] ibid [9.4]-[10.5].
[28] ibid [9.4]-[10.5].
[29] ibid [10.5]. See also *KKR India Private Financial Services Ltd v Williamson Magor* OMP (I) (Comm) 459/2019 (Judgment dated 23 November 2020) [45].
[30] *Purple Medical Solutions Private Limited v MIV Therapeutics Inc & Another* (2015) 15 SCC 622.
[31] *GMR Energy v Doosan Power* (2017) SCC Online Del 11625; *Shapoorji Pallonji & Co v Rattan India Power Ltd* ARB P 716/2019 (Judgment dated April 7, 2021).

doctrine along with the theory of alter-ego.[32] In fact, the application of the group of companies doctrine carries with itself the underlying principles of purely contractual theories such as 'implied consent' and 'third party beneficiary'. However, it remains to be seen how Indian courts and tribunals exclusively apply the other possible theories recognised in *Chloro Controls* to bind non-signatories.[33] In this regard, the Supreme Court may consider clarifying that the application of these theories to bind non-signatories is not contingent on the phrase '*claiming through or under*' under Sections 8 and 45 of the Act, respectively.[34] This proposition causes unwarranted confusion. The reason being that not only do tribunals exercise this power under Section 16 of the Act, but even courts exercise the same under sections other than 8 and 45.[35]

Therefore, the theories to bind non-signatories to arbitration may apply to bind a non-signatory, in its own right, regardless of whether a party is '*claiming through or under*' a party to the arbitration agreement.

Binding non-signatories to arbitration is in consonance with the Act

The Act supports the position of non-signatories being bound by arbitration agreements. A 'party' is defined under Section 2(1)(h) of the Act as a 'party to the arbitration agreement' and, crucially, not as a 'signatory' to the arbitration agreement.[36] This position is further evident from the plain language of Section 7(4) of the Act, which provides that only one of the modes of forming an arbitration agreement is through a document signed by the parties. Section 7 of the Act recognises that an arbitration agreement may also be formulated by an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or by acquiescence, wherein an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.[37] The Supreme Court in *Cheran Properties* affirmed this position and opined that the requirement under Section 7 of the Act for the agreement to be in writing does not exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities.[38] Therefore, the requirement of

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[32] See ibid, *Rattan India* [27].
[33] See *Anheuser Busch Inbev India Limited v East Godavari Breweries* Civil Miscellaneous Petition No 304/2019 (Judgment dated March 31, 2021) [20]-[31], [34]; *Scarpe Marketing Private Limited & Others v Anheuser Busch InBev India Limited & Others* SLP (C) No 6908 of 2021 (Judgment dated June 29, 2021).
[34] *Gemini Bay Transcription Pvt Ltd v Integrated Sales Service Ltd and Another* 2021 SCC OnLine SC 572 [39].
[35] *MTNL* (n 26); *Doosan Power* (n 27); *Purple Medical Solution* (n 30).
[36] The Arbitration and Conciliation Act 1996 Act, s 2; *MTNL* (n 26) [9.2]-[9.4], [10.3], [10.10], [20]-[28]. See also *Govind Rubber v Louis Dreyfus* (2015) 13 SCC 477 [15], [16], [21], [23].
[37] The Arbitration and Conciliation Act 1996 Act, s 7.
[38] *Cheran Properties* (n 14) [25].

Section 7 is that the arbitration agreement should be in writing and not that it should be signed by the parties.[39]

Pertinently, the issue as to the existence of a valid arbitration agreement in writing under Section 7 is distinct from a determination as to which parties are bound by the arbitration agreement. The same has been explained by the Supreme Court in *Chloro Controls*, wherein it has highlighted "*[o]nce it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it [and that] The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope.*"[40] In other words, the ambit of Section 7 does not concern the *ratione personae* jurisdiction of a tribunal, which includes the issue of whether or not non-signatories can be subjected to arbitration. Therefore, there is no restriction in the Act for Indian courts or tribunals to bind non-signatories to arbitration.

Conclusion

The Supreme Court has evidently been at the forefront of an increasing international consensus on the manner in which courts and tribunals can bind intimately related non-signatory parties to arbitrations. In this regard, the Supreme Court has adopted a business sense and commercial lens while dealing with composite and integrated transactions and agreements. The approach taken with respect to the *ratione personae* jurisdiction of a tribunal is pragmatic, wherein the factual circumstances are considered to examine if there is a composite transaction involving affiliated entities who are not only intimately involved in the same transaction but also have a collective bearing on the dispute.

However, while the theories to bind non-signatories to arbitration are well established in India, their application on the particular facts of each case remains a contentious issue. The reason is that courts and tribunals are expected to conduct a consent-based factual enquiry to ascertain whether a non-signatory ought to be brought within the scope of an arbitration clause it has not expressly acceded to. There cannot be a straightjacket formula for this enquiry because the specific factual matrix of each case needs to be considered to ascertain the existence and degree of relational intimacy as well as the presence of an indivisible common intention of the parties to resolve their disputes before a single forum. Therefore, courts and tribunals should be cautious while dealing with such situations. For instance, the mere existence of a group/affiliate companies arrangement

[39] *MTNL* (n 26) [9.3]; *Carvel Shipping Services Private Limited v Premier Sea Foods Exim Private Limited* (2019) 11 SCC 461 [8]; *Babaji Automotive v Indian Oil Corporation Limited* (2005) SCC Online Cal 291 [10]-[11].
[40] *Chloro Controls* (n 9) [106].

will not in itself warrant the application of the group of companies doctrine. There needs to exist an intimacy between the parties as well as an indivisibility of the transactions in question to warrant the inclusion of a non-signatory in arbitration.