

SHIFTING OF PARADIGM IN THIRD-PARTY PARTICIPATION IN ARBITRATION

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Introduction

Certain disputes demand third-party involvement, prompting an assessment of the contributions made by non-signatories or third parties and their shared interest in fulfilling the terms. The matter gains significance in assessing the extent of the third party's consent to the arbitration agreement. Mere affiliation with a company does not suffice; requiring the non-signatory's conduct expressly/tacitly indicating agreement with the signatories' arbitration agreement. If deducible from the circumstances, they can be held liable & be bound by it, irrespective of their non-signatory status. The extension to third parties hinges on their contribution to fulfilling the agreement terms.

The legal framework governing the inclusion of third parties in arbitral proceedings & imposing an obligation on them to be bound has substantially evolved, with Indian courts recognizing its necessity. However, the courts also acknowledge the exceptional nature of such inclusion.

Drawing from Indian precedents, the study delves into the evolution & implications of mandating non-signatory/third-party impleadment in arbitration.

Third-party or non-signatory & their involvement in Arbitration

In common parlance, "third party" and "non-signatory" mean the same thing. At the outset, a distinction in terms is required. As noted by renowned arbitrator, arbitration practitioner, and author James M. Hosking, a "non-signatory" is someone who has not physically signed the agreement containing the arbitration clause. On the other hand, "third party" denotes an individual or organisation that is not a signatory or not named as a party to the agreement being discussed. The rights and obligations of a "non-signatory" or "third party" in relation to an arbitration

agreement can be determined through several legal theories, such as Joinder to Arbitration, the Doctrine of Group of Companies, and Intervention/Consolidation.¹

In certain disputes, third-party involvement in arbitration may be necessary. For that, it is imperative to note the implicit/explicit consent of the third party to be bound by the arbitration agreement. The non-signatory's conduct must be such that it can reasonably be interpreted as consent, expressly or inferred, to be bound by the signatories' arbitration agreement.

Arbitral jurisdiction hinges upon the consent of the participant. Disputes emanate when non-signatories are forcefully obligated to be bound by terms they didn't agree to, thereby undermining the arbitral process's legitimacy. Hence, there should be a distinction made between "*consenting non-signatories*" & "*non-consenting non-signatories*". For obvious reasons, it is simpler to justify letting a consenting party participate in an arbitration proceeding than the alternative.²

Being a private method of dispute resolution that relies on mutual agreement, arbitration requires all parties to reach an agreement with its application.³ Section 9 of the Arbitration & Conciliation Act, 1996 [**"the Act"**] is predicated on the UNCITRAL Model Law [**"UNCITRAL"**] on International Commercial Arbitration, 1985,⁴ which when taken at face value, applies only to the parties to the Arbitration Agreement.⁵ Moreover, in terms of Section 2(h) of the Act, a "Party" indicates a "party to the Arbitration Agreement".⁶ This implies that only a Party to an Arbitration Agreement is entitled under Section [**"u/s"**] 9, before or during the arbitration proceedings. Accordingly, third parties, because of their affiliation & commercial engagement with signatories, can be mandated to arbitration proceedings.

Impleadment of the Third-party

Indian law has evolved over the years through the acknowledgement of international arbitration norms, such as the "*group of companies doctrine*" [**"Doctrine"**]. However, impleading non-signatories in proceedings u/s 9 of the Act was adversely received. This is because the parties who agreed to arbitrate have consented that the provisions of the Arbitration Act "are made to apply" to them. According to the Supreme Court [**"SC"**], if a third party is impleaded u/s 11 of the Act, the Court

¹ James M Hosking, 'The Third-Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent' (2004) 4 Pepperdine Dispute Resolution Law Journal 472.

² Kunal Mimani, Ishan Jhingran, 'Extension of Arbitration Agreements to Non-Signatories: An International Perspective' (2020) 4 India Law Journal.

³ Gary Born, *International Arbitration Law and Practice*, vol 2 (3rd ed., 2021).

⁴ UNCITRAL Model Law on International Commercial Arbitration, 1985.

⁵ The Arbitration & Conciliation Act 1996, s 9.

⁶ The Arbitration & Conciliation Act 1996, s 2(h).

must either dismiss them or restrict the proceedings to the original parties since non-signatories cannot seek redress or join proceedings u/s 9 of the Act.⁷

An arbitration agreement or an arbitral clause must subsist between the parties in order to institute a case for arbitration & seek relief. The SC affirmed this notion by stating that “a person who is not a part to the arbitration agreement or the arbitration proceedings has no right to seek redress or to be joined as a party in a petition u/s 9 of the Act”.⁸ Thus, necessitating understanding the expression “Party” defined u/s 2(1)(h), “party” as one bound by an arbitration agreement unless the context otherwise requires. This is essential in order to understand the Section 9 mandate & *locus standi* of the party. However, the literal interpretation of Section 9 shows that the tribunal has the discretion to grant interim remedies to a third party if the circumstances warrant it. This is done solely to ensure a proper adjudication, and it is based on the parties' or the subject matter's proximity to the arbitration agreement. Ultimately, as the SC noted, an arbitration agreement binds only signatories, irrespective of other parties involved in the transaction leading to the dispute.⁹

Nevertheless, where non-signatories hold significant positions, and considering the compressed nature of the grouping where the transaction could not have occurred without the assurances from these non-signatories, it becomes crucial that they should bear responsibility. The possibility of binding a “non-signatory” to arbitration does not negate the requirement for an arbitration agreement. Rather, it indicates that the agreement's binding effect arises from circumstances beyond just the formal act of signing.

The recent observation of the Hon'ble SC in *Cox and Kings Ltd v. SAP India Pvt Ltd*¹⁰ [**Cox & Kings Case**], supports this understanding wherein it noted: “*the requirement of a written arbitration agreement does not preclude from binding non-signatories, when there exists a defined legal relationship between the signatories and the non-signatories & that the parties mutually intended to be bound by it by the act of conduct*”.

Chloro Controls Case as a precedent

In *Chloro Controls (I) Pvt. Ltd. v. SAP India Pvt. Ltd. & Ors.* [**Chloro Controls Case**],¹¹ the SC went on to determine whether non-signatories to multi-party agreements could be compelled to arbitrate. The Court held that u/s 45 of the Act, the phrase “person claiming through or under” extends to include non-signatories in cases of interconnected agreements. This decision allowed

⁷ *Jagdish Chander v. Ramesh Chander and Ors.*, (2007) 5 SCC 719.

⁸ *Firm Ashok Traders and Ors. v. Gurumukh Das Saluja and Ors.*, (2004) 3 SCC 155.

⁹ *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*, (2003) 5 SCC 531.

¹⁰ *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Ors.*, 2023 SCC OnLine SC 1634.

¹¹ *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Incorporated*, (2013) 1 SCC 641.

for non-signatories to be involved in arbitration in certain complex transactions. The ruling significantly expanded the scope of parties that can be involved in commercial arbitration.

While concurring with the ratio decidendi in the *Chloro Controls Case*,¹² the SC had also acknowledged the atypical nature of the doctrine recognizing that its applicability is highly dependent on the terms within the arbitration agreement and the specific circumstances of the matter before the court.¹³

Following a similar fashion, the Delhi High Court [“HC”] in *R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit and Ors.* [“**R. V. Solutions**”] noted that when there is a lack of exceptional circumstances, a non-signatory or third party can’t be brought into arbitration without its willingness to do so. The parties to the Arbitration Agreement must have a connection, either via business operations or commonalities concerning the subject or transactions at hand.¹⁴ It is necessary to “identify the real essence of the commercial transaction and to untangle from a layered structure of commercial layout” the intention to bind a non-signatory who has endorsed on to be lawfully accountable for the conduct of the signatory.¹⁵

Binding the non- signatory

While there is no universally accepted test for determining the usage of doctrine, Indian precedents have established some relevant parameters. The parties' intent and the test of common control guide the adoption of the doctrine. The arbitration agreement may bind non-signatories linked through contract enforcement, benefit entitlement, or involvement in a series of transactions forming a composite deal. In the same vein, the SC reversed an arbitral award that improperly overlooked this doctrine.¹⁶

In an instance, the Delhi HC refused to lift interim relief granted u/s 9 concerning non-signatory guarantors. The court considered their intertwined shareholding and significant roles in signatory companies, asserting that due to the close grouping and the necessity of assurances from non-signatories, they were liable to be accountable for the interim measures imposed.¹⁷ If a cohesive corporate group structure reflecting a unified economic reality is in place, the doctrine may be employed to compel a third party into arbitration.¹⁸

¹² *ibid.*

¹³ *Cheran Properties Ltd v. Kasturi and Sons Ltd & Ors.*, (2018) 16 SCC 413.

¹⁴ *R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit and Ors.*, AIR ONLINE 2019 DEL 1537.

¹⁵ *Kotak Mahindra Bank Ltd. v. Williamson Magor and Co. Ltd. and Ors.*, 2021 SCC OnLine. Bom 305.

¹⁶ *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. and Ors.*, (2022) 8 SCC 42.

¹⁷ *Eveready Industries India Ltd. v. KKR India Financial Services Limited & Ors.*, MANU/DE/0421/2022.

¹⁸ *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*, (2019) SCC Online SC 995.

The Constitution Bench of the SC in *Cox & Kings Case*,¹⁹ deduced that an arbitration agreement can bind non-signatories as per the doctrine. CJI DY Chandrachud underscored that “*the signature of the party in the agreement is the most profound expression of consent of the person to submit to jurisdiction. However, the corollary that persons who have not signed aren't part of agreement may not always be correct*”. Nevertheless, an exercise of caution in applying the doctrine is necessary, as mere affiliation doesn't extend the arbitration agreement to non-signatories.

The case underpinned- “*the judgment in Chloro Controls Case is flawed in its interpretation that 'non-signatories' can be roped in by invoking “parties claiming through or under”. The phrase “parties claiming through or under” is specifically intended for successors-in-interest in a derivative capacity*”. The court criticized the *Chloro Controls Case* for its economically driven interpretation of this phrase.

Exploring the Ramifications

i. Lucrative advantages of impleading non-signatories

In a layered structure of commercial arrangements, disputes and the rights of the parties cannot be properly adjudicated without paying adequate attention to third parties who are not part of the arbitral proceeding. The purpose of arbitration is to resolve conflicts outside of court; however, if third parties are not given a voice in the process, it can lead to multiple proceedings, which can be harassing to the parties involved. Hence, impleading third parties or non-signatories will be beneficial in such cases.

In cases where a participant to the arbitration agreement may not be capable of fulfilling the award, the claimant may wish to bind the financially sounder non-signatory to the arrangement. The ultimate focus is to prevent the potential of inconsistent or contradictory verdicts from multiple proceedings probing the same or comparable matters & involving multiple parties. The ultimate goal is to issue a ruling that settles the case once and for all, affecting all parties involved.

ii. Daunting challenges arising from the inclusion of non-signatories

Although promising at first, the application of doctrine should be the exception rather than the rule as certain parties are purposefully excluded from commercial contracts and arrangements. In applying the doctrine or executing the arbitration agreement, the court or arbitral tribunal must

¹⁹ *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Ors.*, 2023 SCC OnLine SC 1634.

not be biased towards doing so in such a way as to disregard the actual objective of the parties as endorsed in the agreement. The application of this doctrine calls for the utmost care.

Arbitration is not just a fancy theory of contract law. There are crucial jurisdictional considerations that are being ignored. The issue of third parties is frequently misunderstood from a contractual standpoint and reduced to a question of evidence of consent. The issue here is whether or not a court should exercise jurisdiction over a non-party to a lawsuit if doing so is necessary for it to achieve what it was originally convened to do, resolve the dispute at hand. Whether or not a tribunal could produce evidence that the non-signatory had consented to the arbitration clause is less significant than the degree of implication of the non-signatory party in the main dispute before the tribunal.

Conclusion & Analysis

The Indian arbitration jurisprudence is emerging to support the view that non-signatories can be made “party” to an arbitration agreement and so be bound by its terms.

This shift is marked by the inclusion of doctrines like the “group of companies” to bind non-signatories to arbitration under specific circumstances, particularly where there is explicit or implicit consent or a close connection to the dispute. While the *Chloro Controls Case* broadened this scope, the recent judgment in the *Cox and Kings Case* emphasized caution, ensuring that such inclusion does not undermine the integrity of the arbitration process or the original intent of the parties. Consequently, in summation, the nature of the transactions may indicate an intent to bind non-signatory entities within the same group. Thus, to enforce an arbitration agreement against a non-signatory, courts should consider whether the transactions were intended to be read in a commercially consistent manner.