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FROM ADHESION TO COHESION- RECONTEXTUALIZING THE APPLICATION OF THE GROUP OF COMPANIES DOCTRINE UNDER THE LAW OF ARBITRATION

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Introduction

The 'group of companies' doctrine is one of the essential doctrines used under the law of arbitration to impose the obligations of an arbitration agreement on non-signatories. It recognises them as a single economic unit despite being separate legal entities. This doctrine, originating from taxation and company law,[1] imposes contractual obligations on all members due to their shared economic relationship. It essentially serves as an exception to the principles of privity of contract and party autonomy in arbitration law, allowing for broader arbitration coverage within corporate groups. While effective commercially, it however, conflicts with central tenet of arbitration: party autonomy.

The doctrine was introduced in the 1980s through the award passed in *Dow Chemical v. Isover-Saint-Gobain*[2] ["**Dow Chemicals**"]. A three-pronged rationale was adopted by the Tribunal to invoke the group of companies doctrine. It was stated that firstly, both the signatory and non-signatory parties involved must belong to the same corporate structure. Secondly, the active role of the non-signatories in the conclusion and performance of the agreements was required to be established. Lastly, a common intention of all the parties, signatories, and non-signatories, to arbitrate was essential.

This doctrine was first followed by the Supreme Court in the case of *Chloro Controls India Pvt. Ltd. v Severn Trent Water Purification Inc.*[3] ["**Chloro Controls**"]. The Apex Court stated here that an

[1] Disha Surpuriya, 'Group of Companies Doctrine: Caveats to Consider before its Application' (2022) 2 IRIArb 2.
[2] *Dow Chemical v. Isover-Saint-Gobain*, ICC Case No. 4131, Award (1984).
[3] *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc* (2013) 1 SCC 641.

arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates. However, the rationale followed by the judgment was questioned by J Surya Kant in the case of *Cox & Kings Ltd. v. SAP India (P)* Ltd ["**Cox & Kings**"]. Consequently, in December 2023, the Apex court clarified several nuances for the application of the Group of Companies doctrine.

Rationale for the Doctrine

The fundamental idea behind the doctrine is that a multinational corporation usually functions through various subsidiaries stationed in several countries. It is an efficient business model which has been adopted by various companies. However, both the academia and the jurists of several jurisdictions have not accepted the doctrine to be a rightful inclusion, specifically under the law of arbitration. The courts of the United States have consistently favoured traditional concepts of contract law over the doctrine.[4] Justice Langley of the UK Commercial Court made it very clear that the group of companies doctrine finds no place in English Law. [5] Likewise, Lee Kim Shin JC of the Singapore High Court observed that the doctrine has had little traction in the international arbitration community. He further opined that application of the doctrine would disrupt other settled doctrines of law.[6] This is due to its antithetical nature of the doctrine to the principle of party autonomy which is at the heart of the law of arbitration.

Party autonomy, a cornerstone of arbitration law, grants parties the freedom to choose arbitration. Multiple provisions in the UNCITRAL MODEL Law,[7] and national legislation,[8] have strived to ensure the same. The Group of Companies doctrine, while an exception to this principle, is universally recognized as applicable only in exceptional circumstances. This is also the position that exists in the Indian jurisdiction. However, due to the complex nature of the doctrine, it is not sufficient to proceed on the basis of such a statement.

[4] *Fisser v. Int'l Bank*, 282 F.2d 231 (2d Cir 1960); Thompson-CSF, *S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); See also Virginia Harper Ho, "Theories of Corporate Groups: Corporate Identity Reconceived" (2012) Seton Hall L Rev 879.
[5] *Peterson Farms Inc v C & M Farming Ltd* [2004] APP.L.R. 02
[6] *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd*, [2014] SGHC 181.
[7] UNCITRAL Model Law on International Commercial Arbitration, (Entered into force of 1 June 1985),Art 1(1), ('UNCITRAL MODEL Law').
[8] Arbitration and Conciliation Act 1996, s 2(6).

Dichotomy between the "Doctrine" and the "Principle"

Party autonomy is the core tenet of arbitration. The right and permission to seek arbitration constitute the first step towards ensuring party autonomy. As a result, the group of companies doctrine is essentially an exception to this principle of arbitration. This leads to a dichotomy between the two. The clash becomes more apparent in multiparty contracts. Moreover, in large scale commercial contracts the entity that concludes the arbitration agreement need not necessarily be the company that performs the contract. Therefore, while the parties mentioned in the contract ordinarily become party to the arbitration, those that are not entirely barred from being called as parties to the agreement. It is for the latter that doctrine is applied.

By establishing an inalienable structure between a signatory and a non-signatory, the arbitration clause can be widened to include a non-signatory even against its express will. Often in such cases, the request to widen the clause comes from the claimant but refuted by the respondent. This prima facie violates the party autonomy of the respondent. Thus, this dichotomy can be only be harmonised by setting a reasonable threshold beyond which party autonomy will give way to the application of the doctrine. This was done for the first time in the landmark case of Dow Chemicals.[9] The case laid down the three requirements to be fulfilled for the application of the doctrine. They are:

1. Tight group structure
2. Active role of the non-signatory in the contract
3. The mutual intention to arbitrate.

Globally, the three requirements for the Group of Companies Doctrine have remained consistent. However, the inconsistency lies in their application. In the Dow Chemical case, no priority was dictated among these requirements, leading to ambiguity regarding consequences for non-compliance.[10] Analysing these requirements in line with current corporate practices is crucial for updating the doctrine and reconciling it with party autonomy principles.

Indian Context

[9] *Dow Chemical v. Isover-Saint-Gobain*, ICC Case No. 4131, Award (1984).
[10] Ana Kombikova, 'Extension of the arbitration agreement to third parties based on 'Group OF Companies' and 'Piercing the Corporate Veil' Doctrines (LL.M. Short Thesis, Central European University 2012).

As for the Indian context, the Apex Court in the Chloro Controls case relied on the test laid down in the Dow chemicals' case to come up with its own test. These were:

1. direct relationship
2. direct commonality of the subject-matter;
3. composite nature of the transaction; and
4. whether referring disputes would "serve the ends of justice.

The terms 'direct relationship' and 'commonality' have been drawn from the second prong of the Dow chemical test i.e., 'Active role of the non-signatory in the contract'. The last two requirements are ancillary tests that the Court has developed through its own expertise. However, in doing so, neither of the four factors mentioned reflect a requirement of a tight group structure for the application of the doctrine.

From an analysis of the above-mentioned factors, it is evident that the 'tight group structure' finds neither explicit nor implicit mention among the tests laid down by the court. The doctrine from its name itself signifies that a 'group' structure is imperative for its application. Without this requirement, the doctrine falls flat of establishing its own separate application or distinction. The Apex Court incorrectly interpreted the Dow chemical test and consequently widened the ambit of the application of the Doctrine. It has thus failed to capture the true scope of the doctrine. Such approach is antithetical to the very fundamental of arbitration. It was this ambiguity that led to discrepancies in the Indian context. In the latest judgement of Cox & Kings, the Apex Court was successful in clarifying several such questions. However, it failed to establish a procedure under which this doctrine can be invoked in a given set of circumstances. This leads to patent ambiguity regarding the doctrine correct application

Resolution of the conundrum

The above-mentioned conundrum led to a dire need to systematic procedures to be laid down. This can be done by assessing each step of the Dow Chemical test in the appropriate context i.e., the Tight Group structure followed by Significant Involvement and finally concluding with the mutual intention to arbitrate

The first requirement established by Dow Chemicals, necessitates a strong affiliation between entities within a group. It is not enough for both entities to merely be part of the same group.[11] It

[11] Adyasha Samal, Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies

is therefore, important to breakdown the test and understand how it can be objectively fulfilled. The analysis of entity structure involves two steps: examining corporate ties and determining a 'single economic entity'.[12] This can be done based on various factors like intellectual property,[13] human resources,[14] and finances.[15] However courts lack fixed criteria and therefore rely on preliminary facts. Tight group structure requires close corporate links. This goes beyond mere shareholding.[16] This requirement must not be construed liberally to include individuals or entities that merely share a contractual relationship with the party to the arbitration agreement. Unfortunately, there have been cases where the 'Group of companies' doctrine has been conveniently used to include natural persons as party to arbitral proceedings.[17] Expanding the scope of the doctrine to include natural persons will open up a floodgate of new problems, as often shareholders are mere investors in a company. They cannot be seen as the same economic entity as the company.[18]

Despite this theoretical priority, recent trends show that courts often skip this step, leading to misapplication of the doctrine and the inclusion of unrelated third parties. [19] This requirement has faced several disputes notably in cases where parties with only contractual ties to the signatory are included in arbitration. [20] Tribunals have had divergent views on the same. Unrelated entities, like guarantors or agents have been included under the doctrine for merely aiding in fulfilment of the original contract.[21] This inconsistency highlights the need for a clearer interpretation of the requirement to avoid misapplication in arbitration proceedings.[22] The tension between a liberal approach and the sound commercial practice of separate legal entities is evident. However, the Venezuela Tax exemption case upheld the practice of using subsidiaries to shield parent companies from liability, affirming it as a valid international trade practice not constituting arbitral consent.[23]

Doctrine'(2020) 11 KING'S STUDENT L. REV. 73, 16.
[12] Gizem Halis Kasap, 'Etching the Borders of Arbitration Agreement: the Group of Companies Doctrine in International Commercial Arbitration under the U.S. and Turkish Law' (2017) 2 University Of Bologna Law Review. 87, 92.
[13] ICC Case No. 2375 Award (1975).
[14] *Kis France v. Societe Generale*, (1992) Rev. Arb. 90.
[15] Indu Malhotra, *The Law & Practice of Arbitration and* Conciliation, (Thomson Reuters 2014) 211.
[16] ICC Case No 8910, Award (1998).
[17] ICC Case No 9517, Interim Award (30 November, 1998).
[18] Alona Kiriak, Arbitral Jurisdiction over Non-Signatories: The Group of Companies' Doctrine, (LL.M. Short Thesis, Central European University 2015).
[19] Prince George (City) v. Sims (A.L.) & Sons Ltd. et al., (1995) 61 B.C.A.C. 254 (CA).
[20] ICC Case No. 10818, Partial Award (2005).
[21] ICC Case No. 13774, Award (2009).
[22] STCI Finance Ltd. v. Shreyas Kirti Lal Doshi & anr, 2020 SCC OnLine Del 100.
[23] ICC Case No. 11160, Final Award (2002).

In the Indian context, as the trend of the doctrine evolved, the inclination of the courts leaned majorly towards the last two requirements. The first requirement was presumed to be met without following a uniform criteria. The criteria prescribed by subsequent cases give considerable importance to mutual consent and involvement over existing corporate structure.[24] Courts have inconsistently prioritized the three requirements of the Group of Companies Doctrine,[25] emphasizing mutual consent but neglecting a tight group structure.[26] Therefore, while parties with contractual relationships may join arbitration, this doctrine cannot be used to do the same.[27] The Apex Court made a reference to the 'tight group structure' in Cox & Kings. However, this requirement has been given a secondary stature as compared to mutual consent. While it is not denied that consent is inextricable to arbitration, the establishment of a tight group structure is essential to the application of this particular doctrine. If this requirement is overlooked by courts in their assessment, it will lead to unnecessary widening of the scope of the doctrine. This is discussed in the later sections of the article.

The second requirement by Dow Chemical mandates active involvement of the non-signatory in contract conclusion, performance, or termination. Mere corporate structure is not enough; there must be a strong link binding group members to the signatory. This link includes:

1. Entities with significant control over the signatory or
2. Those affected by its terms.

It is important to note that the doctrine requires the joining of parties in their own right. If this joinder is premised only on a commercial reality, it would effectively be the legal enforcement of a commercial principle for the sake of judicial convenience.[28] The element of significant involvement was relied upon primarily in the Dow Chemicals' case.[29] In that case, involving two Dow Chemical subsidiaries and Boussois-Isolation, disputes arose from distribution agreements with ICC arbitration clauses. The tribunal, noting significant involvement of non-signatories, invoked the Group of Companies Doctrine to include them. The factual context showed active non-signatory participation in agreement conclusion and performance. Therefore, in the present case, the conduct of the non-signatories was assessed to determine inclusion.

[24] ONGC Ltd. v. Discovery Enterprises (P) Ltd (2022) 8 SCC 42.
[25] KKR India Private Financial Services Ltd. v Williamson Magor (I) (Comm) 459/2019.
[26] Mahanagar Telephone Nigam Ltd v. Canara Bank (2020) 12 SCC 767.
[27] Alona Kiriak, Arbitral Jurisdiction over Non-Signatories: The Group of Companies' Doctrine, (LL.M. Short Thesis, Central European University 2015).
[28] Ibid.
[29] Dow Chemical v. Isover-Saint-Gobain, ICC Case No. 4131, Award (1984).

From the aforementioned reasoning, the 'group of companies' doctrine seems based on piercing the corporate veil, to reveal the alter ego. However, this would mean implied consent of the non-signatory group entity which could run contrary to the principles of arbitration. It is therefore, important to separately contextualise these concepts under the law of arbitration. Various international authorities have concluded that a party that has not executed or expressly assented to a contract containing an arbitration clause may still be bound by it only in exceptional circumstances.[30] The International Court of Justice ["**ICJ**"] clarified in the judgement concerning *Barcelona Traction, Light & Power Co.*[31] that the process of lifting the corporate veil or disregarding the legal entity would be justified only in certain circumstances.

Establishing alter ego status to pierce the corporate veil is challenging,[32] due to the underlying presumption of separate legal entities for parent corporations and affiliates.[33] Evidence of one entity's domination over another is necessary. *Anderson v. Abbot*[34] ["**Anderson**"] emphasizes limited liability as the norm, requiring substantial proof for invoking the alter ego doctrine. Corporate structures aim to establish separate legal entities.[35] These are vital for legitimate purposes but are often incorrectly undermined by general agency relationships. The award of *Baque Arabe et Internationale d'Investissement v. Inter-Arab Inv. Guarantee Corp.*,[36] highlighted the voluntary nature of arbitration. It held that only parties to a written arbitration agreement can participate in the proceedings as opposed to traditional courts where interested parties join. Courts should therefore, systematically establish the rationale for invoking the *alter ego* doctrine and based on that, analyse if the group of companies doctrine can be invoked. A mere joint cause of action or a corporate structure alone should not suffice the requirement for invoking the doctrine under the arbitration law. This is in contradistinction to the general civil or commercial law where autonomy is not a criterion to adjudge the locus standi of a party.

In the India pretext, in *Magic Eye Developers v. Green Edge Infra Pvt. Ltd. and Ors.,* [37] ["**Magic Eye Developers**"] the Indian court utilized the alter ego doctrine to refer non-signatory group companies to arbitration. The issue however, with this judgement highlights the larger problem that exists with the Indian Courts adopting the group of companies' doctrine. The judgment lacks

[30] Gary B. Born, International Commercial Arbitration, (Wolters Kluwer 2014) 515.
[31] Barcelona Traction, Light, and Power Company, Ltd [1970] ICJ 1.
[32] Indu Malhotra, *The Law & Practice of Arbitration and* Conciliation, (Thomson Reuters 2014) 212.
[33] Bridas 345 F.3d at 356.
[34] 321, U.S. 349, 362 (1944).
[35] ICC Case No. 8385, Award (1995).
[36] Baque Arabe et Internationale d'Investissement v. Inter-Arab Inv. Guarantee Corp. XXI Y.B. Comm. Arb. 13, 18 (1996).
[37] Magic Eye Developers v. Green Edge Infra Pvt. Ltd. and Ors., CS(COMM) 1290/2018.

substantive reasoning for invoking the doctrine, a trend seen in Indian jurisdiction. Properly invoking the alter ego doctrine could strengthen the case, but the judgment lacks detailed rationale, relying instead on the absence of counterarguments from the sister companies. Such approach reiterates the importance of following a top-down approach and executing a step-by step analysis of the facts at hand in accordance to the three-step test.

Lastly, as for the third requirement, the most actively pursued ground for inclusion of non-signatories is that of mutual consent. It serves as the primary basis for including non-signatories in arbitration, rooted in the preceding requirements and central to the doctrine. [38] The tribunal must ensure mutual agreement to arbitrate, whether implicit or explicit, for the doctrine's application. This aligns the doctrine with arbitration law fundamentals and upholds party autonomy.[39] The leeway to prove mutual consent lies in the phrasing of Article 7 of the UNCITRAL Model law. While the arbitration agreement is mandated to be in writing, it can be 'concluded orally, by conduct or by any other means.'[40] Furthermore, Article 7(4) also provides that an arbitration agreement is said to exist if there is enough record via electronic, letter or telecommunication to prove the agreement[41]. Section 7 (3) of the Arbitration and Conciliation Act, does not allow contain the words "concluded orally, by conduct or by any other means."[42] However, Section 7(4)(b) is similar to the Article 7 (4).[43] This has led courts to look for exchange of emails, letters and invoices to ascertain this mutual intent.[44] Another approach taken by the courts is the use of the extent of fulfilment of the prior two requirements to deduce intent to arbitrate.[45] This however is can lead to unnecessarily Widening the Scope of 'Consent'.

The requirement of consent in including non-signatories in arbitration has faced challenges due to a broad interpretation of the term. Rather than a top-down approach, courts often infer consent from minor connections in the factual context.[46] This deviation leads to a subjective analysis by adjudicating bodies, eroding the objective sense of consent. [47] There have been cases where a mere

[38] Alona Kiriak, Arbitral Jurisdiction over Non-Signatories: The Group of Companies' Doctrine, (LL.M. Short Thesis, Central European University 2015).
[39] Stavros Brekoulakis, Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories (2017) 8 Journal Of International Dispute Settlement 619.
[40] UNCITRAL Model Law on International Commercial Arbitration, (Entered into force of 1 June 1985) ('UNCITRAL MODEL Law') art 7.
[41] UNCITRAL Model Law on International Commercial Arbitration, (Entered into force of 1 June 1985) ('UNCITRAL MODEL Law') art 7 (4).
[42] Arbitration and Conciliation Act 1996, s 7(3).
[43] Arbitration and Conciliation Act 1996, s 7(4).
[44] Gary B. Born, International Commercial Arbitration, (Wolters Kluwer 2014).
[45] ICC Case No. 15116, Interim Award (2008).
[46] Stavros Brekoulakis, Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories (2017) 8 Journal Of International Dispute Settlement 619.
[47] *Cheran Properties Ltd. v. Kasturi and Sons Ltd*., (2018) 16 SCC 413.

presumption of knowledge of the existence of an arbitration agreement has been construed as consent to arbitrate.[48] Such liberal interpretations risk undermining party autonomy, allowing claims for non-consenting non-signatories based on presumptions, and threatening fundamental arbitration principles.

In India, the approach to the consent requirement varies, with some cases strictly adhering to the three-step approach, like *Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing India Pvt. Ltd.* ["**Reckitt Benckiser**"]. This case relied on *Godhra Electricity Co. v. State of Gujarat*,[49] to exclude post-contractual negotiations to determine consent, as subsequent conduct cannot be construed as involvement.[50] However, recent judgments have deviated, focusing on determining intention of parties through surrounding facts,[51] compromising the objectivity of the requirement.[52] Furthermore, the High Courts have unjustifiably applied this doctrine in the context of varied commercial considerations to join non-signatories, completely overriding the principle of a separate legal entity.[53] Despite multiple judicial precedents set by the apex court, the discrepancy persists.

In December, the Apex Court gave its latest verdict in the case of Cox and Kings. This judgement is far more advanced as compared to its precedents in that the court as at least recognised the elements of the three tests in Dow Chemical. The Court has made a reference to the need of a 'Tight Group Structure'. However, the importance given to it is secondary. It has rather emphasised the importance of mutual consent quite elaborately. However, in doing so, the Court seems to have blurred the lines between the second and third requirements laid down by Dow Chemical. The court has concluded that the actions of the of the parties can be used to determine their subjective intent of the parties.[54] It is opined that the court has erred in interpreting that relationships among legal entities and their involvement in contract performance indicate mutual intentions. The fulfilment of the first two requirements do not automatically lead to the fulfilment of the third. This error is observed in the previous judgements as well. This is also why neither Cox and Kings, nor the preceding judgments have been able to chalk out an objective and

[48] *Societe Korsnas Manas v Societe Durand-Auzias*, Rev Arb 692 (1989) 694.
[49] *Godhra Electricity Co. v. State of Gujarat* [1975] 1 SCC 199.
[50] Achyutha GM, Pranika Correa, 'Group of Companies" Doctrine & Post-Negotiations in the Context of an Arbitration Agreement' (IndiaCorp Law, 12 September 2019) < https://indiacorplaw.in/2019/09/group-companies-doctrine-post-negotiations-context-arbitration-agreement.html > accessed 29 September 2023.
[51] M/s SEI Adhavan Power Private Limited v. M/s Jinneng Clean Energy Technology Limited. 2018 SCC OnLine Mad 13299.
[52] *Mahanagar Telephone Nigam Ltd v. Canara Bank* (2020) 12 SCC 767.
[53] *Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power* Ltd 2021 SCC OnLine Del 2875.
[54] UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3 78.

structured procedure for their tests to be followed. Without this, there is no clarity in when and how this doctrine ought to be applied

Conclusion

The 'group of companies' doctrine, while intended for exceptional circumstances, exhibits inherent flaws in its application. Courts often disregard the sequential assessment of its three requirements, prioritising mutual intention to arbitrate. However, such errors are not irreparable.

The first of these flaws is that in the modern practical approach, the doctrine has been turned upside down by the courts. Then, directly proceed to assess whether there is a mutual intention to arbitrate. The first, and in some cases, even the second requirements are ignored. Therefore, a top-down approach of the three requirements is proposed, emphasising equal importance for each requirement, starting with a 'tight group structure' assessment. However, lacking an objective threshold for this structure poses a challenge. Courts must establish a universal threshold that contains the elements that are to be fulfilled.

Secondly, proving 'significant involvement' demands clarity on actions indicating control. To be bound by the agreement, a party must establish (or disprove) that there is a common thread of intention between the signatories and the non-signatories.

Thirdly, while 'consent' under other aspects of law finds wide application, it must be restricted to truly determine the presence of mutual intent under the arbitration regime. This can only be done if the second requirement is cleared of all ambiguity regarding what actions constitute substantial involvement and control.

In conclusion, to enhance the doctrine's application, recontextualization is proposed, restricting it to genuinely exceptional cases. Bridging the gaps in current tests is crucial, ensuring a comparative analysis between global practices and India's approach to maintain the integrity of the arbitration regime. Upholding party autonomy remains paramount, safeguarding the Indian arbitration landscape from the casual application of the doctrine. This approach fosters an environment where parties' autonomy is respected, strengthening the arbitration framework's effectiveness.