RECONCEPTUALIZING CONSENT IN ARBITRATION AGREEMENTS - CHLORO CONTROLS REVISITED

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1. INTRODUCTION

One of the foundation principles of arbitration law is the principle of consent.[1] Unlike other forms of adjudication such as courts, which draw their jurisdiction from their respective statutes, an arbitration tribunal attains its competency through the consent of the parties before it. However, this principle of consent is not absolute, and in order to accommodate for the complex social realities, there has been the development of both consensual and non-consensual theories to involve non-signatories in the arbitration proceedings.[2] While the validity of these theories has faced stern opposition in some jurisdictions,[3] a doctrine that India has incorporated into its jurisprudence is the "Group of Companies Doctrine" through the case of *Chloro Controls India (P) Ltd* v. *Severn Trent Water Purification* ("**Chloro Control**").[4] However, in recent times, there has been severe criticism against the doctrine with the Supreme Court of India even referring the matter to a larger bench.[5] In light of the exponential growth of popularity and usage of arbitration in India over the past decade and the number of cases coming up before arbitration tribunals owing to the COVID-19 pandemic, the question of the impleading of non-signatories becomes of utmost relevance.

1. Sundra Rajoo, 'Law, Practice and Procedure of Arbitration in India' (Thomson Reuters 2021) 18.
2. Gary B Born, 'International Commercial Arbitration' (2) 1414 (Alphen aan den Rijn: Kluwer Law International, 2014).
3. Alexandre Meyniel, 'That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine' (2013) 3(1) The Arbitration Brief 18, 29.
4. Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc (2013) 1 SCC 641.
5. Cox and Kings Ltd. v. SAP India (P) Ltd. (2022) 8 SCC 1, para 47 (Supreme Court).

This paper begins by providing the relevant background of the case and the doctrine and then goes on to argue that the manner of importing the doctrine has in fact deviated from the underlying rationale of implied consent.

2. RELEVANT BACKGROUND OF THE CASE AND DOCTRINE

Chloro Control was a case before a full bench of the Supreme Court. In this case, there were two 'groups of companies', which had entered into a series of agreements through joint venture agreements or through subsidiaries. However, not every member of the respective groups were signatories in every single agreement, the most relevant of which was the Shareholder's Agreement which contained the arbitration clause.[6] As a result, when a dispute arose, the Indian Courts were tasked with determining as to what extent the non-signatories could be impleaded in an arbitration proceeding without compromising the principles of consent.

In order to resolve this dilemma, the Supreme Court turned to the jurisprudence of international arbitration law and found it appropriate to import the 'Group of Companies Doctrine' as laid out in *Dow Chemicals* v. *Isover Saint Gobain* ("**Dow Chemicals**").[7] The ICC in this case presented a three-level test to check if it is permissible to implead a non-signatory into an arbitration proceedings, namely (a) the presence of a tight group structure; (b) the involvement of the non-signatory at the stages of performance, termination or conclusion of the contract; and (c) the presence of a mutual intent between all parties (including the non-signatory) to be bound by the arbitration agreement.[8] It was said that by applying the above test, there would be an implied consent on behalf of the non-signatory to arbitrate the dispute and therefore, the tribunals would be able to expand their scope of jurisdiction over non-signatories.[9]

The Supreme Court in *Chloro Control,* appeared to provide several reasons for the adoption of such a doctrine. *Firstly,* the Court stated that the doctrine had found widespread judicial acceptance in several countries in the world such as in the United States, the United Kingdom and France. *Secondly*, by stressing on the requirement of mutual intention, the Court

6. *Supra* n 4.
7. *Dow Chemical France v Isover Saint Gobain*, ICC Case No 4131, Interim Award (23 September 1982).
8. *Ibid*.
9. Adyasha Samal, 'Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine' (2020) 11 King's Student Law Review 73.

has highlighted that the doctrine is in fact based on consent as opposed to non-consent. This indicates that the doctrine is in consonance with the principles of arbitration law. *Thirdly,* on comparing the language present in the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") to Article II of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, ("**New York Convention**") the Court noted the absence of the phrase "*any person claiming through or under him*". This interpretation allows for the impleadment of non-signatories into proceedings as well. Therefore, the Courts seems to take a very pro-arbitration stance towards the application of the doctrine, a marked difference from previous cases which read the Section restrictively.[10]

However, there are certain concerns about the manner of importation of the doctrine, particularly with regards to the first and third rationale of the Supreme Court highlighted above. The following part of this paper aims to engage further with the reasoning of the Supreme Court as well as analyse the effect of the adoption of the test on the jurisprudence surrounding arbitration law in India.

3. ANALYSIS OF THE SUPREME COURT REASONING AND EFFECT

Regarding the manner of the importation of the doctrine, this paper has three concerns. *Firstly,* that the Court erred in holding that the doctrine had found widespread acceptances, particularly in the jurisdiction of the United States ("**A**"); *secondly,* that the Court erred in reading the doctrine under the "*claiming through or under"* present in the Arbitration Act ("**B**"); and *thirdly,* the vague manner in which the doctrine has been imported has resulted in an inconsistent application that has disregarded the underlying rationale of implied consent. ("**C**").

A. The Doctrine has Not Found International Acceptance

While it is conceded that the Group of Companies Doctrine has found some traction in some jurisdictions such as France,[11] Germany,[12] and Switzerland,[13]

10. Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531.
11. Sponsor AB v. Lestrade Pau, 26 November 1986 [1988] Rev arb 153 (France).
12. Bundesgerichtsh of [BGH] [Federal Court of Justice] Case No. III ZR 371/12 (May 8, 2014) (Germany).
13. X Ltd. v. Y and Z SpA Bundesgericht [BGerl [Federal Supreme Court] Aug 19, 2008 (Switzerland).

it remains largely unpopular in others such as the United Kingdom[14] and the United States.[15] Jurisdictions such as the latter two, tend to view arbitration law as a mere extension of contract law and therefore, impose a stringent threshold to check for the presence of intention of the parties. For instance, in the United Kingdom, courts have been highly hesitant to allow for a non-signatory to participate in arbitration proceedings, as it would go against the privity of the contract at both the adjudication stage as well as potentially in the enforcement stage.[16]

This appears to be the case in the United States of America as well, a jurisdiction which the Court claimed had acknowledged and accepted the Group of Companies Doctrine. However, in making this assertion, the Supreme Court did not cite any precedent or cases from the United States. In reality, the law in the United States, recognises only five theories in order to implead a non-signatory into an arbitration agreement, namely: (a) incorporation; (b) agency; (c) estoppel; (d) assumptions; and (e) veil piercing.[17] Hence, while there are certainly theories that do allow for the impleading of non-signatories into arbitration proceedings, these are largely mere direct imports from the law on contracts[18] and do not include the Group of Companies Doctrine.[19]

A factor that the Supreme Court seemed to consider in the making of its decision to import the doctrine appeared to be that such a doctrine had international recognition and therefore, was appropriate to incorporate into Indian jurisprudence.[20] However, the doctrine has not attained the level of international acceptance that the Supreme Court considered it to have attained, particularly in light of the analysis presented above regarding the few jurisdictions that the Supreme Court did look at. While this in no way limits the Supreme Court's ability to import the doctrine considering the controversial nature of the same and the potential challenges in its enforcement,[21] particularly in foreign jurisdictions, the Supreme Court

14. Peterson Farms Inc. v. C & M Farming Ltd. 2004 EWHC 121 : (2004) APP LR 02/04.
15. *Supra* n 3.
16. Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration', (2010) 1 Global Bus L Rev 1.
17. Thompson-CSF, S.A. v. Am. Arbitration Asn. 64 F.3d 773 (2d Cir 1995).
18. Certain Underwriters at Lloyd's London v. Westchester Fire Insurance Co. 489 F.3d 580, 584 (3d Cir 2007).
19. Sarhank Group v. Oracle Corpn. 404 F.3d 657, 662 (2d Cir 2005).
20. *Supra* n 4.
21. There have been issues regarding the ability to enforce awards that utilise this doctrine. For instance, in Dalla v. Government of Pakistan 2010 UKSC 46, the UK Courts (the

ought to have given its rationale and provided a stronger basis for the manner of importation. Additionally, the vague manner in which the Court has imported the doctrine has resulted in an inconsistent application of the doctrine and a move away from the underlying rationale of 'implied consent', a proposition explored in the subsequent part of this paper.

B. The Court Erred in Reading the Doctrine Under the "Claiming Through or Under" Present in the Arbitration ACT

The Supreme Court demarcated the scope of the doctrine by reading it within the phrase "*claiming through or under*" as present in Section 45 of the Arbitration Act.[22] The Court contrasted this Section with Article II of the New York Convention and held that as the phrase "*claiming through or under*" was notably absent in the latter, there was a clear intent of the legislature to promote arbitration in India and would allow for the impleading of non-signatories into the proceedings.[23]

However, the issue with such a reading is that the Court in this case, appears to conflate the intention behind "*claiming through or under*" with the Group of Companies Doctrine. Generally, the usage of the phrase "*claiming through or under*" is limited to the matter of succession of interests and rights and aimed to provide a successor the ability to substitute itself in an arbitration proceeding in place of the party from which the right or interest devolved from.[24] Alternatively, the Group of Companies Doctrine aims to involve the non-signatory on the ground that there is a mutual intention to be bound by the arbitration agreement, thereby giving the non-signatory their own standing and ground, rather than figuratively piggybacking on another. While Indian jurisprudence regarding the scope of the phrase "*claiming through or under"* in the context of arbitration proceedings is fairly limited, foreign authorities seem to suggest a narrow scope of the same.

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site of execution was the United Kingdom) refused to mandate the enforcement of an award granted by a foreign tribunal on the grounds that the UK did not recognise the Group of Company Doctrine. Therefore, blanketly accepting such a doctrine, without considering its applications would result in the passing of awards which will not be enforceable in multiple prominent jurisdictions, thereby leading to a deadweight loss on behalf of the parties.

22. Arbitration and Conciliation Act 1996, s. 45.
23. *Supra* n 4.
24. Charlie Caher, Dharshini Prasad, Shanelle Irani, 'The Group of Companies Doctrine – Assessing the Indian Approach' (2021) 9(2) Indian Journal of Arbitration Law 44.

Section 82(2) of the English Arbitration Act 1996, which includes within the definition of the term party, "*any person claiming under or through a party*", has been limited in its application to parties which come into some form of interest [through actions such as novation, assignment or subrogation].[25] In fact, the English Courts have gone so far as to explicitly out rule any possibility for using the phrase to read the Group of Companies Doctrine.[26] This is similar to the position in another common law country, namely Australia.[27] In determining the scope of the phrase "*claiming through or under*", the High Court of Australia opted for a narrower view. The High Court held that the words 'through' and 'under' merely expressed a derivate cause of action against/derived from either party.[28]

Therefore, a recurring theme from the above two case studies is that the non-signatories' involvement in the arbitration proceedings is not an independent right, but rather consists of stepping into the shoes of another party. However, the Group of Companies Doctrine does not aim to merely substitute one party for another but rather consider the non-signatory as a party in itself to the proceedings. The underlying rationale necessarily mandates that there is an independently standing claim against the non-signatory. Therefore, the foundational blocks that build up these two principles are vastly different and it would be a grave error to read one into another.

The following part of this paper will aim to engage further with the effects that such a reading has had on Indian jurisprudence surrounding arbitration law and how such a reading has resulted in a marked shift away from the principle of consent.

C. The Judgement has Resulted in An Inconsistent Application of the Doctrine and A Move Away from the Underlying Rationale of 'Implied Consent'

One of the effects of the Chloro Control judgements was that, in the light of the notable absence of guidelines as to how each of the three legs of the test is to be construed and the issue highlighted in the preceding part of this paper, there has been a marked move away from the principle of implied

25. Francis Russell, *Russell on Arbitration* (24th edn., Sweet and Maxwell 2015).
26. The Mayor and Commonalty Citizens of the City of London v. Ashok Sancheti 2008 EWCA Civ 1283.
27. Tanning Research Laboratories Inc v. O'Brien (1990) 169 CLR 322, [11].
28. *Ibid*.

consent, which supposedly formed the basis of the Group of Companies Doctrine.

A prime example of this stark shift is evident in the case of *Cheran Properties Ltd.* v. *Kasturi and Sons Ltd.*[29] In this case, the Supreme Court relied on Section 35 of the Arbitration Act and the Group of Companies Doctrine to hold that despite the non-inclusion of a non-signatory at the stage of adjudication, an award could still be enforced against them. This is a problematic precedent as it not only expands the scope of the Group of Companies Doctrine, which was originally intended to provide a manner to include non-signatories in the adjudicating process but also violates principles of natural justice such as *audi alteram partem*, the right to be heard. This right is seen as fundamental to ensuring any adjudication process is fair and no individual is bound by an order without being able to adequately represent their version of events.[30] This in turn has led to a further expanding of the scope of the phrase "*claiming under or through*" that was developed in the *Chloro Control* case.

In addition to this, the rationale given in the *Chloro Control Case* itself leaves much to be desired with regard to how one should approach the application of the Group of Companies Doctrine. While the Court in the case, constantly emphasised the need for assessing mutual intention to be bound by arbitration, they failed to go beyond looking at the fact that this was a composite transaction instead.[31] However, adopting such an interpretation essentially shifts the focus and manner of the impleading from a position of consent to a position of merely being in a composite transaction. Such an approach does not take into account that commercial realities in the 21st century almost necessarily involve having a multiplicity of contracts that may or may not be intertwined with each other. Hence, holding a mere transaction as part of a composite transaction as a ground to invoke the application of this doctrine,[32] goes against the very basis of the doctrine itself.

If one was to consider the mere involvement of a third party in a composite transaction to hold that there was intent, then one makes consent a question of degree rather than kind by introducing a different standard for consent to

29. Cheran Properties Ltd. v. Kasturi and Sons Ltd. (2018) 16 SCC 413 (India).
30. Uzma Sultan, 'Explained: In Depth Analysis of the legal Principle 'Audi Alteram Partem'' (2020) 6(5) International Journal of Legal Developments and Allied Issues 1.
31. A composite transaction is a transaction in which there are multiple parties and multiple agreements.
32. Nirmala Jain v. Jasbir Singh 2018 SCC OnLine Del 11342 (India).

the substantive part and consent to the arbitration clauses of the contracts.[33] Therefore, it appears to be an underlying presumption that once a composite transaction is proved, the standard of consent for arbitration would somehow be lower. Such a position is not only fundamentally irreconcilable with the principles of contract law which mandates that the same form of consent be present for every stage of the contract[34] but also finds no support in any international treaties or laws pertaining to arbitration.[35]

4. CONCLUSION

The Group of Companies Doctrine was formulated with a very clear rationale, i.e., the principle of implied consent. Therefore, as a consent-based theory, in the absence of implicit consent, the doctrine must necessarily fail and there is an onus on those using this doctrine to handle the matter with utmost care to protect this core principle. However, to this effect, the Court in *Chloro Control* has failed to engage meaningfully with the doctrine which has in turn had detrimental impacts on the manner in which arbitration law has and will develop in India.

The author submits that reading in the Group of Company doctrine as part of the "*claiming through or under*" reflects an academically dishonest approach by increasing the scope of the phrase to an unprecedented level without any clear rationale to explain its reasons. The doctrine necessitates that the non-signatory be involved in the proceedings as a party and not merely as a substitute and therefore, attempts to reconcile these two factors. Additionally, guidelines must be drafted regarding when Courts can reasonably infer mutual intent to try and recalibrate the approach India has taken, back to the academically integral consent-centric analysis. Allowing for such a path forward would aid in evolving the discourse surrounding the impleading of non-signatories into arbitration proceedings and aid in developing a clearer standard for the same.

33. Tejas Chhura, 'The Need to Re-Think the Group of Companies Doctrine in International Commercial Arbitration', (2022) 15(1) NUJS L. Rev. 1.
34. D Cohen, *note in* Cour de Cassation, 5 January 1999, and Cour de Cassation, 19 October 1999 (2000) Rev Arb 92.
35. Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories' (2017) 8 Journal of International Dispute Settlement 610, 643.