REAFFIRMING THE GROUP OF COMPANIES DOCTRINE IN INDIAN ARBITRATION: A COMPREHENSIVE ANALYSIS OF THE COX AND KINGS JUDGMENT

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ABSTRACT

This article critically examines the Supreme Court of India's landmark judgment in Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., which reaffirms the Group of Companies Doctrine as a cornerstone of Indian arbitration jurisprudence. The judgment represents a pivotal step in adapting arbitration law to the complexities of modern corporate structures, allowing non-signatories within corporate groups to be bound by arbitration agreements under specific circumstances. By striking a balance between traditional principles of consent and the realities of integrated business operations, the judgment aligns Indian arbitration with globally recognised practices while addressing its unique legal and commercial context.

The article offers a distinctive perspective by analysing the judgment's nuanced application of Group of Companies Doctrine and situating it within the broader evolution of Indian arbitration law. It also provides a comprehensive analysis of the judgment's attempt to harmonise conflicting precedents and clarify the doctrine's contours, distinguishing it from related concepts like piercing the corporate veil. In particular, it highlights the Supreme Court's focus on implied consent, composite transactions, and mutual intent, setting a robust yet flexible framework for determining the involvement of non-signatories. Further, the article's exploration of the judgment's practical implications offers a fresh understanding of its significance.

By delving into the judgment's strengths, the article demonstrates how Group of Companies Doctrine enhances efficiency of arbitration and ensures

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inclusivity in resolving disputes involving corporate groups. It also identifies certain challenges, such as the risk of inconsistent application and potential for overreach, while advocating for legislative codification to address these concerns. This analysis underscores the doctrine's potential to strengthen India's position as a pro-arbitration jurisdiction, fostering a fair and predictable framework for domestic and international stakeholders.

Through its comprehensive analysis, the article contributes to the ongoing discourse on the Group of Companies Doctrine, offering valuable insights for practitioners, academics, and policymakers aiming to refine arbitration framework in India.

> *"Group of Companies doctrine - a modern theory which challenges the conventional notions of arbitration law. It is celebrated by some, reviled by many others. Yet, its legacy continues."*
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> —Dr. Dhananjaya Y Chandrachud, Former CJI

1. INTRODUCTION

In the present times, wherein trade and commerce is at the forefront of every civilization, and almost all significant and important commercial disputes are being resolved through arbitration, it is only imminent that it is ensured that an arbitral award is effectively and necessarily enforced. With increasing complexities in commercial transactions and various layers and structures that are invariably present these days in various companies and conglomerates, it is only necessary that the arbitration process also develops and becomes robust with time to tackle all possible scenarios for it to be an effective dispute resolution process.

It is now established jurisprudence that arbitration, as a method of dispute resolution, hinges on party autonomy, of which consent is the bedrock. The principle of party autonomy ensures that only parties who willingly submit their disputes to arbitration are bound by its procedures and outcomes. Against this backdrop, the *Group of Companies Doctrine* challenges traditional and literal notions of consent and privity by allowing arbitration agreements signed by one corporate entity to bind other entities within the same group under specific circumstances in order for it to be more pragmatic and effective approach of dispute resolution.

The landmark judgment of the Supreme Court of India in *Cox and Kings Ltd v SAP India (P) Ltd*[1] represents a seminal moment in Indian arbitration jurisprudence, in a sense reaffirming the doctrine and cementing it as part of Indian arbitration regime. The judgment delves into various aspects surrounding the applicability of the said doctrine and its relationship with the well settled legal principles of corporate law and contract law, *inter alia*, 'piercing the corporate veil', separate legal personality, party autonomy, privity of contract, and requirement of written/ express consent to arbitration agreement. The judgment decides the contours of the doctrine, and more specifically, finds its imprint in the Indian Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and interprets the phrase "claiming through or under" as present in Section 8, Section 35, and Section 45 of the Arbitration Act. The judgment raises critical questions about the balance between judicial pragmatism and the sanctity of contractual principles. It also invites comparisons and similarities with international arbitration practices.

This article seeks to conduct an in-depth analysis of the aforesaid judgment, its impact on Indian arbitration law, and its alignment with global standards, offering a critical evaluation of its merits and limitations.

2. TRACING THE ORIGIN AND HISTORICAL OVERVIEW OF THE DOCTRINE – INTERNATIONAL STANCE

The *Group of Companies Doctrine* has its roots in the practical realities of corporate structures. In many complex commercial transactions, multiple entities within a corporate group play an active role in negotiating, executing, or performing contracts, even when only one entity formally signs the arbitration agreement. The doctrine enables tribunals to bind non-signatories within such groups, provided the evidence demonstrates their mutual intent to arbitrate.

The doctrine has originated from the decisions rendered by international arbitral tribunals. The Supreme Court is aware that to authoritatively determine the validity and applicability of the doctrine in the Indian arbitration regime, it ought to be pragmatically tuned with well recognised and internationally accepted principles. Thus, the Supreme Court has traced the origin of the doctrine to other jurisdictions, as elaborated below.

1. *Cox and Kings Ltd v SAP India (P) Ltd* (2024) 4 SCC 1.

In France, *Dow Chemical Case*[2] was the first to establish that a non-signatory could be bound by an arbitration agreement entered into by another entity within the same corporate group, provided there was common intention or mutual intention of all the parties and the non-signatory appears to be a veritable party to the contract on the basis of their engagement in negotiating, performing, and terminating the contract. In fact, membership within the same group of companies or, as may be called, the "same economic reality" was neither the sole nor the guiding criteria to bind the non-signatory companies to the arbitration agreement.

Despite its recognition in some jurisdictions, the doctrine has not been uniformly embraced or applied in the same manner across the globe. In fact, Bernard Hanotiau, a renowned scholar in international arbitration, contends that the ruling in Dow Chemical has been misconstrued to support the emergence of the *Group of Companies Doctrine*. Instead, he highlights that the true significance of the Dow decision lies in its focus on assessing a non-signatory's status as a party based on its conduct, which demonstrates consent. Hanotiau further argues that referring to a group of companies is in fact superfluous, as affiliation within the same corporate group is not a decisive criterion for determining party to an arbitration agreement.[3]

The English Courts have generally taken a rather conservative approach, by favouring strict adherence to the doctrine of privity. The English law envisages that only such non-signatories that claim under or through the original party to the agreement, may be bound by an arbitration agreement. Consequently, under English law, an arbitration agreement is extended to non-signatory parties by way of applying traditional contractual principles and doctrines such as novation, agency, operation of law, assignment, and merger and succession.

Courts in Singapore have dismissed the applicability of the *Group of Companies Doctrine*, upholding the core corporate law principle of maintaining distinct legal identities for separate entities.[4]

In contrast, Swiss courts have permitted non-signatories to be bound by arbitration agreements if their conduct demonstrates implied consent. The Swiss Federal Court has clarified that, under Article 178 of the Swiss

2. *Dow Chemical v Isover Saint Gobain,* Interim Award, ICC Case No. 4131, 23 September 1982.
3. Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 27(4) Arbitration International 539.
4. *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] SGHC 181.

Private International Law Act, an arbitration agreement must be in writing. However, the determination of whether a non-signatory is a party to such a written agreement can be made by examining its role in the preparation and performance of the contract containing the arbitration clause, thereby evidencing its intention to be part of the arbitration agreement.[5]

The US courts do not expressly rely on the *Group of Companies Doctrine*, but have often used general principles of contract law such as incorporation by reference, assumption, agency, veil piercing or alter ego, and arbitral estoppel for binding non-signatories to arbitration agreements.[6]

In India, the doctrine gained prominence with the Supreme Court's judgment in *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013)[7]. In this case, the Supreme Court held that a non-signatory could be bound by an arbitration agreement if it played a significant role in the contractual framework and if the transaction was composite in nature. The doctrine was subsequently applied in several cases, notably *Cheran Properties Ltd v Kasturi and Sons Ltd* (2018)[8], *MTNL v Canara Bank* (2020)[9], and *ONGC Ltd v Discovery Enterprises (P) Ltd* (2022)[10], further elaborating and solidifying its place in Indian arbitration law.

Thus, the Supreme Court has observed that other jurisdictions, in certain ways, have moved beyond the formal requirement of express and written consent to bind a non-signatory to an arbitration agreement, and thus even the Arbitration Act should be interpreted in a manner that is consistent with the approaches prevailing internationally.

However, the doctrine has also faced criticism for undermining principles of party autonomy and privity of contract. These tensions had set the stage for the five-judge bench in *Cox and Kings* (supra) to revisit its validity, and thus, the following observations emerge from the landmark judgment of the Supreme Court in this regard.

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5. X.___ et al v. Z.___, 4A_115/2003; A._____, v. B._____ Ltd., 4A_376/2008; X._____ v. Y._____ Engineering and Y._____ S.p.A., 4A_450/2013.
6. *GE Energy Power Conversion France SAS Corpn, FKA Converteam SAS v Outokumpu Stainless USA, LLC*, et al., Case No. 18-1048 (1 June 2020).
7. *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641 : 2012 INSC 436.
8. *Cheran Properties Ltd v Kasturi and Sons Ltd* (2018) 16 SCC 413.
9. *MTNL v Canara Bank* (2020) 12 SCC 767.
10. *ONGC Ltd v Discovery Enterprises (P) Ltd* (2022) 8 SCC 42 : 2022 INSC 483.

3. FINDINGS AND OBSERVATIONS OF THE SUPREME COURT

A. Consent

The Supreme Court has unequivocally held that the issue of determining who qualifies as a "party" to a given arbitration agreement, fundamentally revolves around the concept of consent. It emphasised that arbitration is a matter of contract, and an arbitration agreement, being a creature of such contract, is also governed by the contract law principles. Accordingly, the contractual principles or doctrines such as, privity of contract, consensus ad idem, express and implied consent, etc., are foundational for constituting a valid arbitration agreement. Under Indian contract law, a party's actions or conduct can signify consent of a party to be bound by a contract and that this principle of implied consent extends equally to arbitration agreements.

The Supreme Court has also noted that determining whether a non-signatory can be bound by an arbitration agreement is a rather fact-specific inquiry. The phenomenon of group companies is the "modern reality of economic life and business organization". Often, a company signing the contract, which contains the clause on arbitration, is not the one who negotiated or performs the contract. Rigidly focusing on formal consent in such cases will lead to the exclusion of such non-signatories from the ambit and scope of the arbitration agreement, resulting in fragmented disputes and multiple proceedings.

Additionally, the Supreme Court has observed that the term "non-signatories" is more appropriate, than the traditional "third parties", to describe entities that have given consent to arbitration through means other than signature or explicit formal agreement.

B. Adhering to requirements under Section 7 of the Arbitration Act and Definition of "party"

The Supreme Court has held that for an arbitration agreement to be valid and enforceable, it must meet the requirements laid down under Section 7 of the Arbitration Act, which contains two aspects:

(1) Substantive aspect - The legislative intent underlying Section 7 of the Arbitration Act is that any legal relationship, including relationships where there is no contract between the persons or entities, whose actions or conduct has given rise to a relationship, could form a subject matter of an arbitration agreement.

(2) Formal aspect - Section 7(3) of the Arbitration Act stipulates the requirement of a written arbitration agreement. Section 7(4) lays down three circumstances under which arbitration agreement can be said to be in writing: (i) if it is signed by the parties; (ii) if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement; (iii) if it is contained in 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. The Supreme Court has observed that above three circumstances are geared towards determining the "mutual intention of the parties" to be bound by an arbitration agreement.

Consequently, the Supreme Court has also observed that Section 2(1)(h), read with Section 7 of the Arbitration Act, does not expressly require the "party" to be a signatory to an arbitration agreement. Accordingly, the Apex Court has conclusively settled the position as follows[11]:

- The definition of "parties" under Section 2(1)(h), read with Section 7 of the Arbitration Act includes both signatory as well as non-signatory parties.
- Conduct of non-signatory party could signify its consent to be bound by the arbitration agreement;
- The *Group of Companies Doctrine* has an independent existence as a principle of law, which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act.
- The underlying basis for application of the *Group of Companies Doctrine* rests on maintaining the corporate separateness of group companies while determining the mutual intention of the parties to bind the non-signatory party to the arbitration agreement;
- The *Group of Companies Doctrine* concerns only parties to the arbitration agreement and not the underlying commercial contract. Consequently, a non-signatory could be held to be a party to the arbitration agreement without becoming a formal party to the underlying contract.

11. *Cox and Kings Ltd v SAP India (P) Ltd* (2024) 4 SCC 1.

C. Relevant factors

The Supreme Court has held that to apply the *Group of Companies Doctrine*, the courts have to consider all the cumulative factors as laid down in ***Discovery Enterprises*** (supra)**,** which are:

- *"Mutual intent of parties;*
- *Relationship of a non-signatory to a signatory;*
- *Commonality of the subject matter;*
- *Composite nature of the transaction; and*
- *Performance of the contract."*

The Supreme Court has observed that the primary test to apply the doctrine is by determining the intention of the parties on the basis of the underlying factual circumstances. Such intention can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental.

The other factors such as commonality of subject matter and composite nature of the transactions, ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory, based on objective evidence.

D. "Claiming through or under"

The judgment holds that the approach in *Chloro Controls case*, to the extent that it traced the *Group of Companies Doctrine* to the phrase "claiming through or under", was erroneous and against the well-established principles of contract law and corporate law. Consequently, the Supreme Court conclusively settled the position as follows:[12]

12. ibid.

- *"that the persons "claiming through or under" can only assert a right in a derivative capacity that is through the party to the arbitration agreement;*
- *the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation and novation;*
- *the persons claiming through or under do not possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest;*
- *mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party."*

As a corollary, the Supreme Court has noted that the term of "party" is distinct from the concept of "*persons claiming through or under*" a party to the arbitration agreement. The *Group of Companies Doctrine* operates to bind the non-signatory to the arbitration agreement, enabling it to assert the benefits and bear the obligations arising from the performance of the contract.

Furthermore, Section 9 of the Arbitration Act permits a "party" to seek interim measures and does not from the court and does not use the phrase "claiming through or under". The Supreme Court has thus clarified that once a non-signatory is determined to be a veritable party to the arbitration agreement by court or tribunal, such non-signatory party can also apply for interim measures under Section 9 of the Arbitration Act.

E. Piercing the corporate veil

The Supreme Court has highlighted a key distinction between the *Group of Companies Doctrine* and the principle of veil-piercing or alter ego, where, the principle of alter ego sets aside the separate legal identities of corporate entities (say that of a parent company and its subsidiary) based on overriding considerations such as equity and good faith, often to prevent fraud.[13] Conversely, the *Group of Companies Doctrine* focuses on uncovering the mutual intent of the parties to identify the true participants in the arbitration agreement, without disregarding the legal personality of the entities involved.[14]

13. ibid.
14. ibid.

As a result, the Supreme Court has clarified that the principle of alter ego or piercing of the corporate veil, cannot serve as the foundation for applying the *Group of Companies Doctrine.*

F. Concept of 'Single Economic Unit'

The existence of strong organisational and financial ties between signatory and non-signatory parties is merely one of the many factors that a court or tribunal may evaluate to ascertain the legal relationship between them. Consequently, the Supreme Court has clarified that the concept of "single economic entity" cannot, on its own, be the criteria for applying the *Group of Companies Doctrine*.

Whether court or tribunal can decide on binding non-signatory to an arbitration

The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal which is enshrined in Section 16 of the Arbitration Act. It is a settled position of law is that the referral court only needs to give a prima facie finding on the validity or existence of an arbitration agreement.[15] The arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts.[16]

Consequently, the Supreme Court has conclusively held that when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should *prima facie* determine the validity or existence of the arbitration agreement, and leave it for the arbitral tribunal to decide at the stage of Section 16 on whether the non-signatory is bound by the arbitration agreement.

Thus, when subsequent to the decision of the Supreme Court in *Cox and Kings (supra)* a petition under Section 11 of the Arbitration Act was filed in the given arbitration matter[17], the three-judge bench[18] of the Supreme

15. *Lombardi Engg Ltd v Uttarakhand Jal Vidyut Nigam Ltd* (2024) 4 SCC 341: 2023 INSC 976; *Interplay between Arbitration Agreements under Arbitration and Conciliation Act 1996 and Stamp Act 1899, In re* (2024) 6 SCC 1: 2023 INSC 1066.
16. *SBI General Insurance Co Ltd v Krish Spinning*, 2024 SCC OnLine SC 1754: 2024 INSC 532.
17. *Cox and Kings Ltd v SAP India (P) Ltd* (2024) 4 SCC 1: 2024 INSC 670.
18. Bench comprising of Justice D.Y. Chandrachud (Former CJI), Justice J.B. Pardiwala and Justice Manoj Misra.

Court held that in light of the settled principle in *Cox and Kings (supra)*, it would be appropriate for the arbitral tribunal to take a decision on the application of the doctrine after taking into consideration the evidence adduced by the parties. Since the requirement of *prima facie* existence of an arbitration agreement, as provided under Section 11 of the Arbitration Act, was satisfied, the Supreme Court therefore allowed the petition.

4. STRENGTHS OF THE JUDGMENT

The judgment acknowledges commercial realities. It recognises the complexity of modern commercial transactions, where entities within a corporate group often function as a single economic unit. By allowing non-signatories to be bound under specific circumstances, the Supreme Court ensures that the arbitration mechanism adapts to the realities of integrated business operations. This approach aligns with the pro-arbitration stance of the Arbitration Act, and fosters efficient dispute resolution.

The Supreme Court reiterates that consent remains central to arbitration. The *Group of Companies Doctrine* can only apply if mutual intent to arbitrate is demonstrated through objective factors such as participation in contract negotiation, performance, or termination. Further, by emphasising consent, the Supreme Court seeks to balance the doctrine's pragmatic application with the foundational principle of party autonomy.

The judgment limits the doctrine's applicability to cases where the facts clearly establish the non-signatory's involvement in the transaction. This ensures that its application remains contextual and not arbitrary. Further, the focus on composite transactions and direct involvement prevents overreach and ensures that the doctrine is applied in genuine interdependent cases.

By analysing the international position on the *Group of Companies Doctrine*, the judgment situates India within the broader global framework. Jurisdictions such as France, Switzerland, and the United States employ similar principles, making the Indian stance more predictable for multinational corporations.

Moreover, while validating the doctrine, the Supreme Court underscores the importance of party autonomy. This prevents the indiscriminate extension of arbitration agreements to non-signatories, ensuring that arbitration remains a consent-based process.

5. LIMITATIONS OF THE JUDGMENT

The Supreme Court relies heavily on judicial interpretation to determine the applicability of the doctrine. However, the absence of explicit legislative guidance creates ambiguity, leaving the doctrine open to inconsistent application by lower courts. Further, while the judgment provides detailed factors, it stops short of recommending legislative amendments to codify the doctrine's use under the Arbitration Act.

Further, factors such as "mutual intent" and "composite transaction" are inherently subjective and can lead to inconsistent interpretations. What constitutes "direct involvement" or "mutual intention" may vary widely across cases, creating legal uncertainty. The judgment does not establish a clear evidentiary threshold for proving these factors, leaving significant discretion to the judiciary. A more definitive statutory framework would provide greater predictability and uniformity in the doctrine's application.

Despite its safeguards, the judgment may inadvertently result in overuse of the doctrine. Aggressive litigants might attempt to bind non-signatories in unrelated cases by exploiting the doctrine's flexible criteria, or may use it as a tactic to delay the proceedings. This poses risks for entities operating within corporate groups, particularly in industries with complex supply chains or multi-tiered contractual structures.

The doctrine may seem to challenge the principle of separate legal personality, a cornerstone of corporate law. By binding non-signatories within a corporate group, the judgment risks blurring the boundaries between independent entities. The judgment does not sufficiently address how this reconciles with the well-established principles of corporate autonomy and limited liability.

6. BROADER IMPLICATIONS

The judgment reinforces India's position as a pro-arbitration jurisdiction by ensuring that disputes involving interconnected corporate entities can be resolved in a single forum. However, the lack of legislative clarity may deter foreign investors who prioritise legal certainty in arbitration frameworks.

Companies/businesses operating within corporate groups may face increased exposure to arbitration risks. Non-signatories might be drawn into disputes despite having no direct contractual relationship with the signatories. This could lead to cautious contractual practices, with

businesses seeking to limit their involvement in negotiations or performance to avoid being implicated.

The judgment aligns India with jurisdictions like France that adopt a pragmatic approach to non-signatories in arbitration. However, it diverges from stricter jurisdictions like the United Kingdom and Singapore, potentially creating conflicts in cross-border disputes.

7. CONCLUSION

The Supreme Court has embraced the *Group of Companies Doctrine* as being instrumental in making the transition from a restrictive express consent-based approach to a more flexible approach in attaching relevance to the concept of 'implied consent' in order to bind a non-signatory to an arbitration agreement. The judgment conclusively holds that the *Group of Companies Doctrine* should be retained in the Indian arbitration regime given its utility in determining the party's intention to be bound by arbitration agreement, specifically in the context of composite transactions involving several parties and multiple agreements.

Further, the Supreme Court has harmonised the divergent strands of law emanating from the judgments in Cheran Properties (supra), Canara Bank (supra) and Discovery Enterprises (supra), and categorially held that "*the observations pertaining to the Group of Companies Doctrine were rendered in the facts and circumstances of each case*". Thus, the judgment aims to make further progress in evolution of Indian arbitration law, without dismissing the earlier rulings and taking each of such judgments, beginning with Chloro Controls *(supra)* to Cox and Kings (supra), as adding further dimensions to the theory already propounded by such earlier judgments.

By reaffirming the Group of Companies Doctrine, the judgment ensures that Indian arbitration remains flexible and business-friendly. However, its success will depend on careful judicial application and legislative support to address its inherent ambiguities. By embracing these measures, India can strengthen its position as a global arbitration hub, offering a fair and predictable dispute resolution framework for domestic and international stakeholders alike.

The views expressed in this Article are the authors' personal views and do not reflect the views of Cyril Amarchand Mangaldas.