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A Roadmap of Non-Signatories Being a Part of Arbitration Proceedings

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ABSTRACT

Arbitration is a process which is often used globally to settle disputes in the international arena; because it is a private practice outside the public eye with experts as judges and results in an award that is relatively easier to enforce than court decisions, it can be the most effective way to settle foreign disputes. In order to be eligible to begin arbitral proceedings instead of prosecution, the only provision for this is an agreement between two or more parties and when a conflict occurs later in which a non-signatory third party is so involved with the conflict that it appears unlikely or perhaps even futile to settle it without third party being part of the proceedings, he cannot legally participate in the arbitration proceedings.If such an issue is at hand, or if a third party itself wishes to invoke arbitration against one of the signatories, the courts and arbitral tribunals have established procedures by which third parties can be bound by an arbitration agreement with their express consent.

The previously so relevant notion of consent in arbitration has increasingly been replaced by the consideration of efficiency and fairness with regard to third parties. Thereof, in this research paper an attempt has been made to justify the link between two doctrines i.e. 'Group of Companies' and 'Piercing of Corporate Veil' as well as its implication,Pre and Postamendment. The paper analyses various modes through which a non-signatory party can be made binding in an arbitration agreement. This paper would be also dealing with the applicability of these two doctrines in domestic arbitration.

Further, this paper would be concluding with the process and meaning of party autonomy in context of third party and as a consequence the development of the doctrine of'Corporate Veil piercing' and the doctrine of 'Group of Companies'.

Kewords: Non-signatory; Arbitration Agreement;Corporate Veil Piercing; Group of Companies; Party autonomy.

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I. INTRODUCTION

In contract law, the doctrine of privity provides that a contract cannot grant rights or enforce obligations arising under that on someone or agent apart from the parties to that.The doctrine of privity of contract ensures that it may be followed solely by those inquisitive about creating an agreement. Generally, this is often still the case; solely parties to a contract could sue for infringement of a contract. It is a basic principle of corporate law that the company and its shareholders are regarded as distinct personalities. The standard theory of contract privity only requires certain individuals who are parties to an arrangement to be responsible for its violation. Accordingly, asset-rich parent companies enter into and conduct contracts in the name of shell subsidiary companies to also escape liability. It is to rectify this asymmetry that the doctrine of group business was applied. The courts have used the concept of breaking the corporate veil and privacy through actions to enforce liability in certain cases upon a group of corporations.

Therefore, it has been well known in the case of an arbitration arrangement that the party's approval is a sine qua non for arbitration. This element of arbitration assures that it is only the parties to an arbitration agreement that would be the parties between who arbitration shall commence against. Over time, however, we have seen different doctrines or legal theories established, such as the company doctrine community, the agency principle[2], which was used to make a non-signatory party to arbitration.

Nowmoving towards the significance of doctrine of the group of companies in arbitration agreement was firstly propounded in the case of ***Dow Chemical v. Isover Saint Gobain***[3], which was reapplied by the Supreme Court in the case of ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc***.[4] in respect of an international trade agreement.which was further added additional elements in the caseof ***Mahanagar Telephone Nigam Ltd. vs. Canara Bank &Ors.***[5]in which the group of companies is the focus of an international contractual agreement.

The doctrine of piercing the corporate veil is another way by which courts in the sense of complex corporate structures have tried to assess liability. In fact, the theory requires the court to ignore a company's independent character in order to identify its owners and in some cases enforce liability generally but in the present scenario the concept of group of companies have come into picture which tells that and is just similar like owners hiding behind the name of the

[2]Blackaby, Nigel. Redfern And Hunter on International Arbitration. Oxford; New York:Oxford University Press, 2015(Agency Principle:The Agency Principle regulates the contractual relationship in which the Agent on behalf of the Principal, is interacting with the third party)

[3] 1984 Rev Arb 137; 110 JDI 899 (1983)

[4] (2013) 1 SCC 641

[5]2019 SCCOnLine SC 995

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company, whilst subsidiary company also stays behind the parent company that is why Doctrine of Veil Piercing is another way.

Therefore, through this research paper I want to analyze that whether Non-Signatories to an arbitration agreement can be a party to the arbitration proceeding?

II. INTERMINGLING DOCTRINES "NON-SIGNATORIES TO AN ARBITRATION AGREEMENT"

Two well-known principles allowing arbitration agreements to be applied to non-signatories are 'group of companies' and 'corporate veil piercing'.

Essentially, both of these basic principles of contract law are justified by standards of justice and good faith. Veil piercing focuses on fraud or violation of right where the corporate structure protects the actual party from liability. The theory of 'group of companies' addresses the presumed intention of the parties to arbitrate.

It may not be unprecedented for companies within the same group to be involved in carrying out various parts of a project, often without formally setting out their positions through contracts. If there is no intent to demand that an arbitration arrangement be extended to non-signatories involved in a project, the agreement must state this very clearly.Otherwise, businesses can be drawn into arbitration proceedings with similar companies and find that that is justified by the circumstances.

Nonetheless, there are exceptions to the default corporate separateness rules which also require courts to hold parent companies responsible for wrongdoing at the subsidiary level where applicable. The best known of those cases is called veil piercing. In these cases, a court may look for clear conditions that allow it to disregard the distinction between a corporation and its owner, which may apply to a subsidiary and its parent. The courts have thus established new approaches for making parent corporations and subsidiary accountable as a whole.

(A) Justification of the Link of these two doctrines through case laws:

In **LIC of India v. Escorts Ltd, Justice Chinnappa Reddy**[6]stressed the lifting of the company veil within which the associated corporations area unit inextricably interlinking.

Therefore, this case enlightens us with the idea of non-signatories/associated corporations being a part of the arbitration agreement. As in corporate veil, when the veil is Pierced the subsidiary companies or the associated companies come behind the parent company, that is to

[6] (1986) 1 SCC 264

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say, non-signatories are recognized as a part of the corporate veil.

1. **(Pre-Amendment) Phase before Arbitration and Conciliation (Amendment) Act, 2015-**

'Doctrine: Group of Companies'- This theory has been developed within an international context whereby an arbitration agreement signed by a company, which is the part of group companies, may bindnon-signatory affiliates or sister or parent issues if the circumstances show that the common purpose of all parties was to bind both the signatories and the non-signatory affiliates.

The argument has been used in a variety of arbitrations to justify the authority of a tribunal over a party which is not a signatory to the arbitration contract.

Thereby, I would also like to bring in notice the case of **Chloro Controls**[7] where the non-signatories to an arbitration agreement were made parties to an arbitration; as it ruled that where the agreements are intertwined and where several parties are interested in a single project carried out through several agreements then all the parties in the agreement may be considered to the conduct of arbitration proceedings.

2. **(Post-Amendment) Phase after Arbitration and Conciliation (Amendment) Act, 2015-**

After the case of **Chloro Controls**[8], the post amendment scenario was dealt by the Supreme Court in the case of **AmeetLalchand Shah and Ors. v. Rishabh Enterprises and Ors.**[9]and through the observations of the amendments in **Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya**[10]**,** the court proceeded to argue that all the agreements had been concluded pursuant to a single initiative which were directly related to one another and that one of the agreements had been concluded. The Equipment Lease Agreement was the key agreement between both of the parties and the other agreements were likewise ancillary.Since the said Equipment Lease Agreement contained an arbitration clause, the Supreme Court held that a single composite arbitration could be referred to all the parties involved.

Likewise, for binding non-signatories in an arbitration agreement the Supreme Court applied the group of company doctrine in **Mahanagar Telephone Nigam Ltd. v. Canara Bank**[11] and held that the subsidiaries were bound by an arbitration settlement entered into by the parent.

[7]Supra Note 3
[8]Supra Note 3
[9]2018 SCC OnLine SC 487
[10](2003) 5 SCC 531
[11]Supra Note 4

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Nevertheless, no general rule was laid down which would bind all group companies to an arbitration agreement signed by one of the group's companies. Consequently, shared ownership and control by itself was not considered sufficient to bind non-signatory companies. Instead, the Court considered other additional elements which would connect non-signatory community companies at present.Such elements involve a *shared intent, agreement or success by non-signatory group companies for the contract in question*. The Court further held that the arbitration agreement it contains must also bind non-signatory group companies which benefit from the contract.

Therefore, I can conclude that both the doctrines are intertwined with each other and an arbitration agreement is regulated by the same guidelines as contract law, because if one of the companies in a group signs an arbitration agreement, the same can be binding on the other companies in the same group, when mutual intention is reflected. Therefore, the parent company that entered into the Arbitration Agreement would not be bound alone. The Theory of the 'Group of Companies' can only is applied in a situation where it is clear from the arbitration agreement that the parties have agreed to bind both the signatory and the non-signatory to the arbitration agreement**.** Accordingly, the courts and tribunals that invoke the doctrine of the 'Group of Companies' in cases where the parties *'purpose was clear from the Arbitration Agreement that the non-signatory is a legitimate party to the contract.'*

Thereof, the elements required for the applicability of Doctrine of Group of Companies are *Composite Transactions*. However, the holding in **Mahanagar TelephoneNigam**[12] is extending the test of composite transaction postulated in **Chloro Controls**[13].Accordingly, within the case of composite transactions solely non-signatory group corporations were observed to be bound.In addition to composite transactions, the decision in **MahanagarTelephone Nigam**[14]makes non-signatory firms certain by arbitration agreements in an exceedingly larger range of factual circumstances. The court thus considered other additional elements in **Mahanagar Telephone Nigam**[15]., which would connect non-signatory group companies; they are *common intention, negotiation or performance of the contract by non-signatory companies for the contract in question.*

(B) Implementation of the intermingling doctrines to Domestic Arbitration

[12]Supra Note 4
[13]Supra Note 3
[14]Supra Note 4
[15]Supra Note 4

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In the case ofAmeetLalchand Shah and Ors. v. Rishabh Enterprises and Ors.[16]

Facts of the case:

Rishabh Enterprises, signed four photovoltaic solar plant commissioning agreements at Dongri, Raksa, Jhansi district, Uttar Pradesh, in which only the third Agreement among the other agreements was without an Arbitration Clause, which was with Astonfield Renewable Pvt. Ltd. Rishabh filed, before the Delhi High Court, a civil suit against the Appellants raising various charges. Upon receipt of notice, the appellants requested a motion to refer the issue to arbitration under Section 8 of the Act.

The Delhi High Court's dismissal of the aforementioned plea, the appellants filed an appeal before the Supreme Court.

The question before the court concerned whether the rules set out in the case of **Chloro Controls[17]** could be extended to refer non-signatories to domestic arbitrations under section 8 of the Act. The Supreme Court addresses the changes made to Section 8, and what was proposed in the Law Commission's 246th Report. Although not expressly mentioned, the Supreme Court applies the case concerning **Chloro Controls[18]** and analyzes the facts in the light of the principles set out in the case; it was for a single commercial project, i.e. the commissioning of the Photovoltaic Solar Plant project, though there were various agreements involving multiple parties; it held that the Equipment Lease Agreement was the principal/ main agreement, and that the other three agreements were ancillary. Therefore, the Supreme Court mentioned "the facts and intention of the parties" to facilitate the procurance of equipment, the sale and buying of equipment, the installationand the leasing of equipment to Dante Energy. In the light of the Amendment Act of 2015, the SC has interpreted Section 8as allowing any party to refer the dispute to arbitration, "claiming through or under", a party that was party to an arbitration agreement. With such an interpretation the SC chose to adopt the rules set out in the case of **Chloro Controls[19]**.

(C) International Perspective as to Group of Companies Doctrine

The ICC arbitral award in **Dow Chemical v Isover Saint Gobain[20]** can be traced to one of the earliest known adoptions and promulgation of the doctrine of the 'Group of Companies'. In that respect, the conflict arose out of multiple contracts performed by different divisions of

[16] 2018 SCC OnLine SC 487
[17] Supra Note 3
[18] Supra Note 3
[19] Supra Note 3
[20] Supra Note 2

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Dow Chemical Company (but not Dow Chemical Company itself) and Isover. Dow Chemical Company began arbitration along with its subsidiaries.

Particularly, assuming the arbitration clause specifically,if agreed by some subsidiary of the group company; it should also bind the other companies which by virtue of their position are in a stateto conclude, implement or terminate the contracts containing those clauses which form the part of the parent contract.

III. CONCLUSION:

This research paper provided a short analysis of judicial interpretation and doctrines prevalent w.r.t.the extension of arbitration agreement to non-signatories.It attempted to address the question whether the very basic definition of arbitration as a process for consent-based dispute settlement could be used without any restrictions or terminology. The following paper is concluded on the undermentioned points:

1. Party Autonomy:

Party autonomy professes that the parties to the arbitration agreement are autonomous not only in choosing laws but also in performing the arbitration process. Thus, it is against the Party Autonomy unless there is an express inclusion of the third party. If the company is not a party to an arbitration agreement through an express inclusion, then it will always bring a situation of confusion and thereof it will always implead and bring the third party in trouble. The arbitration agreement is a key aspect which represents the party's autonomy and the arbitrator's powers and responsibilities are also assigned according to the rules of party autonomy in arbitration. Thereof, a strict test must be provided through judicial interpretations or amendment.

2. Burden of Proof:

In order to apply the 'Group of Company' doctrine to implead non-signatories, the court ought to be satisfied that the non-signatory was actually involved and played a significant role in the transaction at the hand.The Burden of Proof lies on the party who wishes to implead the non-signatory party. Thecircumstances and correspondences before signing the arbitration agreement can be the primary tool to satisfy this burden.

3. Mutual Intention to be a Prerequisite of Arbitration Agreement:

The consent of parties is the basic prerequisite for an arbitration agreement.The decision to invokearbitration clause would unmistakably arise from the agreement and the agreement would have arisen from the party's discretion. In the case of ***Reckitt Benckiser(India) Pvt. Ltd.***

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***vs. Reynders Label Printing India Pvt. Ltd. and Ors.*[21],** the Supreme Court stated that intention of the non-signatory party is reflected by the agreement and if not, then it is established that such party cannot be referred to the arbitration agreement. Also, it should be mutual intention of the company to bind both the signatory and the non-signatoryparties. The intention must be expressly implied before the agreement from both the parties. Also, in the case of ***Dow chemical vs. Isover Saint Gobin*[22],** *i*t was specifically stated that it would be in compliance with the common interest of all the parties to the proceed together i.e. Non-signatory to be made a part of the proceeding.

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[21](2019) 7 SCC 62

[22]Supra Note 2

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