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# Legitimising the Inclusion of Third Parties While Passing an Arbitral Award

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MAYANK AGNANI<sup>1</sup>

## ABSTRACT

*The case comment discusses the landmark decision of the Supreme Court of India in Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., which legitimised the inclusion of non-signatory third parties in arbitration proceedings under the "group of companies" doctrine. The case highlights the evolving nature of Indian arbitration jurisprudence and its alignment with international practices.*

*The abstract outlines the key facts of the case, including the software licensing agreement between Cox and Kings Ltd. (C&K) and SAP India Pvt. Ltd., the subsequent agreements, and the dispute that arose leading to arbitration proceedings. It then summarises the Supreme Court's ratio decidendi, which establishes that an arbitration award can be passed against a non-signatory party if they are part of the same group of companies and have dealt with the business along with the signatory parties.*

*The abstract provides background information on the UNCITRAL Model Law on International Commercial Arbitration and its influence on the Arbitration Act of India, 1996. It also analyses the submissions made by the petitioner and respondents, as well as the Supreme Court's decision to recognise the "group of companies" doctrine as part of Indian arbitration law.*

*The abstract concludes by highlighting the significance of the decision in Cox and Kings, which serves as an authoritative discussion on the applicability of the "group of companies" doctrine in India. It emphasises the need for corporate groups to structure their transactions and conduct appropriately to ensure that only the intended parties are bound by the arbitration agreement.*

**Keyword:** *Doctrine of Group Companies, UNCITRAL Model, Arbitration, Arbitration Award, Signatory Parties.*

## I. INTRODUCTION

The case of Cox and Kings Ltd. v. SAP India<sup>2</sup> marked a significant turning point in Indian arbitration jurisprudence, particularly in the context of the group of companies doctrine. This

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<sup>1</sup> Author is a student at Institute of Law, Nirma University, India.

<sup>2</sup> Cox and Kings Ltd. v SAP India Pvt Limited and Anr., Supreme Court of India, 6 June 2022, Arbitration Petition No. 38 of 2020, SCC (India)

doctrine, hinging on economic efficiency, came under scrutiny as the Supreme Court sought to examine its validity in the Indian legal landscape. On December 14, 2010, Cox and Kings Ltd. (C&K) entered a software licensing agreement with SAP India Pvt. Ltd. In October 2015, C&K began developing an e-commerce platform, prompting SAP India to propose the installation of their 'Hybris Solution' software. They entered three new agreements, including one with an arbitration clause, agreeing to resolve disputes in Mumbai under the Arbitration and Conciliation Act, 1996.

Despite difficulties in implementing the software, C&K sought assistance from SAP SE, which took over the project but ultimately failed. C&K terminated the contract in November 2016 and demanded a refund of ₹45 crores. SAP India responded by initiating arbitration for wrongful termination and claiming ₹17 crores. In November 2019, arbitration was adjourned due to C&K's insolvency proceedings. C&K then initiated fresh arbitration, including SAP SE as a party despite it not being a signatory to any agreements. They argued that SAP SE's involvement and ownership of SAP India implied consent to the arbitration agreement, invoking the 'Group of Companies Doctrine.' C&K later approached the Supreme Court under Section 11 of the Arbitration Act to appoint an arbitrator when SAP did not respond.

### **(A) Ratio Decidendi**

An Arbitration Award can be passed against a non-signatory party also, if it deals with the business along with the signatory of the parties as accordance with the '*Doctrine of Group Companies*'.

### **(B) Background**

The UNCITRAL Model Law on International Commercial Arbitration<sup>3</sup> was adopted by the United Nations in 1985 to assist States in reforming and modernising their laws on arbitral procedure. It covers all stages of the arbitral process and reflects worldwide consensus on key aspects of international arbitration practice[3]. The General Assembly recommended all Member States to adopt the Model Law in their domestic legislation to uniformize the law of arbitral procedures<sup>4</sup>.

In India, the Arbitration Act was enacted in 1996 to consolidate and amend the law relating to arbitration, bringing it in consonance with the UNCITRAL Model Law, the New York Convention, and the Geneva Convention. The Act defines an arbitration agreement as an

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<sup>3</sup> CS, UNCITRAL Model Law on International Commercial Arbitration (The Commonwealth Secretariat 1985)

<sup>4</sup> HL, 'THE ADOPTION OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN SINGAPORE' [1994] JSTOR 387

agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship. The agreement must be in writing and can be contained in a document signed by the parties, an exchange of letters or other means of telecommunication, or an exchange of statements of claim and defence.

## **II. ANALYSIS**

### **(A) Submissions Of The Petitioner:**

The Petitioner argued that the Respondent No. 1 was a wholly owned subsidiary of the Respondent No.2 and customisation would be only possible through the aid of Respondent No. 2, therefore all the four agreements and email exchanges between all the parties constitutes a composite agreement and will become part of the single transaction.

It relied on *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.*[2] to contend that arbitration can be invoked even against the non-signatories if mutual intention of the parties can be shown. It was also argued that as Section 11 of the Act has limited scope, the intervention by the Hon'ble Supreme Court should be minimal and thus the Court at this stage should only examine the existence of a valid arbitration agreement.<sup>5</sup>

### **(B) Submissions Of The Respondent(s):**

The Respondent No.1 argued that when the Clause 15.7 of the GTC was invoked, the Petitioner itself had challenged it on the ground of the GTC being void ab initio. Therefore, the reliance on the same provision cannot be invoked by the Petitioner in order to appoint an Arbitrator.

On the other hand, Respondent No. 2 argued that they were a separate and independent legal entity and does not have any business dealings in India. It was further claimed that neither they were signatory to the arbitration agreement nor have they expressly or impliedly agreed to be bound by the terms of the agreement.

The Respondent No. 2 further contented that the emails on which Petitioner has relied, does not reflect any participation from Respondent No. 2's side therefore they were not involved in the contract negotiation process. In addition, there was no consensus among the parties to be bound by the agreement, thus the doctrine of Group of Companies will not be applicable in the present case.

### **(C) Analysis Of Courts Decision(s):**

A five-judge bench of the Supreme Court recognised the “group of companies” doctrine as

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<sup>5</sup> *Cox and Kings Ltd. v SAP India Pvt Limited and Anr.*, Supreme Court of India, 6 June 2022, Arbitration Petition No. 38 of 2020, SCC (India)

being part of Indian arbitration law. By virtue of this doctrine, “an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories.”

The Supreme Court noted that while the Arbitration Act requires a written agreement, it does not mandate that all parties must sign it; an arbitration agreement can be inferred from communications between parties. Thus, non-signatories may be bound by an arbitration agreement if they have shown consent. The Court clarified that this does not extend the agreement to third parties but rather identifies the true parties involved in the dispute. By adopting a modern perspective on consent, the Court aimed to reflect the complexities of contemporary transactions involving multiple agreements and parties.<sup>6</sup>

The decision in *Cox and Kings* is an authoritative discussion of the Doctrine and its applicability in India, of interest to all with India-related dealings. It makes clear that being a signatory to an arbitration agreement is not the sole determinant of being a 'party' to the arbitration agreement. Where companies are part of a group, and there are interrelated dealings, such dealings could constitute consent to be bound by the arbitration agreement.<sup>7</sup> When corporate groups intend for only the signatory company to be bound by the arbitration agreement, they should take care to ensure that the transaction is structured appropriately and their conduct is in line with such intention. They must also take care not to get involved without good reason in negotiations and performance of another group company's contractual obligations. Parties may also consider inserting clear language to this effect in the contract.

#### **(D) Relevant laws, case-laws and principles applied**

- Arbitration and Conciliation Act, 1996<sup>8</sup>
- United Nation Commission on Inter-national Trade Laws, 1985<sup>9</sup>
- Insolvency and Bankruptcy Code, 2016<sup>10</sup>
- Doctrine of ‘Group of Companies’

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<sup>6</sup> Supreme Court: Non-signatories to an arbitration agreement can be made parties to an arbitration proceeding under the group of companies doctrine January 24, 2024 '(Vaishlaw.com, 24 January 2024) <[www.vaishlaw.com/category/between-the-lines/](http://www.vaishlaw.com/category/between-the-lines/)> accessed 18 September 2024

<sup>7</sup> PS, ‘Arbitration Agreement Can Bind Non-Signatories: Supreme Court Upholds 'Group Of Companies' Doctrine ’ (*livelaw.in*, 6 December 2023) <[www.livelaw.in/top-stories/arbitration-agreement-bind-non-signatories-supreme-court-group-of-companies-doctrine-243822](http://www.livelaw.in/top-stories/arbitration-agreement-bind-non-signatories-supreme-court-group-of-companies-doctrine-243822)> accessed 11 September 2024

<sup>8</sup> Arbitration and Conciliation Act, Arbitration No ACT No. 26 OF 1996, 16 August 1996 (India)

<sup>9</sup>CS, UNCITRAL Model Law on International Commercial Arbitration (The Commonwealth Secretariat 1985)

<sup>10</sup> The Insolvency And Bankruptcy Code, No ACT NO. 31 OF 2016, 28 May 2016 (India)

- *Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc.*, 2016<sup>11</sup>

### **III. CONCLUSION**

The Constitutional Bench's decision in *Cox & Kings* is a welcome step in India's attempts to be a pro-arbitration jurisdiction in line with international practices. While the Constitution Bench has explained the contours of the doctrine, courts and tribunals must be mindful that arbitration is a consensual mechanism founded on party autonomy and apply the doctrine with due care, ensuring that mere association or involvement with a contract does not result in a non-signatory taking on the obligations of a party to the agreement.

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<sup>11</sup> *Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc.*, Supreme Court of India, 28 September 2012, CIVIL APPEAL NO. 7134 OF 2012, SCC (India)