Page 1579 - 1589 **DOI:** *https://doij.org/10.10000/IJLMH.118173*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 4

2024

The Issue of Inclusion of Non-Signatories in Arbitration Proceedings

SAKSHI RAMAN[1]

ABSTRACT

Arbitration has long been lauded for its equitable nature, offering a peaceful resolution to disputes through discussion rather than force. In general, arbitration agreements, as contractual agreements between two or more parties, bind them to arbitration proceedings. However, non-signatory parties may also find themselves bound by arbitration agreements through various legal doctrines including alter ego, agency, estoppel, assignment and third-party beneficiary. Another doctrine which has exponentially expanded the jurisdiction of arbitral tribunals is the Group of Companies doctrine allowing for the inclusion of non-signatory affiliates within the scope of arbitration agreements. The Group of Companies doctrine was invoked for the first time in the Chloro Controls case and since then, Indian Courts have relied upon it to bind non-signatory parties to arbitration proceedings. This article explores the binding nature of arbitration agreements on non-signatory entities, examining such legal doctrines and drawing insights from landmark cases. The article, further, traces the evolution of law and decisions taken by the Supreme Court of India where dispute arises in multi-party transactions and some liability lies on the non-signatory party who was initially not a part of the arbitration agreement.

Keywords*: Arbitration, Non-signatories, Group of Companies doctrine, Arbitration and conciliation Act, Chloro Controls Case.*

I. INTRODUCTION

In the words of Aristotle[2], "*Arbitration is equitable to be patient under wrong [not to retaliate]; to be willing that a difference shall be settled by discussion rather than by force; to agree to arbitration rather than to go to court- for the umpire in an arbitration looks to equity, whereas as the juryman sees only the law. Indeed, arbitration was devised to the end that equity might have full sway.*"

In the contemporary landscape of commercial law, arbitration stands as a paramount feature, especially within the private sector where parties in order to settle their disputes opt for

[1] Author is a lawyer practising at High Court of Delhi, India.
[2] The Rhetoric of Aristotle, Book I, ch 13, D Appleton-Century Company, New York, 1932, pp.77-78 (Tr Lane Cooper).

 [ISSN 2581-5369]

arbitration over litigation. Arbitration is an alternative dispute resolution process which facilitates a speedy resolution of conflicts between the parties.

There is no internationally recognized definition of arbitration. Different commentators have provided different meanings to arbitration. However, there are four essential requirements[3] of the concept of arbitration which are as follows:

a) an arbitration agreement

b) a dispute

c) a reference to a neutral independent party for its determination; and

d) an award by such neutral adjudicator which is binding on both the parties.

Section 2 (a) of the Arbitration and Conciliation Act, 1996 ("**Act**") defines arbitration as follows-

"2. (a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;"

It is evident that the definition does not explicitly define arbitration but offers various forms of arbitration. It covers pure *ad hoc* arbitration, statutory arbitration as well as any type of arbitration administered by an arbitral institution.

II. ARBITRATION AGREEMENT

Arbitration agreement is nothing else but a contract which is to be worked out by and between the parties to the contract.

Section 2(1)(b) of the Act defines Arbitration agreement. The said sub-section reads as follows:

"2.(1)(b) "arbitration agreement" means an agreement referred to in section 7;"

This provision signifies a pivotal clarification in the arbitration laws, amending Section 2(a) of the 1940 Act and thus addressing and rectifying the ambiguities inherent in the previous legislative framework. By replacing vagueness that may have lingered in the 1940 Act, Section 7 establishes a more robust foundation for the interpretation and application of arbitration agreements.

Section 7 of the Act further defines the arbitration agreement as follows:

"***7. Arbitration agreement****. — (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may*

[3] Indu Malhotra, O.P. Malhotra's Arbitration and Conciliation 81 (Thomson Reuters 2014).

arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) 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.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

A reference can be made or even directed to the arbitrator only if a pre-existing arbitration agreement subsists between the parties. In the absence of a pre-existing arbitration agreement, the court has no power, authority or jurisdiction to refer unwilling parties to arbitration. Therefore, the word "agree" in Section 21 of the Act refers to *consensus ad idem* between the parties who take a considered decision to forego their right of adjudication before a court where the suit is pending, and mutually agree to have the subject matter of the suit or part thereof adjudicated and decided by an arbitrator[4].

By merely putting the signatures on an agreement, the signatories cannot become parties to the arbitration agreement or to the reference. Thus, an award dealing with properties left by their parents but not regarding distribution of properties to them could not form the subject matter of the dispute.[5]

The fact that a person claiming under a party to an agreement has the power to move to the judicial authority, cannot establish that all outsider entities can claim a right to enforce an arbitration agreement to which they are not parties under the law. Only those persons who can claim under a party to an arbitration agreement, in addition, to the parties themselves, are held

[4] *M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District Sehore & Ors. v. Modi Transport Service*, (2022) 14 SCC 345.
[5] *Padam Chand Jain v. Hukam Chand Jain*, AIR 1999 Del 61.

 [ISSN 2581-5369]

entitled to claim its benefits and also be held bound by the obligation imposed thereby.[6]

III. THE BINDING NATURE OF ARBITRATION AGREEMENT ON THE PARTIES TO THE AGREEMENT

The Supreme Court of India in one of the landmark cases in *K.K. Modi v. K.N. Modi & Ors*.[7] held certain essential attributes of an arbitration agreement. Among these, one of the essential ingredients cited by the Apex Court was that the arbitration agreement must contemplate that the decision of the tribunal will be binding to the parties to the agreement.

However, even if the subject clause lacks certain essential characteristics of arbitration like "final and binding" nature of the award, the parties have evinced clear intention to refer the dispute to arbitration and abide by the decision of the tribunal. The party autonomy to this effect, therefore, is to be protected.[8]

Generally, an arbitration award neither confers any rights nor imposes any obligations, upon a person who is not a party to the arbitration agreement or the proceedings[9]. An arbitral tribunal is not empowered to give directions or order against someone who is not a party to the arbitration agreement, unless that party has in someway acquiesced in a manner which, without making him a party to the arbitration agreement, indicates an intention on his part to be bound by the award[10].

IV. NON-SIGNIFICANCE OF SIGNATURE TO CONSTITUTE A WRITTEN ARBITRATION AGREEMENT

It is not necessary for an arbitration agreement to be signed by the parties. It was held in the *Trimex case*[11] that in the absence of a signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication.

The facts in *UNISSI case*[12] were that the Respondent demanded execution of agreement containing an arbitration clause. The agreement was signed by the Appellant which was later sent to the Respondent. However, the Respondent never signed that agreement. When disputes arose, the Respondent contended that there was no agreement executed between the parties and

[6] *Patanjal v. Rawalpindi Theatres Pvt. Ltd.*, AIR 1970 Del 393.
[7] *K.K. Modi v. K.N. Modi & Ors.* (1998) 3 SCC 573.
[8] Babanrao Rajaram Ound v. Samarth Builders & Developers & Anr, (2022) 9 SCC 691.
[9] Mustill and Boyd, Commercial Arbitration, Second edition, 1989, pp 414.
[10] Indu Malhotra, O.P. Malhotra's Arbitration and Conciliation 81 (Thomson Reuters 2014).
[11] *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd., India*, (2010) 3 SCC 1.
[12] *UNISSI (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research*, (2009) 1 SCC 107.

 [ISSN 2581-5369]

hence, the question of appointment of an arbitrator could not arise. The Apex Court held that the tender documents contained an arbitration clause and as the Respondent accepted that tender, there was a valid arbitration agreement between the parties.

Furthermore, in *M/s Caravel Shipping Services Pvt Ltd v M/s Premier Sea Food Exim Pvt Ltd*[13], the Supreme Court upheld that signing of an arbitration agreement is not mandatory, when such agreement satisfies that it has been in writing.

Thus, the basic requirement of Section 7 of the Act is that the arbitration agreement should be in writing, and not that it should be signed by the parties.

V. THEORIES WHICH BIND NON-SIGNATORIES TO ARBITRATION

There are various means by which the non-signatory parties can find themselves bound by an arbitration agreement which are as follows:

Firstly, traditional contract principles like agency law may apply, where a principal could be held to the terms of an arbitration agreement signed by its agent. Similarly, an insurer who subrogates the rights of the insured might be bound when claiming indemnification. Other concepts such as Alter-ego, Estoppel, Third Party Beneficiary, and Assignment can come into play. For instance, an assignee of an insurance contract might have the right to initiate arbitration against the insurer of the original insured party; a merged entity could carry on with arbitration proceedings initiated by one of its original constituent entities or rules of succession.[14]

Secondly, the 'group of companies' doctrine allows for the extension of arbitration agreement benefits and responsibilities to other members of the same corporate group. This doctrine evolved within the realm of arbitration, permitting affiliates of a signatory to an arbitration clause to potentially be included.

A non-signatory may be bound by the operation of the group of companies doctrine as well as by the operation of the principles of assignment, agency and succession.[15]

i. Doctrine of Alter Ego

A party, which is not a signatory to a contract containing an arbitration clause, may be bound by the agreement to arbitrate if it is an alter ego of a party which executed the agreement.

The doctrine of alter ego is applied by courts when a company lacks distinct identity from a

[13] *M/s Caravel Shipping Services Pvt Ltd v M/s Premier Sea Food Exim Pvt Ltd*, (2019) 11SCC 461.
[14] Dr. PC Markanda, Naresh Markanda and Rajesh Markanda,Law Relating to Arbitration and Conciliation, LexisNexis Ninth Edition 2016
[15] Redfern and Hunter on International Arbitration, 5th Edn, 2.13, pp. 89-90.

promoter or a shareholder of that corporation. It lifts the corporate veil by viewing the directors or members of the company and the company itself as a single entity. The doctrine of alter ego is resorted to in exceptional cases to depart from the fundamental principle that only a signatory to an arbitration agreement is bound by it and there should be convincing evidence that the non-signatory is the alter ego of the signatory.[16]

ii. Doctrine of Estoppel

Under the doctrine of equitable estoppel, there are two types of theory which apply to a non-signatory party. These are :-

- **The Direct Benefits Estoppel Theory**

The direct benefits estoppel theory prohibits a party from taking an inconsistent position or attempting to benefit from a contract while disregarding its obligations. This principle prevents a party from selectively relying on a contract for advantageous terms while disavowing its obligation to arbitrate as stipulated in the same contract.

- **The Intertwined Estoppel Theory**

The focus under the intertwined estoppel theory is not on whether the non-signatory party received any benefit, but rather on the nature of the dispute between the signatory and the non-signatory more particularly the issues which the non-signatory seeks to resolve in arbitration.

The Delhi High Court in *Gaurav Dhanuka & Anr v. Surya Maintenance Agency Pvt. Ltd.*[17], has applied both the "direct benefits" estoppel theory and the "intertwined estoppel theory" to direct a non-signatory to arbitration.

iii. Doctrine Of Agency, Assignment Or Other Consensual Theories

The arbitration agreement can be extended to the third parties, compelling them to participate in arbitration proceedings even if they have not directly signed the agreement. This extension can occur through contractual methods such as agency, assignment, etc. establishing a link between a third party and the signatory of the arbitration agreement. For instance, when an agent enters into an arbitration agreement, either explicitly or implicitly, on behalf of the principal, the principal is deemed to have consented to be bound by the arbitration terms due to the application of principle of agency. The same may be applied to guaranty agreements where, in certain cases, the courts or tribunals may determine that the rights and obligations of the

[16] *Vatsala Jagannathan & Ors. v. Tristar Accommodations Ltd,, represented by its Managing Director and Ors.*, 2023 SCC OnLine Mad 308.
[17] *Gaurav Dhanuka & Anr v. Surya Maintenance Agency Pvt. Ltd*, 2023 SCC OnLine Del 2178.

 [ISSN 2581-5369]

guarantor are identical to the obligations of the guarantee under the agreement which contain the arbitration clause. Thus, by entering into the guaranty agreement, the guarantor consents to arbitrate.

iv. Doctrine Of Group of Companies

Generally, as per the law of contract, an agreement entered into by one of the companies in a group is not binding on other members of the same group. The parent or subsidiary company entering into such agreement will only be an entity in the group by that agreement unless acting in accordance with principles such as agency or representation. An arbitration agreement is governed by the same principles and only the company entering into it is bound by it.[18] The Courts and Tribunals will extend an arbitration clause to a non-signatory member of the group only if they are satisfied with the following conditions as ruled by the Supreme Court *in Oil and Natural Gas Corporation Ltd. Vs. Discovery Enterprises Pvt. Ltd. and Ors.*[19] The factors which make a non-signatory bound by the arbitration agreement are as follows:

(i) The mutual intention of the parties;

(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;

(iii) The commonality of the subject matter;

(iv) The composite nature of the transaction; and

(v) The performance of the contract.

VI. THE DYNAMIC EVOLUTION OF SUPREME COURT DECISIONS

While the jurisdiction of an arbitration agreement traditionally extends solely to the parties involved and those deriving their rights directly from them, English courts have, in specific instances, embraced the "Group of Companies Doctrine." Originating in the international context, this doctrine allows an arbitration agreement initiated by one company within a corporate group to potentially encompass its non-signatory affiliates, sister companies, or parent entities. This extension of scope is contingent upon circumstances demonstrating a shared intention among all parties to bind both signatories and non-signatory affiliates. This principle has found application in numerous arbitration cases, justifying a tribunal's jurisdiction over a party not explicitly signing the contract that incorporates the arbitration clause.

The first case which dealt with the Group of Companies Doctrine in domestic arbitrations was

[18] Indu Malhotra, O.P. Malhotra's Arbitration and Conciliation 81 (Thomson Reuters 2014) pp 1629.
[19] Oil and Natural Gas Corporation Ltd. Vs. Discovery Enterprises Pvt. Ltd. and Ors, 2022) 8 SCC 42.

 [ISSN 2581-5369]

Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya[20]. In this landmark decision, the dispute involved multiple parties entangled in the same transaction, with some parties in the dispute who were not parties to the arbitration agreement. The Appellant sought relief against some of these non-contracting parties. The Court, invoking Section 8 of the Act, unequivocally held that causes of action cannot be bifurcated in arbitration proceedings, and entities/individuals not parties to the arbitration agreement cannot be included into the same arbitration proceeding.

With the evolution of Group of Companies Doctrine, the Apex Court in 2013 in the *Chloro Controls Case* [21] held that a party which is not a signatory to the arbitration agreement can claim through the main party. It further said that arbitration could be possible between a signatory party to the arbitration agreement and a non-signatory/third party. Such third party can take the assistance of words "claiming through or under (a party)" enshrined under Section 45 of the Act. The Court thereafter enlisted the following attributes essential for the application of the doctrine:

a) **Direct Relationship**: The non-signatory or third party should have a direct relationship with the entity that is a signatory to the arbitration agreement.

b) **Composite Transaction**: The transaction involving both signatory and non-signatory parties should be viewed as a composite or integrated transaction.

c) **Common Subject Matter**: There must be a commonality of subject matter under the various agreements governing the relationship between the parties.

d) **Connected or Ancillary Agreements**: All agreements within the transaction, including those involving non-signatory parties, should be connected or ancillary to the agreement containing the arbitration clause.

A non-signatory party could be subjected to arbitration provided these transactions were with a group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. Thus, a non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases [22]. This decision was further confirmed in *Cheran Properties Ltd. v. Kasturi & Sons Ltd. & Ors* [23] and the Apex Court added that the group of companies doctrine is essentially intended to facilitate the fulfillment of a mutually held intent between parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence

[20] *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531
[21] *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification INC & Ors.*, (2013) 1 SCC 641.
[22] Supra
[23] *Cheran Properties Ltd. v. Kasturi & Sons Ltd. & Ors*, (2018) 16 SCC 413.

 [ISSN 2581-5369]

of the business arrangement and to unravel from al layered structure of a commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

Furthermore, along with Sections 8 and 45 of the Act, Section 35 of the Act also talks about the final and binding nature of the contract not only on the parties to the agreement but also on the persons claiming under them.

Since its establishment in the *Chloro Controls case*[24], Indian courts have consistently invoked the Group of Companies doctrine to compel non-signatories to adhere to arbitration agreements and awards. A notable development arose in the *Cox and Kings Limited vs. SAP India Private Limited case*[25], prompting the Supreme Court to refer key issues to a larger bench for a comprehensive examination of the Group of Companies doctrine:

i) Whether the phrase 'claiming through or under' in Sections 8 and 11 of the Act be interpreted to include the 'Group of Companies' doctrine?

ii) Whether the 'Group of Companies' doctrine, as articulated in *Chloro Control Case*[26] and subsequent judgments, holds legal validity?

The three-judge bench in *Cox and Kings Case*[27] expressed skepticism about the foundation of the doctrine, suggesting that previous decisions, including Chloro Control, may have been influenced more by economic and practical considerations than the law.

The Group of Companies doctrine, actively employed by Indian courts, has expanded the jurisdiction of arbitral tribunals while challenging the traditional concept of the 'Separate Legal Entity.' The latter, designed to grant companies autonomous existence, is a safeguard ensuring a division between the corporate entity and its stakeholders. This separation is typically maintained unless specific circumstances necessitate lifting the corporate veil.

The then Chief Justice of India, NV Ramana in the *Cox and Kings Case* acknowledged multi-party and multi-claim proceedings as one of the most challenging areas in both theoretical and practical sense. He further added that arbitration in general sense, unfolds between parties who have explicitly executed an arbitration agreement or parties with successor interests claiming under them. However, unique situations arise where third parties are bound by an arbitration clause by tactic consent, etc.

[24] Supra note 21.
[25] *Cox and Kings Limited vs. SAP India Private Limited*, (2022) 8 SCC 1.
[26] Supra note 21.
[27] Supra note 25.

 [ISSN 2581-5369]

The majority in the five-judge bench in *Cox and Kings case*[28] was opinionated that adopting the Group of Companies (GOC) doctrine by virtue of the law laid down in the case of *Chloro Controls*[29], was based on considerations of economics and convenience rather than of law. Further, it observed that the doctrine was theoretically based on considerations of efficiency and that efficiency could not have been the sole basis to bind a party to arbitration in the absence of a legal basis for grounding the doctrine in Indian jurisprudence. The Court further emphasized that the GOC doctrine is an exception to the general rule of arbitration. However, where the facts and circumstances of a case indicate that the intention of the parties was to bind the non-signatory, the courts after exercising due care and caution, will be justified in invoking the doctrine to do substantial and complete justice. The Court has continued to acknowledge and apply this doctrine in exceptional cases after the 2016 amendment to the Act, viewing all these factors in consonance., it can appear that the doctrine has found firm footing in Indian jurisprudence.

In a recent ruling by the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd 7& Anr*[30], the court addressed the applicability of the Group of Companies Doctrine to make a non-signatory, a party to the arbitration proceedings. The facts of the case are as follows: A contract was awarded by the appellant to the respondent no. 1 which is a company belonging to Jindal Group for operating a floating, production, storage and offloading vessel. Respondent no. 1 failed to adhere to the formalities/ procedures of conduct of business. Thus, the appellant invoked the arbitration clause against respondent no.1 and Jindal Group claiming that they constitute a single economic entity. Jindal group sought deletion from the array of parties on the ground that it was not a party to the arbitration agreement. It laid down five factors which help in deciding whether a company is within a group of companies which is not a signatory to the arbitration agreement- mutual intention of parties, their nature of relationship, commonality of subject matter, nature of business transactions and performance of the contract. The five-judge bench in the landmark case of *Cox and Kings*[31] cited *ONGC v. DEPL* while invoking the Group of Companies doctrine.

VII. CONCLUSION

In the complex realm of multi-party transactions or multilateral agreements, the question of whether non-signatory parties are bound by arbitration agreements has been a subject of

[28] *Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Ors.* Neutral Citation: 2023/INSC/1051.
[29] Supra note 21.
[30] *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd 7& Anr*, (2022) 8 SCC 42.
[31] Supra note 28.

longstanding debate. The Supreme Court in Cox and Kings case put an end to this decade-old debate by addressing the issue of whether an arbitration agreement entered into by one party extends its binding effect to group affiliates or individuals who are not signatories to the agreement. The Apex Court in its various recent rulings has emphasised that the mutual intention of the parties is significant to establish the inclusion of non-signatory party is subjected to arbitration. The Supreme Court has further laid down the factors which determine the binding nature of the arbitration agreement on third parties in the case of *ONGC v. DEPL*[32]. The development of the 'Group of Companies' doctrine in the Indian jurisprudence has helped the Courts in resolving the complexities of modern commercial transactions pertaining to arbitration. However, the courts should cautiously exercise their power to implead non-signatory parties to arbitration. Unjustified impleading of parties which are loosely affiliates of signatories would cause obstruction and delay in the dispute resolution process.

*****

[32] Supra note 30.

 [ISSN 2581-5369]