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Cox and Kings v. SAP India Pvt. Ltd. & Anr.: The Indian Supreme Court Revisits and Retains the Group of Companies Doctrine

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In December 2023, a five-judge bench of the Indian Supreme Court issued its much-awaited decision on the "group of companies" doctrine in *Cox and Kings v. SAP India Pvt. Ltd. & Anr.* ("*Cox and Kings*"),[1] confirming that the doctrine forms part of Indian law. In expressly reaffirming the applicability of the doctrine, the Indian Supreme Court continues to take a different approach to courts in many other jurisdictions.[2]

The issue of whether a party can be bound by or rely on an arbitration agreement in a contract that it did not sign has long been a topic of discussion. This is because arbitration is generally understood to require the consent of the parties. Courts and tribunals have relied on a number of different doctrines to find that a non-signatory party can rely on or be bound by an arbitration agreement, including, in some jurisdictions, the group of companies doctrine.[3] That doctrine provides, in broad terms, that a non-signatory can be bound by or rely on an arbitration agreement if the non-signatory is part of the same group of companies as a signatory. The doctrine is

[1] *Cox and Kings v. SAP India Pvt. Ltd. and Anr.,* 2023 INSC 1051.

[2] For example, English courts have expressly rejected the group of companies doctrine, holding that it "forms no part of English law." *See Peterson Farms Inc. v. C&M Farming Ltd,* [2004] EWHC 121 (Comm), at paras. 43, 65. Courts in Singapore and the U.S. have also rejected the doctrine. *See*, *e.g.*, *Manuchar Steel H.K. Ltd v. Star Pac. Line Pte Ltd,* [2014] SGHC 181, at para. 76; *Sarhank Group v. Oracle Corp*, 404 F.3d 657, 662 (2d Cir. 2005).

[3] For example, the group of companies doctrine has been recognized under French law. *See Dow Chemical France, the Dow Chemical Company & Ors. v. Isover Saint Gobain*, ICC Case No. 4131, IX Y.B. Comm. Arb. 131 (1984); *Sponsor A.B. v. Lestrade*, Cour d'appel [Regional Court of Appeal] Pau, Nov. 26, 1986, 1998(1) Revue de L'arbitrage 153, 156 (Fr.). *See also,* G. Born, *International Commercial Arbitration,* 3rd ed., 2021, at §10.02[E].

sometimes criticized for conflicting with the principle that companies have separate legal personalities as well as the principle of privity of contract.

The Indian Supreme Court first adopted the group of companies doctrine in its 2012 decision in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.* ("*Chloro Controls*").[4] That decision and its application in subsequent cases has been controversial, and *Cox and Kings* gave the Court a chance to revisit the applicability of the doctrine. In *Cox and Kings*, the five-judge bench of the Supreme Court disagreed with the reasoning in *Chloro Controls*, but concluded that the group of companies doctrine nonetheless "should be retained in the Indian arbitration jurisprudence." The Court explained that the group of companies doctrine is a "consent-based doctrine,"[5] and clarified the scope of its continued application.[6]

In coming to this conclusion, the Court relied on international arbitration authorities including Gary Born's treatise on *International Commercial Arbitration*. Specifically, the Court agreed with Born that: (i) the application of the group of companies doctrine is "based on identifying the mutual intention of the parties"[7] to bind the non-signatory to the arbitration agreement; and (ii) the doctrine promotes efficiency and expedition by prohibiting non-signatory affiliates from circumventing or frustrating the arbitration agreement through satellite litigation.[8]

The Indian Supreme Court's Recognition of the Group of Companies Doctrine in Chloro Controls and Subsequent Decisions

In *Chloro Controls*, the Indian Supreme Court recognized the group of companies doctrine as part of Indian law.[9] Following that decision, the Supreme Court and other Indian courts have applied the doctrine to bind non-signatories in a number of other cases.[10] However, the Court's reasoning in *Chloro Controls* has been criticized for a number of reasons, including for arguably leading to an overexpansion of the doctrine in subsequent case law.[11]

The facts of *Chloro Controls* are complex. The dispute concerned various entities across two groups of companies, one foreign and one Indian, that had entered into a series of agreements for the distribution of chlorination equipment in India. Not all the contracting entities were parties to all the agreements. However, the principal contract – a shareholders agreement – contained an arbitration agreement. When a dispute arose, the Respondent entities applied for it to be referred to arbitration under the shareholders agreement. They did so on the basis that all the agreements formed part of a composite transaction and any non-signatories to the shareholders agreement

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[4] *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc*., (2013) 1 SCC 641.
[5] *Cox and Kings,* at para. 81.
[6] *Cox and Kings*, at para. 165.
[7] *Cox and Kings,* at paras. 26, 56(II) (Narasimha J., concurring). *See also, Cox and Kings,* at paras. 101, 123.
[8] *Cox and Kings,* at para. 100.
[9] *Chloro Controls,* at para. 148.
[10] *See e.g., ONGC Ltd. v. Discovery Enterprises,* (2022) 8 SCC 42; *MTNL v. Canara Bank,* (2020) 12 SCC 767; *Cheran Properties v. Kasturi and Sons,* (2018) 16 SCC 413; *Ameet Lalchand Shah v. Rishabh Enterprises*, (2018) 15 SCC 678.
[11] For an in-depth discussion of the Indian approach to group of companies doctrines, *see* C. Caher, D. Prasad, and S. Irani, *The Group of Companies Doctrine – Assessing the Indian Approach*, 9 Indian J. Arb. L. 33 (2021).

were bound on the basis of the "group of companies" doctrine because they are parties "claiming through or under" the signatory under Section 45 of the Indian Arbitration and Conciliation Act, 1996 (the "Act"). Section 45, which is materially identical to Article II(3) of the New York Convention,[12] allows a party – as well as any person claiming "through or under" a party to an arbitration agreement – to seek to refer a matter brought before a national court to arbitration.[13]

The Indian Supreme Court held that, under certain circumstances, a non-signatory affiliate of the signatory could be said to be claiming "through or under" the rights of the signatory and therefore could be bound by the arbitration agreement. The Court emphasized that key considerations were "the language of the contract" and "the intention of the parties to refer all the disputes between all the parties to the arbitration tribunal…."[14] However, the Court also identified certain circumstances where a non-signatory could be bound by an arbitration agreement "without their prior consent."[15] One of those circumstances was when there was a "direct relationship" between the signatory and non-signatory.[16]

Following *Chloro Controls*, the Court applied the group of companies doctrine in a number of cases. For example, in *Cheran Properties v. Kasturi & Sons*,[17] relying on the phrase "through or under" in Section 35 of the Act, the Supreme Court held that an award could be enforced against a non-signatory even though it did not participate in the arbitration. [18] In *MTNL v. Canara Bank*, the Court observed that the doctrine may apply even where there is a tight group structure with strong organizational and financial links, constituting a "single economic reality."[19] Lower courts have followed the Supreme Court's approach and applied the doctrine expansively.[20]

The Supreme Court's Decision in Cox and Kings To Reaffirm But Restate the Basis for the Group of Companies Doctrine

[12] New York Convention, at Article II(3) ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed").
[13] Arbitration and Conciliation Act, 1996, at Section 45 ("Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed). Other sections of the Act with similar language include Section 8 (providing that judicial authorities can refer a party or "any person claiming through or under him" to arbitration); Section 35 (providing that an arbitral award shall be final and binding "on parties and persons claiming under them respectively"); Section 54 (providing that judicial authorities may refer parties "or any person claiming through or under him" to arbitration); Section 73 (providing that settlement agreements shall be binding on "parties and persons claiming under them").
[14] *Chloro Controls*, at para. 72.
[15] *Chloro Controls*, at para. 73.
[16] *Chloro Controls,* at para. 73.
[17] *Cheran Properties v. Kasturi and Sons Ltd.*, (2018) 16 SCC 413.
[18] *Cheran Properties v. Kasturi and Sons Ltd.*, (2018) 16 SCC 413, at paras. 24-28 and 34.
[19] *MTNL v. Canara Bank*, (2020) 12 SCC 767, at para. 10.5.
[20] *See, e.g., Nirmala Jain & Ors. v. Jasbir Singh & Ors.*, 2018 SCC OnLine Del 11342; *RV Solutions*, (2019) 257 DLT 104.

The dispute in *Cox and Kings* relates to a software license agreement between Cox and Kings and SAP India Private Limited, which contained an arbitration agreement. Cox and Kings commenced an arbitration against SAP India Private Limited as well as against its parent company SAP SE GmbH, which was not a signatory to the contract containing the arbitration agreement. After the SAP entities failed to appoint an arbitrator, Cox and Kings applied to the court under Section 11 of the Act to appoint an arbitrator on their behalf. In its Section 11 application, Cox and Kings relied on *Chloro Controls* to argue that the non-signatory parent company – SAP SE GmbH – was bound by the arbitration agreement pursuant to the group of companies doctrine. In May 2022, a three-judge bench of the Court referred the question of the doctrine's continued application to a larger bench.

The three-judge bench formulated certain questions for the larger bench including: (i) whether the "phrase 'claiming through and under' in Sections 8 and 11 [in the Arbitration Act] could be interpreted to include the 'Group of Companies' doctrine"; and (ii) "whether the Group of Companies Doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?"[21]

Although the larger bench disagreed with the reasoning in *Chloro Controls*, it upheld the continued application of the group of companies doctrine in India.[22] The Court's key conclusions are set out below.

First, the Court concluded that "the approach … in *Chloro Controls* to the extent that it traced the group of companies doctrine to the phrase 'claiming through or under' is erroneous…."[23] The Court explained that the phrase "through or under" in various provisions of the Act only applies to entities acting in a *derivative* capacity (i.e., it applies where a party is asserting a right or being subjected to an obligation that it has derived from a party to the arbitration agreement) and not to parties acting in their own right. The Court therefore concluded that phrase could not be a basis for applying the doctrine because its purpose is to determine whether an affiliate of a signatory can be "made a party to the arbitration agreement ***in its own right***."[24]

The Court further held that the "basis for" binding a non-signatory to an arbitration agreement under the group of companies doctrine is the "harmonious reading of Section 2(1)(h) along with Section 7" of the Act.[25] Section 2(1)(h) contains the definition of "party,"[26] while Section 7 deals with the form of the arbitration agreement. The Court concluded that the definition of "party" in Section 2(1)(h) includes both signatories and non-signatories to the arbitration agreement and therefore does not prevent the application of the group of companies doctrine.

The Court also clarified the legislative intent underlying Section 7. Section 7 permits parties to submit any disputes "in respect of a defined legal relationship whether contractual or non-

[21] *Cox and Kings v. SAP India Pvt. Ltd. and Anr.,* (2022) 8 SCC 1, at paras. 54, 104; *Cox and Kings*, at paras. 4-5.
[22] *Cox and Kings*, at para. 165.
[23] *Cox and Kings*, at para. 165(j).
[24] *Cox and Kings*, at para. 146.
[25] *Cox and Kings,* at para. 149.
[26] Arbitration and Conciliation Act, 1996, at Section 2(1)(h) ("'party' means a party to an arbitration agreement").

contractual" to arbitration, but requires the arbitration agreement to be "in writing."[27] The Court clarified that for legal relationships under Section 7 to be categorized as "contractual in nature, they ought to meet the requirements of" the Indian Contract Act, 1872.[28] The Indian Contract Act provides that "a contract can either be express or implied" and an implied contract "is inferred on the basis of action or conduct of the parties." [29] Therefore, "it is not necessary for …entities to be signatories to a contract to enter into a legal relationship...." [30] For non-signatories, "***the important determination for the courts is whether the persons or entities intended or consented to be bound by the arbitration agreement … through their acts or conduct***."[31]

The Court also explained that the writing requirement in Section 7 does not prevent a non-signatory from being bound by it and, therefore, does not prevent the application of the doctrine. This is because, while an arbitration agreement must be in writing, it "need not be signed."[32] According to the Court, the writing requirement is to "ensure that there is a clearly established record of the consent of the parties to refer their disputes to arbitration" – but the form of "such agreement is...irrelevant."[33] Further, the Court noted that the inquiry under Section 7(4)(b) – which provides that an arbitration agreement meets the writing requirement 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" – and the group of companies doctrine is the same.[34] Therefore, the doctrine "can be subsumed within Section 7(4)(b) …."[35]

Second, the Court held that the group of companies doctrine is a "***consent-based doctrine***."[36] Accordingly, its application "depends upon the consideration of a variety of factual elements to establish the mutual intention of all the parties involved."[37] Referring to English and Australian decisions,[38] the Court found that under common law a party could not be bound by an arbitration agreement simply because it shared a "legal or commercial connection," such as membership in the same corporate group with the signatory to an arbitration agreement.[39]

The Court therefore held that, for the group of companies doctrine to apply, not only do the signatory and non-signatory have to be part of the same corporate group, but there also must be "a mutual intention of all the parties to bind the non-signatory to the arbitration agreement."[40] The Court explained that whether there was such an intention should be determined based on a "holistic" application of the factors it had previously identified in *Oil and Natural Gas Corporation v.*

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[27] Arbitration and Conciliation Act, 1996, at Section 7.
[28] *Cox and Kings*, at para. 74.
[29] *Cox and Kings*, at para. 74.
[30] *Cox and Kings*, at para. 74.
[31] *Cox and Kings,* at para. 78.
[32] *Cox and Kings*, at para. 75.
[33] *Cox and Kings*, at para. 78.
[34] *Cox and Kings*, at para. 56(I) (Narasimha J., concurring).
[35] *Cox and Kings*, at para. 56(III) (Narasimha J., concurring).
[36] *Cox and Kings,* at para. 81.
[37] *Cox and Kings*, at para. 111.
[38] *The Mayoralty and Commonalty & Citizens of the City of London v. Ashok Sancheti*, [2008] EWCA Civ 1283 (E&W); *Tanning Research Laboratories Inc. v. O'Brien* [1990] HCA 8 (Australia).
[39] *Cox and Kings,* at para. 135.
[40] *Cox and Kings*, at para. 105.

Discovery Enterprises ("*Discovery Enterprises*").[41] The factors identified in *Discovery Enterprises* are:

1. **Involvement of the non-signatory in the performance of the contract containing the arbitration agreement**: The Court held that a non-signatory's involvement in the performance of the contract containing the arbitration agreement is "***the most important factor to be considered by the courts and tribunals***."[42]

2. **Nature of the relationship between the non-signatory and the signatory**: The Court noted that the presence of strong organizational and financial links between the non-signatory and the signatory company could indicate a mutual intention for the non-signatory to be bound by the agreement.[43]

3. **Commonality of subjectmatter between the contract and the conduct of the non-signatory**: The Court noted that commonality between the subject matter of the contract containing the arbitration agreement and the conduct of the non-signatory is relevant. If the non-signatory's actions are connected to the signatory's contractual obligations, it would weigh in favor of applying the group of companies doctrine.[44]

4. **Common participation in a composite transaction**: The Court noted that, in cases involving multiple agreements, a court or tribunal must assess the degree to which the various agreements are linked. If the principal agreement (containing the arbitration agreement) cannot be performed in isolation, requiring the performance of a connected agreement to which the non-signatory is a party, that could indicate that the non-signatory intended to be bound by the arbitration agreement contained in the principal agreement.[45]

The Court also made clear that the fact that the non-signatory and the signatory belong to a "single economic unit" cannot be "the sole basis for invoking the group of companies doctrine."[46] In doing so, the Court clarified its previous decision in *Mahanagar Telephone Nigam Limited v. Canara Bank*, where it had held that the group of companies doctrine could be invoked "in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit or a single economic reality."[47] The Court explained that it "did not apply the group of companies doctrine solely on the basis that the companies belonged to a single economic

[41] *Oil and Natural Gas Corporation v. Discovery Enterprises,* (2022) 8 SCC 42 at para. 40.
[42] *Cox and Kings*, at para. 118.
[43] *Cox and Kings*, at para. 114.
[44] *Cox and Kings*, at para. 115 ("Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.").
[45] *Cox and Kings*, at paras. 116-117.
[46] *Cox and Kings*, at para. 165(h).
[47] *Cox and Kings*, at para. 165(h) (overruling *Mahanagar Telephone Nigam Limited v. Canara Bank*, (2020) 12 SCC 767, at para 10.7).

unit. Rather, it was held that there was an implied or tacit consent by the non-signatory party … to being impleaded in the arbitral proceedings."[48]

Third, the Court also clarified that, because the group of companies doctrine is based on consent, it is conceptually distinct from "non-consensual" theories such as piercing of the corporate veil or the alter-ego doctrine.[49] On this basis, the Court explained that the application of the doctrine does not impinge on the separate legal personality of entities within a corporate group.

Fourth, the Court held that, because a non-signatory that is bound by an arbitration agreement is considered a "party" in its own right, it can seek interim measures from Indian courts under Section 9 of the Act.[50] However, the Court clarified that a non-signatory party can only seek interim measures "[o]nce a tribunal comes to the determination that a non-signatory is party to the arbitration agreement."[51] The practical implication of this may be limited, because, under Section 9(3) of the Act, once an arbitral tribunal is constituted, a court is only permitted to hear applications for interim relief if it is convinced that an interim order from a tribunal would not be efficacious.[52]

Finally, the Court clarified that the arbitral tribunal, and not a court, should decide on the application of the group of companies doctrine. Specifically, when a party applies to a court either to refer a dispute to arbitration (under Section 8 of the Act) or to appoint an arbitrator (under Section 11 of the Act), the court should restrict its decision to a *prima facie* determination of the existence of an arbitration agreement.[53] This clarification by the Court may reduce concerns that retaining the group of companies doctrine in Indian jurisprudence could lead to unnecessary delays and unwarranted judicial intervention in arbitration proceedings.

Conclusion

The Supreme Court's decision in *Cox and Kings* provides clarity on the parameters of the group of companies doctrine under Indian law. The Court redefined the contours of the doctrine to permit its application only once the "mutual intention of all the parties to bind the non-signatory to the arbitration agreement"[54] is established. The Court's focus on consent provides a principled way to find that disputes involving complex multi-party and multi-contract transactions can be resolved in an arbitration proceeding. As the Court noted, its decision seeks to strike a "***balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways***."[55] Going forward, the Court's clarification on the parameters of the group of companies doctrine – and its

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[48] *Cox and Kings*, at para. 114.
[49] *Cox and Kings*, at para. 104.
[50] *Cox and Kings*, at para. 153. While the Court did not expressly address this, it appears likely that the opposite is also true: *i.e.*, that a signatory party can seek interim measures against a non-signatory found to be a party to the arbitration agreement.
[51] *Cox and Kings*, at para. 153.
[52] Arbitration and Conciliation Act, 1996, at Section 9(3) ("Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.").
[53] *Cox and Kings*, at para. 164.
[54] *Cox and Kings*, at para. 105.
[55] *Cox and Kings*, at para. 127.

focus on consent – should limit the expansive application that followed *Chloro Controls*. It also may lead other jurisdictions to consider the same approach.

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WilmerHale's publications on other developments in arbitration relating to India include updates on the following:

- The Indian Supreme Court's decision clarifying that two Indian parties can choose a foreign arbitral seat: https://www.wilmerhale.com/en/insights/blogs/international-arbitration-legal-developments/20210525-pasl-wind-solutions-pvt-ltd-v-ge-power-conversion-india-pvt-ltd
- The 2020 amendments to the Indian Arbitration Act: https://www.wilmerhale.com/en/insights/client-alerts/20201215-recent-amendments-to-arbitral-laws-india-and-singapore
- The 2015 amendments to the Indian Arbitration Act:
  - https://www.wilmerhale.com/en/insights/client-alerts/2015-12-11-india-revises-the-1996-arbitration-act; and
  - https://www.wilmerhale.com/en/insights/client-alerts/2016-01-14-indian-parliament-enacts-revisions-to-the-1996-arbitration-act

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