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BINDING NON-SIGNATORIES TO AN ARBITRATION

- CHARTING THE SHIFTING PARADIGMS

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Introduction

Commercial transactions in today's context are often complex, multi-layered and involve parties from several jurisdictions executing numerous documents. Consequently, contracting parties encounter several challenges in ensuring that the primary commercial objective is fulfilled along with safeguarding the interest of parties who are integral to the transaction.

In balancing the interests of all stakeholders there are complications and time and again roadblocks are encountered when these complex multi-layered transactions end up before dispute resolution forums (mostly arbitrations in the present scheme of matters). In such scenarios judges and arbitrators are often confronted with the task of ensuring that party autonomy is not compromised while also bringing the entire dispute under one umbrella in keeping with the original intent of parties.

Against this backdrop this paper traces the journey of the group of companies/single economic entity doctrine in India and the treatment it has been meted with by judges and arbitrators alike and analyses the shifting trends in arbitral proceedings. Where appropriate, references have also been made to common law principles and precedents to evaluate how the doctrine has evolved in common law jurisdictions other than India.

Analysis

An Early International Perspective

Dow Chemical v. Isover-Saint-Gobain- Origins of the 'Group of Companies' doctrine

One of the earliest known adoptions and promulgation of the 'Group of Companies' doctrine can be traced to the ICC arbitral award in *Dow Chemical v. Isover-Saint-Gobain*¹. In that matter, the dispute arose out of several contracts executed by various Dow Chemical Company subsidiaries (but not Dow Chemical Company itself) and Isover. Dow Chemical Company together with its subsidiaries commenced arbitration. Isover objected to jurisdiction over the claims asserted by Dow Chemical Company on the ground that the latter was not a party to the contract. The tribunal upheld its jurisdiction. In its award, the ICC arbitral panel stated that mere corporate ties between different companies were not enough to bind them to a single arbitration and the non-signatory companies must have played an essential role in the '*conclusion, performance or the termination*' of the contracts. It was held therein as follows:

“Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique) of which the arbitral tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules.

Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.” (emphasis supplied)

¹ *Dow Chemical v. Isover-Saint-Gobain*, ICC Award No. 4131, YCA 1984, at 131 et seq., available at <https://www.trans-lex.org/204131>, last visited on November 13, 2019.

Indian Jurisprudence on the subject:

The question then arises that what would be a good starting point in the Indian context, regarding whether a non-signatory can be bound by an arbitration agreement, and if so, in what circumstances?

The Supreme Court of India, in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors.*², had observed that causes of action against different parties cannot be bifurcated in a single arbitration and that an arbitration agreement will only bind the parties which have entered into the same.

A few years down the line in a series of judgments starting from *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*³ to the recent judgment in *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*⁴, the Supreme Court has gradually clarified and broadened its position in this regard by adopting the 'Group of Companies' doctrine, and indeed the High Courts have also passed several important judgments in this regard.

a) Sukanya Holdings- The Supreme Court holds that only signatories are bound by an arbitration agreement

In *Sukanya Holdings* (supra), disputes had arisen between several parties in relation to the same transaction. However, all these parties were not signatories to the agreement containing the arbitration clause and the Supreme Court stated that the non-signatory parties could not be referred to a single arbitration, in the context of Section 8 of the Arbitration and Conciliation Act, 1996⁵ ('the Act'). It was further held that causes of action cannot be bifurcated in an arbitration and thus the arbitral proceedings could be restricted only to the parties to the arbitration agreement. Therefore, any person who was not a party to the arbitration agreement could not be brought into the arbitration. The Supreme Court held as follows:

"15. The relevant language used in Section 8 is--"in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since

² *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors.*, (2003) 5 SCC 351.

³ *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*, (2013) 1 SCC 641.

⁴ *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*, 2019 SCC OnLine SC 995.

⁵ Section 8 of the Act, as it stood then, reads as follows:

"Section 8. Power to refer parties to arbitration where there is an arbitration agreement. (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.” (emphasis supplied)

A reading of the judgment of the Supreme Court in *Sukanya Holdings* (supra) clearly suggests that as of the year 2003, party autonomy was considered to be supreme and judicial interpretation was in favour of excluding non-signatories irrespective of the commercial intent between the contracting parties. It is pertinent to mention here that till date, the judgment in *Sukanya Holdings* (supra) has not been overruled. However, whether the same is still good law after a spate of recent judgments on the issue by the Supreme Court, is a matter of debate.

b) Chloro Controls and a subsequent broadening of the position

So how have we evolved since the days of *Sukanya Holdings* (supra)? The year 2013 sees the Supreme Court setting down a landmark precedent in the *Chloro Controls* (supra) judgment. Not only does the concept of party autonomy get diluted significantly but the Apex Court highlights the commercial prudence of bringing the entire dispute resolution process under one umbrella i.e., an arbitration proceeding which not only encompasses parties who are signatories to the arbitration agreement but non-signatories as well.

In *Chloro Controls* (supra), the facts involved a principal agreement, being a Shareholders' Agreement, between an Indian party and a foreign party, with the English law being the governing law and London being the seat of arbitration, and several interconnected agreements stemming from the said Shareholders Agreement but not between the same parties. Dealing with the question whether all these parties could be referred to a single arbitration and whether such an order would be in conflict with its earlier judgment in *Sukanya Holdings* (supra), the Supreme Court stated that *Sukanya Holdings* (supra) was passed in the context of Section 8 of the Act while the facts in this case fell within the ambit of Section 45 of the Act, of which a much wider interpretation was possible. It was held that *the expression “person claiming through or under” appearing at Section 45 of the Act could be given a much wider import and “would mean and take within its ambit multiple and multiparty agreement, though in exceptional cases”*⁶. The Supreme Court also applied the 'Group of Companies' doctrine and held as follows:

“66. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [‘Russell on Arbitration’ (Twenty Third Edition)].

67. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, ‘intention of the parties’ is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.”(emphasis supplied)

⁶ Section 45 of the Act reads as follows:

“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 finds that the said agreement is null and void, inoperative or incapable of being performed.”

c) Amendment of the Arbitration and Conciliation Act, 1996 and applicability of the ratio in Chloro Controls to domestic arbitrations

Since the judgment in *Chloro Controls* (supra) was passed in the context of Section 45 of the Act, and *Sukanya Holdings* (supra) held the field when it came to non-signatory parties being referred to an arbitration in the domestic scenario, it might seem like an automatic presumption that non-signatory parties could never be bound by an arbitration agreement in a reference under Section 8 of the Act. However, even prior to the amendment of the Act in 2015, Indian courts had alluded to their power (it is debatable whether correctly or not) to apply the ratio in *Chloro Controls* (supra) to a domestic arbitration. In an application under Section 9 of the Act where certain pre-arbitration reliefs were prayed for against non-signatory parties also, the Division Bench of the Bombay High Court, though deciding the matter on the facts of that case and the wide import of the arbitration clause, referred to the ratio in *Chloro Controls* (supra) and the power of the courts to refer non-signatory parties to arbitration, even though the disputes here were between domestic parties⁷.

Major amendments were carried out to the Act through the Arbitration and Conciliation (Amendment) Act, 2015 ('the Amendment Act'), including to Section 8 therein, whereby the words 'a party to the arbitration agreement or any person claiming through or under him' were included to replace the word 'party'⁸.

d) Does that necessarily imply that the ratio in Chloro Controls (supra) can now be applied to domestic arbitrations?

Our evaluation shows that this has been a mixed bag across the spectrum with no clear trend emerging. In *Duro Felguera, S.A. v. Gangavaram Port Ltd.*⁹, the fact situation involved multiple contracts entered into by and between Gangavaram Port Ltd. ('GPL') and a Spanish company as well as FGI, the Spanish company's subsidiary. GPL argued that a composite reference to arbitration should be made for all the companies, following the ratio in *Chloro Controls* (supra). However, the Supreme Court held that the ratio in *Chloro Controls* (supra) will be inapplicable in this case since there were multiple contracts between GPL and the Spanish company as well as GPL and FGI, each having separate arbitration clauses, whereas in *Chloro Controls* (supra) all the agreements were part of a composite transaction which emanated from the principal agreement, which contained the arbitration clause. Further, the Court also pointed out that while the agreements between GPL and the Spanish company contemplated international arbitrations between them, those between GPL and FGI contemplated domestic arbitrations, and therefore if the award (in case a composite reference was made) came to be challenged before an Indian court, there would be no clarity regarding applicability of Section 34 of the Act to such award. In such scenario, a reference to a single arbitration for all the agreements could not be possibly made.

⁷ *Rakesh S. Kathotia & Anr v. Milton Global Ltd. & Ors*, 2014 SCC OnLine Bom 1119.

⁸ Post the amendment to the Act, Section 8 reads as follows:

"8. Power to refer parties to arbitration where there is an arbitration agreement.—(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

⁹ *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729.

In *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Ors.*¹⁰, the Supreme Court was faced with the question whether, post the amendment of the Act (and Section 8 thereof), non-signatory parties could be referred to a single composite domestic arbitration, when such parties had entered into several contracts with each other (not all of which contained arbitration clauses also) in connection with the execution of the same project. The Supreme Court analysed the amendments to Section 8 of the Act as well as the 246th Report of the Law Commission and observed as follows:

“28. “Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments — (i) the relevant “party” that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming “through or under” such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a finding whether “no valid arbitration agreement exists” and the nature of examination by the judicial authority is clarified to be on a “prima facie” basis; (iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean “the date of” submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same.” (Ref.: Justice R.S. Bachawat’s Law of Arbitration and Conciliation, Sixth Edn., Vol. I (Sections 1 to 34) at p. 695 published by LexisNexis).

29. Amendment to Section 8 by the 2015 Act, are to be seen in the background of the recommendations set out in the 246th Law Commission Report. In its 246th Report, Law Commission, while recommending the amendment to Section 8, made the following observation/comment:

LC Comment:

*“The words “such of the parties ... to the arbitration agreement” and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya* [*Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531] in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary [Ed.: Emphasis in original.] parties to the action — and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.”*

On the basis of the aforementioned observations, the Supreme Court went on to hold that all the agreements were entered into in pursuance of a single project, were intrinsically connected to each other and one of the said agreements viz. the Equipment Lease Agreement between two of

¹⁰ *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Ors.*, (2018) 15 SCC 678.

the parties was the main agreement and the remaining agreements were ancillary agreements to the same. Since the said Equipment Lease Agreement contained an arbitration clause, the Supreme Court held that all the parties involved could be referred to a single composite arbitration.

e) Impact of Supreme Court's observations in Ameet Lalchand Shah (supra)

This judgment is pathbreaking for two reasons- (i) The Court applied the rationale adopted in *Chloro Controls* (supra), though not expressly so, to a fact situation within the ambit of Section 8 of the Act, though that judgment was passed in the context of Section 45 of the Act; and (ii) by referring to the language of the amended Act, particularly Section 8 thereof as well as the 246th Report of the Law Commission of India, the Hon'ble Supreme Court has diluted the applicability of *Sukanya Holdings* (supra) in a Section 8 scenario to a large extent. The introduction of the phrases '*party to the arbitration agreement or any person claiming through or under him*' (which is similar to that used in Section 45 of the Act) and '*notwithstanding any judgment, decree or order of the Supreme Court or any Court*' to the amended Section 8 of the Act has been interpreted by the Hon'ble Supreme Court to refer parties who have executed agreements forming part of the same transaction to a composite arbitration, even if all of those agreements do not contain arbitration clauses. Therefore, *Sukanya Holdings* (supra), though not overruled, may have very limited applicability in similar fact scenario, and may only be used to test whether all the parties sought to be referred to a composite arbitration are necessary parties, or whether the arbitration agreement itself is bad in law¹¹. This wide interpretation has been adopted by the Supreme Court in recent cases, as will be seen hereinbelow.

f) Cheran Properties-Execution of Arbitral Award against non-signatory and 'intention of parties'

One of the biggest concerns of contracting parties globally has been the ability to effectively enforce arbitration awards in India. Against this backdrop, the observations of the Supreme Court in a recent judgment (discussed below) is of considerable interest inasmuch as it aims to bring non-signatories to arbitration agreements within the ambit of execution proceedings in an appropriate case. Whether this opens up a Pandora's box or ends up being an effective tool in the hands of a genuine litigant is to be seen in the days that follow but the endeavour at some level seems to point towards greater recognition and acceptance of the Group of Companies doctrine.

The Supreme Court in *Cheran Properties Limited v. Kasturi and Sons Limited*¹² went on to hold that even an arbitral award may be binding on a third party if such party falls within the meaning of '*parties and persons claiming under them*' under Section 35 of the Act¹³. In this case, the award-holder sought execution of the arbitral award against a third party contending that such party was a nominee of the judgment-debtor, even though the principal agreement, being a Share Purchase Agreement containing the arbitration clause, was entered into only between the award-holder and the judgment-debtor and the arbitral proceedings were also only conducted between them. The Supreme Court relied heavily on its judgment in *Chloro Controls* (supra) and held as follows:

¹¹ The Hon'ble Supreme Court itself, in its judgment in *Emaar MGF Land Limited v. Aftab Singh*, 2018 SCC Online SC 2771, observed this diluting down of the position in *Sukanya Holdings* (supra) in the following words:

"The amended provision, thus, limits the intervention by judicial authority to only one aspect, i.e. refusal by judicial authority to refer is confined to only one aspect, when it finds that prima facie no valid arbitration agreement exists. Other several conditions, which were noticed by this court in various pronouncements made prior to amendment were not to be adhered to and the Legislative intent was clear departure from fulfilling various conditions as noticed in the judgment of *P. Anand Gajapathi Raju* (supra) and *Sukanya Holdings (P) Ltd.* (supra)." (see paragraph 46)

¹² *Cheran Properties Ltd. v. Kasuri and Sons Ltd. & Ors.*, (2018) 16 SCC 413.

¹³ Section 35 of the Act reads as follows:

"35. Finality of arbitral awards.—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively."

“As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of 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.” (emphasis supplied)

The tenets in *Cheran Properties* (supra) have, however, been adopted with caution and the Supreme Court has broadly espoused that the facts and circumstances of each case must be evaluated in context before foisting a principle of law. In *Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing India Private Limited and Ors.*¹⁴ the Supreme Court in keeping with the aforementioned espousal in *Cheran* (supra), has observed that unless the non-signatory's intention to be bound by the arbitration agreement can be established, such non-signatory cannot be referred to arbitration. In this case, the petitioner had sought to implead the respondent (with which it had entered into an agreement) as well as a group company of the respondent (which was not a signatory to such agreement) in the arbitration proceeding by invoking the 'group of companies' doctrine. However, even though a clause in the said agreement mentioned that the non-signatory group company would indemnify the petitioner in case of breach by the respondent, it was not found to be involved in any other way towards the negotiations or the execution of the said agreement. It was held by the Court as follows:

“...If the main plank of the applicant, that Mr. Frederik Reynders was acting for and on behalf of respondent No.2 and had the authority of respondent No.2, collapses, then it must necessarily follow that respondent No.2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if respondent No.2 happens to be a constituent of the group of companies of which respondent No.1 is also a constituent, that will be of no avail. For, the burden is on the applicant to establish that respondent No.2 had an intention to consent to the arbitration agreement and be party thereto, maybe for the limited purpose of enforcing the indemnity clause 9 in the agreement, which refers to respondent No.1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein. That burden has not been discharged by the applicant at all. On this finding, it must necessarily follow that respondent No.2 cannot be subjected to the proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process.” (emphasis supplied)

g) Most recent trends

MTNL v. Canara Bank- Clarification on when the 'Group of Companies' doctrine can be invoked

The Supreme Court in *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*¹⁵, while allowing the impleadment of a non-signatory party to single composite arbitration by invoking the

¹⁴ *Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing India Private Limited and Ors.*, (2019) 7 SCC 62.

¹⁵ *Supra* at 3.

'Group of Companies' doctrine, clearly laid down the circumstances in which such doctrine can be invoked by the courts. After referring to the ICC award in *Dow Chemicals* (supra), the Court observed as follows:

"The 'Group of Companies' doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.

The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A 'composite transaction' refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.5. The Group of Companies Doctrine has also been 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. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group." (emphasis supplied)

The Supreme Court also noted that the 'Group of Companies' doctrine has now been applied to domestic arbitrations in the *Ameet Lalchand Shah* (supra) judgment. Following the aforementioned observation in *Mahanagar Telephone Nigam* (supra) as well as the principles laid down in *Dow Chemicals* (supra), it may be stated that the courts may ordinarily invoke the 'Group of Companies' doctrine and refer non-signatory group companies to a single composite arbitration if the following conditions are met:-

- i. It is established that it was the intention of all the parties to bind the signatory as well as the non-signatory group companies to the arbitration agreement;
- ii. The non-signatory company has either:-
 - a. Been engaged in the negotiation or the performance or the termination of the contract; or
 - b. Made statements expressing its intention to be bound by the contract;
- iii. The non-signatory signatory has a direct relationship with the signatory party or the parties are involved in the execution of a composite transaction, i.e. a transaction with a common or shared business objective which would not be possible without the participation of the non-signatory party.
- iv. The 'Group of Companies' doctrine may also be invoked by the courts if it can be established that the signatory and non-signatory parties exist within a tight group

structure with strong organizational and financial links, so as to constitute 'a single economic unit', or 'a single economic reality'.

The 'Group of Companies' doctrine, as espoused in the *Mahanagar Telephone Nigam* (supra) case by the Supreme Court, has also been relied upon by the High Courts at Telengana¹⁶ and Calcutta¹⁷ in recent judgments.

h) Applicability of the 'Group of Companies' or 'single economic reality' concept in other common law jurisdictions

It may be pertinent to mention at this stage that the wholehearted acceptance of the 'Group of Companies' doctrine through the Hon'ble Supreme Court's judgments in *Chloro Controls* (supra), *Ameet Lalchand Shah* (supra) and *Mahanagar Telephone Nigam* (supra) is a major departure from the position regarding the same in other significant common law jurisdictions such as the United Kingdom ('UK'), Singapore or even the United States of America ('US'), where the 'Group of Companies' doctrine has not been adopted to such an extent, if at all.

In *Peterson Farms Inc. v. C&M Farming Ltd.*¹⁸, the respondent in an arbitration sought a declaration from the Court that certain findings in an award were made without jurisdiction because those findings related to members of the claimant group that did not enter into a binding arbitration agreement with the respondent. The respondent's argument had been rejected by the arbitral tribunal because the tribunal accepted the 'Group of Companies' doctrine. The award was challenged before the UK Commercial Court by the Respondent, which held that the arbitral tribunal's decision was "open to a number of substantial criticisms" and "seriously flawed in law". It was further held that the issue of whether the respondent had contracted with the other members of the claimant group was governed by the proper law of the contract which was Arkansas law and which the parties had agreed was the same as English law. On that basis, the Commercial Court went on to hold that the 'Group of Companies' doctrine "forms no part of English law" and set aside the arbitral award.

Relying on the aforementioned judgment in *Peterson Farms* (supra) as well as a plethora of judgments passed by the courts in Singapore, the High Court of Singapore, in its judgment in *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pvt. Ltd.*¹⁹, pronounced as follows:

"Interestingly, Mr. Gary Born, a prominent international disputes practitioner and commentator, too, takes the view that the "group of companies" doctrine (at [73] above), which I mentioned earlier is conceptually similar to the single economic entity (though confined primarily to the arbitration context), is fundamentally distinct from the other techniques of disregarding separate legal personality (see Born at p. 1449).

Apart from the conceptual difficulties I had with the doctrine as stated above, I was also not persuaded by the case law that the single economic entity concept was recognised under the common law, or at any rate under Singapore law." (emphasis supplied)

In *Manuchar* (supra), the High Court of Singapore further went on to state as follows:

¹⁶ *Tecpro Systems Limited v. Telangana State Power Generation*, 2019 SCCOnline TS 1658.

¹⁷ *IL&FS Financial Services v. Aditya Khaitan & Ors*, TA No. 12 of 2019 and CS No. 177 of 2019 (order dated September 3, 2019). It is pertinent to mention herein that the Hon'ble Calcutta High Court, in this case, relied upon the judgment in *Mahanagar Telephone Nigam* (supra) not in the context of binding non-signatories to an arbitration agreement but to pass an interlocutory injunction restraining the respondents, all of whom were found to belong to a single group with a "tight group structure with strong organisational and financial links so as to constitute a single economic unit or a single economic reality", from alienating or encumbering or disposing off their assets, even though not all the respondent companies had signed an agreement with the petitioner-creditor (please see paragraph 25).

¹⁸ *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] EWHC 121.

¹⁹ *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pvt. Ltd.*, [2014] SGHC 181.

“Last but not least, I should mention that as far as I could tell, the single economic entity concept has not received endorsement under US corporate law (see Virginia Harper Ho, “Theories of Corporate Groups: Corporate Identity Reconceived” (2012) Seton Hall L Rev 879 at pp 880–881). A sprinkling of cases mention (with approval) a similar doctrine loosely described as “enterprise liability”, but on the whole, my assessment of the cases in the US was that the single economic entity concept in the context of company law was not clearly settled.

Apart from the Dow Chemical arbitration case which I mentioned in passing above (see [72] and [73] above), I found that the single economic entity concept had very little traction in the international arbitration community, especially outside jurisdictional issues (such as whether a company within the group is part of the group for the purposes of jurisdiction). I found particularly helpful the tribunal’s summary in the investment treaty arbitration case of CME Czech Republic BV v The Czech Republic (Final Award, dated 14 March 2003 at para 436):

Only in exceptional cases, in particular in competition law, have tribunals or law courts accepted a concept of a ‘single economic entity’, which allows discounting of the separate legal existences of the shareholder and the company, mostly, to allow the joining of a parent of a subsidiary to an arbitration. Also a ‘company group’ theory is not generally accepted in international arbitration (although promoted by prominent authorities) and there are no precedents of which this Tribunal is aware for its general acceptance....

For all the foregoing reasons, I was not persuaded, on balance, that the single economic entity concept was recognised at law in Singapore nor was there a good legal basis to support its recognition.” (emphasis supplied)

The aforementioned judgments certainly provide an interesting perspective on how readily Indian courts have adopted the ‘Group of Companies’ doctrine, post the *Chloro Controls* (supra) judgment, in sharp contrast to the prevailing scepticism with regard to the same in prominent common law jurisdictions. It certainly makes one wonder whether the judgment in *Sukanya Holdings* (supra) would find more acceptance among legal practitioners in these jurisdictions, as opposed to the judgments discussed hereinabove where such doctrine has been invoked and upheld.

Concluding Remarks

A lot of water has flown beneath the bridge since the days of *Sukanya Holdings* (supra). The bias towards party autonomy has been considerably diluted as observed from landmark precedents of the Indian Supreme Court and High Courts across the country.

In its endeavour to highlight the importance and sanctity of the Group of Companies Doctrine the Indian Courts have been in favour of extending references to non-signatories of an arbitration agreement subject to certain thresholds being met. The Courts have broadened their approach, no doubt aided by the amendments effected to the Act in 2015 and the 246th report of the Law Commission of India, to extend the principles first expounded in *Chloro Controls* (supra) in the scenario of international arbitrations to domestic arbitrations also. With the adoption of such position in *Ameet Lalchand Shah* (supra) and *Mahanagar Telephone Nigam* (supra), no doubt the law laid down in *Sukanya Holdings* (supra), while not being overruled, has been substantially weakened. Further, *Mahanagar Telephone Nigam* (supra), has provided much needed clarity on the circumstances in which the ‘Group of Companies’ doctrine can be invoked. However, as we have seen, the courts in the UK and Singapore have viewed the doctrines of ‘Group of Companies’ or ‘single economic reality’ with suspicion and rejected their applicability in such legal regimes.

That leads us to end on a note of caution. The Indian courts must not adopt an overzealous approach in every matter where multiple contracts between multiple parties are involved and impleadment of non-signatories to a single, composite arbitration is sought. A detailed examination of the facts of each case on their own merits must be made and the same should be tested against the criteria as laid down in *Mahanagar Telephone Nigam* (supra), as elaborated hereinabove. In absence of the same, even non-signatories whom the parties never intended to be bound by the arbitration agreement or who had no or minimal role to play in a transaction between the signatories would also be subjected to the same arbitration, which could not have been the intention of the legislators while carrying out the amendments to the Act.

This paper has been written by Soorjya Ganguli (Partner) and Somdutta Bhattacharyya (Managing Associate) with research inputs from Radhika Misra (Associate).

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