THE GROUP OF COMPANIES DOCTRINE: A COMPARATIVE STUDY BETWEEN INDIA, U.S.A. AND U.K.

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ABSTRACT

The group of companies doctrine evolved in France originally but it has now spread across the world in different jurisdictions. Some jurisdictions have a positive opinion of the doctrine and others have a negative opinion on the same. The reason there are jurisdictions that do not agree to the applicability of the doctrine is because it raises doubts about some fundamental principles of arbitration like that of consent and party autonomy. The purpose of this paper is to assess the approach taken by different jurisdictions, both positive and negative and to establish the fact that this doctrine being against the fundamentals of arbitration should be done away with in India

INTRODUCTION

According to the 'group of companies doctrine,' a party that is not a signatory to the arbitration agreement, can be joined as one in the procedure of arbitration.[1] This happens by the virtue of the fact that the said non-signatory belongs to the particular group of the companies as its subsidiary or parent company for example.[2] It derives its roots from the *Dow Chemical Case*[3] wherein the court made it clear, that a party who is not expressly a signatory to an arbitration agreement, can still be subject to it if implied consent to become a party to the agreement is drawn from their conduct. The said conduct would be highlighted by the party's participation in the process of performance, conclusion, or termination of the contract. This case will be further elaborated on in the paper.

Consent of the parties involved is the bedrock of an arbitration agreement and this has been recognized as a basic principle of arbitration.[4] The group of companies doctrine raises the question pertaining to the validity of this principle of consent. The courts around the world have produced theories with respect to how and when the group of companies doctrine should be applied or not. However, most of the courts have been cautious and reluctant when binding the non-signatory to an arbitration agreement.

This paper serves threefold objectives- the first is to understand the basic concepts of the group of companies doctrine, second, it will discuss these stances taken by the American, English, and Indian courts in this regard in the comparative analysis section and finally, it goes on to analyse the flaws associated with the doctrine. The question however arises is whether India should do away with the Group of Companies doctrine? A number of points have been analysed which help in establishsing that Indian courts should do away with the group of companies doctrine as it compromises with the basic principles on which arbitration law was framed.

CONCEPTS THAT FORM THE BASIS OF AN ARBITRATION AGREEMENT

The beginning of arbitration was marked by informal and pliable modes of contracts between merchants and was subject to the very basic principle like party autonomy and alike treatment.[5]

[1] GARY BORN, INTERNATIONAL ARBITRATION LAW AND PRACTICE 94 (Kluwer Law International 2012).
[2] *See id.*. at 95.
[3] Dow Chemical v. Isover Saint Gobain, ICC Case No. 4131, Interim Award, Sept. 23, 1982, JDI (1983).
[4] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 131 (Sweet & Maxwell Press 2004).
[5] STAVROS L. BREKOULAKIS, THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION (Wolters Kluwer 2016).

It was not even considered as a separate subject for study until the 19th century which was dedicated to the codification of such principles into a legal framework and the practice of arbitration under some supervision of Courts.[6] Even today, the basic theories relating to non-signatories in arbitration have been borrowed from Company law and the law of Contracts.

The arbitration agreement being the foundation stone of an arbitration procedure is governed by the principle of "privity" of contract, however, in today's scenario, the meaning of the word "party" is being extended to persons who are not a signatory of the agreement.[7] The extension of the meaning of the word persons is favoured by authors worldwide.

Consent, is the basis of any arbitration agreement. Through judicial developments, the courts have made it clear that consent can be either expressed or implied. In the case of the existence of a group of companies, it is obvious for a party to assume that the parent company will include all its subsidiaries as a member of the arbitration agreement.[8] However, a considerable amount of involvement of the parties in the negotiation and execution process of the contract is necessary to imply their consent.

Another important characteristic of an arbitration agreement is its separability from the main text of the agreement. In most jurisdictions, an arbitration clause in the main agreement can be made exclusive of it and can be enforced by the parties.[9] It is because of this feature of the agreement, the invalidation of the whole contract itself would not affect the validity of the arbitration agreement. The parties would still have to rely on the terms of this agreement to resolve any disputes arising out of the whole contract.

OPINIONS OF AUTHORS ON THE GROUP OF COMPANIES DOCTRINE

As per Hanotiau (2005)[10], in order to include non-signatory parties to the arbitration process, the courts have relied upon various theories of contract law, which have been explained in detail by the author in this book. These theories involve assumption, incorporation by reference, agency, piercing the corporate veil and equitable estoppel.

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[6] *See id.*
[7] FRANCO FERRARI & STEFAN KROLL, CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 137-186 (Sellier 2011).
[8] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 317-319 (Juris 2014)
[9] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 18 (Cambridge University Press 2017).
[10] BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 7-47 (Wolters Kluwer Law & Business 2005).

The judicial developments with respect to the doctrine in India have been brought into light through Bharucha, Jaisingh and Gupta (2016)[11], through their article. The author cites various cases where the courts have both accepted and denied the joining of non-signatory parties to the proceedings of the arbitration. The Indian arbitration law has derived its genesis from the UNCITRAL Model Law, with various amendments being made to make it more compliant with the conditions of Indian laws. The article seeks to establish that the country is following up with the trend to include non-signatories in the arbitration agreement.

The position of the doctrine in the U.S. has been discussed by Meyneil (2013)[12]. The origin of the doctrine in the U.S. happened through the Dow Chemical case which has been elaborated by the author in the article. Alongside, it has also been discussed that the U.S. courts have time and again rejected the application of the doctrine in the country. To an extent, the question of whether the doctrine should exist or not has also been addressed by this piece of writing.

Courtney (2009)[13], has elaborated the fundamentals of arbitration that are being threatened because of the application of the doctrine of group of companies with its position in the United States of America. It brings out the most basic points of weaknesses of the said doctrine and thereby helps the readers understand why the courts in America have taken the stance of not implementing the doctrine in their state.

Lastly, the article by Woolhouse (2004)[14], elaborates the position that the doctrine holds in the United Kingdom (U.K.). It has prima facie been rejected by the courts in the U.K. and the author makes a point that the court in doing so has not, in any way moved backwards in developing the English arbitration law.

COMPARATIVE STUDY OF THE GROUP OF COMPANIES DOCTRINE

The beginning of the doctrine was marked by the landmark judgement of Dow Chemicals Case[15]. Saint Gobain, wherein the non-signatories were given permission to be a part of the arbitration process after analyzing the agreement on a three-factor test. It was the first time when such a doctrine was implemented. It was a case that originated between two subsidiaries

[11] M.P. Bharucha, Sneha Jaisingh & Shreya Gupta, T*he Extension of Arbitration Agreements to Non-Signatories - A Global Perspective*, 5 INDIAN J. ARB. L. 35 (2016).
[12] Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts with Respect to the Group of Companies Doctrine*, 3 ARB. BRIEF 18 (2013).
[13] Tae Courtney, *Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad*, 8 RICH. J. GLOBAL L. & Bus. 581 (2009).
[14] Sarita P. Woolhouse, *Group of Companies Doctrine and English Arbitration Law*, 20 ARB. INT. 435 (2004).
[15] *supra* note 3.

of the Dow Chemical Group that had entered into multiple contracts (containing arbitration clause) with Isover for thermal insulation products to be distributed. The dispute arose when the parent (Dow US) and another subsidiary (Dow France) came with the plan to join Dow AG as well as Dow Europe as signatories while they commence an arbitration procedure against Isover, and Isover resisted the joinder on the grounds that Dow US and Dow France were not signatories to the agreement. Isover contention was rejected by the International Chamber of Commerce's ("ICC") tribunal as it found the Dow subsidiaries and the parent, despite possessing distinct legal entities, together constituted 'one and the same economic reality.

1. THE UNITED KINGDOM (U.K.)

The United Kingdom has never accepted or implemented the doctrine of group of companies.[16] The English commercial court in the year 1998 refused to apply the doctrine first.[17] In this case, the court pointed out that arbitration agreements and contracts were governed by English law according to which no other party could be included in the arbitration agreement or the contract itself other than the plaintiff and the defendant themselves.[18]

Peterson Farms Inc. v. M. Farming Ltd.[19] is a landmark judgment that very rightly projects the approach of the courts in the U.K. towards the group of companies doctrine. The facts of this case include the matter relating to the selling of chicken under Arkansas law. the claimants, in this case, purchased chickens from the Peterson farms, mated them for the purpose of further sale to other parties within its own corporate group. The chickens that were originally brought from Peterson farms suffered from avian flu and thus it caused a huge loss to the claimant along with other members of its corporate group.

Hence, the claimant sought to include the members of its corporate group in the process of arbitration claiming that they were an indivisible part of the group. Peterson farms on the other hand claimed that the claimant cannot include the other members as the group of companies doctrine has no provision under the Arkansas law. The ICC, however, applied the doctrine of separability in an arbitration agreement and hence concluded that the group of companies doctrine cannot be applied. An appeal was made before the English High Court which upheld the decision of the ICC.

[16] WOOLHOUSE, *supra* note 14, at 435.
[17] Caparo Group Ltd v Fagor Arrasate Sociedad Cooperativa (1998) EWHC.
[18] *See id.*
[19] (2004) EWHC (Comm.) 121 (U.K.).

In another case namely Roussel-Uclaf v. G.D. Searle.[20] the English court again refused to apply the doctrine of group of companies.

2. THE UNITED STATES OF AMERICA (U.S.A.)

Some of the U.S. courts have not taken a favourable stand towards the group of companies doctrine and have rejected it altogether[21], while others have had a positive opinion about it. The courts in the state have drawn a distinction between "alter ego" and the group of companies doctrine on the grounds of fraud.[22]

The Second Circuit in Sarhank Group v. Oracle Corporations[23] rejected the application of the doctrine by not upholding the award passed by a tribunal in Cairo which had held the subsidiary companies to be bound by the arbitration clause by virtue of the group of companies doctrine.

The Fifth Circuit in Bridas S.A.P.I.C. v. Government of Turkmenistan[24] held the parent company liable for the actions of the subsidiary and bound it to the arbitration agreement in pursuance of the "alter ego" theory. They relied on the fact that the parent company in this case had full control over its subsidiary through which the fraud was perpetrated.

The Ninth Circuit (Court of Appeals) went on to hold that a non-signatory cannot invoke the arbitration clause in an agreement except in accordance with the standard rules of contract and agency.[25] A non-signatory agent can be bound by the arbitration clause in case he is involved in some wrongdoing related to the contract itself.[26]

In case of an arbitration clause that has been incorporated by reference into an agreement binding the parties that are not signatories of the agreement, the American courts have held that such a reference agreement can go on to include the non-signatories.[27] However, a test has been laid down for this situation which includes sufficing of two conditions.[28] The first one is whether the agreement contains the required lingo for incorporation of the non-signatories and

[20] (1978) 1 Lloyd's Rep. 225 (U.K.).
[21] MEYNEIL, *supra* note 12, at 32.
[22] *See id.*
[23] Sarhank Group v. Oracle Corporation, 404 F. 3d 657 (2d Cir. 2005) (U.S.).
[24] Bridas S.A.P.I.C. v. Government of Turkmenistan, 447 F. 3d 411 (5h Cir 2006) (U.S.).
[25] Paracor Finance Inc. & Ors.v. General Electric Capital Corporation, 96 F.3d 1151 (U.S.).
[26] *See id.*
[27] Upstate Shredding, LLC v. Carloss Well Supply Co., 84 F. Supp. 2d 357 (N.D.N.Y 2000) (U.S.).
[28] *See id.*

the second pertaining to whether the arbitration clause that is being talked about is wide enough to include the non-signatories and the contemporaneous dispute.[29]

The court has also embarked upon the principle of "equitable estoppel" according to which a person who is not a signatory to a contract shall be made to arbitrate if we accept fit the direct benefit arising out of the contract which contains the arbitration clause.[30]

3. INDIA

The first case of group of companies doctrine in India was that of Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Anr.[31] wherein the application filed before the Bombay High Court under Section 8 of the Arbitration and Conciliation Act, 1996 to include non-signatories of the arbitration agreement to the arbitration procedure. The court however refused to do so and thereby confirming the non-applicability of the doctor into the case.

The judgment in Indowind Energy Ltd. v. Wescare (q) Ltd. & Anr.[32] was in consonance with that of Sukanya Holdings[33]. Here the alter-ego theory was put before the court to interpret with respect to the group of companies doctrine and the court held that non signatories were not the alter-ego of signatories in this case because of the mere fact that they shared a registered office. The court applied the principle of strict interpretation and concluded that it was necessary for the parties to be signatories in the written arbitration agreement for them to become a party in the arbitration procedure. On appeal the Supreme Court upheld this decision of the Bombay High Court.

The judgment which established the application of group of companies doctrine in India was that of Chloro Controls case[34]. The Supreme Court Extended the inclusion of non-signatories to an arbitration agreement through this case and the closeness between the parties was also put to review by the court. The court recognized the linkage between multiple agreements signed by the parties to form one consolidated transaction, the performance of which made the multiple contracts linked to each other.

[29] *See id.*
[30] American Bureau of Shipping v. Tencara Shipping SPA, 170 F.3d 349 (2nd Cir 1999) (U.S.).
[31] A.I.R. 2003 S.C. 2252.
[32] (2010) 5 S.C.C. 306.
[33] *supra* note 30.
[34] Chloro Contros India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors. (2013) 1 S.C.C. 641.

After this case Section 8(1) of the Arbitration and Conciliation act 1996 was amended to include non-signatories as parties to the arbitration procedure. Hence India has moved forward with the complete adaptation of the group of companies doctrine in the country.

RUDIMENTS OF ARBITRATION THREATENED BY THE GROUP OF COMPANIES DOCTRINE

Having studied the approaches of various countries with respect to the group of companies of doctrine has been analysed but the courts around the world have not been able to establish a very grounded approach towards it. The reason for this is that there exist a number of flaws in the said doctrine which are in conflict with the very basic nature and principles of arbitration. The following are the of flaws that have been analyzed with respect to this doctrine:

1. CONSENT

Consent of the parties to arbitrate is a primary requirement for the arbitration process to take place.[35] The parties need to have a written agreement[36] between them, which is a form of expressed consent. On the other hand, implied consent comes into picture with the court applying principles of contract and company law including that of assumption, incorporation by reference, agency, piercing the corporate veil and equitable estoppel.[37]

It is because the parties have the autonomy to select everything in an arbitration procedure, beginning from the appointment of arbitrators and going on to selecting the primary law that will govern the whole procedure, that it has become a successful mode of dispute resolution. The problem with implied consent is that sets aside the whole importance of consent and party autonomy.[38]

It is only when a person is a signatory to an arbitration agreement, he is aware of the consequences that would arise in case of a dispute and that he would not be forced into the litigation process. The contrary of this should be true for a person who is not a signatory of the agreement i.e., they should have an option to choose litigation over arbitration if they want to.

[35] REDFERN & HUNTER, *supra* note 4.
[36] United Nations Conference on International Commercial Arbitration, July 6,1988, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Art. II, 2, available at http://www.uncitral.org/pdf/english/texts/arbitration/NYconv/XXII_le.pdf [hereinafter UNCITRAL].
[37] HANOTIAU, *supra* note 10.
[38] Anthony DiLeo, *The Enforceability of Arbitration Agreements by and Against Non signatories*, 2 J. AM. ARB. 31, 72 (2003).

2. THE APPLICABILITY OF THE NEW YORK CONVENTION

The international law on arbitration, driven by the New York Convention, makes it mandatory for the arbitration agreement to be put in writing and be signed by the parties.[39] The Indian law, having adopted the New York Convention has also made it compulsory through of the Arbitration and Conciliation Act, 1996.[40]

In an ad hoc award[41] by an arbitral tribunal, it has been pointed out that, as opposed to judicial proceedings or litigations, where the parties can be joined or adjoined, in the arbitration proceedings only the parties who have given their consent by signing the arbitration agreement can joined as claimants or defendants. No other party should be allowed to join the proceedings as this is a very basic rule embarked upon by the New York Convention.

On analysing this article, it is clear that the inference of the New York Convention is to exclude non-signatories in an arbitration proceeding. The convention having been adopted by a number of countries, should be properly adhered to.

3. SEPARABILITY OF THE ARBITRATION CLAUSE

Party autonomy being the base of arbitration allows the existence of separability of the arbitration clause. The international law on arbitration has clearly mentioned that the arbitration agreement when present in form of a clause is separable from the contract to which it is a part.[42] It is because of this principle of separability that the parties are still able to enforce the arbitration agreement in case a dispute arises and the contract itself has been rendered invalid. On the contrary, it is not possible for a non-signatory to exclude themselves from the agreement due to the group of companies doctrine.

The arbitration regime allows minimum interference of the courts. In case where there is a lacuna in the arbitration process, the case goes to the court, however when there is lacuna in the contract, it goes before the arbitrator. [43]

[39] UNCITRAL, *supra* note 36, at Art. II.
[40] The Arbitration and Conciliation Act, 1996,§7, No. 26, Acts of Parliament, 1996 (India).
[41] HANOTIAU, *supra* note 10, at 7.
[42] MOSES, *supra* note 9, at 18.
[43] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006).

Hence, it must be realised by the courts that the arbitration agreement being separable from the main contract, implies that when a non-signatory assists the performance of the contract, it only agrees to the terms of the contract and not automatically to the arbitration agreement.

CONCLUSION AND SUGGESTIONS

When arbitration was introduced the main purpose was to give the parties the right to resolve their dispute according to their own terms and conditions. For this reason, they have been given the power and the autonomy to choose whether they want to go into arbitration command the appointment of arbitrators themselves, the seat and venue of arbitration and even the law with which they want to govern the procedure.

The courts which have accepted the existence of the doctrine have relied on the various methods through which the implied consent of a party can be construed but have completely failed to bring it to consonance with the very basic principles of arbitration law. Due to the existence of this doctrine the parties have been denied their very basic right to first hand choose whether or not they want to go into the process of arbitration or litigation for the disputes that they become a part of.

In order to resolve the existing issues with respect to the group of companies doctrine a number of suggestions can be made. The courts should make a strict interpretation with respect to how consent has been defined by the existing laws on arbitration and not go beyond those definitions to derive implied consent of the parties at least in case of arbitration.

The principle of separate legal entity should be followed strictly and there should be no such classification of a group of companies for the purpose of enforcement of an arbitration agreement. The non-signatories to an arbitration agreement should be given an option to either opt for arbitration or litigation when a dispute arises.

The doctrine of separability of arbitration agreement should be followed strictly by the courts who separate the arbitration agreement with the main contract so that the non-signatory parties can claim that they did not consent to the arbitration clause of the agreement. There should be no forceful enforcement of the arbitration agreement on the non-signatory parties.