THE MODERN CONTOURS OF THE GROUP OF COMPANIES DOCTRINE: RECONCILING PRIVITY AND INTENT POST-COX AND KINGS

Adv. Sarthak Kohli, Legal Researcher at Delhi High Court

Synopsis:

This article provides a comprehensive analysis of the Group of Companies Doctrine (GOCD) in India, specifically its refinement following the landmark Constitution Bench judgment in Cox and Kings Ltd. v. SAP India Pvt. Ltd. wherein the Supreme Court shifted the doctrine's foundation from the "claiming through or under" theory to a consent-based framework that prioritizes the mutual intent of parties and the "single economic reality" of transactions. By examining the impact on Sections 9 and 11 of the Arbitration and Conciliation Act, 1996, the article highlights a shift toward minimal judicial intervention, where referral courts perform only a prima facie review of a non-signatory's involvement, leaving detailed factual determinations to the arbitral tribunal.

Introduction:

Arbitration refers to a voluntary method of dispute resolution between parties wherein generally only the signatories are bound by such agreement. Several doctrines and principles have been evolved to make arbitration a more effective procedure than burdening the court more and the doctrine of the group of companies is one of them.

What is the Doctrine of Group of Companies

The Doctrine of Group of Companies is often referred to as the Trojan Horse as just like the wooden horse bypassed walls from within, this doctrine enables an arbitration agreement to pull in a non-signatory parent or affiliate, potentially bypassing the traditional "walls" of corporate separateness and the privity of contract.

In cases of transactions within a group of companies where different agreements within a transaction are entered between different groups of companies then *Doctrine of the Group of Companies* comes into picture which recognises the intention to bind both signatory and non-

signatory entities within the same group to the agreements.

The said doctrine was primarily used in international arbitration to bind non-signatory companies to an arbitration agreement.

Evolution of the Doctrine through Indian Jurisprudence

The doctrine's journey in India has been marked by initial adoption, followed by a period of uncertainty, and culminating in a definitive clarification by the Supreme Court.

The doctrine was first significantly acknowledged by the Supreme Court of India in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641*** wherein the Court held that a non-signatory could be referred to arbitration if there was a clear intention of the parties to bind both the signatory and the non-signatory.

Following *Chloro Controls*, the application of the doctrine became inconsistent, creating tension with established legal principles like party autonomy, privity of contract and the separate legal personality of a company. ***In MTNL v. Canara Bank, (2020) 12 SCC 767*****,** the Supreme Court reiterated that the doctrine should not be applied carelessly. And emphasized that a "direct relationship" with the signatory party and the contract, along with evidence of participation in negotiation or performance, was essential. Similarly, in ***ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42,*** the Court cautioned against mechanical application, stating that a mere corporate relationship or common shareholding is insufficient and the party invoking the doctrine must prove the non-signatory's direct engagement and mutual intent to be bound.

Overview of the Cox and Kings Judgement:

In the case of ***Cox and Kings Ltd. v. SAP India Pvt. Ltd & Anr., Arbitration Petition (Civil) No. 38/2020,*** the petitioner entered into several software agreements with SAP India, which included an arbitration clause. When the project faced significant delays, SAP India's parent company, the SAP SE, intervened by providing global experts to oversee the implementation. Despite this, the project failed, leading C&K to terminate the contract and eventually initiate arbitration proceedings against both SAP India and the non-signatory parent, SAP SE wherein C&K argued that SAP SE should be bound by the arbitration agreement under the "Group of Companies Doctrine" due to its direct involvement in the project's execution and its ownership

of SAP India. The matter ultimately was referred to a Constitution Bench of the Supreme Court to clarify whether a non-signatory can be legally compelled to join arbitration proceedings based on this doctrine wherein the Apex Court unanimously upheld the **Group of Companies Doctrine (GOCD)** as a valid tool to bind non-signatories to arbitration agreements, grounding it in the **mutual intention** of parties rather than the concept of "claiming through or under" established in *Chloro Controls*.

While concluding, the Bench ruled that the determination of whether a non-signatory is a party should ideally be left to the **arbitral tribunal** under the principle of *competence-competence*, rather than being fully adjudicated by referral courts at the Section 9 or 11 stage.

Core Scope and Contours Defined in Cox and Kings

The doctrine's scope covers non-signatory entities in corporate groups bound by arbitration agreements in complex, interconnected transactions. It does not pierce the veil but imputes consent where equity demands, preventing forum-shopping or evasion.

Benefits/Strides of GOOCD:

1. **Efficiency in Multi-Party Disputes:** It allows for the consolidation of disputes involving multiple group companies into a single arbitration, avoiding conflicting judgments.

2. **Enhanced Legal Certainty:** Provides a clear test, reducing litigation risk over a tribunal’s jurisdiction.

3. **Respect for Corporate Personality:** The doctrine upholds corporate law principles by requiring proof of consent rather than treating a group as a single economic entity.

While the GCD has made significant strides, its application still faces challenges:

1. **Ambiguity in Criteria**: The lack of clear, consistent criteria for applying the GCD may lead to unpredictability in judgments.

2. **Balancing Corporate Autonomy and Responsibility**: Finding a balance between protecting companies' right to autonomy and ensuring accountability within corporate groups remains a pressing challenge.

2. **Potential for Abuse**: There is a risk that companies might exploit the GCD to draw non-signatories into arbitration to dilute liability.

3. **Uncertain Application:** The reliance on a subjective, fact-based inquiry into "common intention" can still lead to unpredictability for businesses.

4. **Cross-Border Enforcement Risks:** The doctrine is not universally accepted.

5. **Risk of Overreach:** A broad application could unfairly bind companies that had only minimal involvement, potentially deterring efficient corporate structuring.

The Impact of the GCD on Indian Corporate and Arbitration Law

The application of the GCD has significant implications for corporate law and arbitration in India, providing a means to hold companies accountable within complex corporate structures.

The GCD facilitates a streamlined arbitration process by allowing for a single arbitration proceeding rather than multiple fragmented ones which can save time and costs, reducing the burden on arbitration institutions and promoting efficiency in the dispute resolution process.

By holding non-signatories accountable, the GCD reinforces the idea of corporate responsibility across the group, preventing companies from evading obligations through separate legal identities.

Scope of GOCD with International Arbitrations

The Group of Companies doctrine is now explicitly recognised as a part of Indian law, and an arbitral tribunal seated outside India may also be called upon to apply this doctrine in some circumstances. An arbitral tribunal considering whether a non-signatory should be a party may choose to apply one among the different laws available to it, such as the law of the seat, law of the arbitration agreement, international principles and law of the main contract.

In the absence of an express stipulation of the governing law of the arbitration agreement in jurisdictions such as Singapore and England (both of which are preferred arbitral seats in agreements with Indian governing law), there is a presumption that the parties have chosen the governing law of the main contract to govern the arbitration agreement as well. Such a presumption would be displaced only if the governing law of the main contract invalidates the

arbitration agreement.

Parties choosing Indian law as the governing law of their contract (without stipulating a different law governing the arbitration agreement) therefore, must be aware of the possibility of group/affiliate companies being compelled to arbitrate if the conditions stipulated in the judgement are met, even if the arbitral seat is outside India.

Application Under Section 11-Limited Judicial Scrutiny

Section 11 mandates referral courts to prima facie verify arbitration agreement existence and non-signatory binding. Post-*Cox and Kings*, courts apply GOCD at this stage minimally, deferring detailed intent analysis to tribunals under Section 16. This curtails interference, promoting arbitration efficiency.

The Court significantly limited its own "gatekeeping" role as when a party seeks to appoint an arbitrator against a non-signatory. The referral court should only conduct a *prima facie* examination of whether a group company relationship exists. The final, detailed determination of whether the non-signatory is actually bound is left to the Arbitral Tribunal, preserving the principle of *Kompetenz-Kompetenz*.

Application Under Section 9: Interim Relief Expansion

Section 9 allows interim measures against "parties," now including GOCD-bound non-signatories if prima facie intent exists. Courts grant relief pre-award for urgency, extending to affiliates in composite disputes. The doctrine expands access as Non-signatories can seek/ face injunctions, attachments if factors align.

For a party seeking an injunction or asset protection against a non-signatory, the court must be satisfied that the non-signatory is a "party" under the GOC doctrine. It is a tool to identify the true intention of the parties.

To bind a non-signatory, the following must be examined:

1. The direct involvement of the non-signatory in the negotiation, performance, or termination of the contract.

2. The non-signatory’s knowledge of the agreement and its underlying obligations.

3. The commonality of subject matter across the group.

Subsequent Judgements Reaffirming Cox and Kings

Following the *Cox and Kings* judgment, High Courts have consistently applied its principles, focusing on a detailed factual analysis to ascertain implied consent.

1. **Vistrat Real Estates Private Limited v. Asian Hotels (North) Limited, 2023 SCC OnLine Del 7384:** The Delhi High Court, applying the *Cox and Kings* framework, referred a non-signatory to arbitration. The court conducted a thorough review of the contractual arrangements and the non-signatory's conduct, finding that it was not just a third party but was intrinsically involved in the overall transaction, thus implying its consent to be bound by the arbitration clause.

2. **Knowledge Podium Systems Private Limited v. S.M. Professional Services Pvt. Ltd., 2024 SCC OnLine Del 118:** In this case, the Delhi High Court declined to apply the doctrine. It meticulously examined the facts and concluded that there was insufficient evidence to demonstrate a common intention to bind the non-signatory affiliate. The court noted that the non-signatory's role was minimal and did not meet the high threshold of direct involvement in the performance or negotiation of the main contract, reinforcing that the doctrine is not to be applied automatically.

3. **Cardinal Energy and InfraStructure Private Ltd. v. Subramanya Construction and Development Co. Ltd. (2024) -** The Bombay High Court, referencing the verdict in Cox and Kings, held that the jurisdiction of the Arbitral Tribunal to apply the 'group of companies' doctrine does not depend on a specific request for the inclusion of non-signatories in a Section 11 application. It stated that the absence of such a request does not prohibit the jurisdiction of the Arbitration Tribunal to apply the group of companies doctrine. Court further observed that the Arbitral Tribunal's interpretation of the group of companies doctrine cannot be set aside merely for the reason that there was no request to implead non-signatory parties under Section 11 of the Arbitration and Conciliation Act. The High Court explained that under Section 16 of the Arbitration and Conciliation Act, the Arbitration Tribunal has the authority to decide on issues of jurisdiction, including those related to non-signatory parties to an arbitration

Conclusion:

The Group of Companies Doctrine is now firmly embedded in Indian arbitration law as a consent-based, pragmatic principle. The *Cox and Kings* judgment marks a milestone, providing clear guidelines for courts, tribunals, and businesses. By balancing the need to avoid fragmented litigation with respect for contractual consent and corporate separateness, Indian jurisprudence has aligned itself with the commercial realities of modern corporate ecosystems. This robust and equitable mechanism for multi-party dispute resolution solidifies arbitration's role as the preferred choice for businesses in India.

References:

https://amlegals.com/group-of-companies-doctrine-in-indian-arbitration/#

https://www.amsshardul.com/insight/the-trojan-horse-group-of-companies-doctrine/

https://www.sonisvision.in/blogs/novel-contours-of-group-of-companies-doctrine-in-india

https://www.bailii.org/ew/cases/EWCA/Civ/2022/51.html