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NAVIGATING THE GROUP OF COMPANIES DOCTRINE IN THE INDIAN ARBITRATION FRAMEWORK

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INTRODUCTION

The group of companies ("**GoC**") doctrine is often relied on to bind a non-signatory entity to an arbitration agreement signed by an affiliate within its group. It has been affirmatively declared as part of Indian arbitration jurisprudence by the recent decision of a Constitution Bench of the Supreme Court of India in *Cox and Kings v. SAP India (P) Ltd.*[4]

Cox & Kings distinguishes the GoC doctrine from others by which legal personalities of group entities (which would otherwise be considered sacrosanct and amenable to dilution only in exceptional scenarios (such as fraud)) may be disregarded (such as in the *alter ego* principle). In its practical application, however, the doctrine could blur the separate legal personality afforded to companies under Indian law, by allowing group entities who did not sign an arbitration agreement to be reached through the GoC doctrine and consequently be amenable to the arbitral process and award.

As such, the GoC doctrine has potentially far-reaching consequences for entities within a group of companies, and its applicability should be examined while structuring contractual arrangements involving group entities, to avoid unexpected outcomes later in the arrangement.

BACKGROUND

The circumstances in which the GoC doctrine can apply, and the foundation for the doctrine in Indian law, have been the subject of considerable debate over the years.

In the context of arbitration, the GoC doctrine was, initially, formally recognised by a three-judge bench of the Supreme Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*[5] to refer certain entities within a group of companies to arbitration under the principal agreement in a

1 Partner, S&R Associates
2 Associate, S&R Associates
3 Associate, S&R Associates
4 Cox and Kings Ltd. v. SAP India Pvt. Ltd., (2023) 15 SCR 621, para 122 [hereinafter Cox and Kings].
5 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

composite transaction, although such entities were not parties to the principal agreement (but only to some connected ancillary agreements within that composite transaction).

In *Chloro Controls*, the Supreme Court considered that the non-signatory group entities before it claimed "*through or under*" the group entities who were signatories to the principal agreement, and could be referred to arbitration in view of that wording in Section 45 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**"). In doing so, the Supreme Court distinguished a reference to arbitration under Section 45 of the Arbitration Act from the then-prevailing view in *Sukanya Holdings (P) Ltd. v. Jayesh H Pandya* (rendered in the context of a reference to domestic arbitration under Section 8 of the Arbitration Act) that the court would not make a reference where the arbitration agreement was only between some (and not all) of the parties to the suit before the court.[6]

The GoC doctrine as expounded in *Chloro Controls* was followed and expanded by later judgments of the Supreme Court,[7] but came to be referred to the Constitution Bench of the Supreme Court to examine, *inter alia*, whether the doctrine is valid in law and whether the phrase "*claiming through or under*" in Sections 8 and 45 of the Arbitration Act encompasses the GoC doctrine in light of the principles of party autonomy, privity of contract, separate legal personality and express consent to arbitrate.

In answer, the Constitution Bench declared that the GoC doctrine is valid and a part of Indian arbitration law, although the approach in *Chloro Controls* to read the doctrine into the phrase "*claiming through or under*" in Sections 8 and 45 of the Arbitration Act was wrong.

This article examines the practical implications and potential challenges of the GoC doctrine as explained in *Cox & Kings*.

THE *COX & KINGS* APPROACH

The Constitution Bench in *Cox & Kings* notes that the foundations of arbitration are consent and party autonomy, and emphasises the principle of privity of contract by which only parties to an arbitration agreement would be bound and benefitted by an arbitration agreement.

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6 In view of recommendations of the Law Commission of India in its 246th report (August 2014), Section 8 of the Arbitration Act was amended pursuant to the Arbitration and Conciliation (Amendment) Act, 2015, *inter alia*, to provide that reference to arbitration under Section 8 could be requested by a party as well as persons "*claiming through or under*" a party to the arbitration agreement. Prior to the amendment, Section 8 did not extend to persons claiming through or under a party to the arbitration agreement (unlike Section 45 of the Arbitration Act).

7 Cheran Properties Ltd. v. Kasturi and Sons Ltd., (2018) 16 SCC 413; MTNL v. Canara Bank, (2020) 8 SCC 42; ONGC v. Discovery Enterprises, (2022) 8 SCC 42 [hereinafter Discovery Enterprises].

It held that a non-signatory cannot forcibly be made a party to an arbitration agreement, but regarded that the issue does not arise where a group company consents to arbitration although it did not sign the arbitration agreement, and it is left to the court or tribunal to ascertain whether consent "*was expressed through means other than signature*". In other words, the GoC doctrine is applied to unveil the parties who consented to the arbitration agreement, even though they may not have signed the agreement.

The Constitution Bench cautioned that membership of a group of companies is not, of itself, sufficient to bind a non-signatory group company by the arbitration agreement and a fact-specific enquiry would be required to ascertain whether a non-signatory group company intended to be bound by an arbitration agreement signed by its affiliate.

The Constitution Bench held that such intention may be inferred where the non-signatory is involved in the negotiation, performance and/or termination of a contract (among other factors). In ascertaining such intention, several factors would apply cumulatively, including those held in *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises*:[8] (i) the mutual intent of the parties; (ii) the relationship of a non-signatory to a party which is a signatory to the agreement; (iii) the commonality of the subject-matter; (iv) the composite nature of the transaction; and (v) the performance of the contract.

The Constitution Bench held that the court (on a *prima facie* basis) or tribunal should consider the overall conduct and involvement of the non-signatory in the performance of the contract. The standard to be met is that the involvement of the non-signatory in the performance of the contract is such that it has actively assumed obligations under the contract and has a positive, direct and substantial involvement in the negotiation, performance or termination of the contract.[9]

Once ascertained, the Constitution Bench considered that such consent would satisfy the requirements of an arbitration agreement under Section 7 of the Arbitration Act. It held that in requiring that an arbitration agreement be in "*written*" form, Section 7 does not require that the arbitration agreement be "*signed*". The Constitution Bench held that it is sufficient to have a record of the agreement, such as the scenarios contemplated in sub-section (4)(b) where an arbitration agreement may be contained in an exchange of written communications or documents and sub-section (4)(c) where an arbitration

8 Discovery Enterprises, *supra* note 4, at para 40.
9 Cox and Kings, *supra* note 1, at para 122.

agreement is considered to be in writing, if by way of an exchange of statements of claim and defence, it is asserted by one party and not denied by the other.

The Constitution Bench emphasised that there should be minimal judicial intervention in arbitration, and the courts must only determine the existence of an arbitration agreement among the relevant (signatory and non-signatory) parties on a *prima facie* basis. It considered that the arbitral tribunal would be best placed to make a final determination upon a review of the evidence and merits of the case.

Finally, the Constitution Bench held that, pursuant to the GoC doctrine, the non-signatory is a party to the arbitration agreement in its own right, and does not claim "*through or under*" a signatory in a derivative capacity (such as in cases of subrogation, assignment, succession or novation of contracts). On that basis, the Constitution Bench concluded that the approach in *Chloro Controls* was erroneous to this extent.

PRACTICAL CONSIDERATIONS AND CHALLENGES

Limiting liability is usually one of the key considerations of commercial arrangements. To that end, limited liability entities (such as companies or limited liability partnerships) are often chosen as contracting parties. In the context of a group of companies, the objective is typically to limit liability to the contracting entities such that liability, unless intended, is not afflicted upon parent entities or unwitting affiliates.

Unlike *Chloro Controls*, *Cox & Kings* lays considerable emphasis on the involvement of group entities in the negotiation of the contractual arrangement (in addition to the performance and termination of the arrangement). The Constitution Bench did not consider that the bar on extrinsic evidence under Sections 91 and 92 of the Indian Evidence Act, 1872 (which has been held to form part of substantive Indian law[10] and which an arbitral tribunal is mandatorily required to follow in domestic arbitrations)[11] would preclude evidence of pre-contractual negotiations for purposes of the GoC doctrine.[12]

It is fairly common for parent or group companies to be involved in the negotiation of a contract or investment, with it being understood that the transaction would be signed and executed through a specifically designated group entity with the intention to limit recourse to that designated entity. One

10 Roop Kumar v. Mohan Thedani, (2003) 6 SCC 595, para 13.
11 Arbitration and Conciliation Act, 1996, § 28(a), No. 26, Acts of Parliament, 1996.
12 Cox and Kings, *supra* note 1, at paras 94-97.

of the principal means of accomplishing this objective is to identify the intended parties to the agreement and confirm the arrangement among them by way of a written instrument.

However, in view of the extensive factors set forth in *Cox & Kings* ranging from the negotiation to the termination of the contract, parties should carefully consider, and appropriately structure, contractual arrangements so that the intended parties (whether or not signatories) can be safely identified in the event of a dispute, and appropriate safeguards are included for group entities that are intended to be excluded.

Cox & Kings also does not conclusively resolve the question of how the GoC doctrine will apply to different types of group relationships. Complex corporate structures have been the subject matter of judicial scrutiny for a variety of reasons in India, including in the context of taxing statutes.[13] A 'group of companies', although a term of ordinary parlance, has not yet been defined precisely in Indian jurisprudence. Group of companies may, for instance, be understood in the context of a multi-party contractual framework which involves several inter-linked agreements (rather than an ownership structure). In other cases, group of companies may be referable to holding and subsidiary company structures. In protecting the sanctity of the corporate veil, Indian courts have regard to the commercial objective which underpins the concept of group company structures and the distinction between operating companies and holding companies within a group company structure.[14]

Cox & Kings sounds the warning bell in holding that the application of the GoC doctrine would rest on a fact-specific enquiry and in limiting the GoC doctrine as explained in *Cox & Kings* to Indian arbitration jurisprudence. It remains to be seen whether the GoC doctrine would apply, or to what extent its application would differ, to different group company relationships (such as independent operating companies under common ownership or listed companies within a group structure) or in relation to inter-linked contracts.

Even in situations where the GoC doctrine rightfully applies and non-signatory parties are joined to the proceedings, the nature and extent of the rights and obligations of those non-signatory parties remain undetermined at present.

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13 LIC v. Escorts Ltd., (1986) 1 SCC 264, para 90; State of UP v. Renusagar Power Co., (1988) 4 SCC 59, paras 53 and 66; Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613, paras 79 and 260 [hereinafter Vodafone].

14 Vodafone, *supra* note 10, paras 256-258.

For instance, *Cox & Kings* recognises this difficulty in respect of interim relief that a non-signatory may require under Section 9 of the Arbitration Act.[15] It holds that the non-signatory may apply for interim measures "[*o*]*nce a tribunal comes to the determination that a non-signatory is a party to the arbitration agreement*",[16] but does not express a view on interim measures that the non-signatory may require before the commencement of the arbitration or before the arbitral tribunal makes its determination as to whether the non-signatory is a party to the arbitration agreement. The issue is arguably (*albeit* not expressly) answered by the court's reasoning that the non-signatory is a "*party*" for purposes of Section 2(1)(h) and Section 7 of the Arbitration Act, and by extension, is a "*party*" who is permitted by Section 9 of the Arbitration Act to apply for interim measures.

Where available, one alternative may be to approach an emergency arbitrator for the interim relief and seek enforcement of the emergency arbitrator's decision pursuant to Section 17(2) of the Arbitration Act (such as in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited*,[17] where the decision of the emergency arbitrator joining non-signatories and granting interim relief against them was held to be enforceable as an order of the arbitral tribunal under Section 17(2) of the Arbitration Act).

CONCLUSION

The GoC doctrine has not received uniform support across jurisdictions, with some jurisdictions such as England refusing to accept the doctrine into their arbitration jurisprudence.[18] With the decision in *Cox & Kings*, the GoC doctrine stands firmly incorporated into Indian arbitration jurisprudence.

If Indian law applies, parties can consider incorporating contractual guardrails to reflect their intentions to safeguard non-signatory group entities which are intended to be excluded from exposure to the arbitration agreement. For instance, an appropriately worded entire agreement provision may serve to exclude and supersede any prior negotiations and agreements. In *Neelkanth Mansions v. Urban Infrastructure Ventures Capital Limited*, the High Court of Bombay relied on the entire agreement provisions in separate shareholders' agreements to hold that non-signatories could not be referred to arbitration under those shareholders' agreements which they had not signed.[19] Parties may also

15 Cox and Kings, *supra* note 1, at paras 152-153.
16 Cox and Kings, *supra* note 1, at para 153.
17 Amazon.com NV Investment Holdings LLC v. Future Retail Limited, (2022) 1 SCC 209, paras 45-46.
18 Peterson Farms Inc v. C & M Farming Limited, [2004] EWHC 121 (Comm).
19 Neelkanth Mansions v. Urban Infrastructure Ventures Capital Limited, 2018 SCC OnLine Bom 5970, paras 250-251.

consider incorporating provisions to limit liability to the contracting (signatory) parties and exclude recourse to parent and/or group companies who are not signatories.

The application of the GoC doctrine to specific group structures and contractual contexts will inevitably entail a case-specific analysis, including the terms of the relevant contractual matrix and an analysis of the involvement and conduct of non-signatory group companies in relation to the transaction. Issues regarding the appropriate parties to an arbitration agreement are properly determined by reference to the law of the arbitration agreement.[20] Accordingly, if Indian law applies to a potential or ongoing transaction involving a group of companies, parties should carefully evaluate their contractual framework and conduct from the inception of the transaction.

[20] Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait), [2021] UKSC 48, paras 23-26.