NEWSLETTER 2

The "Group of Companies" doctrine: Future of composite-transaction disputes after *Cox and Kings*

In 1986, Ronald Dworkin postulated a scenario through his *Law's Empire* in which a group of writers compose a novel, with each writer creating a new chapter, employing their interpretation of the previous chapters assigned to them. It is anticipated that novelists would take their duty of continuity with greater seriousness in order to produce "a single, cohesive novel that is the best it can be." This is what appears to have transpired through the various judgments of the apex court on the "Group of Companies doctrine". It all began with *Chloro Controls*[1] which was followed by series of subsequent judgments starting from *Cheran Properties*[2] and ending with *Cox and Kings*[3], and though all these judgments tend to promote the doctrine, each judgment has tweaked the plotline a bit to make the novel a more coherent read, instead of rewriting or discarding the previous chapters.

Feeling a need to put an end to this ambiguity and seek operative answers to a few questions related to the doctrine, a reference was made, in *Cox and Kings,* to a 5-judge bench headed by the CJI. In a welcome move, and categorically so, the "Group of Companies" doctrine, which was consistently applied in international arbitrations, was finally adopted in Indian arbitration jurisprudence. What was otherwise only a legal theory to determine whether a non-signatory to an arbitration agreement could be made a party to the arbitral proceedings, has been given adequate scholarly exposition by Hon'ble CJI Dr. D.Y. Chandrachud and Hon'ble Justice P.S. Narasimha through arguably one of the best written judgments on arbitral law. Through this piece, I undertake the dual task of setting out the true import of the doctrine and assessing its impact on the future.

Decrypting the GoC doctrine:

Group companies have become the trend in modern economic reality. Most common examples would be the TATA Group or the Reliance Group. An inevitable consequence of the group structure is that more often than not, the subsidiary companies work in unison with the parent company, although each company has its separate legal existence under law. What

[1] Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc, (2013) 1 SCC 641
[2] Cheran Properties Ltd v. Kasturi and Sons Ltd, (2018) 16 SCC 413
[3] Cox and Kings Ltd v. SAP India Pvt Ltd. (2022) 8 SCC 1

happens then if arbitration is invoked under a contract which only the parent company has signed, although the subsidiary companies have actively participated in performing the contract. This million-dollar question is what gave rise to the GoC doctrine. Now, there are some well settled doctrines of contract law and company law such as *privity of contract* and *separate legal entity* or *limited liability of a company*. These follow that only a party to the arbitration agreement can be drawn before the arbitral tribunal in event of a dispute. The problem really arises when a claim is made against/by a subsidiary company which has not formally affixed its stamp/signature on the contract, but has played its part in negotiation and performance of the contract.

The GoC doctrine is a means of identifying the common intention of the parties to bind a non-signatory to an arbitration agreement. In other words, the doctrine says that instead of adopting a dogmatic approach to 'consent' and limiting it to only a signature/stamp of the party on paper, the tribunal must adopt a dynamic approach towards consent and assess whether a company, though not a formal party, has 'consented' to be bound by the contract by its overall conduct vis-a-vis the contract.

Noteworthy observations:

Although it's impossible to sum up the reasoning of the court in a short newsletter, I think I should point out a few observations which deserve special attention. What really stands out from a full reading of the judgment is the CJI's endeavour to not just lay down the law, but attach apt and adequate reasoning to it, so that arbitration practitioners/arbitrators can apply the doctrine with reasonable certainty.

Notably, terminology such as 'extension' of the arbitration agreement to 'third parties' is bluntly proscribed. As Born[4] avers, *"...an entity is in reality a party to the arbitration agreement – which therefore does not need to be "extended" to a "third party" – because that party's actions constitute consent to the agreement, or otherwise bind it to the agreement, notwithstanding the lack of its formal execution of the agreement*". It would therefore also be wrong to say that the words "person claiming through or under such party" in Ss. 8 and 45 of the Act form basis for the GoC doctrine under Indian arbitration law. This is because a 'party' is obviously different from 'a person claiming under that party', as the latter stands in the arbitration in a 'derivative capacity' which it derives from the former. This follows that a

[4] Gary Born, International Arbitration Law and Practice (3rd ed, 2021)

person claiming under a party cannot stand independently in the arbitration. Typical situations include subrogation, assignment, novation, etc.

Instead of complicating the doctrine by finding its basis in the Act, the court, after a holistic review of international practice, held that it has separate existence as a legal theory. GoC is nothing but a 'fact based' doctrine which entails a proper assessment of implied consent of a non-signatory to be bound by the arbitration agreement which can be reflected in things like correspondences, invoices, MoMs, etc.

Future considerations:

Although the international arbitration practitioners must have breathed a sigh of relief after this judgment, what remains to be seen is how arbitrators interpret and apply this doctrine judiciously. A doctrine like GoC, in my opinion, is highly vulnerable to misapplication. Arbitrators must tread carefully before allowing a party to implead a non-signatory to the arbitration by invoking the doctrine. It is in the worst interests of a company to be pulled from its daily affairs and be dragged into dispute resolution to which it never consented to. From the limited insight I've had in the workings of International Law Firms, it wouldn't be a stretch to assume that most of them would have begun analysing the import of this judgment to advise clients on the consequences of arbitrating in India.

Ergo, I believe that though the judgment is huge first step towards the dream of making India an arbitration hub, the prospects of that unfolding are majorly dependant on judicious application of the doctrine paired with minimal intervention by courts at the pre-referral stage.

Best,
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