‘Group of Companies Doctrine’ set for an overhaul, about time, too

The present understanding of the term can’t be sustained in India–a jurisdiction that respects party autonomy in arbitration

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In a recent decision in *Cox and Kings vs SAP India*, the Supreme Court, after undertaking a detailed review of the evolution of jurisprudential position on the ‘group of companies’ doctrine, opined that the same needed to be relooked. The apex court observed that the present understanding of the ‘group of companies doctrine’ cannot be sustained in India – a jurisdiction that respects party autonomy in arbitration.

The doctrine and its origin

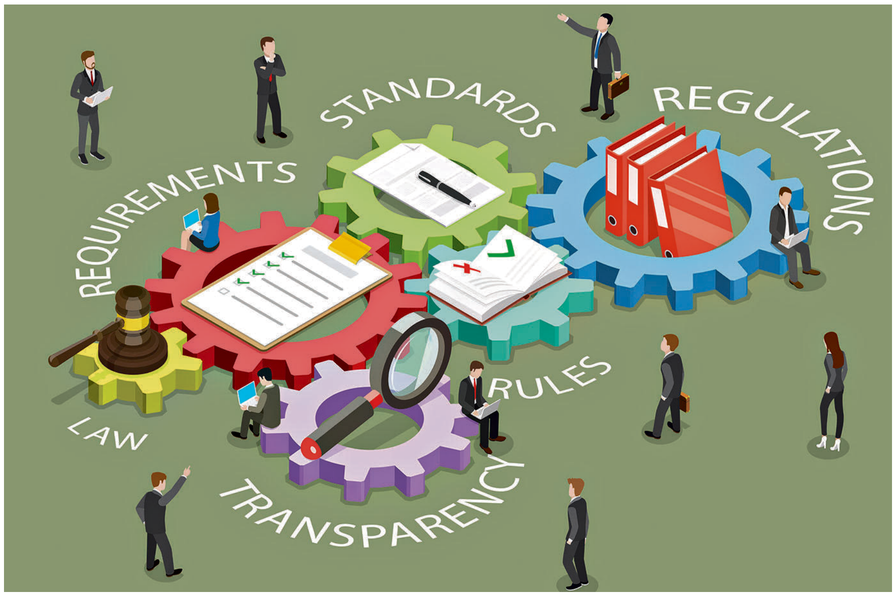
Arbitration, across the globe, is a phenomenon that finds its roots in the mutual and voluntary agreement between disputing parties to settle their disputes privately through a neutral and typically non-state adjudicator. The Arbitration and Conciliation Act, 1996 (Arbitration Act) under Section 7 encapsulates the statutory mandate for parties to reduce their intention to submit disputes to arbitration in a written arbitration agreement. Thus, party autonomy and consent to be bound by an arbitration agreement are of paramount importance in Indian arbitral jurisprudence.

A challenge that has perplexed jurists in India and the world is the question of whether an arbitration agreement would extend to non-signatories as well. The crucial factors that support the argument for the inclusion of non-signatories in arbitral proceedings include: (i) the non-signatory’s direct relationship with a signatory; (ii) the non-signatory being closely associated with the subject matter of dispute; and (iii) the composite nature of the transaction making non-signatory’s involvement ideal and necessary.

The group of companies doctrine emerged in this background and was first discussed in the International Chamber of Commerce (ICC) case of *Dow Chemicals Company vs Isover Saint Gobain*. In essence, it was held that a non-signatory company could be bound by an arbitration agreement if a mutual intention can be made out amongst all the parties to be bound by the proceedings. Such parties must belong to a group that is closely related and forms a single economic unit (termed as ‘same economic reality’).

The downside

While the group of companies doctrine aims at increasing procedural efficiency by weaving together companies engaged in a web of complex business structures to extend an arbitration agreement to one or more companies of a group, it also attacks the doctrine of corporate personality by lifting the corporate veil.



Pros and cons While the group of companies doctrine aims at increasing procedural efficiency in case of arbitration, it also attacks the doctrine of corporate personality by lifting the corporate veil

In other words, the group of companies doctrines treats different corporate entities as a single economic unit to conduct the arbitration and determine the disputes.

In India, the first case which dealt with the applicability of the group of companies doctrine was *Sukanya Holdingsvs Jayesh H. Pandya*. In Sukanya Holdings, the Supreme Court while interpreting Section 8 under Part I of the Arbitration Act opined that causes of action could not be bifurcated in arbitration and non-signatories could not be included within the same arbitral proceeding.

In the case of *Chloro Controls India vs Severn Trent Water Purification Inc.*, the Supreme Court while dealing with a case of international arbitration under Part II of the Arbitration Act held that a non-signatory or third party could be subjected to arbitration without its prior consent in exceptional circumstances.

For allowing the joinder of a non-signatory, the courts will look for, amongst other things: (i) a direct relationship of the non-signatory to the arbitration agreement; (ii) direct commonality of the subject matter of dispute; and (iii) the arbitration agreement governing a composite transaction.

Ultimately, the Supreme Court concluded that the decision and ratio in Sukanya Holdings were restricted to the arbitrations conducted under Part I of the Arbitration Act.

The position in Chloro Control was further expanded in *Cheran Properties vs Kasturi & Sons* where the Supreme Court allowed enforcement of an arbitral award against a non-signatory even though it did not participate in the proceedings. Similarly, in *Reckitt Benckiser (India) (P) vs Reynders Label Printing (India)*, the Supreme Court refused to apply the group of companies doctrine on account of the lack of mutual intention of the parties to bind both the signatory as well as the non-signatory parties. Thus, the decision in Chloro Control paved way for other judicial pronouncements on the joinder of non-signatories to arbitration.

Section 8

As the decisions in Sukanya Holdings and Cholro Controls presented a different approach for joinder of non-signatories under Part I and Part II of the Arbitration Act, the legislature amended Section 8 of the Arbitration Act. The scope of reference of parties to arbitration was extended from the parties signatory to an arbitration agreement to also include the parties “claiming through or under” them. However, while amending Section 8, the legislature did not introduce a corresponding amendment to the definition under Section 2(1)(h) which defines a “party” as a party to an arbitration agreement. Thus, the 2015 amendment of Section 8 left the door open for a potentially anomalous situation where a party claiming through or under a signatory could be referred to arbitration, but would not have a right to seek recourse to other reliefs under the Arbitration Act.

Subsequent to the introduction of the amendment in Section 8, in *Ameet Lalchand Shah v Rishab Enterprises*, the Supreme Court while dealing with several parties involved in a single commercial project placed reliance on the amended position to extend the applicability of the arbitration agreement to non-signatories as well. The Supreme Court opined that the disputes that had emerged could be resolved only resolved by referring all parties to the arbitration.

Anomalies highlighted by SC

In its judgment in Cox and Kings, the Supreme Court highlighted several anomalies in the ratio of the Chloro Control dictum. Firstly, it was opined that the decision in Chloro Control refers to the subjective intention of the parties to be bound by the arbitration agreement when they have clearly not been a signatory to the agreement. It was held that inferring the intent of a party while it is not a signatory to an agreement is difficult and requires exposition by the Supreme Court.

Further, the Supreme Court observed that the joinder of non-signatories has the effect of obliterating the commercial reality and the benefits of having distinct corporate entities in the form of subsidiaries. It was also observed that concepts such as single economic entity are difficult to enforce as principles of law.

The areas left open by Chloro Control were held by the Supreme Court to go not only against the distinct legal identities of companies but also the principle of party autonomy itself. In its conclusion, the Supreme Court held that the law laid in Chloro Control was more on economics and convenience rather than law. Therefore, doubting the correctness of the legal position in Chloro Control, the Supreme Court has referred the matter to a larger bench to settle the conundrum around the doctrine of group of companies once and for all.

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