



Lex Spectrum
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**GROUP OF COMPANIES DOCTRINE:
ARBITRATION AGREEMENT BINDS
NON - SIGNATORIES**

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COX AND KING LTD. V SAP INDIA PVT. LTD. & ANR.¹

INTRODUCTION

In legal doctrine, it is an established principle that the essential pre-requisite for a legally binding contract is the mutual consent of the involved parties. This consent can be expressed verbally, through actions, or in the case of a written contract, by signing the document. The contractual obligations extend only to the individuals who have provided their consent, specifically those who have affixed their signatures to the agreement. This legal concept is commonly referred to as "privity of contract," which stipulates that parties not directly involved in the contract are not bound by its terms and cannot assert any claims arising from it.

FACT AND ISSUE

Recently, in above mentioned case, the Supreme Court of India is called upon to determine the validity of the 'Group of Companies' doctrine in the jurisprudence of Indian arbitration. This doctrine is called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy, privity of contract, and separate legal personality. The challenge before the Supreme Court of India is to figure out whether there can be a reconciliation between the group of companies doctrine and well settled legal principles of corporate law and contract law.

The group of companies doctrine is used in the context of companies which are related to each other by virtue of their being a part of the same corporate group. Since every company in a group has a separate legal personality, a contract formally entered by one member of a group will not be binding on the other members by virtue of the limited liability principle. The group of companies doctrine is used to bind a non-signatory company within a group to an arbitration agreement which has been signed by other member of the group.² The underlying basis of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement. In other words, the group of companies doctrine is a means of identifying the common intention of the parties to bind a non-signatory to arbitration agreement by emphasizing and analysing the corporate affiliation of the distinct legal entities.³

RATIO AND DECISION

In multi-party agreements, the courts or tribunals will have to examine the corporate structure to determine whether both the signatory and nonsignatory parties belong to the same group. This evaluation is fact specific and must be carried out in accordance with the appropriate principles of company law. Once the existence of the corporate group is established, the next step is the determination of whether there was a mutual intention of all the parties to bind the non-signatory to

¹ (Arbitration Petition (Civil) No. 38 of 2020).

² UNCITRAL, 'Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form of arbitration agreement: Report of the Secretary General' A/CN.9/WG.II/WP.108/Add.1 (26 January 2000)

³ Gary Born (n 44) 1563.

the arbitration agreement. The ‘group of companies’ doctrine requires the courts and tribunals to consider the commercial circumstances and the conduct of the parties to evince the common intention of the parties to arbitrate. It is important to note that the group of companies doctrine concerns only the parties to the arbitration agreement and not the underlying commercial contract.

Consequently, a non-signatory could be held to be a party to the arbitration agreement without becoming a formal party to the underlying contract. The existence of a group companies is one of the essential factors to determine whether the conduct amounts to consent but membership of a group is not sufficient in itself. This has been the consistent position of law, starting from the *Dow Chemicals*⁴ award, where it was observed that the common intention of the parties to bind the non-signatory party to the arbitration can be inferred from the “circumstances that surround the conclusion and characterize the performance and later the termination of the contracts.” In other words, it was held that a non-signatory party could be considered as a “true party” to the arbitration agreement on the basis of their role in the conclusion, performance, or termination of the underlying contract containing the arbitration agreement.

LEXSPECTRUM’S COMMENT

In the current legal matter, the Supreme Court of India has established the principle that a party who did not formally sign an arbitration agreement may still be subjected to arbitration, under the condition that the transactions involved pertain to a group of companies and there exists a clear intention among the parties to bind both the signatory and non-signatory entities. In essence, the determination of the parties' intention holds significant weight in delineating the scope of arbitration, encompassing both signatory and non-signatory parties.

The inclusion of a non-signatory or third party in arbitration proceedings without prior consent is permissible but is considered an exception, subject to certain criteria. The court will scrutinize these exceptional circumstances based on the criteria of a direct relationship with the party that signed the arbitration agreement, a direct commonality of the subject matter, and the agreement between the parties constituting a composite transaction. The transaction in question should be of a composite nature, where the performance of the main agreement is not practically achievable without the support, execution, and performance of supplementary or ancillary agreements, all contributing to a common objective and collectively influencing the dispute.

In addition to these considerations, the court must assess whether a composite reference involving such parties would align with the principles of justice. Once this thorough examination is undertaken, and the court affirms these conditions, the inclusion of non-signatory parties in the arbitration reference may fall within the discussed exception.

⁴ Daw Chemicals & Co. v United States 476 U.S. 227 (more) 106 S. Ct. 1819; 90 L. Ed. 2d 226.

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