THE GROUP OF COMPANIES DOCTRINE – ASSESSING THE INDIAN APPROACH

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Abstract

Arbitration is a creature of consent. In establishing such consent, a variety of legal doctrines have been used, albeit sparingly, to bind non-signatories to an arbitration agreement. This article explores one such legal doctrine – the "group of companies" doctrine. With limited exceptions, the "group of companies" doctrine has received a lukewarm reception in most civil and common law jurisdictions, having been primarily criticised for disregarding the principle of separate legal personality and permitting distinct corporate entities within a group to be treated as a single economic unit. Breaking ranks with its common law counterparts, Indian courts have displayed a greater proclivity for the "group of companies" doctrine. Through a comparative lens, this article discusses the Indian Supreme Court's seminal judgment adopting the doctrine and the issues arising out of the Court's reasoning, some of which have arguably led to an overexpansion of the doctrine in subsequent case law. The article concludes by highlighting the imminent need to revisit the contours of the "group of companies" doctrine in India, to prevent its erroneous application in the future.

I. Introduction

Arbitration is a voluntary method of dispute resolution. Consent has thus rightly been described as the "*essential basis*" of arbitration,[1] and, as the embodiment of that consent, the arbitration

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[1] REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.01 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "BLACKABY ET AL."]; *see also* ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION ¶¶ 2.10, 5.07 (2012) ("The principal characteristic of arbitration is that it is chosen by the parties by concluding an agreement to arbitrate. This is considered the foundation stone of international commercial arbitration, as it records the consent of the parties to submit to arbitration – a consent which is indispensable to any process of dispute resolution outside national courts.") ("The consensual nature is one of the fundamental elements of the classical characterization of the concept of arbitration"); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 498 (Emmanuel Gaillard & John Savage eds., 1999) [*hereinafter* "FOUCHARD GAILLARD GOLDMAN"] ("The arbitration agreement binds only those parties that have entered into it."); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1–11 (2003) ("The principal characteristic of arbitration is that it is chosen by the parties."); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 280–81 (3d ed. 2021) [*hereinafter* "BORN"] ("It is elementary that arbitration is consensual … [T]hat is the uniform holding of national courts, commentary and other authorities. Simply put, absent an 'agreement' to arbitrate, there is, by definition, obviously no 'arbitration agreement.'").

agreement is of foundational importance to the arbitral process.[2] International conventions and national law universally require the existence of a valid arbitration agreement to found the jurisdiction of an arbitral tribunal and, conversely, to permit awards to be set-aside or refused enforcement in the absence of such an agreement.[3] In assessing that requirement, the existence of a written arbitration agreement is often the starting point for a complex jurisdictional analysis into who is bound by that agreement.

Typically, the parties that are bound by an arbitration agreement – and that are considered to have provided consent to arbitrate – are its signatories.[4] But like any other contract, non-signatories can also be bound by an arbitration agreement in limited circumstances. In cases where a party is not a signatory to an arbitration agreement, courts and arbitral tribunals have properly exercised caution in ascertaining whether that party is in fact bound by the agreement.[5] The reason for this is obvious: it contradicts the basic principles of international arbitration to impose an arbitration agreement on a party that has not consented to it. The majority of doctrines that are used to bind non-signatories to an arbitration agreement are thus well-established and clearly defined, deriving their basis from existing principles of contract, company, and agency law in domestic legal systems.[6] But there is one conspicuous outlier: the "*group of companies*" doctrine.

As the name suggests, the "*group of companies*" doctrine provides, in broad terms, that a non-signatory may be bound by an arbitration agreement if it forms part of the same group of companies as a signatory and all the parties to the arbitration agreement mutually intend that the non-signatory be bound by it. The parties' intentions are typically ascertained through their conduct, which includes a consideration of whether the non-signatory participated in the negotiation, performance, or termination of the contract. Authorities emphasise that mere existence of an affiliate relationship between a signatory and non-signatory cannot be the basis for

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2 BLACKABY ET AL., *supra* note 1, ¶ 2.01 ("The agreement to arbitrate is the foundation stone of international arbitration. It records the consent of the parties to submit to arbitration – a consent that is indispensable to any process of dispute resolution outside national courts. Such processes depend for their very existence upon the agreement of the parties … [T]he consent of the parties remains the essential basis of a voluntary system of international arbitration.") (emphasis added).

3 *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(a), June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"]; Arbitration and Conciliation Act, No. 26 of 1996, § 34(2)(a)(ii) (India) [*hereinafter* "Arbitration Act"]; United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 34(2)(a)(i), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

4 There is, on occasion, misplaced debate as to whether a signature is necessary for a valid arbitration agreement. It is well-established that the validity of an arbitration agreement, like any other contract, is not contingent on formal execution or signature by the parties. *See* William Park, *Non-Signatories and the New York Convention*, 2 DISP. RESOL. INT'L 84, 89–90 (2008) (discussing the position under various national laws and the New York Convention). The existence of signatories does, however, provide a useful starting point to ascertain the parties that are bound by the arbitration agreement.

5 *See, e.g.*, Smith/Enron Cogeneration LP, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 97 (2d Cir. 1999) ("[A] court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party"); RV Solutions Pvt. Ltd. v. Ajay Kumar Dixit & Ors., (2019) 257 DLT 104, ¶ 12 (India) [*hereinafter* "RV Solutions"] ("A third party or a non-signatory could be subjected to arbitration without his prior consent, though this would only be in exceptional cases.").

6 BORN, *supra* note 1, at 1525–27.

consent.[7] Unlike other non-signatory theories that find their roots in domestic law principles, the "*group of companies*" doctrine stems from international arbitration jurisprudence.[8]

The ease with which the "*group of companies*" doctrine appears to impute intent and glide over distinct legal entities and signatories strikes immediate discord with the sacrosanct principles of separate legal personality and privity of contract. Perhaps unsurprisingly, the doctrine is not without its critics and has been rejected by most national courts across the civil and common law divide. Scathing criticisms go so far as to suggest that the doctrine is simply a "*shortcut permitting avoidance of rigorous legal reasoning*".[9]

In a seminal decision that goes against the proverbial tide, the Indian Supreme Court in *Chloro Controls India Private Limited* v. *Severn Trent Water Purification Inc*[10] ["**Chloro Controls**"] adopted the "*group of companies*" doctrine into Indian law. Multiple Indian courts have since applied the doctrine in varying contexts, including to enforce an award against a non-signatory that was not party to the underlying arbitration. The doctrine now appears to be entrenched in Indian jurisprudence.

This article explores the genesis of the "*group of companies*" doctrine and its reception by national courts, arbitral tribunals and in commentary **[Part II]**, before setting out the manner of its adoption and application by Indian courts **[Part III]**. Through a comparative lens, the article then challenges the reasoning and reliance on precedent in *Chloro Controls* to conclude that the Indian Supreme Court should, if the opportunity arises, reconsider the existence and parameters of the "*group of companies*" doctrine under Indian law **[Part IV]**.

II. The "*group of companies*" doctrine – genesis and reception

The "*group of companies*" doctrine was first espoused and applied by an arbitral tribunal in *Dow Chemicals* v. *Isover Saint Gobain* ["**Dow Chemicals**"].[11] Beyond French courts and some arbitral tribunals under the rules of the International Chamber of Commerce ["**ICC**"], the doctrine has largely been subject to critical reception. The main criticisms focus on the doctrine's apparent disregard for the principles of privity of contract and separate legal personality, blurring the requirement of consent in international arbitration.

A. *Dow Chemicals* — From arbitral jurisprudence to the French courts

The dispute in *Dow Chemicals* arose out of distribution agreements that were governed by French law and contained an arbitration clause which provided for ICC arbitration seated in Paris. Subsidiaries of Dow Chemical Company, Dow Chemical A.G., and Dow Chemical Europe, signed two distribution agreements to distribute thermal isolation equipment in France with certain companies, who later assigned their rights and obligations to Isover Saint Gobain ["**Isover**"]. Both contracts provided that any subsidiary of Dow Chemical Company could comply with the delivery

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7 BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE – A COMPARATIVE STUDY ¶ 244 (2d ed. 2020) ("…we will emphasise in the conclusions that we will draw from an analysis of the case law that the existence of a group of companies is not per se a sufficient element to allow the extension to a non-signatory company of an arbitration agreement concluded by another member of the group.").

8 BORN, *supra* note 1, at 1558–68; BLACKABY ET AL., *supra* note 1, ¶¶ 2.43–2.50.

9 HANOTIAU, *supra* note 7, ¶ 245.

10 Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. (2013) 1 SCC 641 (India) [*hereinafter* "Chloro Controls"].

11 Dow Chemical France, the Dow Chemical Company & Ors. v. Isover Saint Gobain, ICC Case No. 4131, IX Y.B. COMM. ARB. 131 (1984) [*hereinafter* "Dow Chemicals"].

obligations that were eventually fulfilled by Dow Chemical France, a subsidiary that was not a signatory to the distribution agreements.

In light of certain disputes over the performance of the distribution agreements, all four Dow Chemical entities – Dow Chemical Company, Dow Chemical A.G., Dow Chemical Europe, and Dow Chemical France – initiated arbitral proceedings against Isover. Isover objected to the jurisdiction of the Tribunal on the basis that two of the four Dow Chemical entities – Dow Chemical France and Dow Chemical Company – did not sign the distribution agreements and there was thus no valid arbitration agreement with those parties.[12] The Tribunal disagreed.

In assessing whether the non-signatories were bound by the arbitration agreements, the tribunal held, applying the general principles of international arbitration law, that the scope and effect of the arbitration agreement should be determined by reference to the "*common intent of the parties*" as ascertained from the facts relating to the conclusion, performance, and termination of the agreements.[13] The Tribunal also took into account international trade usage, specifically in the presence of a group of companies.[14]

The Tribunal noted that none of the parties had attached any relevance to which company within the Dow Chemicals group signed and performed the distribution agreements.[15] Accordingly, the Tribunal held that all the companies within the Dow Chemicals group had understood themselves to be concluding the contract – an understanding shared by Isover's predecessors in contract.[16] In particular, the Tribunal found that Dow Chemical France played a central role in the formation, performance, and termination of the contracts as it was pivotal in organising "*the contractual relationship with the companies succeeded by [Isover]*" and had carried out the deliveries envisaged under both agreements.[17] The Tribunal also concluded that Dow Chemical Company had been involved in all stages of the contract as it owned the trademarks under which the relevant products were to be marketed in France and controlled the subsidiaries that entered into and performed the distribution agreements.[18] Observing that the Dow Chemical group operated as a single "*economic reality*," the Tribunal held that the non-signatories were bound by the arbitration agreements:

> "*[T]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intentions of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*"[19]

Isover applied to the French courts to set aside the award on jurisdictional grounds. The Paris Court of Appeal rejected the application, reasoning that the "*[arbitral tribunal] ha[d], for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved, that Dow*

12 *See id.* at 132.
13 *Id.* at 134.
14 *Id.*
15 *Id.* at 134–35.
16 *Id.* at 135.
17 *Id.* at 134.
18 *Id.* at 134–35.
19 *Id.* at 136.

Chemical France and Dow Chemical Company have been parties to these agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well".[20]

B. Reception across the civil and common law divide

Subsequent French courts have enforced arbitral awards where the arbitration agreement has been extended to bind non-signatories, either expressly or implicitly, on the basis of the "*group of companies*" doctrine.[21] In *Sponsor A.B.* v. *Lestrade*, for instance, the Court of Appeal of Pau affirmed the decision of the lower court in appointing an arbitrator for a party that was a non-signatory. In applying the "*group of companies*" doctrine, the Court observed that the non-signatory had played an important role in the conclusion, non-performance, and termination of the underlying contract, making it "*the soul, the inspirer and, in fact, in a word, the brains of the [signatory] party*".[22]

ICC tribunals have also adopted and applied the "*group of companies*" doctrine, often underscoring that the mere fact that the non-signatory belongs to the same group of companies as the signatory is a necessary but not sufficient condition to bind the non-signatory to the arbitration agreement.[23] Outside the French and ICC context, however, the "*group of companies*" doctrine has had a more lukewarm reception.

Perhaps most forcefully, the "*group of companies*" doctrine has been eschewed for running roughshod over the principle of separate legal personality and permitting distinct corporate entities within a group to be treated as a single economic unit.[24] The principle of separate legal personality is not limited to national legal systems and is even well-rooted in international jurisprudence, including decisions of the International Court of Justice.[25] In simple terms, the principle of separate legal personality provides that a company is a distinct legal entity from its shareholders and affiliates with the capacity to sue and be sued, enter into legal relations and own assets in its own right.[26]

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20 Yves Derains, *Is There a Group of Companies Doctrine?*, *in* DOSSIER OF THE ICC INSTITUTE OF WORLD BUSINESS LAW: MULTIPARTY ARBITRATION 131, 133 (Bernard Hanotiau & Eric E. Schwarz eds., 2010).

21 *See, e.g.*, Cour de Cassation [Supreme Court for Judicial Maters] June 11, 1991, 1992(1) REVUE DE L'ARBITRAGE 73 (Fr.); Cour d'appel [Regional Court of Appeal] Paris, Oct. 7, 1999, 2000(2) REVUE DE L'ARBITRAGE 288 (Fr.); Cour d'appel [Regional Court of Appeal] Pau, Nov. 26, 1986, 1998(1) REVUE DE L'ARBITRAGE 153 (Fr.).

22 Cour d'appel [Regional Court of Appeal] Pau, Nov. 26, 1986, 1998(1) REVUE DE L'ARBITRAGE 153, 156 (Fr.); Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?,* 26(5) J. INT'L ARB. 647, 668 (2009) [*hereinafter* "Ferrario"].

23 *See, e.g.*, ICC Case No. 5103, 2(2) INT'L CT. ARB. BULL. 20 (1991); ICC Case No. 6519, 2(2) INT. CT. ARB. BULL. 34 (1991); ICC Case No. 11405 (cited in HANOTIAU, *supra* note 7, ¶¶ 418–21); HANOTIAU, *supra* note 7, ¶ 244 ("But the fact that the signatory and the non-signatory belong to the same group is only one factual element (*un indice*) to be taken into consideration to determine the existence of consent").

24 Otto Sandrock, *Group of Companies and Arbitration*, TIJDSCHRIFT VOOR ARBITRAGE 6 (2005) ("[The group of companies] doctrine must however, be rejected for several reasons. First, the rules developed under this doctrine are not clear-cut and defined enough to permit their unambiguous application ... Secondly, the basic principle of privity of contract is confusingly blurred. Thirdly, there is no reason whatsoever to deviate from the traditional approach which guarantees a much higher degree of certainty of law and of foresee ability. Fourthly, this theory often also runs counter to the clear intention of the parties."). For further discussion, *see* cases set out in Part II(B) of this article.

25 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, at 39 (Feb. 5).

26 *See, e.g.,* Albacruz (Cargo Owners) v. Albazero [1977] AC 774 (HL) 807 (Eng.) ("[e]ach company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law.").

The rights and liabilities of a company cannot, without more, be transposed on its shareholders or affiliates or vice-versa.

Attempts to treat corporate actors in the same group as a single entity have found little favour, even in circumstances where non-contracting entities might have participated in transactions. Indeed, in international commerce, entities across a corporate group regularly and interchangeably negotiate and perform contracts, notwithstanding the legal form or named parties to a transaction. Imputing intent in such circumstances defeats the purpose of conferring separate legal personality.

As Robert Goff LJ famously observed in *Bank of Tokyo Ltd.* v. *Karoon*:

> "*Mr. Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.*"[27]

Given the primacy of separate legal personality, national courts have rejected attempts to import the "*group of companies*" doctrine in the international arbitration context.

In the United States, for instance, the Court of Appeals for the Second Circuit dismissed attempts to enforce an arbitral award against a non-signatory parent in *Sarhank Group* v. *Oracle Corp.*[28] In the arbitral proceeding, the Tribunal had found that the non-signatory was bound by the arbitration agreement and liable for obligations under the contract.[29] The Court of Appeals for the Second Circuit disagreed.

While accepting in principle that non-signatories could be bound by an arbitration agreement, the Court confirmed that the instances in which U.S. courts have bound non-signatories to an arbitration agreement are limited to "*incorporation by reference, assumption, veil piercing/alter ego and estoppel and the like*".[30] Stressing the importance of separate legal personality, however, the Court concluded that it would be impermissible to look beyond the corporate form of a subsidiary to bind a parent company because:

> "*[t]o hold otherwise would defeat the ordinary and customary expectations of experienced business persons. The principal reason corporations form wholly owned foreign subsidiaries is to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts. The practice of dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade.*"[31]

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27 Bank of Tokyo Ltd. v. Karoon [1987] AC 45, at 64 (Eng.).

28 Sarhank Group v. Oracle Corp, 404 F.3d 657 (2nd Cir. 2013) [*hereinafter* "Sarhank"].

29 *Id.* at 662 ("The Arbitral Tribunal held that, 'despite ... their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed.'").

30 *Id.* at 662.

31 *Id.*; *see also* Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect To The Group of Companies Doctrine*, 3(1) THE ARB. BRIEF 18, 34 et seq (2013).

Singapore courts have similarly rejected the doctrine. In *Manuchar Steel H.K. Ltd* v. *Star Pac. Line Pte Ltd.*,[32] the Claimant sought to enforce an award against a non-signatory that formed part of the same group of companies as the signatory, on the basis that the two companies formed a single economic entity.[33] In dismissing the argument, the Court concluded that the right to use a corporate structure in any manner legally permissible was inherent in Singapore's corporate law and that Singapore did not recognise the theory of single economic entity:

> "*[a] basic tenet of company law in Singapore … is that a company and its shareholders are separate legal persons. Save for very limited exceptions, most of which are statutory, the company has rights and liabilities of its own which are distinct from those of its shareholders.*"[34]

It is only in limited circumstances where there has been some form of abuse that the court looks past the corporate form of contracting entities.[35] In relation to the argument that the signatory and non-signatory company formed a single economic entity, the Court held that enforcing the arbitral award against a non-signatory on the basis of this theory "*would be anathema to the 'internal logic of the consensual basis of an agreement to arbitrate*'."[36]

The English High Court in *Peterson Farms Inc.* v. *C&M Farming Ltd* similarly rejected the "*group of companies*" doctrine as forming "*no part of English law*".[37] While not expressly articulated in those terms, the decision makes apparent that the Court was motivated by the primacy of separate legal personality under English law.

Swiss and German courts have also refused to apply the "*group of companies*" doctrine, noting, *inter alia*, that the corporate form of entities could only be disregarded in limited circumstances of abuse.[38]

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32 Manuchar Steel H.K. Ltd. v. Star Pac. Line Pte Ltd. [2014] SGHC 181 (Sing.).

33 *Id.* ¶ 18.

34 *Id.* ¶ 89.

35 *Id.* ¶ 96.

36 *Id.* ¶ 70.

37 Peterson Farms Inc. v. C&M Farming Ltd. [2004] EWHC (Comm) 121, ¶ 62 (Eng.) [*hereinafter* "Peterson Farms"]; *see also* The Mayor & Commonalty & Citizens of the City of London v. Sancheti [2008] EWCA (Civ) 1283 (Eng.) [*hereinafter* "Sancheti"] (rejecting arguments that a subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were "so closely related" that it could be said that the subsidiary was "claiming through or under" the parent).

38 Bundesgericht [Bger] [Federal Supreme Court] Jan. 29, 1996, 14(3) ASA BULL. 496 (Switz.); *see also* DANIEL GIRSBERGER & NATALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 101 (3d ed. 2016); *see also* Andrea Meier, *Multi-party Arbitrations*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 2505, 2508 (Manuel Arroyo ed., 2d ed. 2018); Oberlandesgericht Hamburg [OLG Hamburg] [Higher Regional Court of Hamburg] Nov. 8, 2001, 2002 OBERLANDESGERICHT-REPORT 305 (Ger.); Christian Duve & Philip Wimalasena, *Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration of Corporate Law Disputes in Germany*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 927, 951 (Patricia Nacimiento eds., 2d ed. 2015). Both Swiss and German courts have been more receptive to the "group of companies" doctrine in cases where the tribunal applied foreign law. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 8, 2014, GER. ARB. J. 151 (Ger.) ("[I]t is not evident that such a binding [of a non-signatory to the arbitration agreement] would offend against the *ordre public*. Article 6 of the Introductory Act to the German Civil Code protects – like other appropriate reservation clauses … only the 'core of the domestic legal system'…. The decisive factor in this respect is whether the result of the application of foreign law is so strongly at odds with the fundamental ideas of the German regulations and the ideas of justice contained in them that it appears unacceptable according to domestic perceptions…. For this purpose, it is not sufficient if the German judge, if he or she had to decide the case according to German law, would come to a different conclusion on the basis of mandatory German norms …. The assumption of a violation of the *ordre public*

The doctrine has also been criticised for disregarding the foundational requirement of party consent in arbitration and the contractual emphasis on privity.[39] One of its more vocal critics, Bernard Hanotiau argues that the "*group of companies*" doctrine has been misapplied in practice by tribunals that disregard the "*undisputed principle*" that jurisdiction over a non-signatory cannot be established solely on the basis that a non-signatory belongs to the same corporate group as a signatory.[40]

However, commentaries on the "*group of companies*" doctrine are not universally critical. In defence of the doctrine, some have underscored that it does not easily disregard corporate form and only applies in circumstances where the evidence objectively points to an intent for the non-signatory to be bound.[41] Equally, while there is some force to the criticism that the doctrine has been misused and is easy to misapply, as a matter of principle, it is difficult to challenge the "*group of companies*" doctrine as categorically eschewing party consent. To the contrary, the intentions of the parties, as manifested in their conduct, is the touchstone of the "*group of companies*" doctrine.[42]

As some commentators have observed, the bone of contention for the "*group of companies*" is arguably one of semantics.[43] The doctrine is a manifestation of the principle of implied consent.[44] If one looks past labels, the doctrine, in essence, simply seeks to ascertain whether all the parties, signatories and non-signatories alike, intended the non-signatory to be bound by the arbitration agreement based on the conduct of the parties as objectively construed. The fact that the non-signatory is of the same group of companies as a signatory is, in that regard, merely one factor that points towards the existence of such intent.[45] But the relationship of the parties is not, in itself, dispositive of the inquiry.[46] That might beg the question of whether there is a need for a separate "*group of companies*" doctrine and whether it has any practical effect, but that ought not to diminish the underlying rationale that where parties intend for a non-signatory to be bound by an arbitration agreement, it should be held to its contractual obligations.

III. ***Chloro Controls*** **and the Indian approach to the "*group of companies*" doctrine**

The "*group of companies*" doctrine is of relatively recent import in India and has largely grown out of the need to avoid the fragmentation of disputes in multi-party and multi-contract situations (referred to as "*composite*" transactions). Like most arbitral laws, the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] does not expressly recognise the doctrine. The Indian courts have,

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therefore only comes into consideration in extremely exceptional cases ….”); Bundesgericht [Bger] [Federal Supreme Court] Oct. 16, 2003, 129 Entscheidungen des schweizerischen Bundesgerichts [BGE] III 727 (Switz.).

39 Ferrario, *supra* note 22, at 652.

40 HANOTIAU, *supra* note 7, ¶ 390. *See also* BLACKABY ET AL., *supra* note 1, ¶ 2.46("on a close reading of the [*Dow Chemicals*] decision, the tribunal's analysis was based on the parties' common intention, and its decision may be explained by reference to the traditional requirement for consent in international arbitration").

41 Derains, *supra* note 20, at 138; FOUCHARD GAILLARD GOLDMAN, *supra* note 1, ¶¶ 500–01 (1999); *see also* BORN, *supra* note 1, at 1561–62.

42 Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories*, 8(4) J. INT'L DISP. SETTLEMENT 610, 618 (2017).

43 *See, e.g.*, Jeffery Waincymer, Procedure and Evidence in International Arbitration 522–23 (2012).

44 BORN, *supra* note 1, at 1564.

45 Derains, *supra* note 20, at 141–42. *See also* WAINCYMER, *supra* note 43, at 523; Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate*, 26(1) ASA BULL. 18, 25 (2018).

46 *See, e.g.*, ICC Case No. 5103, 2(2) INT'L CT. ARB. BULL. 20 (1991); ICC Case No. 6519, 2(2) INT. CT. ARB. BULL. 34 (1991); ICC Case No. 11405 (cited in HANOTIAU, *supra* note 7, ¶¶ 418–421).

however, justified the application of the doctrine by relying on the phrase "*party and any person claiming through or under him*" in Sections 8,[47] 35,[48] and 45[49] of the Arbitration Act.

The doctrine was first adopted by the Supreme Court in *Chloro Controls*.[50] The facts of the case are complex. Suffice it to note that various entities across two groups of companies, one foreign and one Indian, entered into a series of agreements for the distribution of chlorination equipment in India. The parties also incorporated a joint venture company for the purpose of distributing the equipment and the shareholders agreement was the principal contract that contained the arbitration clause that was used to invoke arbitration. Not all the contracting entities were parties to all the agreements, including the shareholders agreement.[51] Some of the agreements also contained inconsistent dispute resolution clauses, including references to the U.S. courts.[52]

Disputes arose when the parent company of the foreign group of entities started distributing its equipment through an entity other than the joint venture. The counterparties applied to Indian courts to obtain an injunction restraining this distribution arrangement. Some of the Respondent entities applied for the disputes to be referred to arbitration under the shareholders agreement on the basis that all the agreements form part of a composite transaction and any non-signatories to the shareholders agreement are bound on the basis of the "*group of companies*" doctrine because they are parties "*claiming through or under*" the signatory under Section 45 of the Arbitration Act.

The Supreme Court agreed. While noting that the doctrine has not been universally accepted, the Court observed that it had found judicial acceptance in the U.S.,[53] England,[54] and France.[55] In defining the parameters of the doctrine, the Court was careful to emphasise that any decision to bind non-signatories should take place with great caution and by "*definite reference to the language of the contract and intention of the parties*".[56] The Court stressed that "*'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties*".[57]

Interestingly, however, in the case of composite transactions and multiple agreements, the Court goes on to observe that a non-signatory could be subject to an arbitration "*without their prior consent*"

47 Arbitration Act, No. 26 of 1996, § 8(1) (India) (In Indian-seated arbitrations, the courts "shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substances of the dispute… refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.") (emphasis added).

48 *Id.* § 35 ("an arbitral award shall be final and binding on the parties and persons, claiming under them, respectively.") (emphasis added).

49 *Id.* § 45 (in foreign seated arbitrations, the courts "shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.") (emphasis added).

50 Chloro Controls, (2013) 1 SCC 641 (India).

51 *Id.* ¶ 18.

52 *Id.* ¶¶ 26, 30.

53 *Id.* ¶ 70.

54 *Id.* ¶ 66.

55 *Id.* ¶ 70.

56 *Id.* ¶ 71.

57 *Id.* ¶ 67.

in "*exceptional cases*".[58] Here, the Court held that four factors guide the application of the doctrine in such cases:[59]

- The *direct relationship* of the non-signatory to the signatory to the arbitration agreement;
- The *direct commonality of the subject matter and agreement* between the parties;
- The transaction should be of a *composite nature where performance of [the principal] agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements*; and
- Whether referring disputes under all the agreements would *serve the ends of justice*.

The Court concluded that "*[t]he intention of the parties to refer all the disputes between all the parties to the arbitration tribunal is one of the determinative factor[s]*".[60]

The Court's references to the need for consent and the ability to join non-signatories in the absence of consent are less-than-easy to reconcile. At points, the Court emphasises the requirement for party intent to bind the non-signatories in the same group of companies and at other times, it discusses the intent of the parties to create a group of contracts in a composite transaction.[61] The Court also appears to suggest that intent is irrelevant where equity calls for a different result.

One reading of the decision is that the Court was simply drawing a line between instances where party intent would be readily ascertainable from their conduct, including through the performance of contractual obligations of a signatory by a non-signatory, and cases where it could be implied by virtue of the structure of the transaction as a whole (although the reference to the "*ends of justice*" still muddies the waters). This reading would also be consistent with the Court's summary of the doctrine:

> "*[A]n arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.*"[62]

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58 *Id.* ¶ 68.

59 *Id.* ¶ 68.

60 *Id.* ¶ 69.

61 *Id.* ¶ 68 ("The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice."), ¶ 102 ("We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."), ¶ 139 ("The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction. It can safely be covered under the principle of 'agreements within an agreement'."), ¶ 154 ("Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law."), ¶ 155 ("The real intention of the parties was not only to refer all their disputes arising under the agreement which could not be settled despite friendly negotiations to arbitration, but even the disputes which arose in connection with the shareholders/mother agreement to arbitration.").

62 *Id.* ¶ 102.

In finding that the "*group of companies*" doctrine could be read into the phrase "*any person claiming through or under him*" under Section 45 of the Arbitration Act, the Court placed particular emphasis on the fact that the language does not appear in Article II of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (on the enforcement of arbitration agreements). The Court, therefore, held that it must give "*due weightage to the legislative intent*" in including those additional words, which was to promote arbitration:

> "*The language and expressions used in Section 45, 'any person claiming through or under him' including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the Legislature are of wider connotation or the very language of section is structured with liberal protection then such provision should normally be construed liberally.*
>
> *Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers.*"[63]

It is worth noting that *Chloro Controls* reflects a shift towards a more pro-arbitration reasoning by the Supreme Court. Prior to *Chloro Controls,* in *Sukanya Holdings* v. *Jayesh H. Pandya* ["**Sukanya Holdings**"],[64] the Supreme Court had refused to refer a matter to arbitration on the ground that the claims fell outside the scope of the arbitration agreement and, importantly, some of the parties to the dispute were not signatories to the arbitration agreement. *Sukanya Holdings* has generally been viewed as adopting a restrictive approach to binding non-signatories to the arbitration agreement. Yet, the decision can be distinguished from *Chloro Controls* as it was rendered in respect of Section 8 of the Arbitration Act, which, at the time, did not contain the phrase "*claiming through or under*". Indeed, given the centrality of that phrase to the Court's reasoning in *Chloro Controls*, in its 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996, the Law Commission of India recommended that the definition of "*party*" contained in Section 2(1)(h) of the Arbitration Act be amended to include the phrase "*any person claiming through or under*". Curiously, while Section 8 of the Arbitration Act was subsequently amended by the Arbitration and Conciliation (Amendment) Act 2015 to include the phrase "*claiming through or under*", the definition of "*party*" contained in Section 2(1)(h) remained unchanged.

Since *Chloro Controls,* subsequent Indian courts have applied the "*group of companies*" doctrine to bind non-signatories to arbitration agreements in the context of composite multi-party and multi-contract disputes.[65] In *Ameet Lalchand Shah* v. *Rishabh Enterprises* ["**Ameet Lalchand**"],[66] in light of the amendments to Section 8 to insert the phrase "*claiming through or under*", the Supreme Court extended the arbitration agreement to non-signatories in a composite transaction and, in effect,

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63 *Id.* ¶¶ 90–91.

64 Sukanya Holdings v. Jayesh H. Pandya, (2003) 5 SCC 531 (India) [*hereinafter* "Sukanya Holdings"].

65 *See, e.g.,* Mahanagar Telephone Nigam Ltd v. Canara Bank, AIR 2019 SC 4449 (India); Reckitt Benckiser v. Reynders Label Printing, (2019) 7 SCC 62 (India) [*hereinafter* "Reckitt Benckiser"] (decided against binding the parent company to the proceedings as it had not taken part in the negotiation of the arbitration agreement even though it was part of the group of companies); SEI Adhavan Power Pvt. Ltd. v. M/s SunEdison Solar Power India (Pvt.) Limited, (2018) SCC OnLine Mad 13299 (India); Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. & Ors., 2020 SCC OnLine Del 597 (India).

66 Ameet Lalchand Shah & Ors. v. Rishabh Enters. & Ors., (2018) 15 SCC 678 (India) [*hereinafter* "Ameet Lalchand"].

restricted the applicability of *Sukanya Holdings*.[67] In *Cheran Properties Limited* v. *Kasturi and Sons Limited* ["**Cheran Properties**"],[68] the Supreme Court also applied the doctrine where the dispute arose out of one agreement rather than a "*composite transaction"*. It would be right to conclude, therefore, that the "*group of companies*" doctrine is now well-rooted in Indian jurisprudence. Yet, a close review of *Chloro Controls* raises a number of issues over the Court's reasoning, some of which have arguably led to an overexpansion of the doctrine in subsequent case law.

First, the Court's reliance on the phrase "*claiming through or under*" in Section 45 of the Arbitration Act to adopt the "*group of companies*" doctrine is questionable. The "*group of companies*" doctrine is premised on ascertaining whether there is a mutual intent amongst all the parties, including the non-signatory, that the non-signatory be bound by the arbitration agreement. The non-signatory is, therefore, bound in its own capacity as a party to the arbitration agreement and has rights and obligations under the arbitration agreement in addition to the signatory. The phrase "*claiming through or under*", however, is designed to capture successors in interest that derive their rights through, and substitute the party to the arbitration agreement. This is apparent from case law and commentary in other jurisdictions that consider the phrase "*claiming through or under*" in different arbitral laws.

For instance, in *Tanning Research Laboratories Inc* v. *O'Brien,* the High Court of Australia was required to construe the phrase "*claiming through or under*" in the 1974 Australian Arbitration (Foreign Awards and Agreements) Act to determine whether a liquidator of a company is entitled to rely on an arbitration clause between the company and its creditor. In describing the meaning of those terms, and in finding that a liquidator did have a derivative interest through the company, the Court held that:

> "*[T]he prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence.*"[69]

A leading treatise on arbitration under English law, Russell on Arbitration, similarly discusses the phrase "*claiming through or under*" in Section 82(2) of the 1996 English Arbitration Act in the context of "*substituted parties*"[70] or parties that are "*successors [in] interest*" to a signatory.[71] The typical scenarios where the entities claim "*through or under*" a party are assignment, subrogation, and novation. These are classic cases where the non-signatory steps into the shoes of the party rather than claiming an independent right under the agreement.[72]

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67 While the Supreme Court did not expressly overturn its judgment in *Sukanya Holdings*, the fact that *Sukanya Holdings* no longer applies to Section 8 applications can be inferred from the fact that the Supreme Court eluded to the amendments to Section 8 and referred the non-signatories to arbitration.

68 Cheran Props. Ltd. v. Kasturi & Sons Ltd. & Ors., (2018) 16 SCC 413 (India) [*hereinafter* "Cheran Properties"].

69 Tanning Research Labs. Inc. v. O'Brien, (1990) 169 CLR 332, ¶ 11 (Austl.).

70 FRANCIS RUSSELL, RUSSELL ON ARBITRATION ¶¶ 3-029–3-035 (24th ed. 2015).

71 *Id.* ¶ 3-025 ("assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim 'through or under' the original party.") (emphasis added).

72 *Id.* ¶¶ 3-029–3-035.

Importantly, despite some ambiguity, English courts have unequivocally rejected attempts to read concepts akin to the "*group of companies*" doctrine into the phrase "*claiming through or under*". In the 1978 decision of *Roussel-Uclaf* v. *GD Searle & Co. Ltd.* ["**Roussel-Uclaf**"], the English High Court had to determine whether a non-signatory subsidiary was "*claiming through or under*" its signatory parent in the context of a stay application under Section 1(1) of the 1975 English Arbitration Act. Graham J. stayed the application on alternative grounds but noted in *obiter dicta* that, on the facts, the subsidiary and parent were so closely related to each other that the subsidiary was "*claiming through or under*" its parent:[73]

> "*...I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. ... The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is 'claiming through or under' the parent to do what it is in fact doing whether ultimately held to be wrongful or not.*"

Roussel-Uclaf thus left the door open for arguments akin to the "*group of companies*" doctrine under English law on the basis that non-signatories were, in fact, "*claiming through or under*" signatory affiliates. Nearly three decades later, the English Court of Appeal in *The Mayor and Commonalty & Citizens of the City of London* v. *Ashok Sancheti*[74] ["**Sancheti**"] definitively overruled *Roussel-Uclaf*. The Court strongly rebuked attempts to expand the scope of "*claiming through or under*" in Section 82(2) of the 1996 English Arbitration Act to groups of companies. Lawrence Collins L.J. (as he was then) observed that *Roussel-Uclaf* was simply "*wrongly decided on this point and should not be followed*".[75] Collins L.J. also highlighted prior commentary and case law critical of *Roussel-Uclaf,* including the seminal treatise of Mustill and Boyd on Commercial Arbitration.[76]

With its definitive dismissal of the *obiter dicta* statements in *Roussel-Uclaf*, the Court of Appeal in *Sancheti* is generally considered to have closed the door to use of the "*group of companies*" doctrine under Section 82(2) of the 1996 English Arbitration Act (and indeed, even outside that context).[77]

Interestingly, the Supreme Court in *Chloro Controls* refers to both *Roussel-Uclaf* and the disapproval of its reasoning in *Sancheti*. However, the Court does not meaningfully engage with the rationale of the cases or consider the limited scope of the phrase "*claiming through or under*".[78]

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73 Roussel-Uclaf v. GD Searle & Co. Ltd. [1978] FSR 95, at 104 (Eng.) [*hereinafter* "Roussel-Uclaf"].

74 Sancheti, [2008] EWCA (Civ) 1283 (Eng.).

75 *Id.* ¶ 34.

76 *Id.* ¶ 33 ("In MUSTILL AND BOYD, COMMERCIAL ARBITRATION (2d ed. 1989) it is said (at 137) that the decision can perhaps be explained on the basis of agency, and otherwise it is difficult to see how the subsidiary could have taken any part in the arbitration, and elsewhere (at 472) the decision is described as 'curious'. In Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah, [1995] 1 Lloyd's Rep 374 Mance J (as he then was) said (at 451) that he did not find it easy to extract any principle from the reasoning.").

77 RUSSELL, *supra* note 70, ¶ 3-035; Kate Davies, *A Ghost Laid to Rest?,* KLUWER ARB. BLOG (Mar. 12, 2009), *available at* http://arbitrationblog.kluwerarbitration.com/2009/03/12/a-ghost-laid-to-rest.

78 Chloro Controls, (2013) 1 SCC 641, ¶ 95 (India) (After setting out *Roussel-Uclaf* and *Sancheti,* the Court concludes that the question of whether an entity is "claiming through or under" a party is a fact specific one: "Having examined both the above-stated views, we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope

In short, the authors opine that the non-signatory should itself be a "*party*" to the arbitration agreement and not merely a person "*claiming through or under*" a party. The Supreme Court's expansion of the phrase "*claiming through or under*" to encompass the "*group of companies*" doctrine was not required and has, in fact, led to serious ramifications for non-signatories in a group of companies, as seen in *Cheran Properties*.

In *Cheran Properties*,[79] relying on a similar phrase in a different provision of the Arbitration Act, the Supreme Court held that an award could be enforced against a non-signatory even though it did not participate in the arbitration.[80] In particular, the Court relied on Section 35 of the Arbitration Act which provides that an arbitral award "*shall be final and binding on the parties and the persons claiming under them respectively*".[81]

On its face, the Court's decision is surprising as awards are only binding and enforceable against the parties to the arbitration and their successors in interest, such as an assignee.[82] Awards do not have effect on non-parties to the proceeding, even if they are members of the same group of companies.[83]

The notion that an award can be enforced against a non-party to the proceeding, even if it may otherwise be a party to the arbitration agreement, raises serious due process concerns. If a non-signatory were indeed a party to the arbitration agreement, the appropriate recourse is for the party to be joined to the proceeding, so it has the opportunity to be heard and to properly defend against the claims. For instance, one sees this in the context of disputes between shareholders arising out of an acquisition, where the target company is also named as a party to ensure that the award is binding on it.

Apart from raising due process concerns, *Cheran Properties* also expands the "*group of companies*" doctrine beyond its original purpose, which was to bind non-signatories to an arbitration agreement (rather than to an award in a proceeding that they may not have participated in). The authors have not identified a case where the doctrine has, in fact, been applied in this manner.

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of the provisions of the section and it may not be possible for the Court to permit reference to arbitration at the behest of or against such party.").

79 Cheran Properties, (2018) 16 SCC 413 (India).

80 *Id.* ¶¶ 21–22.

81 *Id.* ¶ 20 ("The expression 'persons claiming under them' in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well. The expression 'persons claiming under them' is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.").

82 RUSSELL, *supra* note 70, ¶ 6-183 ("Save where a third party agrees to be bound by it, an award is generally only effective as regards the parties to it and persons claiming through or under them including their privies. It does not bind third parties or the public at large, nor can it be invoked by them. This rule applies even if they happen to be members of the same group of companies.") (emphasis added).

83 *See, e.g.*, Michael Wilson v. Thomas Sinclair [2012] EWHC 2560 [50] (Eng.) ("Arbitrations are private and consensual and non-parties cannot, in the absence of consent, be joined or be affected by the decisions of the arbitral tribunal.") (emphasis added).

Building on *Chloro Controls* and *Cheran Properties* thus creates a dangerous precedent for the use of the "*group of companies*" doctrine – and the phrase "*claiming under*" in Section 35 – to enforce awards against non-parties to proceedings.

While questionable as a matter of principle, the Court's decision is perhaps easier to reconcile on the facts.[84] The non-signatory non-party in *Cheran Properties* was the entity that held the shares, which was the subject-matter of the dispute. The shares had been transferred to it by the signatory affiliate in accordance with the contract containing the arbitration agreement. That contract provided that any transfer of shares within the corporate group was subject to the transferee accepting the terms of the contract, including the arbitration agreement. The signatory and non-signatory entities were, therefore, aware from the outset that the award would have ramifications on the non-signatory. Indeed, in reaching its conclusion, the Court observed that to absolve the non-signatory of the consequences of the award "*would be to cast the mutual intent of the parties to the winds and to put a premium on dishonesty*".[85] The case is better rationalised on principles of acquiescence,[86] rather than the "*group of companies*" doctrine.

Second, the decision in *Chloro Controls* misstates the position on precedent in other jurisdictions. In particular, and as set out above, English[87] and U.S. courts[88] have not accepted the "*group of companies*" doctrine. U.S. courts have been circumspect of the doctrine's applicability under U.S. law given the primacy of separate legal personality in American jurisprudence and commerce.[89] Curiously, the U.S. Supreme Court judgment cited in *Chloro Controls - Ruhrgos AG* v. *Marathon Oil Co.*[90] – does not consider or mention the "*group of companies*" doctrine.[91] As regards England, the Supreme Court did not consider the clear rejection of the doctrine by the English High Court in *Peterson Farms Inc.* v. *C&M Farming Ltd,* wherein it was categorically held that the "*group of companies*" doctrine formed "*no part of English law*".[92] Given the numerous references to English cases and treatises in the judgment and the general influence of English law in Indian jurisprudence, including in the arbitration context, one wonders if the Court would have reached a different

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84 Juhi Gupta, *India's Tryst with the Group of Companies Doctrine: Harbinger or Aberration?*, KLUWER ARB. BLOG (Nov. 27, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/11/27/indias-tryst-group-companies-doctrine-harbinger-aberration/.

85 Cheran Properties, (2018) 16 SCC 413, ¶ 26 (India).

86 Govett v. Richmond (1834) 7 Sim. 1 (Eng.); Thomas v. Atherton (1877) 10 Ch. D. 185 (Eng.). Both cases are examples where awards may be enforceable against non-parties to the proceeding that were aware of and did not object to the proceedings or the award. *See* RUSSELL, *supra* note 70, ¶ 6-185.

87 Chloro Controls*,* (2013) 1 SCC 641, ¶ 66 (India) ("Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English law have, in certain cases, also applied the 'Group of Companies Doctrine'.")

88 *Id.* ¶ 70 ("The doctrine has found favourable consideration in the United States…")

89 Sarhank, 404 F.3d 657 (2nd Cir. 2013).

90 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

91 Chloro Controls, (2013) 1 SCC 641, ¶ 70 (India) ("The US Supreme Court in Ruhrgas AG v Marathon Oil Co. (526 US 574 (1999)) discussed this doctrine at some length and relied on more traditional principles, such as, the non-signatory being an alter ego, estoppel, agency and third party beneficiaries to find jurisdiction over the non-signatories.")

92 Peterson Farms, [2004] EWHC (Comm) 121 [62] (Eng.); *see also* Sancheti, [2008] EWCA (Civ) 1283 (Eng.) (rejecting arguments that a subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were "so closely related" that it could be said that the subsidiary was "claiming through or under" the parent).

conclusion on the "*group of companies*" doctrine if the true position in England (and other common law jurisdictions) had been drawn to its attention.

Third, while the decision is careful to emphasise the importance of party intent under the "*group of companies*" doctrine at multiple junctures, the "*composite*" nature of the transaction and the desire to avoid parallel, fragmented proceedings and inconsistent decisions appears to have been a key factor motivating the Court's decision in *Chloro Controls*. This is most apparent where the Court suggests that in deciding whether to join the non-signatory, it would "*have to examine whether a composite reference of such parties would serve the ends of justice*".[93] If there is indeed party intent, that should be the end of the inquiry. There ought to be no need to resort to broader considerations of justice in determining whether the non-signatory should be bound by the arbitration agreement.

There is, of course, nothing objectionable in the desire to avoid multiple parallel proceedings. Far from it, the Court's pragmatic approach to consolidating potentially fragmented disputes is laudable. The consequence of the Court's approach, however, is that the threshold for ascertaining intent in the "*group of companies*" context has been considerably lowered. For instance, the Court concluded that the fact that the various agreements flow from a principal contract and are intertwined is a "*sufficient indicator of intent*".[94]

But most complex multi-contract transactions are almost always integrally intertwined. One needs to look no further than the complex web of contracts in a construction project to see this. Yet, the structure of these agreements, including the fact that different entities within a group are party to different contracts, are often deliberately designed to limit liability and take advantage of the separate legal status of group companies. The mere fact that a group of companies may have entered into overlapping contracts cannot in itself demonstrate intent. As Yves Derains rightly observed, the presence of a group of companies could allow for conflicting arguments on whether the non-signatories truly intended to be bound by an agreement signed by only one party.[95] The Court's formulation of the test, however, risks rendering any analysis of intent – and thus consent to arbitrate – illusory and makes the application of the "*group of companies*" doctrine an almost foregone conclusion. Indeed, in most composite transaction cases that have followed *Chloro Controls,* the courts have applied the "*group of companies*" doctrine.[96] Lower courts that have grappled with composite transactions appear to have indiscriminately applied the rationale in *Chloro Controls*

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93 Chloro Controls, (2013) 1 SCC 641, ¶ 68 (India). There are also various arguments on the multiplicity of proceedings that were raised by the parties.

94 *Id.* ¶ 71 ("Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration.") (emphasis added).

95 Derains, *supra* note 20, at 141–42.

96 *See, e.g.*, Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. & Ors, 2020 SCC OnLine Del 597 (India); Ameet Lalchand, (2018) 15 SCC 678, ¶¶ 21–23 (India); Chatterjee Petrochem. v. Haldia Petrochem., (2014) 14 SCC 574, ¶¶ 30–31 (India); Sterling & Wilson Int'l Fze & Ors v. Sunshakti Solar Power Projects Pvt. Ltd. & Ors., O.M.P. (I) (COMM.) 460/2018, O.M.P (I) & (COMM.) 461/2018, ¶¶ 69–70 (India); Fernas Constr. Co. Inc. v. ONGC Petro Additions Ltd., 2019 SCC OnLine Del 8580, ¶¶ 24–25 (India); M/s. Duro Felguera S.A. v. M/s. Gangavaram Port Ltd., (2017) 9 SCC 729, ¶¶ 3, 6–9, 14, 37–38, 44–50 (India) (in relation to Section 11(6A) of the Act) (The Court did not follow the *Chloro Controls* rationale. The case was distinguished on the basis that, although there were five contracts, these were not interconnected to form one composite contract. It was the parties' intention to keep the contracts separate by incorporating different entities with different scopes of work. The Court also held that the arbitration clauses were narrower in scope than the one at issue in *Chloro Controls*.).

to non-signatories where there is a mere commonality of subject matter and overlapping contracts.[97]

The threshold for intent appears to have been further lowered in *Mahanagar Telephone Nigam Ltd* v. *Canara Bank*.[98] Building on *Chloro Controls,* the Supreme Court in this case held that the "*group of companies*" doctrine also applies where "*there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality*" and in particular "*when the funds of one company are used to financially support or re-structure other members of the group*".[99] Again, this test sits at odds with commercial reality where subsidiaries are funded by parent companies and funds often flow between different corporate entities,[100] and increases the number of fact situations where a non-signatory affiliate may be bound by arbitration agreements.[101]

Given these difficulties in the reasoning in *Chloro Controls,* the Supreme Court should, if the opportunity arises, revisit the "*group of companies*" doctrine. As a starting point, the Court may wish to reconsider the continued application of the doctrine under Indian law, given the divergent approach of its common law counterparts (and indeed, even courts in civil law jurisdictions). Eschewing the doctrine will not create a void in jurisprudence. To the contrary, the principle of implied consent may be sufficient to bind non-signatories based on their conduct or other attendant circumstances that demonstrate intent. The principle is well-established in arbitral jurisprudence[102] and has also been adopted by other common law jurisdictions like the U.S.[103] and Singapore.[104] The principle of implied consent is based on the parties' intention that a particular entity be bound by the arbitration agreement.[105] This intention can be ascertained when a non-signatory party conducts itself as if it were a party to the arbitration agreement, which the signatory parties accept by for instance, playing a role in the negotiation and/or performance of the contract.[106] The basis for applying the principle of implied consent is similar to the basis for

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97 *See*, *e.g.*, Nirmala Jain & Ors. v. Jasbir Singh & Ors., 2018 SCC OnLine Del 11342, ¶ 10 (India); RV Solutions, (2019) 257 DLT 104, ¶¶ 12–13 (India).

98 Mahanagar Telephone Nigam Ltd v. Canara Bank, AIR 2019 SC 4449 (India).

99 *Id.* ¶ 10.5.

100 Large corporate groups, for instance, engage in cash-pooling transactions to avoid recourse to external financing with specific entities within the group providing treasury services. *See* Organisation for Economic Co-operation and Development (OECD), *Transfer Pricing Guidance on Financial Transactions* (Feb. 2020) at ¶ 10.109, *available at* http://www.oecd.org/tax/beps/transfer-pricing-guidance-on-financial-transactions-inclusive-framework-on-beps-actions-4-8-10.pdf.

101 Sidhant Kumar, *Group Company Doctrine in India: Holding Labyrinth Corporate Structures Accountable*, BAR & BENCH (Jan. 15, 2020), *available at* https://www.barandbench.com/columns/group-company-doctrine-in-india-holding-labyrinth-corporate-structures-accountable.

102 *See* BORN, *supra* note 1, at 1539 *et seq*.

103 *See*, *e.g.*, Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993); Fluor Daniel Intercontinental v. General Electric, No. 98 Civ. 7181 (S.D.N.Y. 1999); Southern Illinois Beverage v. Hansen Beverage, No. 07-cv-391-DRH (S.D. Ill. 2007).

104 *See* The Titan Unity, [2014] SGHCR 4, ¶ 35 (Sing.) ("The cases above illustrate the principle that where the objective circumstances and parties' conduct reveal that the parties to the arbitration agreement have consented to extend the agreement to a third person who is not a party to the agreement, and that third party has shown by its conduct to accept to be bound by the agreement, parties can be found to have impliedly consented to form an agreement to arbitrate where this has been clearly and unequivocally shown to be the parties' objective intention. … In particular, implied consent is determined from the parties' intention to extend the written arbitration agreement to a non-party who accepts to be bound by it…"). While there are High Court decisions adopting the theory of implied consent, it has not been considered by the Singapore Court of Appeal. *See* A Co. & Ors. v. D & Ors. [2018] SGHCR 9, ¶ 29 (Sing.).

105 BORN, *supra* note 1, at 1540.

106 *Id.* at 1541.

applying the "*group of companies*" doctrine, with the distinction that it can be applied to any non-signatory, whether that non-signatory is an affiliate of one of the parties to the arbitration agreement or not.

Should the Court choose to retain the doctrine, it may nonetheless wish to clarify that the doctrine is not premised on non-signatories "*claiming through or under*" a signatory affiliate but is instead based on the non-signatory being a "*party*" in its own right. This avoids the due process risk raised by *Cheran Properties* of non-parties to arbitral proceedings being bound by awards merely on the basis that they are non-signatories from the same group of companies that are bound by the arbitration agreement. The Court should also consider reformulating the test of intent in more stringent terms (like in the case of *Reckitt Benckiser* v. *Reynders Label Printing*),[107] such that the fact of a principal contract and intertwined ancillary contracts does not, in itself, provide a basis to bind a non-signatory. The test of intent should instead look more closely at the rationale behind the structure of the transaction and any intent on part of the parties to separate the transaction and liability among group entities.

IV. Conclusion

The "*group of companies*" doctrine has a complex relationship with international arbitration. While some courts and tribunals have embraced it, most have been more critical of it. In adopting the "*group of companies*" doctrine, Indian courts have parted ways with their counterparts, particularly in common law jurisdictions. That is, of course, not a reason in itself to impugn the Indian approach. Indeed, the Indian approach to the "*group of companies*" doctrine reflects a fundamental, pragmatic desire to ensure that related disputes are resolved in a single forum. Yet, in its application by Indian courts, the rationale and contours of the "*group of companies*" doctrine appear to have expanded beyond the doctrine's original ambit and risk undermining the foundational requirement of consent in international arbitration. Therefore, it would be opportune for the Indian Supreme Court to revisit the doctrine to determine whether it continues to have a jurisprudential basis in Indian law and, if so, what the parameters of the doctrine are.

[107] Reckitt Benckiser, (2019) 7 SCC 62 (India). The Court held that the burden was on the signatory party to establish that the non-signatory party intended to consent to the arbitration and be a party thereto.