GROUP OF COMPANIES DOCTRINE: CAVEATS TO CONSIDER BEFORE ITS APPLICATION

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I. INTRODUCTION

Arbitration is a consent-based mechanism of resolving disputes which involves submitting claims between the parties to one or more private adjudicators. As it requires waiving the right to approach judicial authorities in case of any conflict, consent of both parties forms the bedrock of this mechanism. A clear manifestation of the parties' intention to arbitrate can be established from their act of entering into an agreement. In other words, the act of drafting an arbitration agreement in itself reflects the intention of both to submit their dispute(s) to arbitration and not the courts. Thus, an arbitration agreement is the focal point around which this entire dispute resolution method revolves.

Although there is no particular format of an arbitration agreement, the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNCITRAL Model Law**"] mandates it to be in writing.[1] An identical provision has also been incorporated into the Arbitration and Conciliation Act 1996 ["**Arbitration Act**"].[2] However, the relevant observation to make here is that there is no requirement for the same to be signed.

It is pertinent to observe that, due to its consensual nature, an arbitration agreement binds only those who have assented to be bound by it. However, on several occasions non-signatories to the arbitration agreement also become germane to the ongoing differences and without roping them in the proceedings, the legitimacy of any settlement reached between the disputing parties may be jeopardized. Therefore, it becomes imperative to strike a balance between the two aspects and propose a course of action whereby a non-signatory can be lawfully made a party to an arbitration proceeding without their explicit consent.

Courts across different jurisdictions and scholars all around have developed different legal bases to bind non-signatories. These bases have been broadly classified into consensual theories focusing on the actual or presumed intention of the parties like agency, assumption, assignment, etc. and non-consensual theories mandated by the force of applicable law and considerations of

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[1] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 7.
[2] Arbitration and Conciliation Act, 1996, Section 7.

equity like alter ego, estoppel, succession etc.[3] The Hon'ble Supreme Court ["**SC**"] in the case of *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and others*[4] ["**Chloro Controls**"] held that the consensual theory focuses on *discernible intentions* of the parties and the principle of *good faith* whereas non-consensual theory relies on force of applicable law. In the aforementioned decision, the SC also adopted the Group of Companies Doctrine ["**Doctrine**"] as one of the methods to bind a non-signatory to an arbitration agreement. This research paper focuses on this Doctrine, its origin, scope and legal validity. The paper also tries to understand the hesitation behind its adoption by various nations around the world and raises important questions that courts need to look into before application of this Doctrine.

II. WHOLISTIC UNDERSTANDING OF THE DOCTRINE

A. MEANING & ORIGIN

The Group of Companies Doctrine is one amongst many ways by which courts have bound non-signatories to an arbitration agreement. When a company which is part of a corporate group, has a significant control over or is subjected to the control of any of its affiliates (who is the original executor of the contract having an arbitration agreement) such that the company is involved in the negotiation or performance of the contract entered into by the affiliate, then the company in certain circumstances, may invoke or be subjected to arbitration proceedings despite the fact that it has not executed the contract itself.[5]

The Group of Companies Doctrine finds its origin in a 1982 French Arbitral Award, *Dow Chemical France & Ors v. Isover Saint Gobain,*[6] ["**Dow Chemical**"]. In this case an American company, Dow Chemical Group entered into an agreement with the Respondent for the distribution of thermal insulation products, which contained the arbitration clause. When discrepancies arose between the parties, the Applicant along with two of its subsidiaries (who were non-signatories to the agreement) commenced arbitration. An objection was raised by the Respondent on the ground that all the Applicants were not parties to the contract. However, the ICC Tribunal relied upon the Group of Companies Doctrine and upheld its jurisdiction stating that although the parent and its subsidiaries are different legal entities, in this case their corporate structure "constitutes one and the same economic reality".[7] This Doctrine was previously unheard

[3] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1527-1528 (3rd ed. Kluwer Law International 2021).
[4] Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and others (2013) 1 SCC 641.
[5] Gary, *supra* note 3, at 1559.
[6] ICC Case No. 4131, Interim Award of 23 September 1982.
[7] *Id.*

of, and was an original in the field of contract law until the Dow Chemical case was decided. The Tribunal also laid down a threefold test which had to be fulfilled before joining any third party to an arbitration proceeding -

i. Existence of a *tight group structure* wherein one entity exercises substantial control over the other;

ii. An active role of the non-signatory in concluding, performing and terminating the contract containing an arbitration clause;

iii. Common intention of all parties (signatories and non-signatories) to bind the non-signatories to the arbitration agreement.[8]

B. LEGAL BACKGROUND IN INDIA

India's tryst with this Doctrine goes back to 2003, when the issue of inclusion of non-signatories first arose in *Sukanya Holdings Pvt. Ltd. v. Jayesh Pandya & another.*[9] In this case, several persons were a part of a corporate transaction however, not all of them had an arbitration agreement between them. The SC giving utmost importance to the concept of party autonomy, decided that irrespective of the commercial intent of the parties, any person who is not a signatory to an arbitration agreement cannot be included in the proceedings.[10] The Court went on to decide that since the cause of action cannot be severed and non-signatories cannot be excluded, the arbitration agreement could not be enforced even between the signatories and the dispute would inevitably have to go before a judicial authority.

The SC then revisited this stance in 2013 in the case of *Chloro Controls* and came to a completely contradictory finding. In this matter, the three-judge bench held that two significant features need to be established, before including a non-signatory party in an arbitration proceeding - *transactions with group of companies* and *a clear intention of the parties to bind both, signatory as well as non-signatory parties*.[11] Additionally the Court also highlighted situations when these requirements could be met i.e., in case of:

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[8] Adyasha Samal, *Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine,* XI(I) KSLR, (2020).
[9] Sukanya Holdings Pvt. Ltd. v. Jayesh Pandya & another (2003) 5 SCC 351.
[10] Soorjya Ganguli, Somdutta Bhattacharyya and Radhika Misra, *Binding Non-Signatories To An Arbitration - Charting The Shifting Paradigms*, MONDAQ Mar. 17, 2022, 5:05 PM), https://www.mondaq.com/india/arbitration-dispute-resolution/868694/binding-non-signatories-to-an-arbitration--charting-the-shifting-paradigms.
[11] Chloro Controls, *supra* note 4, at p 674.

i. A direct relationship of the non-signatory with the signatory;
ii. A direct commonality of the subject matter;
iii. Composite nature of the transaction between the signatories and the non-signatories such that performance of the mother agreement would not be feasible without the aid, execution and performance of the supplementary agreements;
iv. Determining whether a reference of such non-signatories to arbitration would serve the ends of justice.[12]

The adoption of this Doctrine was definitely a welcome move but being rendered under S. 45 of the Arbitration Act, its application was limited to foreign seated arbitrations only. Nevertheless, the Indian judiciary readily broadened the scope of this Doctrine and applied the same in various subsequent judgments concerning domestic arbitrations. It is pertinent to note that although in this decision the Court reversed its stance on the Group of Companies Doctrine, it did not explicitly overrule the judgment of Sukanya Holdings. However, in light of recent decisions upholding the applicability of this Doctrine, the Sukanya Holdings decision is no longer looked at as a binding precedent.

In 2018 the SC extended the application of this Doctrine beyond S. 45 to S. 8 of the Arbitration Act and permitted inclusion of non-signatories in cases of domestic arbitration as well.[13] The Court stated that there were interlinked agreements for a single commercial project despite participants in the transaction not being part of the same corporate group.[14]

Thereafter a three-judge bench of the SC, *in Cheran Properties v. Kasturi and Sons* while enforcing an award against a non-signatory opined that there must be an intention to bind "someone who is not a signatory but has assumed the obligation to be bound by the actions of a signatory."[15]

In *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*[16] ["**MTNL**"], the Divisional Bench of the SC clarified that besides cases of implied or tacit consent, this Doctrine could also be invoked in cases where the group structure is so rigid that it constitutes a single economic unit such that "the funds of one company are used to financially support or restructure other members

[12] *Id* at p 682.
[13] Ameet Lalchand Shah v. Rishabh Enterprises (2018) 15 SCC 678.
[14] Anjali Anchayil and Tamoghna Goswami, *Two's Company, Three's A Crowd: Revisiting the Group of Companies Doctrine*, Kluwer Arbitration Blog (Mar. 17, 2022, 5:38PM) http://arbitrationblog.kluwerarbitration.com/2021/06/24/twos-company-threes-a-crowd-revisiting-the-group-of-companies-doctrine/.
[15] Cheran Properties v. Kasturi and Sons (2018) 16 SCC 413.
[16] Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors (2020) 12 SCC 767.

of the group". Additionally, this Doctrine could be relied upon when the common objective of the group could only be achieved by a composite transaction where all agreements are performed collectively.[17]

Recently, in April 2022, this Doctrine was once again upheld by the SC when it ruled that a non-signatory may be bound by the agreement "if it is the alter ego of a party which executed the agreement".[18] The Court once again listed down the factors to be considered before binding any third party, something which was previously done in the case of *Chloro Controls*. Therefore, the Indian view on the Group of Companies Doctrine is very transparent and courts have readily applied this Doctrine in a plethora of cases, generally in conjunction with other doctrines like that of alter ego and piercing of corporate veil.[19]

C. COMPARATIVE ANALYSIS

Although the aforementioned discussion highlights that countries like France and India have willingly embraced this Doctrine, several other jurisdictions have shown hesitation to do the same. German laws specify that an arbitration agreements must be in a documentary form[20] and must be signed by the parties.[21] As a result, courts have generally withheld themselves from binding companies, who are not parties to an arbitration agreement, despite acknowledging their participation in the performance of a contract.[22] Additionally, keeping in mind the conflict of laws principles, courts in Germany have held that the result of each case must be carefully examined to ensure that it is in line with German national laws and public policy, failing which the Doctrine would not be invoked.[23] Therefore, Germany shall adjudicate the application of this Doctrine on a case-to-case basis.

American courts have liberally extended arbitration agreements to non-signatories with the help of five theories namely incorporation, assumption, agency, veil piercing/alter-ego and estoppel

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[17] *Id.*
[18] Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd. & Anr., Civil Appeal 2042 of 2022.
[19] Vijayendra Pratap Singh, Abhijnan Jha, Abhisar Vidyarthi, *Whose Arbitration is it Anyway? Non-Signatories?* AZB Partners (Mar. 12, 2022, 2:45 PM) https://www.azbpartners.com/bank/whose-arbitration-is-it-anyway-non-signatories/
[20] German Arbitration Act, Section 1031.
[21] German Civil Code, Section 126.
[22] Otto Sandrock, *Extending the Scope of the Arbitration Agreement to Non-Signatories*, TRANS-LEX.ORG (1994) https://www.trans-lex.org/116200/_/sandrock-otto-arbitration-agreements-and-groups-of-companies-in:-festschrift-pierre-lalive-basel-frankfurt-am-1993-at-625-et-seq/.
[23] Kirstin Schwedt, *When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy*, KLUWER ARBITRATION BLOG (Mar. 15, 2022, 8:24 AM) http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/.

albeit they have refrained from recognizing this particular Doctrine.[24] Jurists believe that US courts have shied away from the application of this Doctrine because of the flawed presumption that this Doctrine goes against the principles of party autonomy and consent.[25] Therefore, the US stance on this issue remains incoherent as on one hand they support joinder of non-signatories but on the other hand they accuse the Group of Companies doctrine of violating parties' consent.

Lastly, English courts place strong reliance on the doctrine of privity of contract and hold that the intention of the parties to arbitrate disputes should be clearly seen from the terms of the agreement and not readily inferred from its conduct.[26] Therefore, their rejection of this Doctrine manifests from the fact that they do not take into account pre-contractual discussions or agreements when identifying the intention as those are not considered as legally binding promises.[27] Some learned members of the legal fraternity have argued that while English law on this issue is conservative, the English courts would recognize and enforce awards based on this Doctrine if the seat law of such an arbitration proceedings upholds the same.[28]

III. CAVEATS TO CONSIDER BEFORE ITS APPLICATION

Time and again, courts, jurists and legal practitioners have clarified several initial hindrances put forth by critics and have given fairly reasonable explanations for the same. However, there still remain certain unresolved issues vis-à-vis this Doctrine some of which have been discussed herein below -

A. ENFORCEMENT AGAINST NON-SIGNATORIES

One of the biggest reasons why arbitration as a dispute resolution mechanism has gained popularity is because it allows parties to subject the arbitration proceedings to a melange of laws. While on most occasions this contributes positively to aid and assist parties in arriving at a settlement, sometimes this factor can pose challenges at the time of enforcement if all the laws are not in consonance with each other. Enforcement of arbitral awards is often a tedious task, especially in the international sphere due to the separate legal systems involved. Therefore, a

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[24] Thomson-CSF, S.A. v Am. Arbitration Ass'n 64 F.3d 773 (2d Cir. 1995).

[25] 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 ARBITRATION BRIEF (2013) https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1033&context=ab.

[26] Arsanovia Ltd & Ors v. Cruz City 1 Mauritius Holdings [2012] EWHC (Comm) 3702 (UK) [35].

[27] MICHAEL H WHINCUP, CONTRACT LAW AND PRACTICE: THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS (4th ed., Kluwer Law International 2001).

[28] Adyasha, *supra* note 8, at 16.

problem could very well arise when the award is sought to be enforced against non-signatories in states which do not recognize the Group of Companies Doctrine.

The leading international case on this subject matter is *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*[29]. In this case the seat of arbitration was France therefore, the ICC Tribunal permitted joinder of a non-signatory as the same is recognized under French laws. However, enforcement was being sought in UK and the English courts, relying upon provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] denied enforcement on the ground that there was no valid agreement. This decision was widely criticized in the legal fraternity due to its conservative approach, reiterating the need to have a coherent stance on the applicability of the Group of Companies Doctrine in order to avoid future inconsistencies of such nature. Therefore, even if the Tribunal holds the non-signatory to be a valid party to the arbitration proceedings, the award might subsequently be rendered futile if it has to be enforced in a country whose laws are inconsistent with the laws under which such joinder has been made. The explanation is that enforcing an award which upholds this Doctrine can be argued to go against the public policy of the enforcing state due to which courts generally do not recognize and enforce awards which, although valid as per the seat law, are contrary to its public policy.[30]

B. LIMITED SCOPE OF THE DOCTRINE

One of the rudimentary pillars of arbitration is the principle of separability, which states that the arbitration clause shall be treated to be independent of the other terms of the contract.[31] In light of the same, it becomes important to ascertain if scope of this Doctrine is limited to making non-signatories a party to the arbitration agreement only and no other contract. As Professor Gary Born has pointed out 'there is a distinction between jurisdiction and substantive liability.'[32] On the sole application of this Doctrine, a non-signatory becomes a party to the arbitration proceedings but such non-signatory does not become substantively liable under the relevant contract i.e., no relief can be claimed against such non-signatory. This is in contradiction to the law followed in civil suits, which states that persons may be joined as defendants in a civil suit where a right to claim relief against such persons exists[33] suggesting that relief can be claimed against such parties despite them being non-signatories to the original contract. In light of the

[29] Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan (2010) UKSC 46.
[30] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V (2) (b).
[31] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 16(1).
[32] Gary, *supra* note 3, at p 1531.
[33] Code of Civil Procedure 1908, Order I Rule 3.

above, there have been divergent views on this issue wherein some courts have imposed substantive liability on the non-signatories[34] whereas some have not.

On a side note, due to this very limitation, the Group of Companies Doctrine is argued to be quite irrelevant and ineffective. Courts in the US have opined that in comparison to this Doctrine, other principles of contract, corporate, and agency are better suited to bind non-signatories as parties can be made substantively liable under the latter and this has resulted in the withering of the novelty of this Doctrine.[35]

C. READING INTO IMPLIED CONSENT OF NON-SIGNATORIES

In furtherance of the introduction above and reiterated by the SC in several judgments like *Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji*[36] and recently once again in *Caravel Shipping Services Pvt. Ltd. v. Premier Sea Foods Exim Pvt. Ltd.*[37], an arbitration agreement merely needs to be in writing and there is no requirement in law for it to be signed. Although formal signature is not a prerequisite for a valid arbitration agreement it is still considered the most appropriate mode of ascertaining the real intention of the parties. Therefore, when an entity refrains from signing an arbitration agreement it must *prima facie* be viewed as a refusal to submit disputes to arbitration. However, while applying this Doctrine, the courts overlook this express act of not signing the agreement and zero in on the implied or tacit consent of the entity to arbitrate the dispute. Thus, the burden to prove implied consent should be extremely high as the express act clearly states otherwise. The courts must go beyond the parent-subsidiary or sister concern relationships and conclusively establish real financial and organizational links between the parties before including any third party to the arbitration proceedings.

D. EXTENDING THE DOCTRINE TO NATURAL PERSONS

One controversy that has arisen recently is whether the 'Group of Companies Doctrine' can be applied only to companies and corporate entities or can it be extended to natural persons/individuals as well. As its name suggests, at the very first sight this Doctrine seems to be applicable only to companies. There are not enough precedents to determine whether the term companies is to be interpreted in the narrow sense or would it include other legal personalities like partnership, joint ventures, etc and/or natural persons as well. With respect to other legal persons,

[34] Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Services Ltd. 2021 SCC OnLine SC 572.
[35] Alexandre, *supra* note 25.
[36] Kishore Rameshwardas v. Mrs. Goolbai Hormusji AIR 1955 SC 812.
[37] Caravel Shipping Services Pvt. Ltd. v. Premier Sea Foods Exim Pvt. Ltd (2019) 11 SCC 461.

it seems likely that they would be included within the ambit of this Doctrine, however there is not enough literature on this subject matter. As regards to natural persons, there are different contentious scenarios that need to be looked into before arriving at any conclusion about its inclusiveness. A few of these have been discussed separately hereinafter -

i. **Whether a natural person can take benefit of this Doctrine and plead for joinder of a non-signatory company?** There are antithetical views on this issue. In *ICC Case No. 9517 of 2000* seated in Dubai, it was held that an individual shareholder, though being the owner of the Claimant companies, could not invoke this Doctrine to join companies to an arbitration proceeding. In complete contrast to this, a German Court in 2014 "allowed a non-signatory patent holder to join its licensee company in arbitration proceedings against the respondents".[38] Indian courts have not faced this question yet so its stance remains unclear however it is only a matter of time before such a case comes up at which time it would be interesting to see what the court's opinion and reasoning is.

ii. **Whether a natural person who is a non-signatory can be made party to an arbitration proceeding?** No specific answer to this question exists as of today and arguments can be made from both sides. Under the provisions of the Companies Act 2013,[39] a director, manager, officer of the company or any other person associated with the transaction in question can be made personally liable for conducting the business in a fraudulent manner. Although such natural persons are non-signatories to the arbitration agreement, they can be included in the arbitration proceedings with the help of principles of agency, vicarious liability, lifting of corporate veil, etc. as understood under the Act. Furthermore, the liability for acts done by such persons during the course of their employment would continue to exist even beyond their stint at the concerned company.[40] On the other hand, principles of limited liability and separate legal personality can be referred to, in order to restrict the scope of this Doctrine and protect natural persons from being included in such proceedings.

The real problem, however, would arise when the liability of such persons has to be proved. The pre-requisites of the Group of Companies Doctrine is existence of a tight group structure, financial or administrative dependency on each other and the like, very well highlight that they have been put together keeping in mind the normal functioning of a corporate personality, more specifically a company. Hence, the same guidelines would not be the most appropriate test to

[38] Adyasha, *supra* note 8, at 7.
[39] The Companies Act, 2013.
[40] *Id.* at Section 441.

establish a commercial link in case of a natural person. If the scope of this Doctrine has to be extended to natural persons different tests will have to be laid down. Therefore, it is still unclear if this Doctrine would be applied to make natural persons personally liable and the manner in which it can be done.

E. EXTENT OF THE BINDING NATURE OF AN AWARD ON THIRD PARTIES

While it is a fairly settled matter that awards shall be enforced against non-signatories who are parties to the proceedings, the contours are not so clear when the enforcement is sought against non-signatories who are not a party to the proceedings. Unfortunately, the New York Convention and UNCITRAL Model Law do not shed enough light on this issue. The Arbitration Act also remains silent on this issue however, it does provide clarity on certain aspects related to the binding nature of both - a domestic and foreign arbitral award. S. 35 therein states that domestic award shall be binding on the parties as well as the *persons claiming under them.* The latter phrase extends the scope of the award beyond the parties and implies that additionally, the award shall also bind all those who derive their capacity or position from the parties;[41] the only limitation being that such other persons must particularly claim under the parties. Therefore, as long as non-signatories who were not party to the arbitration proceedings can be shown to have a connection with the parties to an arbitration agreement, they will be bound by the award. However, if such non-signatories are not related to the parties but only to other non-signatories who were a part of the arbitration proceedings, they will most likely be able to escape the grip of the award.

On the other hand, foreign awards are held as binding *on the persons as between whom it was made*.[42] The replacement of the word *parties by persons* in S. 46, has been interpreted to widen the reach of a foreign arbitral award in comparison with a domestic award anticipated under S. 35.[43] Courts have thus, inferred that S. 46 makes a foreign ward binding on non-signatories to an agreement as well. However, the non-signatories taken into account while making such a decision was limited to such non-signatories who were party to the arbitration proceedings. The position with respect to non-signatories who were NOT a party to the arbitration proceedings continues to remain unclear. It can be argued that if read in its entirety, the phrase *on the persons as between whom it was made under* section *46* could mean that the award shall be binding only on those persons between whom such an award was made whether they are signatories or non-signatories

[41] Cherian Properties, *supra* note 15, at p 436.
[42] Arbitration and Conciliation Act, 1996, Section 46.
[43] Gemini Bay, *supra* note 34, at p 807.

to an arbitration agreement. Therefore, as on today, the position remains that both, domestic and foreign awards are binding on non-signatories who are party to the arbitration agreement though S. 35 is more restrictive in comparison to S. 46. However, the Courts are yet to shed light on the extension of an arbitral award's reach on non-signatories who have not participated in the arbitration proceedings.

F. DEFENCES AVAILABLE TO PREVENT ENFORCEMENT AGAINST NON-SIGNATORIES

In the same decision of Gemini Bay, the SC also discussed S. 48(1) of the Arbitration Act at length to decipher if the defences granted under it are available to non-signatories to resist enforcement of an award against itself. The provision categorically states that enforcement can be refused only at the request of *a party against whom it is invoked*. Thereafter, sub-clause (a) was read literally by the Court to conclude that it clearly dealt with the incapacity of the *parties* and the invalidity of the agreement according to the law decided by the *parties*.[44] Therefore, the Court ruled that this ground for objection cannot be made available to a non-signatory despite being a part of the arbitration proceedings. Subsequently, a similar finding was arrived at with respect to sub-clause (c) which, according to the learned bench, deals only with:

> "Disputes that could be said to be outside the scope of the arbitration agreement between the parties – and not to whether a person who is not a party to the agreement can be bound by the same."[45]

Therefore, the scope of challenge under this provision was concluded to be very limited.[46] Additionally, in order to invalidate the application of this Doctrine, parties can, at the time of signing the contract, specifically include a proviso to the arbitration agreement. Vide such proviso parties can either limit the scope by stating that only signatories to the contract can derived benefits from it[47] or can state that unless otherwise agreed between both the parties, any agreement to arbitrate shall be binding only on the signatories.[48] In this way, despite its affinity with the signatories, a third party would be safeguarded from being made a part of the arbitration proceedings.

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[44] *Id* at p 789.
[45] *Id* at p 797.
[46] Tejaswi Pandit, *Foreign arbitral award enforceable against non-signatories to agreement; 'perversity' no longer a ground to challenge foreign award; tort claims arising in connection with agreement are arbitrable: SC expounds law on foreign awards,* SCC ONLINE BLOG (11 August 2021) https://www.scconline.com/blog/post/2021/08/11/foreign-arbitral-awards/.
[47] *supra* note 14.
[48] GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 112 (6th ed., Kluwer Law International 2021).

IV. AUTHOR'S CRITIQUE AND POSSIBLE ALTERNATIVES

The Group of Companies Doctrine has been a welcome move in the Indian jurisprudence as it brings to the forefront, guileful and deceptive entities who escape liability by making another entity carry out unwarranted actions on its behalf. Especially when most corporate houses in India have such a complexly intertwined structure, this Doctrine proves to be extremely beneficial in finding the true face behind fraudulent transactions. However, it cannot be denied that there are numerous loopholes to this Doctrine, making it susceptible to criticism.

Although the SC has laid down tests which need to be fulfilled before invoking this Doctrine, in practice the same is much more difficult to follow. The High Courts on various occasions have shifted their focus from the requirement of consent and have applied the Doctrine merely relying upon the factual matrix of common email IDs, shared work premises, identical letterheads and same central control[49] or on the basis of a common subject matter, shared interests and prior relationship between the parties.[50] While it is true that no straight-jacket formula can be established to determine the applicability of this Doctrine, it cannot be denied that its current wide nature leaves room for arbitrariness. To narrow down its scope, the Doctrine should be applied only in cases where the non-signatory has gained a direct and obvious benefit (economical or otherwise) under the contract rather than an incidental one.[51] Over the last decade even France, the originator of this Doctrine, has limited its scope to cases where there is a direct involvement of parties in the performance of the contract and the dispute relates to such performance.[52]

Furthermore, it is a general practice for courts all around the world to refer to the principles of agency, alter ego or lifting of corporate veil along with this Doctrine. This helps to substantiate the Doctrine and to make a full-proof case against a non-signatory under the relevant contract. In India as well this Doctrine is often cited in consonance with other legal principles, the latest being the case of *Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd*.[53] Not only do the other principles seem more effective but their contours are also better defined in comparison to this Doctrine, thereby justifying its popularity amongst judges. However, this has cast a big question on the relevance of the Group of Companies Doctrine as it is almost never cited in

[49] SEI Adhavan Power Private Limited & Ors. v. Jinneng Clean Energy Technology Limited, (2018) SCC OnLine Mad 13299.
[50] RV Solutions Pvt. Ltd. v. Ajay Kumar Dixit & Ors., (2019) SCC OnLine Del 6531.
[51] Anjali, *supra* note 14.
[52] Alexandre, *supra* note 25.
[53] Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. (2021) SCC OnLine Del 3688.

isolation and is generally eclipsed behind the other principles which are referred to alongside this Doctrine.

Despite these inhibitions, this Doctrine has been widely used in India since the Chloro Controls case. However, in May 2022, a three-judge bench of the SC has identified the need to have a relook at the ingredients of this Doctrine.[54] Highlighting the inconsistencies in all the previous decisions on this subject matter, the Court stated that its decision in Chloro Controls was based on "economic convenience rather than correct application of law".[55] Therefore, the Court has framed several issues for consideration by a larger bench of the SC. These concerns are apropos of the relevance and applicability of this Doctrine, most of which have already been addressed in detail above.

V. CONCLUSION

The Group of Companies Doctrine first saw light four decades ago when corporate structures were considerably less intricate. However, over all these years the same has metamorphosed, bringing the relevance of this Doctrine back in question. Extensive scrutiny of parties' intention, direct economic beneficiaries of the contract and the organisation of the corporate entities are all caveats to consider before invoking this Doctrine. While courts and tribunals must give a purposive interpretation to the term *party* under the Arbitration Act, it cannot have an overzealous approach and bind those non-signatories who have a minimal role to play in a commercial transaction. Despite repeated judgments on this issue there are still several loopholes that need to be filled and boundaries that need to be defined. The issue of its reconsideration which has come up before the courts today is therefore, of urgency and gravity.

On one hand it is quite noteworthy to see the Indian judiciary adopt a pro-arbitration stance by allowing non-signatories to participate in arbitration. This would prevent a hybrid nature of legal proceedings where some players of a commercial transaction having executed an arbitration agreement would opt for arbitration whereas the others, due to the absence of the same, would move before courts. On the other hand, it is important to determine whether this Doctrine meets the needs of modern-day businesses and its complex internal hierarchies. It is also necessary to permit the Doctrine to expand and take into account various scenarios not considered when the

[54] Cox and Kings Limited v. SAP India Pvt. Ltd, Arbitration Petition (Civil) No. 38 of 2020.
[55] Sohini Chowdhury, *"Group Of Companies" Doctrine Needs Relook, Says Supreme Court; Refers Issues To Larger Bench,* LIVE LAW.IN (7 May 2022, 03:33 PM) https://www.livelaw.in/top-stories/group-of-companies-doctrine-needs-relook-says-supreme-court-refers-issues-to-larger-bench-198532.

Doctrine was originally conceptualised. In conclusive candour, it can be said that without clarifying all these ambiguities, this Doctrine would only open Pandora's box to litigation.