DISPUTE RESOLUTIONS

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Message to the Readers

The group of companies doctrine and its application to arbitration proceedings

In ***Oil and Natural Gas Corporation Limited vs. Discovery Enterprises Private Limited and Another, 2022 8 SCC 42,*** the Supreme Court of India had occasion to delineate more explicitly the group of companies doctrine and its application to arbitration proceedings.

Facts: On 25.04.2008, Oil and Natural Gas Corporation Limited ("**ONGC**") which awarded a contract (Clause 37 provided for arbitration) to Discovery Enterprises Private Limited ("**DEPL**") (a company belonging to the Jindal Group) invoked arbitration against DEPL and Jindal Drilling & Industries Limited ("**JDIL**") (which was not a party to the arbitration agreement) and claimed an amount of Rs. 63.88 crores. When the matter reached arbitration, ONGC argued that DEPL and JDIL belong to the DP Jindal Group of Companies and since they constitute a single economic entity, the corporate veil should be lifted to compel the non-signatory, JDIL, to arbitrate. JDIL filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") to seek deletion. ONGC filed an application for discovery and inspection and to establish the relationship between DEPL and JDIL. By its interim award, the Tribunal held that it lacked jurisdiction since JDIL was not a party to the arbitration agreement and JDIL was deleted from the array of parties. ONGC filed an appeal under Section 37 of the 1996 Act against the interim award before the Bombay High Court which was dismissed, which was challenged by ONGC under Article 136 of the Indian Constitution.

Ratio: The Supreme Court held that there was a fundamental failure by the first Arbitral Tribunal to resolve the discovery and inspection application as well as allow evidence to address whether JDIL could be considered to have an economic unity with DEPL and be made a party to the arbitral proceedings. It issued directions in this regard including the constitution of a fresh Arbitral Tribunal and allowing ONGC to pursue its application for discovery and inspectionand seek further directions. *(Paras 75-79)*

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Law: 1996 Act, Sections 8, 11, 7, 2 (1) (h), 16 and 37

Summary: This decision discusses in depth the 'Group of Companies Doctrine' and how to make a non-signatory or non-party group company (i.e. a company which has not signed the arbitration agreement) a party to arbitration proceedings.

The Court held that:

In deciding whether a company within a group of companies which is not a signatory to an arbitration agreement would nonetheless be bound by it, the law would consider the following factors:

a) Mutual intent of the parties
b) Relationship of a non-signatory to a party which is a signatory to the agreement
c) Commonality of the subject matter
d) Composite nature of the transaction
e) Performance of the contract *(Para 40)*.

1. Section 7

Section 7 of the 1996 Act is undergirded by consent and party autonomy.Non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego. *(Para 41)* (*Gary Born: International Commercial Arbitration, 2nd Edn, Vol 1, pg 1418)*

Interpretation of the term "parties" (as defined in Section 2 (1) (h)) vis-à-vis an arbitration agreement under Section 7 has earlier been dealt with in ***Indowind Energy Ltd. vs.Wescare (I) Ltd. (2010) 5 SCC 306.*** *(Para 24)*

2. Corporate Veil

(Para 23 of Cheran judgment (referenced infra)) "Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories."

The corporate veil can be pierced to bind non-signatories upon a **construction of the arbitration agreement**, the **intention at the time of entering the contract** and the **performance of the underlying contract** *(Para 30)* (***Cheran Properties Ltd. vs. Kasturi & Sons Ltd. (2018) 16 SCC 413 followed) (DuroFelguera, SA vs.Gangavaram Port Ltd., 2017 9 SCC 729, Reckitt Benckiser (India) P Ltd vs. Reynders Label Printing (India) P Ltd (2019) 7 SCC 62 referred to***), *Redfern and Hunter on International Arbitration, 5th Edition, 2.13, pp. 99*

3. **Section 45**

Interpreting the expressions '**through or under**', the Supreme Court in ***Chloro Controls India Pvt Ltd vs. Severn Trent Water Purification Inc*. (Three Judge Bench) (2013 1 SCC 641**) held that an arbitration could take place between a signatory to an arbitration agreement and a third party as well. The group of companies doctrine (developed in the international context) holds that non-signatory affiliates or sister concerns could be bound (in an arbitration agreement entered into by a company, being one within a group of companies) if the circumstances **demonstrate a mutual intention of the parties to bind both the signatory and affiliated non-signatory parties**. *(Para 25-26)*This was preceded by the two-judge bench decision on Section 7 in ***Indowind Energy Ltd. vs. Wescare (I) Ltd. (2010) 5 SCC 306****(Para 24)*.

Amended Section 8 (1) (2015 Amendment to Section 8) clarified that a person claiming through or under a party to the arbitration can also seek reference to arbitration notwithstanding any judicial precedent. *(Para 28)*

Chloro Controls (supra) *(*non-signatory would be bound by the arbitration clause in the mother agreement, since it is a party to an inter-connected agreement, executed to achieve a common commercial goal), ***AmeetLalchand Shah vs. Rishabh Enterprises (2018) 15 SCC 678***

4. **Departure from the ordinary principle of contract law that every company in a group of companies is a distinct legal entity**

A non-signatory may be bound by an arbitration agreement where the **parent/holding company/member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group was engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts**. *(Para 34)* [***MTNL vs. Canara Bank, (2020) 12 SCC 767****, Award in ICC Case No. 5103 of 1988, 115 JDI (Clunet) 1206 (1988)]*

A party may be bound by the agreement to arbitrate if it is an alter ego of a party which executed the agreement. A non-signatory may be bound by the operation of the 'group of companies' doctrine as well as by the operation of the principles of assignment, agency and succession.

In effect, the Court held that a non-signatory may be bound by the arbitration agreement where:

i. There exists a group of companies

ii. Parties have engaged in conduct or made statements indicating an intention to bind a non signatory*(Para 36)*(*Redfern and Hunter on International Arbitration, 5th Edition, 2.13, pp. 89-90)*

N.L. Rajah
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Director, NPAC

LEGAL UPDATES

❖ **Delhi High Court:The Court upholds an arbitration clause contained in a contract that has been superseded by a subsequent Agreement**

- In the case of ***PVR Limited vs. Imperia Wishfield Private Limited***, the parties entered into an MOU and an Agreement to Lease in relation to arrangement for operating a multiplex.
- Due to non-performance of obligations by the respondent, a Mutual Recession and Release Deed was executed and the MOU and the Agreement to Lease were terminated.
- Issue raised was, whether the arbitration clause contained in the MOU and the Agreement to Lease would survive after it is terminated or superseded by a subsequent agreement i.e. the Release Deed?
- Justice Mini Pushkarna held, *"an arbitration clause relates to the resolution of disputes between the parties to a contract and not to the performance of the said contract. Therefore, in accordance with the Doctrine of Severability an arbitration agreement is deemed to be a separate and severable clause and the arbitration agreement survives even if the contract comes to an end"*.
  https://legiteye.com/in-arbp-8292022-del-hc-in-accordance-with-doctrine-of-severability-arbitration-agreement-is-deemed-to-be-separate-and-severable-clause-which-survives-even-if-contract-comes-to-end-delhi-hc-justice-mini-pushkarna-23-11-2022/
  https://theindianlawyer.in/delhi-high-court-upholds-an-arbitration-clause-contained-in-a-contract-that-has-been-superseded-by-a-subsequent-agreement/

❖ **Rajasthan High Court: Arbitral Tribunal's decision to pass award prior to death of one of the Arbitrators is not contrary to Section 10 of A&C Act**

- In the case of ***M/s Shree Ram Junawa Industries vs. M/s Rounak Steels,*** Rajasthan High Court has ruled that if an arbitral tribunal had principally decided to pass the award on a day when all the members of the Arbitral Tribunal were present, merely because the detailed award was passed on a day when one of the members of the Arbitral Tribunal was not alive, and was thus signed by only two members, it cannot be said that the award was contrary to Section 10 of the Arbitration and Conciliation Act, 1996.
- The Single Bench of Justice Vijay Bishnoi held that the principles of res judicata also apply between two stages of the same litigation.
  https://www.livelaw.in/news-updates/rajasthan-high-court-death-of-one-of-the-arbitrators-arbitral-tribunal-award-arbitration-and-conciliation-act-213111

❖ **CalcuttaHigh Court: Arbitrators cannot invoke fundamental rights under the Indian Constitution when issuing awards**

- In the case of ***Chairman Board of Trustees for Shyama Prasad Mookherjee Port Kolkata vs. Universal Sea Port Private Limited***, the Court was hearing a petition for setting aside of an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996.
- In this case, the Court noted that considerations of discrimination and want of state functionaries to act in accordance with Article 14 of the Constitution had swayed the arbitrator's contractual interpretation.
- The Court held, *"Firstly, arbitrators cannot apply the rights envisaged under the fundamental rights of the Constitution of India or equity while granting arbitral awards, and if they do, such awards must be set aside as being patently illegal under Section 34(2A) of the Act. The arbitrator is a creature of contract and must act within the powers granted by it"*.
  https://cdn.ibclaw.online/ADR/HC/2022/The+Chairman+Board+of+Trustees+for+Shyama+Prasad+Mookherjee+Port+Kolkata+Vs.+Universal+Sea+Port+Pvt.+Ltd+-+Calcutta+High+Court-03-11-2022.pdf

❖ **Delhi High Court: Court Dismisses Centre's plea against Arbitrators in KG-D6 Cost Recovery Dispute.**

- In the case of ***Union of India vs. Reliance Industries Limited and Ors***, the Union Government had moved the Court to seek a declaration that two out of the three arbitrators on the Arbitral Tribunal (Sir BernanrdRix, UK Judge and Michael Kirby, former judge of an Australian Court) are 'de jure/ de facto' unable to discharge their functions and consequently their mandate stands terminated in terms of Section 14 (failure or impossibility to act) of the Arbitration and Conciliation Act, 1996.
- The counsel for Reliance Industries Limited raised a preliminary objection with respect to the maintainability of the government petition and stated that, since the challenge to the Arbitral Tribunal in the present case is raised on the ground of bias and justifiable doubt with respect to the independence and impartiality of the arbitrators, it is the procedure specified in Section 13 alone which could have been pursued.
- Justice Yashwant Varma upheld the preliminary objection and dismissed the Centre's petition as not maintainable. The Court ruled that itfailed to observe any merit in the submission of the counsel for the Centre and that the members of the Arbitral Tribunal had already prejudged the entire issue.
  https://energy.economictimes.indiatimes.com/news/oil-and-gas/hc-dismisses-centres-plea-against-arbitrators-in-kg-d6-cost-recovery-dispute/96153782
  https://www.outlookindia.com/business/delhi-high-court-dismisses-centre-s-plea-against-arbitrators-in-kg-d6-cost-recovery-dispute-news-243707

❖ **Bombay High Court: Participating in arbitration proceedings does not disentitle party from challenging award for unilateral appointment of arbitrator**

- In the case of ***Naresh Kanayalal Rajwani& Ors. vs. Kotak Mahindra Bank Limited &Anr.***,Justice Manish Pitale of the Bombay High Court ruled that merely because a party participated in the arbitration proceedings, does not disentitle it from challenging the arbitral award on the ground that the arbitration proceedings were vitiated due to the unilateral appointment of the Arbitrator by the opposite party, under Section 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996.
  https://www.livelaw.in/news-updates/participation-in-arbitral-proceedings-does-not-disentitle-party-to-challenge-award-on-ground-of-unilateral-appointment-of-arbitrator-bombay-high-court-215545

❖ **Delhi High Court: Requirement of a notice of arbitration is not a mere technicality**

- In the case of ***Rahul Jain &Ors. vs. Atul Jain &Ors.***, the Delhi High Court held that a notice of arbitration is sine qua non for commencing arbitral proceedings, and that invalidity of invocation goes to the very root of the matter and hits the jurisdiction of the Court to entertain applications arising out of the arbitration proceedings.
- The bench of Justice Prateek Jalan held that requirement of notice of arbitration is not a mere technicality and its non-compliance cannot be ignored merely because the instrument was a family settlement agreement.
  https://www.livelaw.in/news-updates/requirement-of-notice-of-arbitration-is-not-a-mere-technicality-delhi-high-court-215746

THE ARBITRATION AGREEMENT: FORM AND ESSENCE

By Preeti Mohan & R.S. Pornima

The position that the Court while exercising its powers of appointment under Section 11 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**"), must largely confine itself to examining whether an arbitration agreement exists, is unambiguous. What is less clear however, is how the ingredients of an arbitration agreement are defined by statute, and interpreted by the Courts, the answer to whichwill determine whether an arbitration agreement can be said to exist in a particular case. The position raises interesting issues especially in the context of engineering and construction agreements, where clauses empowering the employer's representative to decide questions are not uncommon. The power exercised by such representative in most cases, appears to be located in a unique matrix, where factual questions and rights of parties often intersect. The nature then, of such power, and the question of whether parties have agreed to arbitration, notwithstanding the position that one party's representative cannot be an arbitrator, arises for examination.

The question came up for the consideration of the Hon'ble Madras High Court in its recent judgment, in ***Innovators Façade Systems Ltd., vs. Larsen & Toubro Limited***,[1] where the Court held, on the facts of the case before it, that a clause empowering the project manager of one of the parties to the contract to settle disputes and differences arising on account of interpretation of clauses, did not satisfy the requirements of an arbitration agreement.

Before proceeding to examine the principles laid down by the Madras High Court, it is useful to study the evolution of the law beginning with the position under the Arbitration Act, 1940 ("**1940 Act**"). The Act through Section 2(a), defined an arbitration agreement as one in writing, intended to refer present or future disputes to arbitration. This fundamental concept finds expression in Section 7 of the 1996 Act as well, with the only difference being its intent to extend to disputes which may or may not be contractual, and the form that such an agreement may take as articulated in Sections 7(2) to 7(5). The question arisesboth under the 1940 Act as also the 1996 Act, as to what are the essential facets or the determinants of an arbitration agreement, and which of these would be peremptory.

This question has merited the consideration of several courts, including the Hon'ble Supreme Court. One of the earliest of the judgments rendered under the 1996 Act, is the decision in the case of ***Jagdish Chandervs Ramesh Chander&Ors***,[2] wherein the Apex Court held that the existence of an arbitration agreement as defined under Section 7 of the 1996 Act is a condition precedent for exercise of power to appoint an Arbitrator/Arbitral Tribunal under Section 11 of the 1996 Act, by the Chief Justice or his designate. The Courtwent on to articulate the principles of what constitutes an arbitration agreement, for which they relied substantially on another leading precedent in the judgment rendered in ***K.K Modi vs. K.N. Modi***.[3]

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[1] Order in Arb. O.P (Com. Div.) No. 258 of 2022 dated 25.08.2022; Disclaimer the authors of this Article represented one of the parties to the dispute.
[2] 2007 (5) SCC 719
[3] 1998 (2) SCC 166

The Court held that a clause in a contract can be construed as an arbitration agreement only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause.

The Court further went on to hold that the terms of the agreement must clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private Tribunal for adjudication and a willingness to be bound by the decision of such Tribunal on such disputes. The words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going to arbitration. With this, the first essential ingredient of an arbitration agreement, namely that it must mandatorily require parties to have their disputes settled through arbitration, and not merely provide them with an option, was clearly defined.

As can be seen from the principles laid down in the ***K.K. Modi*** judgment, this was one amongst a set of ingredients defined as essential to constitute an arbitration agreement. In addition to such mandatory nature of the obligation to have disputes decided, the Supreme Court *inter-alia* considered the following attributes as essential to constitute an arbitration agreement : (i) the decision of the tribunal must bind the parties and the agreement must indicate this; (ii) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal; (iii) the tribunal, must,in determining rights of parties, act impartially and judicially with an equal obligation of fairness to all parties before it; (iv)the agreement to refer disputes must be intended to be legally enforceable.

Of these, the attributes spelt out in (ii) to (iv), have particularly posed complexities for the Courts to decide. For instance, the Madras High Court in ***S.M.R. Nagarajan vs.Navamani***,[4] by applying the principles laid down in ***Jagdish Chander***, and ***K.K. Modi,*** emphasized as central, the need for the tribunal to be one that can act impartially, judicially, and be empowered to decide substantive rights. Accordingly, the Court held that the clause being considered on the facts, was one intended purely for negotiation, and that too by one of the parties' representatives, and could not therefore constitute an arbitration agreement.

The Supreme Court, in the decision in ***Mallikarjun vs. Gulbarga University,***[5] held that a clause empowering the superintending engineer of one of the parties to decide differences, would constitute an arbitration agreement. In reaching this conclusion, the Court relied on the fact that such person was independent and did not play any supervisory role in relation to the execution of the contract in question.

In contrast, the Court in ***Mahanadi Coalfields vs. IVRCL AMR Joint Venture,***[6] held that a clause requiring parties in the event of differences to refer the same to the Engineer-in-Charge, would not constitute an arbitration agreement.

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[4](2020) 2 MLJ 206
[5]2004 (1) SCC 372
[6]2022 SCC OnLIne SC 960

The Court by relying on ***IB Valley Transport, Vijay Laxmi Ltd. vs. Mahanadi Coalfields Ltd.***,[7] held that the clause in question was one that was intended to provide for a mechanism of dispute resolution before resorting to legal remedies, and to settle disputes at the company level. The Court accordingly concluded that this would not constitute an arbitration agreement, with no part of the remaining portions of the relevant clause containing any ingredients necessary for an arbitration agreement.

It is this complex judicial landscape which has been deconstructed by the Hon'ble Madras High Court in the case of ***Innovators***. By cutting through decades of precedents on varied sets of facts, the Court has held that the clause in dispute was not an arbitration clause for *inter-alia* the following reasons:

i. The arbitral tribunal being a creature of contract, the same cannot exist if there is no consensus amongst the parties to have the matter referred to arbitration;

ii. It is imperative that the private tribunal identified be given an adjudicatory power. Agreement between the parties to confer mere supervisory power to the Project Manager and to have him/her decide issues of technical specification at the site level cannot be construed as being a private tribunal conferred with adjudicatory power to settle disputes;

iii. Reliance was placed on the judgments in ***Mahanadi Coalfields*** and ***Jagdish Chander*** to hold that the clause in question being a dispute resolution mechanismto resolve disputes pertaining to technical specifications at site level, could not be read as disclosing the intention of either party to make the project manager an arbitrator in respect of disputes that may arise between the parties;

iv. Reference was made to the view expressed by the Apex Court in ***Mahanadi Coalfields*** on the basis of the findings rendered *inter alia* in Bihar State ***Mineral Development Corporation and Anr. vs. Encon Builders (I)(P) Ltd***.[8] ***K.K Modi*** and ***Jagdish Chander*** that while there is no particular form of an arbitration agreement, it is essential that the clause reveals the intention and the determination of parties to refer disputes to arbitration.

v. Critically, the Court also held that where the intent of the parties to arbitrate is categorically expressed, the determinative factor is not merely to examine whether the other attributes of an arbitration clause, as laid down by the Courts are present, but to examine whether the clause excludes the attributes of an arbitration clause. On the facts, the supervisory role played by the project manager in relation to the project was clearly an element that militated against it being an arbitration clause.

[7] 2014 10 SCC 630
[8] 2003 (7) SCC 418

By a subsequent judgment rendered by the Hon'ble Supreme Court in ***Baburao Rajaram Pund vs. Samarth Builders and Developers and ors,***[9] the Court while reiterating the principles laid down in ***KK Modi*** and ***Jagdish Chander***, looked into the wording of the clause being considered by it which provided for arbitration, specified the number and manner of appointment of arbitrators, as also that the 1996 Act would apply, and held that this was sufficient indication of the intent to arbitrate. The Court reached this conclusion by holding that these attributes were sufficient, and the mere absence of specific wording indicating that the parties intended to treat the process as final and binding, would not take away from this position.

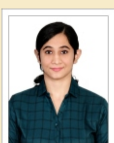
The consensus that appears to emerge from a reading of these judgments, is that the agreement or clause need not take a specific form, to constitute an arbitration agreement. The mere use of the word 'arbitration', or the absence thereof in the clause, is also not determinative. What is relevant however is the intent to refer disputes to an independent private tribunal that acts judicially, with the object of reaching a binding decision. Equally, the presence of elements that may detract from an arbitration agreement, such as a clause which only provides for a person associated with the contract deciding disputes; or decision making in a capacity which is not judicial, may weigh against the clause being treated as one for arbitration.

Conclusion:

The legal position on how an agreement is to be construed, and whether it meets the tests for constituting an arbitration agreement, have substantially evolved through these judgments. However, and from a commercial practice point of view, it may be expedient while drafting clauses, to make a clear distinction between a mechanism that precedes arbitration, or is intended to resolve operational issues, from an agreement for binding arbitration. This position can be of relevance not just in engineering and construction contracts, but equally so in commercial agreements where parties nominate private bodies to undertake fact-finding exercises, or forensic audits. These are distinguishable from arbitration agreements, and the clarity on what they represent, can go a long way in eliminating uncertainty, and disputes at the threshold.

About the Authors

Preeti Mohan *is the Founding Partner of J&M Legal. She has over a decade of experience in commercial litigation and arbitration and has acted for clients in diverse industries in both domestic and international arbitration.*



Pornima RS *is a Senior Associate at the firm with 6 years of experience as a litigator, and has acted in several complex commercial disputes.*

[9] 2022 SCC OnLine SC 1165.

WINNERS OF THE 8TH SATYA HEGDE ESSAY COMPETITION

Nani Palkhivala Arbitration Centre conducted the 8th edition of the Satya Hegde Essay Competition on the topic ***'Is arbitrability of a dispute a pre-condition for an Order under Section 11 of the Act?'***, and below are the details of the prize winners:

I Prize - Ms.Sunidhi Kashyap, Rajiv Gandhi National University of Law, Punjab

II Prize - Ms.Natasha Singh, NALSAR University of Law, Hyderabad

III Prize - Ms.Neha Maria Antony, The National University of Advanced Legal Studies, Kochin

The 1st, 2nd and the 3rd prize winners would be awarded a prize money of Rs. 10,000, Rs. 7,500 and Rs. 5,000 respectively, at NPAC's Annual International Conference on Arbitration to be conducted this year.

The prize winning essay would be published in the upcoming issues of the Newsletter.

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