DENTONS LINK LEGAL

Non-signatories may be bound by arbitration agreements signed by their affiliates within a group of companies

- Rules Supreme Court of India

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TAKE-AWAYS:

- An arbitration agreement entered into by a company within a group of companies may bind its non-signatory affiliates;
- Tribunals will consider express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract;
- Several other factors such as composite nature of the transaction and commonality of subject matter will also be considered

INTRODUCTION:

It is common commercial belief that an arbitration agreement should be in writing, and that only signatories to the agreement are bound by it. However, in complex transactions involving multiple agreements and multiple parties, a party might involve its group affiliates - all of whom may not have signed the agreements but participate in their execution at some stage. Are non-signatory affiliates bound by the agreements signed by their affiliate with other parties? They could be, as per a recent ruling of the Indian Supreme Court in the case of Cox & Kings Ltd. v. SAP India Pvt. Ltd ("**C&K vs. SAP**")[1].

Several principles of law have emerged under arbitration law that deviate from the norm and bind non-signatory entities to a contract. In the context of group affiliates, the 'group of companies' doctrine has been used in several cases, although with circumspection.

This doctrine provides that an arbitration agreement entered into by a company within a group of companies may bind its non-signatory affiliates, if circumstances demonstrate a mutual intention between the parties to bind both

[1] 2023 SCC OnLine SC 1643

signatories and non-signatories. This legal complexity underscores a vital need for companies to comprehend the nuances surrounding the applicability of the group of companies doctrine.

The group of companies doctrine (GoC doctrine) has been a grey area in the realm of joinder of non-signatories to arbitration. National courts in leading arbitral jurisdictions are starkly divided on its applicability.[2] However, the Indian Supreme Court has subsumed the doctrine into the Indian arbitration law through the case of C&K vs. SAP.

This article focuses on the importance and consequence of this judgment for group affiliates or for parties dealing with a group of companies. While engaging in arbitration agreements, companies now need to comprehend factors that might attract the group of companies doctrine. An understanding of these factors will help parties to navigate through complex transactions and to tailor their involvement before, during or after execution of contracts.

THE CASE:

C&K entered into an End User Licence Agreement with SAP. Disputes arose between the parties. C&K filed an application under Section 11 of the A&C Act before a three-judge bench of the Court for appointment of an arbitrator and sought to implead the parent company of SAP in the arbitration proceedings on the basis of the group of companies doctrine. Given the contentious nature of the doctrine, the Court referred the matter to a five-judge bench. The key issue before the Court was whether the Group of Companies Doctrine is valid under the Indian arbitration jurisprudence.

THE JUDGMENT:

The application of this doctrine has been contentious since it interferes with traditional legal principles of contract law (such as privity of contract), company law (such as separate legal personality of companies) and arbitration law (such as party autonomy and consent).

However, the Indian Supreme Court has called for a modern approach to consent by considering conduct of non-signatories and their involvement before, during or after execution of the contract - to determine if they are 'veritable'/'real' parties to the arbitration agreement. The ruling is an endeavour to respond to modern day challenges and retain a sense of dynamism in Indian law to cater to modern business reality involving complex transactions and group affiliates.

Upholding the validity of the group of companies doctrine in impleading non-signatory group affiliates to arbitration proceedings, the Court held that:

1. The doctrine is subsumed under Section 7(4)(b)[3] of the Indian A&C Act: Section 7(3) provides that an arbitration agreement should be in writing. Section 7(4) provides that an agreement will be in writing if it is (a) signed by the parties; or (b) contained in an exchange of letters etc. which provides a record of the agreement; or (c) not denied in pleadings. The Court held that all three circumstances of Section 7(4) are geared towards determining the mutual intention of the parties to arbitrate. Since the purpose of inquiry by a court or arbitral tribunal under Section 7(4)(b) of the Indian A&C Act and the Group of Companies doctrine

[2] England and Singapore have rejected the applicability of the doctrine, while France and Switzerland have upheld it subject to certain conditions

is the same, the doctrine can be subsumed within Section 7(4)(b) to enable a court or arbitral tribunal to determine the true intention and consent of the non-signatory parties to refer the matter to arbitration.

2. Conduct of a non-signatory before, during, or after execution of the arbitration agreement must be considered: Since the group of companies doctrine is established within the scope of mutual intention and consent to arbitrate, its application depends upon the consideration of a variety of factual elements to infer the mutual intentions of both the signatory and non-signatory parties to be bound by the arbitration agreement.

3. Burden and standard of proof: The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence. Mere presence of a group of companies, or mere incidental involvement in the negotiation or performance of the contract, is not sufficient to infer consent of the non-signatory to be bound by an arbitration agreement. Courts will closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract.

4. Group affiliates will not qualify as "persons claiming through or under" a party:_Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement. The latter entails claiming in a derivative capacity. Hence, persons "claiming through or under" can only assert a right in a derivative capacity.

5. Group of companies doctrine is not similar to piercing of corporate veil: The group of companies doctrine rests on maintaining the corporate separateness of the group companies, while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement. It is therefore a consent-based theory to implead non-signatories. On the other hand, the concept of piercing of corporate veil is not based on consent. It is usually employed when a company in a group of companies engages in wrongful activity and attempts to shield itself from liability by taking the garb of another entity in the group. Piercing of corporate veil to bind a non-signatory to arbitration is therefore, not based on implied consent by the non-signatory.

6. Convergence of group companies into a 'single economic unit' not necessary: Joining a third party to arbitration based on the convergence of a group of companies as a "single economic unit" is no longer the norm under the Group of Companies Doctrine. Instead, the standard is premised primarily on implied consent drawn from the acts and conduct of an entity within the group of companies.

PRACTICE NOTES:

The group of companies doctrine can now be pleaded readily before courts and tribunals without any legal suspicion as to its application in Indian law. Pursuant to the ruling of the Indian Supreme Court, companies will need to be aware of several factors while engaging in agreements with or involving group affiliates. Following considerations can assist parties in navigating the implications of the judgment:

1. Companies will now need to be conscious of the fact that lack of a formal signature may not absolve parties of their contractual obligations, including the agreement to arbitrate, if there is sufficient evidence to prove their intention to be bound by the agreement.

2. The relationship between and among the legal entities within the corporate group structure and the involvement of the parties in the performance of the underlying contractual obligations are indicators to determine the mutual intentions of the parties.
3. The court or arbitral tribunal will determine whether a non-signatory is a party to an arbitration agreement by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract.
4. The other factors such as the commonality of the subject matter, composite nature of the transactions, and the performance of the contract will be cumulatively considered to identify the intention of the parties to bind the non-signatory party to the arbitration agreement.
5. The UNIDROIT Principle of International Commercial Contract, 2016 also account for subjective intention of the parties - ascertainable by having regard to circumstances such as: (a) preliminary negotiations between the parties; (b) practices which the parties have established between themselves; (c) the conduct of the parties subsequent to the conclusion of the contract; (d) the nature and purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned; and (f) usages.
6. Companies must carefully evaluate business correspondence such as emails, letters, or any electronic communication to evaluate their involvement in agreements. The extent of this involvement will determine whether they will be impleaded as a party to the arbitration proceedings.
7. Parties claiming in a derivative capacity cannot take advantage of the group of companies doctrine.
8. The acceptance of the doctrine is highly contested across jurisdictions. Therefore, in cross-border transactions, companies will need to evaluate their operative jurisdictions, the legal status of the group of companies doctrine in various jurisdictions, and its impact on enforceability of the arbitral award. For example, companies should consider whether an award passed in India against a non-signatory through the application of group of companies doctrine, would be enforceable against the non-signatory in UK or Singapore.
9. Parties will need to be mindful of their choice of seat of arbitration.
10. Companies will also need to evaluate if interim reliefs against non-signatory parties would be available before courts or arbitral tribunals, and if so, at what stage.
11. Several principles of law have evolved to bind non-signatories to an agreement. Parties will need to evaluate the facts and law to apply the correct legal principle.

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