IRAC ANALYSIS:

COX AND KINGS LTD. V. SAP INDIA PVT. LTD. AND ORS.

[ARBITRATION PETITION (CIVIL) NO. 38 OF 2020, SLP (C) NOS. 8607 OF 2022 AND 5833 OF 2022], DECIDED ON: 06.12.2023

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ABSTRACT

This paper explores the Indian Supreme Court's landmark decision in Cox and Kings Ltd. v. SAP India Pvt. Ltd., which dealt with the use of the "Group of Companies" doctrine in arbitration. Arbitration is often preferred for its efficiency and confidentiality, but complexities arise when disputes involve non-signatories, especially in multi-party corporate transactions. The Court emphasized more stringent criteria for binding non-signatories to arbitration, requiring evidence of mutual intent, a close transactional relationship, and the composite structure of agreements. The judgement elucidates the boundaries of the doctrine, bolstering party autonomy and fostering effective dispute resolution by striking a balance between party consent and commercial realities. The analysis highlights the importance of precise arbitration clauses to navigate intricate corporate structures and prevent fragmentation of disputes.

I. INTRODUCTION

The intersection of corporate law and arbitration is an essential aspect of modern commercial transactions. In today's complex corporate structures, businesses frequently rely on arbitration as the preferred mode of dispute resolution, given its efficiency, confidentiality, and the expertise of arbitrators. Arbitration clauses have become a ubiquitous feature in corporate contracts, joint venture agreements, and multi-party transactions, allowing parties to resolve disputes outside of conventional court systems. This prevalence of arbitration reflects a deep-rooted need for flexibility and finality in resolving business disputes, especially in cross-border and multi-jurisdictional contexts.

However, the increasingly interconnected nature of corporate groups, where multiple affiliates may be involved in a single transaction, raises important questions about the scope of arbitration clauses and the extent to which non-signatories—often other companies in the same

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corporate family—can be bound by them. This issue has been the subject of significant legal debate, particularly in India, where the balance between respecting the contractual basis of arbitration and acknowledging the commercial realities of group enterprises has proven challenging.

The Indian Supreme Court has played a crucial role in shaping the contours of this debate. In ***Cox and Kings Ltd. v. SAP India Private Ltd.***[2], a landmark case decided in 2023, the Court addressed the applicability of the **"Group of Companies"** doctrine, providing critical guidance on when non-signatory entities may be compelled to arbitrate. This judgement marks an important moment in Indian arbitration law, clarifying the legal framework for multi-party disputes within corporate groups and reinforcing the central principle of consent in arbitration agreements.

II. FACTS

On December 14, 2010, Cox and Kings Ltd. (**"C&K"**), a travel company, entered into a software licensing agreement with SAP India Pvt. Ltd., a company specializing in software solutions for business operations such as marketing, finance, and human resources.

In October 2015, C&K started developing its own e-commerce platform when SAP India approached them, proposing to implement their new 'Hybris Solution' software. SAP India assured C&K that the software was already 90% compatible with their existing systems and would require only 10 months to customize the remaining 10%. Based on this, the companies signed three new agreements, including a General Terms and Conditions Agreement, which contained an arbitration clause. This clause required disputes to be resolved through arbitration under the Arbitration and Conciliation Act, 1996 (**"the Arbitration Act"**), with proceedings held in Mumbai. However, difficulties arose during the implementation of the Hybris software. In response, C&K sought assistance from SAP SE, the German parent company of SAP India. SAP SE formed a team of global experts and took over the project, but the project still failed despite several extensions. As a result, C&K terminated the contract in November 2016 and demanded a refund of Rs. 45 crores, representing the payments they had made to SAP. SAP India responded by initiating arbitration proceedings, accusing C&K of wrongful termination and demanding Rs. 17 crores in damages.

[2] Cox and Kings Limited v. SAP India Private Limited & Anr, (2022) 8 SCC 1.

In November 2019, the National Company Law Tribunal adjourned the arbitration proceedings as C&K faced insolvency proceedings. Despite this, C&K sent a fresh notice of arbitration to SAP and included SAP SE, even though SAP SE was not a party to the original agreements. SAP SE did not appoint an arbitrator, leading C&K to approach the Supreme Court under Section 11 of the Arbitration Act, requesting the Court to appoint an arbitrator. C&K argued that SAP SE should be included in the arbitration because they had taken over the project, thereby giving implied consent to the terms of the agreement.

On May 6, 2022, a three-judge Bench led by former CJI N.V. Ramana referred the matter to a five-judge Bench, expressing concerns about the application of the Group of Companies doctrine under the Arbitration Act. The Bench questioned whether an arbitral tribunal could have jurisdiction over non-signatories like SAP SE. A five-judge Bench led by CJI D.Y. Chandrachud began hearing the case on March 22, 2023, and delivered its judgement on December 6, 2023.

III. ISSUE

The issue of whether Indian courts can refer non-signatory parties in judicial proceedings to arbitration, and appoint arbitrators in such cases, has been revisited multiple times. Given the consensual nature of arbitration, courts have been cautious about compelling non-signatories to participate. However, it became clear that some disputes, which should have been arbitrated, were brought before the courts by involving non-signatory parties to avoid arbitration. This issue commonly arose in joint venture agreements with multiple contracts, each having different dispute resolution clauses, often involving related entities within the same corporate group. Despite the varying structures and parties, the core question remained: how should courts handle arbitration referrals in multi-party and multi-contract transactions, especially when non-signatories are involved, and what are the limits of their authority in such situations?

The key legal questions addressed by the Supreme Court in this case are:

1. Can non-signatory companies be compelled to arbitrate under an arbitration agreement governed by the Arbitration and Conciliation Act, 1996?
2. Under what conditions can the ‘Group of Companies’ doctrine be applied to bind on-signatories to an arbitration agreement?

IV. RULE

The relevant provisions governing arbitration in this context are:

- **Section 2 – Definitions.**[3]

(1) In this Part, unless the context otherwise requires,—

(h) "party" means a party to an arbitration agreement.

- **Section 7 - Arbitration Agreement.**[4]

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

- **Section 8 - Power to refer parties to arbitration where there is an arbitration agreement.**[5]

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement 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 substance of the dispute, then, notwithstanding any judgement, decree or order of the Supreme

[3] The Arbitration and Conciliation Act, 1996, § 2(h), No. 26, Acts of Parliament, 1996 (India).
[4] The Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).
[5] The Arbitration and Conciliation Act, 1996, § 8, No. 26, Acts of Parliament, 1996 (India).

Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.;

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

- **Section 45 – Power of judicial authority to refer parties to arbitration.**[6]

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, [unless it prima facie finds] that the said agreement is null and void, inoperative or incapable of being performed.

V. ANALYSIS

In a commercial ecosystem characterized by multi-party and multi-contract transactions, the question of whether non-signatories could be compelled into arbitration has long been debated. Arbitration, being a consent-based process, requires clear agreement between the parties involved. However, in complex business structures, disputes often arise involving parties who have not directly signed the arbitration agreement but are nevertheless integral to the transaction. This issue, particularly in the context of joint ventures and corporate groups, has tested the limits of Indian arbitration law. Arbitration, being a consent-based process, requires clear agreement between the parties involved. However, in complex business structures,

[6] The Arbitration and Conciliation Act, 1996, § 45, No. 26, Acts of Parliament, 1996 (India).

disputes often arise involving parties who have not directly signed the arbitration agreement but are nevertheless integral to the transaction.

The Supreme Court first addressed this question in ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.***[7], where it extended arbitration agreements to non-signatory entities in a multi-contract framework by relying on the phrase "claiming through or under" as found in Sections 8 and 45 of the Arbitration Act. The Court's reasoning was based on a composite transaction involving multiple interrelated agreements and entities.[8] It was this expansion of the doctrine that was questioned and reconsidered in the C&K case, leading to its referral to a larger bench for final determination. In its decision, the Supreme Court reasserted that the Group of Companies doctrine is an established principle in Indian arbitration jurisprudence but imposed stricter criteria for its application. The Court made it clear that merely being part of a corporate group or being involved in a transaction does not automatically make a non-signatory party to an arbitration agreement. Instead, there must be evidence of mutual intent to bind the non-signatory entity, whether through its participation in the negotiation, performance, or termination of the contract.

- **Balancing Consent and Commercial Realities:** The Court emphasized the need to balance the foundational principle of arbitration—consent—with the complexities of modern commerce. In multi-contract, multi-party transactions, the doctrine serves a pragmatic purpose by preventing the fragmentation of disputes and ensuring that interconnected parties resolve their disputes in a unified forum. The judgement recognizes that in some cases, strict adherence to formal consent could lead to unjust outcomes where non-signatory entities that played a significant role in the transaction would be excluded from arbitration, leading to inefficiencies and possible manipulation of legal proceedings to avoid arbitration.
- **Differentiating Between "Party" and "Claiming Through or Under":** A critical component of the judgement was the distinction drawn between the term "party" under Sections 2(1)(h) and 7 of the Arbitration Act and the phrase "claiming through or under." The Court decisively rejected the notion that the doctrine could be based solely on the phrase "claiming through or under" in Sections 8 and 45, as was suggested in

[7] Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641.
[8] Vedaant Agarwal & Shivankar Sukul, *Analyzing the Feasibility & Legitimacy of Third-Party Extension of Arbitration Agreement in the Indian Arbitration Regime*, 3 INDIAN REV. INT'l ARB. 32 (July 2023).

Chloro Controls. The phrase, according to the Court, refers to successors-in-interest or those acting in a derivative capacity, such as assignees, and cannot be stretched to include independent entities within the same corporate group unless there is clear evidence of their intent to arbitrate.

- **Stricter Tests for Invoking the Doctrine:** The judgement laid out specific factors, adopted from the ***ONGC Ltd. v. Discovery Enterprises***[9] decision, which must be cumulatively assessed to determine whether the doctrine applies. These include the mutual intent of the parties, the relationship between the signatory and non-signatory entities, the commonality of the subject matter, and the composite nature of the transaction. The Court was clear that these factors must be considered on a case-by-case basis and that no single factor—such as a corporate group's structure—could automatically justify the doctrine's application.
- **Judicial Deference to Arbitral Tribunals:** Another significant takeaway from the judgement was the Court's deference to arbitral tribunals in determining the scope of their jurisdiction. The Supreme Court limited its role to a prima facie examination of the arbitration agreement at the referral stage, thus encouraging minimal judicial intervention in arbitral proceedings. This reinforces the autonomy of the arbitral process and prevents courts from engaging in detailed analyses that could delay or undermine arbitration.

The decision has broad implications for both Indian and international businesses operating in India. It signals a move toward a more cautious and evidence-based application of the Group of Companies doctrine, reducing the risk of arbitrating with unintended parties while ensuring that arbitration remains an efficient means of dispute resolution in multi-party, multi-contract scenarios. It also reinforces the importance of contractual clarity. Companies must now be more mindful of the way they structure their dealings within a corporate group and ensure that their arbitration agreements explicitly reflect their intent, particularly when some entities within the group are not intended to be bound by the agreement.

The doctrine allows for a non-signatory within a corporate group to be part of an arbitration agreement made by its affiliate, parent, or sister company, provided the facts indicate that all

[9] ONGC Ltd. v. Discovery Enterprises (P) Ltd. (2022) 8 SCC 42.

parties intended to bind both signatories and non-signatories.[10] This pragmatic approach aims to consolidate disputes involving multiple agreements and parties before a single forum, ensuring that all parties materially involved in the transaction are held accountable. By doing so, it reduces the risk of contradictory decisions across different proceedings and helps streamline complex multi-party disputes. However, despite these advantages, the doctrine has faced criticism for stretching the concept of party consent, which is central to arbitration. It is argued that the doctrine sometimes manufactures consent retrospectively, pulling in parties that never explicitly agreed to be bound by the arbitration agreement. This "after-the-event" analysis, which brings in non-signatories' post-contract execution, is seen by some as undermining established legal principles such as **'party autonomy'**, **'privity of contract'**, and the doctrine of **'separate legal personality'**.[11] Thus, it challenges the traditional boundaries of contractual obligations, raising concerns about fairness and overreach in its application.

VI. CONCLUSION

The judgement solidifies the doctrine as a fundamental part of Indian arbitration law while also setting clear boundaries to prevent its misuse. The Supreme Court emphasized the distinction between non-parties and non-signatories, ruling that in certain situations, consent may be implied to include non-signatories as parties to an arbitration. This decision reinforces that non-signatories can be bound by or benefit from an arbitration agreement if the intent of all involved parties was to include them, even without direct consent. It brings a much-needed clarity to the intersection of corporate law and arbitration, promoting efficiency in multi-party, multi-contract disputes while safeguarding party autonomy and legal coherence in arbitration proceedings.

[10] Tejas Chhura, *The Need to Re-Think the Group of Companies Doctrine in International Commercial Arbitration*, 15 NUJS L. REV. 27 (January-March 2022).
[11] Ansh Sethi, *Cox and Kings Ltd v SAP India Pvt Ltd and Anr - Addressing the Elephant in the Room and Settling the Debate on the Group of Companies Doctrine*, 4 JUS CORPUS L.J. 66 (December 2023 - February 2024).

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