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THE INDIAN SUPREME COURT FINDING ON THE 'GROUP OF COMPANIES' DOCTRINE: WHAT THIS MEANS FOR ENERGY SECTOR ARBITRATIONS

In a decision handed down last month, *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Another* (Arbitration Petition (Civil) No. 38 of 2020), a five-judge bench of the Indian Supreme Court ("Supreme Court") passed a landmark ruling (the "Judgment") confirming the continued application of the 'Group of Companies' doctrine. We consider this from the perspective of energy sector project contracts and any arbitrations which might arise. There are unavoidable realities when it comes to negotiating these contracts and performing them, typically involving different entities from a single company group, with the expectation that only the signatory to the contract will be party to any arbitration. In this update we assess balancing these realities against what the Indian Supreme Court has expressed unequivocally as the Indian law position.

Background

The 'Group of Companies' doctrine in question provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories.[1] This is the well-established position in India. While the doctrine has been applied by the Indian courts for several years now when considering arbitration agreements, it was called into question before the Supreme Court on the basis that it was incompatible with established legal principles such as privity of contract, party autonomy and separate legal personality.

Arguments for and against the applicability of the doctrine

Several arguments were made in support of and against the application of the doctrine before the Supreme Court.

In summary, arguments in support of the application of the doctrine were as follows.

- The definition of "party" under Section 2(1)(h)[2] of the Indian Arbitration Act and Conciliation 1996 (the "**Arbitration Act**") "*should be read expansively to also include non-signatories, depending upon the facts and circumstances*".[3]
- "*The group of companies doctrine is inbuilt in the overall scheme of the Arbitration Act. Section 7*[4] *uses the broad phrase "defined relationship whether contractual or otherwise" to convey that an arbitration agreement is not restricted to a conventional agreement.*"[5]
- "*A non-signatory can be impleaded in an arbitration proceeding provided: (i) there is a defined legal relationship between the non-signatory and the parties to the arbitration agreement; and (ii) the non-signatory consented*

[1] Paragraph 2 of Judgment.

[2] Section 2(1)(h) provides that "*"party" means a party to an arbitration agreement*".

[3] Paragraph 7 of Judgment.

[4] Section 7(1) states "*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.*"

[5] Paragraph 13 of Judgment.

to be bound by the arbitration agreement in terms of Section 7 of the Arbitration Act." Under Section 7 of the Arbitration Act, the defined legal relationship between the parties may be non-contractual as well.[6]

- "*The basis for application of the group of companies doctrine is the tacit or implied consent by the non-signatory to be bound by the arbitration agreement.*"[7]

Arguments against the application of the doctrine were as follows.

- "*Section 7 of the Arbitration Act*[8] *requires the arbitration agreement to be in writing. Therefore, an arbitration agreement cannot be created on the basis of implied consent of the non-signatory.*"[9]
- "*Mutual consent of the parties to refer disputes arising out of their defined legal relationship to arbitration is the essential ingredient of an arbitration agreement. It would be against the concept of party autonomy to bind a non-signatory to an arbitration agreement without ascertaining their consent.*" [10]
- "*Mere participation in the negotiation or performance of the contract cannot bind a non-signatory to the arbitration agreement in the absence of express consent.*"[11]
- "*Complex multi-party contracts are outcomes of detailed negotiations entered into after parties have fully applied their mind. To impute intention to parties in contradiction to the express terms of the agreement would defeat the purpose of the parties' memorializing their understanding in a negotiated, written document.*"[12]
- "*The concept of "party" to an arbitration agreement is distinct from the concept of "person claiming through or under" a party.*"[13]

The Supreme Court's decision

After having considered common law jurisdictions which have rejected the application of the 'Group of Companies' doctrine, the Supreme Court upheld the application of the 'Group of Companies' doctrine under Indian law.

In making its decision, the Supreme Court looked to reconcile the doctrine with established legal principles such as party autonomy and separate legal personality as follows.

- *Separate legal personality:* The Supreme Court was of the view that the doctrine of separate legal personality, which essentially means that one group company is a different person from another group company, is not disturbed by the 'Group of Companies' doctrine since the doctrine "*facilitates the identification of the intention of the parties to determine the true parties to the arbitration agreement without disturbing the legal personality of the entity in question.*"[14]
- *Party Consent:* The Supreme Court acknowledged the importance of party consent while emphasising the need for a pragmatic approach. For instance, the Court noted that "*[m]odern commercial reality suggests that there often arise situations where a company which has signed the contract containing the arbitration clause is not always the one to negotiate or perform the underlying contractual obligations.*"[15] In these situations, the 'Group of Companies' doctrine becomes relevant.

The Supreme Court also provided guidance on how a court or tribunal must examine the corporate structure to determine whether the doctrine applies, including considering the commercial circumstances and the conduct of the parties, which would in turn help determine the common intention of the parties to arbitrate. In deciding whether a company in a group of companies intended to be bound by an arbitration agreement, the Supreme Court urged that following factors be taken into account.

- The mutual intent of the parties.
- The relationship of a non-signatory to a party which is a signatory to the agreement.
- The commonality of the subject-matter.

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[6] Paragraph 10 and 74 of Judgment.

[7] Paragraph 7 of Judgment.

[8] Section 7(3) states "*An arbitration agreement shall be in writing*."

[9] Paragraph 12 of Judgment.

[10] Paragraph 8 of Judgment.

[11] Paragraph 14 of Judgment.

[12] Paragraph 12 of Judgment.

[13] Paragraph 8 of Judgment.

[14] Paragraph 104 of Judgment.

[15] Paragraph 92 of Judgment.

- The composite nature of the transactions
- The performance of the contract.[16]

As for the stage at which the question of whether a non-signatory should be bound by arbitration should be considered, the Supreme Court held that, particularly in the case of applications for appointment of arbitrators or reference to arbitration, the court should leave the issue to be determined by the arbitral tribunal.

Recommendations

What all this means is that a non-signatory involved in the contract negotiations and/or performance may well become ensnared in arbitration proceedings. A surprise perhaps, for those more familiar with common law jurisdictions. In the energy sector, it is entirely foreseeable that any contract will be signed by a single company or a JV on the one part. What will also be of no surprise at all is that many other parties (as part of the signatory related/group companies), who are not signatories, will inevitably be involved in negotiating and performing the contract. This is how large projects work and this will not change. In the context of such projects, if Indian law applies, it is critical that the 'Group of Companies' doctrine is considered as part of the overall risk assessment. The prudent approach is, at the outset, to consider the different related parties that inevitably will be involved in the contract negotiation and project performance. Based on all this, an early assessment can be made of the likelihood of the doctrine's application. It is better to understand the risks before the contract is executed. Perhaps any known risks can then be minimised with clear wording in the contract itself. If not, at the minimum, the various non-signatories would be well aware of the risks when the contract is entered into and should have made their assessments accordingly.

For more information, please contact the author(s) of this alert

CHANAKA KUMARASINGHE
Partner, Singapore
T +65 6411 5314
E Chanaka.kumarasinghe@hfw.com

SADHVI MOHINDRU
Senior Associate, Singapore
T +65 6411 5357
E Sadhvi.mohindru@hfw.com

VANESSA KOH
Associate, Singapore
T +65 6411 5377
E vanessa.koh@hfw.com

[16] Paragraphs 110-111 and 128 of Judgment.

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