

Company: Sol Infotech Pvt. Ltd.

Website: www.courtkutchehry.com

Printed For:

Date: 21/10/2025

Cox And Kings Ltd. Vs Sap India Pvt. Ltd. & Anr.

Arbitration Petition (Civil) No. 38 Of 2020, Special Leave Petition (C) No. 5833, 8607 Of 2022

Court: Supreme Court Of India

Date of Decision: Dec. 6, 2023

Acts Referred:

Constitution Of India, 1950 â€" Article 32#Arbitration and Conciliation Act, 1996 â€" Section 2(1)(b), 2(e), 2(1)(h), 7(1), 7(3), 7(4), 7(4)(a), 7(4)(b), 7(4)(c), 7(5), 8, 8(1), 9, 11, 11(6), 11(6A), 35, 37, 45, 73#Code of Civil Procedure, 1908 â€" Section 10#Indian Contract Act, 1872 â€" Section 2, 2(b), 2(d), 9, 10, 13, 28#Companies Act, 2013 â€" Section 2(46), 2(87)#Evidence Act, 1872 â€" Section 91, 92

Hon'ble Judges: Dr. Dhananjaya Y Chandrachud, CJ; Hrishikesh Roy, J; J B Pardiwala, J; Manoj Misra, J; Pamidighantam Sri Narasimha, J

Bench: Full Bench

Advocate: Hiroo Advani, Divyakant Lahoti, Praveena Bisht, Madhur Jhavar, Vindhya Mehra, Kartik Lahoti, Rahul Maheshwari, Garima Verma, Kumar Vinayakam Gupta, Mallika Luthra, Saksham Barsaiyan, Shivangi Malhotra, Navdeep Dahiya, Nakul Dewan, Sanjoy Ghose, Jeevan Ballav Panda, Shalini Sati Prasad, Satish Padhi, Meher Tandon, Gaurav Sharma, Dhriti Mehta, Rohan Mandal, Rohan Andrew Naik, Nagarkatti Kartik Uday, Tushar Mehta, Kanu Agrawal, Rohan Batra, Darius J. Khambata, Rohan Batra, Sonali Malik, Harsh Vardhan Arora, Tushar Hathiramani, Rishabh Bhargava, Dhruv Sethi, Vidhi Shah, Ritin Rai, Farhad Sorabjee, Dheeraj Nair, Kumar Kislay, Pratik Pawar, Siddhesh Pradhan, Shanaya Cyrus Irani, Aishna Jain, Apoorv Shukla, Anirudh Krishnan, Shiva Krishnamurti, Balaji Srinivasan, Rohan Dewan, Sukanya Joshi, Vishwaditya, Niti Richariya, Gauri Pasricha, Ramkishore Karnam, Adarsh Subramanian, Mahaswetha S, Varun Venkatesan, Mohit Kumar, Anisha C, George Pothan Poothicote, Manisha Singh, Jyoti Singh, Ashu Pathak, Arunava Mukherjee, Debesh Panda, Pallav Mongia, Tushar Srivastava, Vijay Deora, Jayesh Gupta, Ritik Sharma, Ajay Bhargava, Vanita Bhargava, Aseem Chaturvedi, Trishala Trivedi, Milind Sharma, Ujjwal A. Rana, Himanshu Mehta

A. The reference
B. Submissions
C. Legal background
i. India
a. Chloro Controls
b. Development of Law after Chloro Controls
ii. France ââ,¬" The Dow Chemicals case
iii. Switzerland
iv. England
v. Singapore
vi. United States of America
D. Arbitration Agreement
i. Consent as the basis for arbitration
ii. Parties to Arbitration Agreement
E. Group of Companies Doctrine
i. Separate legal personality
ii. Adopting a pragmatic approach to consent
iii. Group of companies doctrine $\tilde{A} \not c \hat{a}, \neg$ " a fact based doctrine
iv. The determination of mutual intention
v. Threshold standard
F. The group of companies doctrine has independent existence
i. Party and Persons ââ,¬Å"claiming through or underââ,¬â€≀ are different
ii. The approach adopted by this Court in Chloro Controls is Incorrect
iii. Power of the Courts to issue directions under Section 9
G. The standard of determination at the referral stage $\tilde{A}\phi\hat{a},\neg$ " Sections 8 and 11
H. Conclusions
A. The reference
1. More than a century ago, James Joyce published Ulysses. Joyce experimented with the narrative technique by extensively using a stream of
consciousness. In its modernist narrative technique, Ulysses is feted by literary critics and novelists as a literary masterpiece. Novelists such as
Vladimir Nabokov and T S Elliot eulogized it as a divine work of art. However, others such as Virginia Woolf and Aldous Huxley criticized the povel

for being technical and boring. Despite the varied criticism, the legacy of Ulysses endures particularly because its experimental

Table of Contents

narrative technique

challenged the conventional literary style. Similar is the case of the group of companies doctrine - a modern theory which challenges the conventional

notions of arbitration law. It is celebrated by some, reviled by many others. Yet, its legacy continues.

2. Five judges of this Court are called upon to determine the validity of the $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}$ α Group of Companies $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ doctrine in the jurisprudence of Indian

arbitration. The doctrine 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.

This doctrine is called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy, privity of

contract, and separate legal personality. The challenge before this Court is to figure out whether there can be a reconciliation between the group of

companies doctrine and well settled legal principles of corporate law and contract law.

3. A Bench of three Judges of this Court, while considering an application under Section 11(6) of the Arbitration Act and Conciliation 1996

 $[\tilde{A}\phi\hat{a},\neg \hat{A}$ "Arbitration Act $\tilde{A}\phi\hat{a},\neg]$, sought to reexamine the validity of the group of companies doctrine in the Indian context on the ground that it is premised

more on economic efficiency rather than law. The Bench of three judges (speaking through the majority opinion authored by Chief Justice N. V.

Ramana (as he was then), and the concurring opinion by Justice Surya Kant) doubted the correctness of the application of the doctrine by the Indian

courts.

4. Chief Justice Ramana criticised the approach of a three-Judge Bench of this Court in Chloro Controls India (P) Ltd. v. Severn Trent Water

Purification Inc (2013) 1 SCC 641 of relying upon the phrase $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ in Section 45 of the Arbitration Act to adopt the group

of companies doctrine. He noted that the subsequent decisions of this Court established the doctrine in Sections 8 and 35 without adequately

examining the interpretation of the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ appearing in those provisions. These decisions include : Cheran Properties

Ltd. v. Kasturi and Sons Ltd. (2018) 16 SCC 413, Mahanagar Telephone Nigam Ltd. v. Canara Bank (2020) 12 SCC 767, and Oil and Natural Gas

Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. (2022) 8 SCC 42. He also observed that economic concepts such as tight group structure and

single economic unit alone cannot be utilized to bind a non-signatory to an arbitration agreement in the absence of an express consent. Consequently,

he referred the matter to the larger Bench to seek clarity on the interpretation of the phrase $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ appearing under Sections

- 8, 35, and 45 of the Arbitration Act by formulating the following two questions:
- a. Whether the phrase $\tilde{A}\phi\hat{a}, \neg \tilde{E}$ exclaiming through or under $\tilde{A}\phi\hat{a}, \neg \hat{a}, \phi$ in Sections 8 and 11 could be interpreted to include the $\tilde{A}\phi\hat{a}, \neg \tilde{E}$ excrop of Companies $\tilde{A}\phi\hat{a}, \neg \hat{a}, \phi$

doctrine; and

[The reference to Section 11 seems inadvertent as the phrase $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ is not found in the said provision. Rather, Section 11

ought to be read as Section 45 where the phrase ââ,¬Å"claiming through or underââ,¬â€; appears.]

- b. Whether the $\tilde{A}\phi\hat{a}$, $\neg \ddot{E}$ ceGroup of Companies $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ doctrine as expounded by Chloro Controls Case (supra) and subsequent judgments is valid in law.
- 5. In a concurring opinion, Justice Surya Kant observed that the decisions of this Court before Chloro Controls (supra), rendered in Sukanya Holdings
- (P) Ltd. v. Jayesh H Pandya (2003) 5 SCC 531 and Indowind Energy Ltd. v. Wescare (I) Ltd. (2010) 5 SCC 306, adopted a ââ,¬Å"rigidââ,¬ and

 $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "restrictive $\tilde{A}\phi\hat{a}, \neg$ approach by placing undue emphasis on formal consent. Justice Surya Kant traced the evolution of the group of companies doctrine

to observe it had gained a firm footing in Indian jurisprudence. However, he opined that that this Court adopted inconsistent approaches while applying

the doctrine in India, which needed to be clarified by a larger Bench. Accordingly, he highlighted the following questions of law for determination by

the larger Bench:

a. Whether the Group of Companies Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of

any statutory provision;

- b. Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principle of $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}$ cosingle economic reality $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ ;
- c. Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the

parties; and

d. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation

even in the absence of implied consent.

6. We are not reproducing the factual matrix of the case, as we have been called upon to settle the broader legal issues raised in the reference. In the

process, we will answer the above legal issues, as well as other ancillary issues that have been raised before us by counsel.

- B. Submissions
- 7. Mr. Hiroo Advani, learned counsel appearing for the petitioner in Arbitration Petition No. 38 of 2020, made the following submissions:
- a. The basis for the application of the group of companies doctrine is the tacit or implied consent by the non-signatory to be bound by the arbitration

agreement;

b. The definition of \tilde{A} ¢ \hat{a} , \neg Å"party \tilde{A} ¢ \hat{a} , \neg under Section 2(1)(h) of the Arbitration Act cannot be restricted to the signatories to an arbitration agreement. The

definition should be read expansively to also include non-signatories depending upon the facts and circumstances;

c. Section 7 of the Arbitration Act provides that the defined legal relationship between the parties may be non-contractual as well. Moreover, Section

7(4)(b) indicates that a non-signatory could be bound by an arbitration agreement if in the course of a written communication, it has demonstrated an

intention to be bound by the agreement; and

d. The group of companies doctrine should ideally be applied by the arbitral tribunal. At the stage of referral, the court should merely take a prima

facie view and leave it for the arbitral tribunal to determine the necessity of joining the non-signatories to the arbitration agreement.

- 8. Mr. Darius J Khambata, learned senior counsel appearing for the respondents in SLP (C) No. 8607 of 2022, made the following submissions:
- a. The applicability of the group of companies doctrine must be examined from the touchstone of whether a non-signatory could be made a party to

the arbitration agreement. The expression ââ,¬Å"claiming through or underââ,¬â€≀ a party cannot be the basis to apply the doctrine:

b. The doctrine is a consensual theory premised on the existence of a dispute arising from a defined legal relationship and mutual intention of the

parties to be bound by the arbitration agreement. The intention of the nonsignatory has to be ascertained from the cumulative factors laid down in

Chloro Controls (supra);

c. The following requirements must be met for the application of the group of companies doctrine to bind the non-signatory as a $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "veritable $\tilde{A}\phi\hat{a}, \neg p$ arty

to the arbitration agreement:

- i. mutual intention of all the parties, both signatories and nonsignatories, to be bound by the arbitration agreement;
- ii. absolute and unqualified acceptance by the non-signatory party to the arbitration agreement; and
- iii. such acceptance must either be expressed or implied. In the context of a non-signatory, such acceptance will be implied and manifested in the

negotiation, performance, or termination of the contract;

d. 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;

e. The concept of $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "party $\tilde{A}\phi\hat{a}, \neg$ to an arbitration agreement is distinct from the concept of $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "person claiming through or under $\tilde{A}\phi\hat{a}, \neg$ a party. The latter

expression conveys the notion of a derivative cause of action where the non-signatory steps into the shoes of the party rather than claiming an

independent right under the agreement. The typical scenarios where a person claims through or under a party are assignment, subrogation, and

novation; and

f. Concepts such as $\tilde{A}\phi\hat{a},\neg\tilde{E}$ cetight group structure $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ and $\tilde{A}\phi\hat{a},\neg\tilde{E}$ cesingle economic unit $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ cannot be the sole basis to invoke the group of companies doctrine.

This doctrine cannot be applied to bind a non-signatory merely on account of it being under the ownership, control, or supervision of the signatory

party;

9. Dr A M Singhvi, learned senior counsel appearing for the interveners in IA No. 92757 of 2022, made the following submissions:

a. The group of companies doctrine constitutes a true and genuine effectuation of the real intent of the parties to subject both the signatory and non-

signatory parties to the arbitration agreement;

b. The doctrine is a reasonable and natural extension of the principle of piercing the corporate veil. The application of the doctrine is also justified in

affixing responsibility when the requisite and sufficient degree of common ownership and control exists;

c. The intention of the parties cannot be the only basis to join a non-signatory party to an arbitration agreement. The court can also consider non-

consensual doctrines such as piercing the corporate veil, alter ego, or tight group structure; and

d. The Arbitration Act does not prohibit or inhibit the adoption of the group of companies doctrine in Indian arbitration jurisprudence. On the contrary,

Section 7 of the Arbitration Act provides an expansive concept of an arbitration agreement. Moreover, the legislature specifically amended Section 8

of the Arbitration Act by inserting the words $\tilde{A}\phi\hat{a}, \neg A$ "any person claiming through or under $\tilde{A}\phi\hat{a}, \neg$ to recognize and codify the reality of non-signatories acting

through or under the signatory parties.

- 10. Mr. Kapil Sibal, learned senior counsel appearing for the intervener in IA No. 56615 of 2023, made the following submissions:
- a. 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 to be bound by the arbitration agreement in terms of Section 7 of the

Arbitration Act;

- b. The onus to prove the intention of the non-signatory to be bound by the arbitration agreement lies on the party seeking to implead the nonsignatory;
- c. In view of the requirement under Section 7 of the Arbitration Act, an arbitration agreement has to be in writing and there cannot be an oral

agreement to arbitrate. Regardless, the intention of the non-signatory to be bound by the arbitration agreement can be gathered from conduct;

d. Arbitration is in the realm of private law, and a matter of choice and intent of the parties. Therefore, factors such as economic convenience, justice,

or equity cannot be grounds for binding non-signatories to an arbitration agreement; and

e. The cumulative factors laid down by this Court in Discovery Enterprises (supra) cannot be considered in isolation, and must be applied holistically to

determine the applicability of the group of companies doctrine in a given factual matrix.

- 11. Mr. Nakul Dewan, learned senior counsel appearing for the respondent in SLP (C) No. 8607 of 2022, made the following submissions:
- a. The group of companies doctrine and single economic entity doctrine are purely economic concepts without any basis in either contract law or

company law. Therefore, they cannot be applied to determine the intention of non-signatories to be bound by an arbitration agreement:

b. The decision of a party to not sign the arbitration agreement may form the basis to demonstrate an intent not to be bound by it;

c. The mere factum of multiple agreements or that the non-signatory was involved in the negotiation of the contract cannot form the basis to bind it to

the arbitration agreement;

d. The phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ which finds mention under Sections 8 and 45 of the Arbitration Act cannot be the basis for the

application of the group of companies doctrine; and

e. The determination of the intention of parties to a contract should relate only to the intention held at the time of entering into the contract, which can

be gathered objectively from the text of the contract. However, Chloro Controls (supra) which considers consequential or subsequent agreements to

determine the mutual intention of the parties is incorrect.

- 12. Mr. Ritin Rai, learned senior counsel appearing for the respondent in Arbitration Petition No. 38 of 2020, made the following submissions:
- a. Section 7 of the Arbitration Act 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;

b. 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;

c. An arbitration agreement which sets out the executing parties and the arbitral procedure agreed among them cannot be read to expand its reach to

third parties;

d. The group of companies doctrine cannot be traced to the phrase $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ as provided under Sections 8 and 45 of the

Arbitration Act; and

e. Chloro Controls (supra) erroneously failed to consider whether an implied consent derived from the conduct of a non-signatory satisfied the

requirement of a clear intention to arbitrate. Moreover, Chloro Controls (supra) wrongly held that the courts have the discretion to refer nonsignatory

parties to arbitration under Sections 8 or 45 of the Arbitration Act in exceptional cases. The introduction of such a discretion brings in uncertainty in

the arbitration practice in India.

- 13. Mr. Tushar Mehta, learned Solicitor General appearing on behalf of the Union of India, made the following submissions:
- a. Since India follows the UNCITRAL Model Law, concepts of $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}commercial$ element $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ and $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}commercial$ element $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ and $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}commercial$ element $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ have to be considered

while interpreting the provisions of the Arbitration Act;

b. The group of companies doctrine is inbuilt in the overall scheme of the Arbitration Act. Section 7 uses the broad phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ defined relationship

whether contractual or otherwiseââ,¬â€ to convey that an arbitration agreement is not restricted to a conventional agreement;

c. The insertion of the words $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ in Section 8 of the Arbitration Act is merely in furtherance of the legislative intent to

confer locus on yet another category of persons to insist that the judicial authority must refer the dispute before it to arbitration; and

d. If the referral court under Sections 8 and 11 cannot prima facie determine the issue of joinder of a non-signatory to the arbitration agreement on the

basis of the group of companies doctrine, it can refer the issue to be decided by the arbitral tribunal.

- 14. Mr. Sanjoy Ghose, learned senior counsel appearing on behalf of the petitioner in SLP (C) No. 8607 of 2022, made the following submissions:
- a. Section 2(1)(h) uses the term $\tilde{A}\phi\hat{a},\neg \hat{A}$ "party $\tilde{A}\phi\hat{a},\neg$ and not $\tilde{A}\phi\hat{a},\neg \hat{A}$ "signatory $\tilde{A}\phi\hat{a},\neg$ to account for situations where a non-signatory enters the shoes of a signatory

party either by succession, operation of law, assignment, or death; and

b. The group of companies doctrine contravenes the provisions of corporate law by fixing liability on an entity that is not a party to an arbitration

agreement. 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.

15. Mr. Pallav Mongia, learned advocate on behalf of the interveners in IA No. 58168 of 2023, submitted that Section 2(1)(h) of the Arbitration Act

does not restrict the definition of parties to $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "signatories $\tilde{A}\phi\hat{a}, \neg$. Rather, the definition has to be inferred from Section 7. Section 7(4) expands the

definition of parties to non-signatories.

16. Ms Meenakshi Arora, learned senior counsel on behalf of the respondent in SLP (C) No. 8607 of 2022, argued for de-tagging of SLP (C) No.

8607 of 2022 from the lead matter, that is Arbitration Petition No. 38 of 2020, as the former deals with power of the courts to issue directions under

Section 9 of the Arbitration Act against third parties. Further, the learned senior counsel submitted that the courts can take aid of the group of

companies doctrine to issue interim directions against non-signatories to the arbitration agreement.

17. The arguments advanced by advocates on both sides of the aisle indicate that this Constitution Bench has been primarily called upon to determine

the validity of the group of companies doctrine in Indian arbitration jurisprudence. However, there are other broad ancillary issues which have been

raised by the learned counsel. These include: (i) whether the Arbitration Act allows joinder of a non-signatory as a party to an arbitration agreement;

and, (ii) whether Section 7 of the Arbitration Act allows for determination of an intention to arbitrate on the basis of the conduct of the parties. This

Bench will address the issues arising out of the order of reference as well as the abovementioned ancillary issues in due course.

C. Legal background

i. India

18. Before the enactment of the Arbitration Act, the law on arbitration was substantially contained in the Arbitration Act of 1940 $[\tilde{A}\phi\hat{a},\neg\hat{A}^{"}1940 \text{ Act}\tilde{A}\phi\hat{a},\neg]$,

the Arbitration (Protocol and Convention) Act of 1937, and the Foreign Awards (Recognition and Enforcement) Act of 1961. In 1978, the Law

Commission of India suggested substantive amendments to the 1940 Act. Moreover, the United Nations Commission on International Trade Law

[ââ,¬Å"UNCITRALââ,¬] adopted the Model Law on International Commercial Arbitration in 1985 [ââ,¬Å"UNCITRAL Model Lawââ,¬]. The General

Assembly of the United Nations recommended all the Member States to adopt the UNCITRAL Model Law in their domestic legislation with a view

to uniformize the law of arbitral procedures. [UN General Assembly, Fortieth Session, ââ,¬ËœModel Law on International Commercial Arbitration of the

United Nations Commission on International Trade Lawââ,¬â,¢ 40/72 (1985)] The Arbitration Act was enacted to consolidate and amend the law

relating to arbitration. It brought the law relating to domestic and international commercial arbitration in consonance with the UNCITRAL Model Law,

the New York Convention, and the Geneva Convention.

19. Section 2(1)(h) of the Arbitration Act defines a ââ,¬Å"partyââ,¬ to mean ââ,¬Å"a party to an arbitration agreement.ââ,¬ An ââ,¬Å"arbitration agreementââ,¬ is

defined under Section 2(1)(b) to mean $\tilde{A}\phi\hat{a},\neg \mathring{A}$ an agreement referred to in Section 7. $\tilde{A}\phi\hat{a},\neg$ Section 7 lays down the essential elements of a valid and binding

arbitration agreement. It defines an arbitration agreement as 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. The provision also mandates that an

arbitration agreement shall be in writing. An arbitration agreement is in writing if it is contained in:

- (a) a document signed by the parties;
- (b) an exchange of letters, telexes, 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 defense in which the existence of the agreement in alleged by one party and not denied by the other.

Section 7(5) further stipulates that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if

two conditions are satisfied. These conditions are first, that the contract is in writing; and second, that the reference is such as to make the arbitration

clause part of the contract.

- 20. An arbitration agreement, being a creature of contract, [Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd, (2022)
- 1 SCC 75] is based on the consent of parties to submit their disputes to an alternate dispute resolution mechanism. Generally, a party to an arbitration

agreement is determined on the basis of persons or entities who are signatories to the arbitration agreement or the underlying contract containing the

arbitration agreement. However, over the past two decades the law on joinder of non-signatory parties has evolved substantially. The evolution could

roughly be classified into two stages: before Chloro Controls (supra) and after Chloro Controls (supra).

21. In the pre Chloro Controls (supra) era, this Court construed $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "parties $\tilde{A}\phi\hat{a}, \neg \hat{A}$ by limiting it only to the signatories to the arbitration agreement. In

Sukanya Holdings (supra) the applicant filed an application under Section 8 of the Arbitration Act before the High Court and sought to enforce the

arbitration agreement against both the signatories and non-signatories to the agreement. The High Court rejected the application on the ground that the

non-signatories were not parties to the arbitration agreement. In appeal, this Court upheld the decision of the High Court by observing that there is no

provision under the Arbitration Act stipulating what is required to be done where some parties to the suit are not parties to the arbitration agreement.

In Sumitomo Corporation v. CDC Financial Services (Mauritius) Ltd. (2008) 4 SCC 91, this Court, while dealing with an international commercial

arbitration held that a \tilde{A} ¢â,¬Å"party \tilde{A} ¢â,¬ to an arbitration agreement means a party to the judicial proceedings. This was expressly held to be erroneous in

Chloro Controls (supra), where it was held that $\tilde{A}\phi\hat{a},\neg \hat{A}$ "party $\tilde{A}\phi\hat{a},\neg$ has to be construed in view of Section 2(1)(h) to mean a party to an arbitration

agreement.

22. The interpretation of the expression $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "party $\tilde{A}\phi\hat{a}, \neg$ as defined under Section 2(1)(h) came up for the consideration of this Court in Indowind Energy

Ltd. (supra). In that case, an agreement of sale was entered into by the first and second respondents. The agreement described the second

respondent as the $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}$ buyer $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ and promoter of Indowind, the non-signatory. After a dispute arose, the first respondent instituted an application

under Section 11(6) of the Arbitration Act against the second respondent and Indowind. Indowind resisted the impleadment on the ground that it was

not a party to the underlying sale agreement and, therefore, had not consented to be bound by the arbitration clause. The issue before this Court was

whether the arbitration agreement contained in the sale agreement was binding on Indowind. This Court refused to join Indowind to the arbitration

agreement on the ground that (i) Indowind was not a signatory to the sale agreement; (ii) Indowind and the promoter company were two independent

companies with a separate and distinct legal existence; and (iii) the fact that Indowind did not sign the sale agreement indicated that it was the mutual

intention of all the parties to not make it a party to the arbitration agreement.

23. The pre Chloro Controls (supra) position was characterized by three underlying precepts: (i) arbitration could be invoked at the instance of a

signatory to the arbitration agreement only in respect to disputes with another signatory party; [S N Prasad v. Monnet Finance Ltd, (2011) 1 SCC 320]

(ii) the court would adopt a strict interpretation of the provisions of the Arbitration Act, particularly the unamended Section 8 which only allowed

reference of \tilde{A} ¢ \hat{a} ,¬ \hat{A} "parties \tilde{A} ¢ \hat{a} ,¬ to an arbitration agreement; and (iii) there was an emphasis on formal consent of the parties, thereby excluding any scope

for implied consent of the non-signatories to be bound by an arbitration agreement. This position of law underwent a significant change when a Bench

of three Judges of this Court in Chloro Controls (supra) allowed joinder of non-signatory parties to the arbitration agreement on the basis of the group

of companies doctrine.

a. Chloro Controls

24. In Chloro Controls (supra) this Court was called upon to determine an arbitral reference in case of multi-party agreements where performance of

the ancillary agreements was substantially dependent upon effective execution of the principal agreement. In that case, a foreign entity and an Indian

entity incorporated a joint venture company to market and distribute chlorination equipment. With respect to the joint venture, the related companies of

both the Indian and foreign entity were also involved. Consequently, the parties concluded several ancillary agreements such as a Shareholders $\tilde{A}\phi\hat{a}$, $-\hat{a}_{,\phi}\phi$

Agreement which contained an arbitration clause. All the contracting parties were not signatories to all the agreements, including the

Shareholders \tilde{A} ϕ \hat{a} , φ \hat{a} , φ Agreement. When disputes arose between the parties, the foreign entities sought to terminate the joint venture. The Indian entity

filed an application before the High Court seeking a declaration to restrain the foreign entities from repudiating their obligations under the agreements.

In response, the foreign entities applied for referring the disputes to arbitration in view of the fact that the agreements were binding on the non-

signatories because of the composite nature of the transaction. A Single Judge of the High Court granted the application of the Indian entity, which

was set aside by the Division Bench of the High Court. The primary issue before this Court pertained to the ambit and scope of Section 45 of the

Arbitration Act. This Court framed the issue in the following terms:

 \tilde{A} ¢â,¬Å"1.3. Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others

do not and further the parties are not identically common in proceedings before the court (in a suit) and the arbitration agreement, a reference of

disputes as a whole or in part can be made to the Arbitral Tribunal, more particularly, where the parties to an action are claiming under or through a

party to the arbitration agreementââ,¬â€∢

25. Section 45 of the Arbitration Act in its unamended form read as follows:

ââ,¬Å"45. Power of judicial authority to refer parties to arbitration.ââ,¬" Notwithstanding anything contained in Part I or in the Civil Procedure Code, 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, that the said agreement is null

and void, inoperative or incapable of being performed.ââ,¬â€∢

(emphasis supplied)

In view of the language of Section 45, this Court held that the expression $\tilde{A}\phi\hat{a}, \neg \hat{A}$ any person $\tilde{A}\phi\hat{a}, \neg r$ reflects a legislative intent of enlarging the scope beyond

 $\tilde{A}\phi\hat{a}, \tilde{A}$ "parties $\tilde{A}\phi\hat{a}, \tilde{A}$ who are signatories to the arbitration agreement to include non-signatories. However, the court noted that such non-signatory parties are

required to claim $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "through or under the signatory party. $\tilde{A}\phi\hat{a}, \neg$ Thus, this Court accepted that arbitration is possible between a signatory to an arbitration

agreement and a third party or non-signatory claiming through a party.

26. The next issue before this Court was to determine whether there was any legal relationship between the signatory and the non-signatory for the

latter to $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claim through or under $\tilde{A}\phi\hat{a}, \neg$ the former. The court noted that the group of companies doctrine has been developed by courts and tribunals in

the international context to bind a non-signatory affiliate or sister concern within the same corporate group as the signatory party, to an arbitration

agreement provided there was a mutual intention of all the parties. This court emphasized that the \tilde{A} ¢â,¬Å"intention of the parties \tilde{A} ¢â,¬ is the underlying

principle for the application of the group of companies doctrine. It observed:

 $\tilde{A}\phi\hat{a}, \tilde{A}$ "72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of

companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, ââ,¬Å"intention

of the parties $\tilde{A}\phi\hat{a}$, is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as

the non-signatory parties.ââ,¬â€<

(emphasis supplied)

27. The court held that a non-signatory could be subjected to arbitration $\tilde{A}\phi\hat{a},\neg\hat{A}$ "without their prior consent $\tilde{A}\phi\hat{a},\neg$ in $\tilde{A}\phi\hat{a},\neg\hat{A}$ " exceptional cases $\tilde{A}\phi\hat{a},\neg$ on the basis of

four determinative factors:

- (i) A direct relationship to the party which is a signatory to the arbitration agreement;
- (ii) A direct commonality of the subject-matter and the agreement between the parties being a composite transaction;
- (iii) The transaction being of a composite nature where performance of the mother agreement may not be feasible without the aid, execution, and

performance of supplementary or ancillary agreements for achieving the common object and collectively have a bearing on the dispute; and

- (iv) A composite reference of such parties will serve the ends of justice.
- 28. In Chloro Controls (supra), this Court acknowledged that cases of composite transactions involving multi-party agreement give rise to peculiar

challenges where non-signatories may be implicated in the dispute because of their legal relationship and involvement in the performance of

contractual obligations. To remedy such situations, it was held that the group of companies doctrine could be applied to systematically evaluate the

facts and circumstances to determine $\tilde{A}\phi\hat{a}, \neg A$ "a clear intention of the parties to bind both, the signatory as well as the non-signatory parties $\tilde{A}\phi\hat{a}, \neg$ to the

arbitration agreement.

29. Chloro Controls (supra) was dealing with a situation where the success of the joint venture agreement was dependent upon the fulfilment of all the

ancillary agreements. In this context, this Court observed that all the ancillary agreements were relatable to the parent agreement and the ancillary

agreements were intrinsically linked with each other, to the extent that they could not be severed. This in the view of the court indicated the intention

of the parties to refer all disputes arising out of the parent agreement and ancillary agreements to the arbitral tribunal.

30. Furthermore, this Court explained the phrase $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "legal relationship $\tilde{A}\phi\hat{a}$, \neg to mean the relationship of the signatory party with the person claiming under

or through them. It observed that all the agreements were signed by $\tilde{A} \not \in \hat{a}, \neg \mathring{A}$ "some parties or their holding companies or the companies into which the

signatory company had merged.ââ,¬ Although these companies did not put pen to paper for all the agreements, they were descendants in interest or

subsidiaries of the signatory parties and therefore would be covered under the expression $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg \hat{A}$ " the parties to the

agreement. In this context the Court observed that being part of the same corporate group, the interests of the non-signatory companies were not

adverse to the interest of the principal company and the joint venture company. Therefore, the group of companies doctrine formed the basis for a

non-signatory to claim through or under the signatory. Chloro Controls (supra) laid down the ratio that a non-signatory person or entity could be made

a party to an arbitration agreement, as $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg a$ signatory party, if the circumstances demonstrate the mutual intention of the

parties on the basis of the composite nature of the transaction, direct commonality of subject-matter, and direct relationship of the non-signatory to the

signatory parties.

- b. Development of Law after Chloro Controls
- 31. In the aftermath of Chloro Controls (supra), the Law Commission of India published a Report in 2014 recommending amendments to the

Arbitration Act. The Commission observed that the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ as used and understood in Section 45 is absent in the

corresponding provision of Section 8. To cure this anomaly, it was suggested that the definition of $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "party $\tilde{A}\phi\hat{a},\neg$ under Section 2(1)(h) be amended to

also include the expression \tilde{A} ¢â,¬Å"a person claiming through or under such party. \tilde{A} ¢â,¬16 In 2016, the legislature amended Section 8 to bring it in line with

Section 45 of the Arbitration Act. The unamended Section 8(1) provided that a party to an arbitration agreement could make an application seeking a

reference to arbitration. The amended Section 8(1) provided that $\tilde{A} \notin \hat{a}, \neg \mathring{A}$ a party to an arbitration agreement or any person claiming through or under

 $him\tilde{A}$ ¢ \hat{a} , \neg could seek a reference to arbitration. However, the legislature did not bring about any change in the language of Section 2(1)(h) or Section 7 of

the Arbitration Act. Since Chloro Controls (supra) and the amendment to Section 8, subsequent decisions of this Court have referred to the group of

companies doctrine to join non-signatories persons or entities to arbitration agreements.

32. In Cheran Properties (supra), the issue before this Court was whether the arbitral award could be enforced under Section 35 of the Arbitration

Act against a non-signatory, who was a nominee of one of the signatories to the arbitration agreement and a direct beneficiary of the underlying

contract between the signatories. Section 35 of the Arbitration Act postulates that an arbitral award $\tilde{A}\phi\hat{a},\neg\hat{A}$ "shall be final and binding on the parties and

persons claiming under them respectively. $\tilde{A}\phi\hat{a}$, \neg This Court observed that the expression $\tilde{A}\phi\hat{a}$, \neg \hat{A} "persons claiming under them $\tilde{A}\phi\hat{a}$, \neg refers to every person

whose capacity or position is derived from and is same as a party to the proceedings. It held that the nonsignatory, being a nominee of one of the

signatory parties, was bound by the arbitral award as it was claiming under the signatory.

33. This Court in Cheran Properties (supra) interpreted the group of companies doctrine to hold that its true purport is to enforce the common intention

of the parties where the circumstances indicate that both the signatories and nonsignatories were intended to be bound. One of us (D Y Chandrachud

J) explained the evolution of the group of companies doctrine in the Indian context in the following terms:

 \tilde{A} ¢â,¬Å"23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements.

There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both

signatory and nonsignatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the

matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. 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 effort is to find the

true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not

formally a signatory but has assumed the obligation to be bound by the actions of a signatory.ââ,¬â€∢

(emphasis supplied)

34. The decision in Cheran Properties (supra) holds that the group of companies doctrine is applied to bind a non-signatory party upon a construction

of the arbitration agreement, circumstances which exist at the time of entering into the contract, and the performance of the underlying contract.

Nevertheless, it must be noted that Cheran Properties (supra) did not apply the group of companies doctrine to make the non-signatory a party to the

arbitration agreement. Rather, this Court made the arbitral award binding on a nonsignatory under Section 35 on the ground that it was claiming under

a party which was a signatory to the arbitration agreement.

35. In Ameet Lalchand Shah v. Rishabh Enterprises,17 a two-Judge Bench of this Court was dealing with an arbitral dispute arising out of four

interconnected agreements executed towards a single commercial project. The issue was whether the four agreements were interconnected to refer

all the parties to arbitration. In that case, all the parties were not signatories to the main agreement containing the arbitration clause. This Court relied

on Chloro Controls (supra) to hold that a non-signatory, which is a party to an interconnected agreement, would be bound by the arbitration clause in

the principal agreement. It observed that in view of the composite nature of the transaction, the disputes between the parties to various agreements

could be resolved effectively by referring all of them to arbitration.

36. Over time, this Court has identified certain additional factors for the invocation of the group of companies doctrine. In Reckitt Benckiser (India)

Private Limited v. Reynders Label Printing India Private Limited,18 a two-Judge Bench of this Court was dealing with an application under Section

11(6) of the Arbitration Act seeking the appointment of an arbitrator. This Court prima facie observed that the parties belonged to the same group of

companies. Subsequently, the issue before this Court was whether there was a clear intention of the parties to bind both the signatory and non-

signatory parties based on their participation in the negotiation of the underlying contract. The court held that the non-signatory party, even though a

constituent part of the corporate group, did not have $\tilde{A}\phi\hat{a},\neg\hat{A}$ any causal connection with the process of negotiations preceding the agreement or the

execution thereof, whatsoever.ââ,¬ Thus, the participation of the non-signatory party in the negotiation and performance of the underlying contract was

held to be the key determinant of the intention of the parties to be bound by an arbitration agreement.

37. In Canara Bank (supra), this Court emphasized that the group of companies doctrine could be invoked on the basis of the principle of $\tilde{A}\phi\hat{a}, \neg \tilde{A}$ single

economic unit \tilde{A} ϕ \hat{a} , \neg . In that case, the facts were that Canbank Financial Services Ltd19, a wholly owned subsidiary of Canara Bank, subscribed to the

bonds floated by MTNL. CANFINA subsequently transferred the bonds to Canara Bank. Eventually, MTNL cancelled the bonds which gave rise to

the dispute between the parties. Canara Bank filed a writ petition before the Delhi High Court challenging the cancellation of bonds by MTNL. The

High Court referred the parties to arbitration, but Canara Bank challenged the impleadment of CANFINA. This Court dismissed Canara Bank's

objection on the ground that CANFINA was a necessary and proper party to the arbitral proceedings, being the original purchaser to the bonds. While

dealing with the contours of the group of companies doctrine, this Court noted that the doctrine could also be invoked $\tilde{A} \not\in \hat{a}, \neg \hat{A}$ "in cases where there is a

tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality.ââ,¬â€○

38. The last in the series of decisions dealing with the group of companies doctrine is a three-Judge Bench decision of this Court in Discovery

Enterprises (supra). In that case, ONGC entered into a contract with Discovery Enterprises for operating a shipping vessel. After a dispute arose

between the parties, ONGC invoked the arbitration clause in the contract against Discovery Enterprises and Jindal Drilling and Industries Ltd., a sister

company of Discovery Enterprises. The arbitral tribunal refused to proceed with the claim against Jindal Drilling and Industries Ltd. on the ground that

it was not a signatory to the arbitration agreement. In an appeal filed by ONGC under Section 37 of the Arbitration Act, the High Court upheld the

decision of the tribunal. The High Court's decision was challenged before this Court under Article 136 of the Constitution. This Court cited Chloro

Controls (supra) and the subsequent decisions with approval to emphasize that the group of companies doctrine can be applied to bind a company

within a group which is not a signatory to the arbitration agreement. The Court held that in addition to the cumulative factors laid down in Chloro

Controls (supra), the performance of the contract was also an essential factor to be considered by the courts and tribunals to bind a non-signatory to

the arbitration agreement. Ultimately, this Court set aside the decision of the arbitral tribunal on the ground that it failed to address the plea raised by

ONGC, and remanded the matter back to the tribunal to decide afresh.

- ii. France The Dow Chemicals case
- 39. The application of the group of companies doctrine in arbitration law mainly originated from the decisions rendered by international arbitral

tribunals. Before proceeding to analyze the contours of the doctrine, it is necessary to understand its origin and development in the international

context. Such an analysis is particularly relevant because any authoritative determination by this Court with regard to the group of companies doctrine

ought to be in tune with the internationally accepted principles on the vexed issue of joining nonsignatories to arbitration agreements.

40. The origin of the doctrine is primarily attributed to a number of arbitration awards rendered mainly in France. The most prominent among them

remains an interim award delivered more than four decades ago by an ICC tribunal in Case No. 4131, [Dow Chemical v. Isover Saint Gobain, Interim

Award, ICC Case No. 4131, 23 September 1982] more popularly known as the Dow Chemicals case. In that case, Dow Chemical (Venezuela)

entered into a contract with a French company, which later assigned the rights to Isover Saint Gobain, for distribution of thermal isolation products in

France. Dow Chemical (Venezuela) subsequently assigned the contract to Dow Chemical AG, which was a subsidiary of Dow Chemical Company -

the holding company. Thereafter, Dow Chemical Europe, a subsidiary of Dow Chemical AG, entered into a similar contract with three companies,

which subsequently assigned the contract to Isover Saint Gobain. Both contracts provided that the deliveries of products to the distributors will be

made by Dow Chemical France, or any other subsidiary of Dow Chemical Company. Several suits were instituted against the companies of the Dow

Chemical group before the French courts. In response, the four companies of the Dow Chemical group (the two formal parties to the contract - Dow

Chemical AG and Dow Chemical Europe, and the two non-signatories - Dow Chemical Company and Dow Chemical France) instituted arbitral

proceedings against Isover Saint Gobain before the ICC tribunal.

41. The primary issue before the ICC tribunal was to determine its own jurisdiction over the non-signatory parties. The tribunal sought to determine

whether there existed a common intention of the parties to be bound by the arbitration agreement. The tribunal established the common intention of the

parties by analyzing the factual circumstances underpinning the negotiation, performance, and termination of the contracts. The tribunal held that Dow

Chemical France ¢â,¬Á"was a partyĀ¢â,¬ to the two contracts, and consequently to the arbitration agreements contained in them, because it played a

preponderant role in the negotiation, performance, and termination of the contract. As for Dow Chemical Company, the tribunal held that the holding

company had ownership of the trademarks under which the products were marketed in France and had absolute control over its subsidiaries who

were involved in the negotiation, performance, and termination of the two contracts. The tribunal also relied on the fact that Isover Saint Gobain

applied for the joinder of the holding company into the court proceedings in France before the Court of Appeal of Paris.

42. After concluding that the non-signatories were also a party to the arbitration agreement, the tribunal proceeded to analyze the factual

circumstances of the signatory and non-signatory belonging to the same group of companies. At the outset, the tribunal observed that a group of

companies constitutes one and the same economic reality. However, the tribunal emphasized that a nonsignatory may be bound by the arbitration

agreement entered into by another entity of the same group if the non-signatory appears to be a veritable party to the contracts on the basis of their

involvement in the negotiation, performance, and termination of the contracts. The relevant observation is extracted below:

 $\tilde{A}\phi\hat{a}, \tilde{A}$ "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies

which, by virtue of their role in their conclusion, performance, or termination of the contracts containing said clause, and in accordance with the mutual

intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and

the disputes to which they may give rise.ââ,¬â€¢

43. In Dow Chemical (supra), the arbitral tribunal did not base its decision to extend the arbitration agreement to non-signatories solely on the fact that

both the signatory and non-signatory parties were members of the same group. The tribunal emphasized the importance of determining the true parties

to the arbitration agreement on the basis of their participation in the negotiation, performance, and termination of the agreement. The Dow Chemical

case has been regarded as being instrumental in the transition from a restrictive interpretation of consent focusing only on its express manifestation to

a more flexible approach attaching necessary relevance to implied consent to be bound by the arbitration agreement. [Bernard Hanotiau and Leonardo

Ohlrogge, ââ,¬Ëœ40th Year Anniversary of the Dow Chemical Awardââ,¬â,¢ 40(2) ASA Bulletin 300-308]

44. In a series of subsequent rulings, the Court of Appeal of Paris acknowledged the extension of an arbitration agreement to non-signatories provided

there was common intention of all the parties. According to the Court of Appeal, the common intention may be ascertained from the active role played

by the nonsignatories in the performance of the contract containing the arbitration agreement, which gives rise to the presumption that the non-

signatory had knowledge of the arbitration agreement. [Paris Court of Appeal, 7 December 1994, V 2000 (formerly Jaguar France) v. Project XS,

Rev. Arb. (1996) 67.]

45. The French law has been succinctly summarized in an unpublished ICC award in case No. 11405 of 2001 in the following terms:

 $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "[t]here is no general rule, in French international arbitration law, that would provide that non-signatory parties members of a same group of

companies would be bound by an arbitration clause, whether always or in determined circumstances. What is relevant is whether all parties intended

non-signatory parties to be bound by the arbitration clause. Not only the signatory parties, but also the nonsignatory parties should have intended (or

Companies Doctrine? \tilde{A} ¢ \hat{a} , $\neg \hat{a}$,¢ in Bernard Hanotiau and Eric Schwartz (eds) in Dossier of the ICC Institute of World Business Law, Volume 7, 131-145.]

Hence our understanding of the position in French law is that an arbitration agreement can be extended to non-signatory parties if all the parties to the

arbitration agreement had a common intention to be bound by the agreement. The subjective intention of the parties is to be inferred on the basis of

their objective conduct during the negotiation, performance, and termination of the underlying contract containing the arbitration agreement.

iii. Switzerland

46. Section 178(1) of the Swiss Private International Law Act, 1987 states that an ââ,¬Å"arbitration agreement must be made in writing or any other

means of communication allowing it to be evidenced by text.ââ,¬ In 2003, the Swiss Federal Supreme Court held that once there is a valid arbitration

clause according to Section 178(1) of the Swiss Act, the issue whether it also extends to non-signatories may be decided by the courts or the arbitral

tribunals. As a matter of general rule, the Swiss courts have extended an arbitration agreement to non-signatories typically in cases of assignment of a

claim, assumption of debt or delegation of a contract. [A, B, C v. D and State of Libya, 4A_636/2018]

47. In a decision rendered in 1996, the Swiss Federal Supreme Court held that the fact that a non-signatory party belonged to the same group of

companies as the signatory party to the arbitration agreement was not a sufficient justification for binding the non-signatory to the arbitration

agreement. [Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd, unpublished ICC Interim Award of 25 October 1994, confirmed by

DFT on 29 January 1996, ASA Bulletin (1996) Vol 3 p 496.] However, the Swiss Courts are not averse to extending an arbitration agreement to non-

signatory parties if there is an independent and formally valid manifestation of consent of the non-signatory party to the arbitration agreement.

48. In Swiss law, the consent of the parties to be bound by an arbitration agreement may be express or implied by conduct. In a 2008 decision, the

Swiss Federal Court held that certain behavior or conduct may substitute compliance with a formal requirement of an arbitration agreement.[Decision

4A_376/2008 of 5 December 2008] To determine the implied consent, it was held that the courts or tribunals may take into consideration the fact

whether the non-signatory party was involved in the negotiation and performance of the contract, and thereby expressed its willingness to be bound by

the arbitration agreement. [X v. Y Engineering S.p.A. and Y S.p.A., 4A_450/2013, ASA Bull., 160 (2015)] Thus, the subjective element of willingness

to be bound by an arbitration agreement ought to be expressed through an objective element in the form of negotiation or performance of the contract.

iv. England

49. The English courts have generally taken a conservative approach to binding non-signatory parties to arbitration agreements. Section 82(2) of the

English Arbitration Act, 1996 defines a $\tilde{A}\phi\hat{a}, \neg \tilde{A}$ "party to arbitration agreement $\tilde{A}\phi\hat{a}, \neg$ to include $\tilde{A}\phi\hat{a}, \neg \tilde{A}$ "any person claiming under or through a party to the

agreement. \tilde{A} ϕ \hat{a} , \neg The English law envisages that even non-signatory parties may be bound by an arbitration agreement but only if they are claiming under

or through the original party to the agreement. The English courts have adopted an approach which favors a strict adherence to the doctrine of privity.

Under English law, an arbitration agreement is extended to non-signatory parties on the basis of traditional contractual principles and doctrines such as

agency, novation, assignment, operation of law, and merger and succession. [Audley William Sheppard, ââ,¬ËœThird Party Non-Signatories in English

Arbitration Law \tilde{A} ¢ \hat{a} , $\neg \hat{a}$,¢ in Stavros Brekoulakis, Julian Lew, et al (eds) The Evolution and Future of International Arbitration (Kluwer Law International,

2016) 183-198.] However, the English law has explicitly rejected other doctrines such as piercing the corporate veil, equitable estoppel, and group of

companies as a basis for extending an arbitration agreement to non-signatory parties.

50. In Peterson Farms INC v. C & M Farming Limited, [2004] EWHC 121 (Comm) a claim for damages was brought against Peterson Farms by the

respondent C & M Farming for damages suffered by several C & M group entities, some of them being nonsignatories to the arbitration agreement.

The arbitral tribunal applied the group of companies doctrine to hold that C & M Farming contracted on behalf of the entire C & M group entities, and

therefore was entitled to claim all the damages suffered by the C & M group entities arising out of the contractual relationship with Peterson. In

appeal, the Commercial Court held that the chosen proper law of the Agreement - Arkansas law - is similar to the English law which excludes the

application of the group of companies doctrine. Thus, the English law does not favor the application of the group of companies doctrine for extending

an arbitration agreement to non-signatory parties.

51. The English precedents have also dealt with the meaning of the phrase $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$, which was referred to by this Court in

Chloro Controls (supra). In Roussel-Uclaf v. G D Searle and Co Ltd. [1978] 1 Lloydââ,¬â,,¢s Rep, the issue before the Court of Chancery Division was

whether a wholly owned subsidiary company could claim to be a party to an arbitration agreement between the parent company and a third party. The

Court was called upon to interpret Section 1 of the Arbitration Act of 1975 which allowed any party to an arbitration agreement $\tilde{A}\phi\hat{a}$, \tilde{A} or any person

claiming through or under $him \tilde{A} \phi \hat{a}$, \neg to apply to a court to stay proceedings where an arbitration agreement existed. It was held that the subsidiary can

claim the benefit of the arbitration agreement because the parent company and the subsidiary were $\tilde{A}\phi\hat{a},\neg\hat{A}$ "so closely related $\tilde{A}\phi\hat{a},\neg$ that it could be said that

the subsidiary was $\tilde{A} \not \in \hat{a}, \neg \mathring{A}$ "claiming through or under $\tilde{A} \not \in \hat{a}, \neg$ the parent company. In City of London v. Sancheti, [The Mayoralty and Commonalty & Citizens

of the City of London v. Ashok Sancheti, [2008] EWCA Civ 1283] the Court of Appeal overturned Roussel-Uclaf (supra) on the ground that an entity

cannot be considered to be claiming through or under merely because there is a ââ,¬Å"legal or commercial connectionââ,¬â€¢ between them.

52. Section 5 of the English Arbitration Act, 1996 requires an arbitration agreement to be in writing. Further, Section 5(2)(a) provides that it is not

necessary for the parties to sign the arbitration agreement. In such situations, the critical question that arises before the English courts is whether a

nonsignatory party is bound by an arbitration agreement. The English law position is that $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "contracts are not to be lightly implied $\tilde{A}\phi\hat{a}, \neg$ and the court

 \tilde{A} ¢â,¬Å"must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect

contended for.ââ,¬ [Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council, [1990] 1 WLR 1195] However, in limited situations, a contract

is implied if the parties conducted themselves in a manner as if they have formally entered into a contract. [Chitty on Contracts, Hugh Beale (ed),

(32nd edn, Sweet and Maxwell, 2015) para 2-169.]

53. In Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan34, the Government of

Pakistan entered into a Memorandum of Understanding with Dallah Real Estate and Tourism Holding Company35 for construction of housing facilities

in Mecca, Saudi Arabia. Subsequently, an agreement was executed between Dallah and the Awami Hajj Trust, which was established by the

Government through an Ordinance. However, the trust ceased to exist as a legal entity because the Ordinance was not laid before Parliament and no

further ordinance was promulgated. Dallah commenced arbitral proceedings against the Government. The UK Supreme Court had to determine

whether there was a common intention on behalf of the Government and Dallah to make the former a party to the agreement. The Court observed

that the \tilde{A} ¢ \hat{a} ,¬ \hat{A} "common intention of the parties means their subjective intention derived from the objective evidence. \tilde{A} ¢ \hat{a} ,¬ It was held that there was no

evidence to conclude that the Government's behavior showed that it always considered itself to be a true party to the agreement.

v. Singapore

54. In Manuchar Steel Hong Kong Limited v. Star Pacific Line Pte Ltd.,36 the Singapore High Court expressly rejected the group of companies

doctrine to bind non-signatories to arbitration agreement. The High Court reasoned that the group of companies doctrine was : first, anathema to the

logic of consensual basis of an agreement to arbitrate; and second, ordering of companies within a broader group did not mean one could dispense

with separate legal entity. The Singapore High Court relied on position of law taken in Peterson Farms INC (supra) to observe that enforceable

obligations cannot be imposed on ââ,¬Å"strangersââ,¬â€ to an arbitration agreement.

vi. United States of America

55. The Federal Arbitration Act is silent on the aspect of the joinder of nonsignatory parties to the arbitration agreement. Nevertheless, the US courts

have often used the general principles of contract law such as incorporation by reference, assumption, agency, veil piercing or alter ego, and estoppel

for binding non-signatories to arbitration agreements. [Andrijana Misovic, ââ,¬ËœBinding non-signatories to arbitrate: the United States approachââ,¬â,,¢

(2021) 37(3) Arbitration International 749-768.] Although the United States follow a pro-arbitration policy, an important issue that often comes up for

deliberation is whether the domestic doctrines could be applied for binding non-signatories in cases of international arbitration.

56. In G E Energy Power Conversion France SAS v. Outokumpu Stainless 140 S. Ct. 1637 (2020), the issue before the United States Supreme Court

was whether the New York Convention precludes a non-signatory to an international arbitration agreement from compelling arbitration by invoking

domestic doctrines such as equitable estoppel. In that case, the Eleventh Circuit Court refused to apply the domestic doctrine of equitable estoppel on

the ground that it conflicts with the signature requirements under the New York Convention. The Circuit Court observed that Article II of the New

York Convention contains a strict requirement that the parties $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "actually sign $\tilde{A}\phi\hat{a}, \neg$ the arbitration agreement in order to compel the parties to

arbitration. The US Supreme Court held that the Article II of the New York Convention does not restrict the contracting states from applying

domestic law to refer parties to arbitration agreements. Moreover, it was observed that ââ,¬Å"the provisions of Article II contemplate the use of

domestic doctrines to fill gaps in the Convention.ââ,¬ Thus, it was held that the New York Convention does not set out a comprehensive regime to

preclude the use of domestic law to enforce arbitration agreements.

57. Unlike the English courts, the US Courts have used non-consensual doctrines to extend arbitration agreements to non-signatory parties. For

instance, the US Courts have pierced the corporate veil and held the alter ego liable in exceptional circumstances where the parent company

exercised complete control over the subsidiary with respect to the transaction at issue. [American Fuel Corp v. Utah Energy Development Co, Inc,

122 F.3d 130, 134 (2d Cir 1997)] Similarly, the doctrine of arbitral estoppel has been developed by the US Courts to bind non-signatory parties to an

arbitration agreement. The doctrine of arbitral estoppel suggests that a party is estopped from denying its obligation to arbitrate when it received a

ââ,¬Ëœdirect benefitââ,¬â,,¢ from a contract containing an arbitration agreement. [American Bureau, Shipping v. Tencara Shipyard, 170 F.3d 349, 353 (2d

Cir 1999)] The second type of arbitral estoppel developed by the US courts places emphasis on the substantial interdependent relationship between the

signatory and non-signatory party. [Sunkist Soft Drinks, Inc v. Sunkist Growers, Inc, 10 F.3d 753, 757 (11th Cir 1993)] In a situation where claims of

concerted misconduct were raised against both the signatory and nonsignatory to the contract, the courts have resorted to the doctrine of equitable

estoppel to further the policy of pro-arbitration. [Grigson v. Creative Artists Agency, LLC, 210 F.3d 524 (2000)]

58. The above discussion shows that international jurisdictions, in some form or the other, have moved beyond the formalistic requirement of consent

to bind a non-signatory to an arbitration agreement. The primary conclusion is that the issue of binding a non-signatory to an arbitration agreement is

more of a fact-specific aspect. [Bernard Hanotiau, ââ,¬ËœMay an Arbitration Clause be Extended to Non-signatories: Individuals, States or Other

Companies of the Group? \tilde{A} ¢ \hat{a} , $-\hat{a}$,¢ in Complex Arbitrations: Multi-party, multi-contract, Multi-issue \tilde{A} ¢ \hat{a} , $-\tilde{a}$,¢ Bernard Hanotiau (eds)

(2nd edn, 2020) 95, 194.] In jurisdictions such as France and Switzerland, there is a broad consensus that consent or subjective intention of a non-

signatory to arbitrate may be proved by conduct. Such subjective intention could be derived from the objective evidence in the form of participation of

the nonsignatory in the negotiation, performance, or termination of the underlying contract containing the arbitration agreement. However, the group of

companies doctrine has not been universally accepted by all jurisdictions.

In jurisdictions such as France where the doctrine has gained acceptance, group of companies is one of the several factors that a court or tribunal

considers to determine the mutual intention of all the parties to join the nonsignatory to the arbitration agreement. Keeping in mind the above

background, we now move on to analyze the applicability of the group of companies doctrine in the Indian context.

D. Arbitration Agreement

- i. Consent as the basis for arbitration
- 59. Arbitration is an alternative dispute resolution mechanism where parties consensually decide to submit a dispute between them to an arbitral

tribunal to the exclusion of domestic courts. [Gary Born, International Arbitration Law and Practice (3rd ed, 2021) 2] Arbitration provides a neutral,

efficient, and expert process for dispute resolution at a single forum whose decision is final and binding on the parties. The principle of party autonomy

underpins the arbitration process as it allows the parties to dispense with technical formalities and agree upon substantive and procedural laws and

rules applicable to the merits of the dispute. [Bharat Aluminium Company v Kaiser Aluminium Technical Services, (2016) 4 SCC 126] Party

autonomy allows the parties to choose the seat of arbitration, number of arbitrators, procedure for appointment of arbitrators, rules governing the

arbitral procedure, and the institution which will administer the arbitration. An arbitration proceeding is broadly divided into two stages: The first stage

commences with an arbitration agreement and ends with the making of an arbitral award. The second stage pertains to the enforcement of the arbitral

award. [Satish Kumar v. Surinder Kumar, (1969) 2 SCR 244]

60. Consent forms the cornerstone of arbitration. An arbitration agreement records the consent of the parties to submit their disputes to arbitration. A

two-Judge Bench of this Court in Bihar State Mineral Development Corporation v. Encon Builders (I) Pvt. Ltd. (2003) 7 SCC 418 laid down four

essential elements of an arbitration agreement:

- (i) There must be a present or a future difference in connection with some contemplated affair
- (ii) The parties must intend to settle such difference by a private tribunal
- (iii) The parties must agree in writing to be bound by the decision of such tribunal.
- (iv) The parties must be ad idem.
- 61. An arbitration agreement is a contractual undertaking by two or more parties to resolve their disputes by the process of arbitration, even if the

disputes themselves are not based on contractual obligations. An arbitration agreement is a conclusive proof that the parties have consented to submit

their dispute to an arbitral tribunal to the exclusion of domestic courts. The basis for an arbitration agreement is generally traced to the contractual

freedom of parties to codify their intention to consensually submit their disputes to an alternative dispute resolution process.

62. According to Section 10 of the Code of Civil Procedure of 1908, the courts have jurisdiction to try all suits of a civil nature except suits whose

cognizance is expressly or impliedly barred. The said provision gives a right to any person to file a civil suit before a court of competent jurisdiction.

Moreover, Section 28 of the Indian Contract Act of 1872 [$\tilde{A}\phi\hat{a},\neg \mathring{A}$ "Contract Act $\tilde{A}\phi\hat{a},\neg$] provides that any agreement restraining a party from enforcing their

rights under a contract before courts or tribunals is void to that extent. However, the provision specifically saves a contract by which two or more

persons agree that any dispute, which may arise between them, in respect of any subject or class of subjects shall be referred to arbitration. Thus,

arbitration agreements are granted a statutory exception under Section 28 of the Contract Act. In Dhulabhai v. State of Madhya Pradesh a

Constitution Bench of this Court held that the jurisdiction of civil courts may be excluded by an express provision of law or by clear intendment arising

from such law. [(1968) 3 SCR 662] In Chloro Controls (supra), this Court observed that Section 45 of the Arbitration Act shall prevail over the

provisions of the Civil Procedure Code, 1908 in case of a valid arbitration agreement. Considering the fact that an arbitration agreement excludes the

jurisdiction of civil courts, such an agreement ought to be valid and enforceable.

63. An arbitration agreement must satisfy the principles of contract law laid down under the Contract Act, in addition to satisfying other requirements

stipulated under Section 7 of the Arbitration Act, to qualify as a valid agreement. [Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1]

Section 2(e) of the Contract Act defines an agreement as every promise and every set of promises forming the consideration for each other. An

agreement enforceable by law is a contract. An agreement should satisfy the mandate of Section 10 of the Contract Act to be enforceable by law.

Section 10 provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration

and with a lawful object. According to Section 13, two or more persons are said to consent when they agree upon the same thing in the same sense.

Thus, consensus ad idem between the parties forms the essential basis to constitute a valid arbitration agreement.

64. Being a creature of a contract, an arbitration agreement is also bound by the general principles of contract law, including the doctrine of privity.

The doctrine of privity means that a contract cannot confer rights or impose liabilities on any person except the parties to the contract. This doctrine

has two aspects: first, only the parties to the contract are entitled under it or bound by it; and second, the parties to the contract cannot impose a

liability on a third party. As a corollary, a third party cannot acquire rights and entitlements under a contract. In M C Chacko v. State Bank of

Travancore, this Court held it as a settled principle of law that a person who is not party to a contract cannot enforce the terms of the contract, subject

to certain well-recognised exceptions such as trust, family arrangement, and assignment. [(1969) 2 SCC 343] The principle that only the parties to an

arbitration agreement are either bound or benefited by such an agreement is fundamental to arbitration. [Gary Born (n 44) 1518] This principle is

uniformly reflected in international arbitration conventions as well as the Arbitration Act. For instance, Section 7 of the UNCITRAL Model Law

defines an arbitration agreement as $\tilde{A}\phi\hat{a},\neg\hat{A}$ 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.ââ,¬â€€

(emphasis supplied)

65. It is a generally accepted legal proposition that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute

which they have not agreed so to submit. [United Steelworkers of America v. Warrior and Gulf Navigation, (1960) 363 US 574, 582] Since consent

forms the cornerstone of arbitration, a non-signatory cannot be forcibly made a $\tilde{A}\phi\hat{a}$, $-\hat{A}$ "party $\tilde{A}\phi\hat{a}$, - to an arbitration agreement as doing so would violate the

sacrosanct principles of privity of contract and party autonomy. However, In case of multi-party contracts, the courts and tribunals are often called

upon to determine the parties to an arbitration agreement.

ii. Parties to Arbitration Agreement

66. The general method to figure out the parties to an arbitration agreement is to look for the entities who are named in the recitals and have signed

the agreement. The signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the

jurisdiction of an arbitral tribunal. However, the corollary that persons or entities who have not signed the agreement are not bound by it may not

always be correct. A written contract does not necessarily require that parties put their signatures to the document embodying the terms of the

agreement. [Pollock and Mulla, The Indian Contract and Specific Reliefs Act (14th edn, 2016) 235.] Therefore, the term $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "non-signatories $\tilde{A}\phi\hat{a}, \neg$,

instead of the traditional $\tilde{A}\phi\hat{a}$, $-\hat{A}$ "third parties $\tilde{A}\phi\hat{a}$, -, seems the most suitable to describe situations where consent to arbitration is expressed through means

other than signature. A non-signatory is a person or entity that is implicated in a dispute which is the subject matter of an arbitration, although it has not

formally entered into an arbitration agreement. [Stavros Brekoulakis, ââ,¬ËœRethinking Consent in International Commercial Arbitration: A General

Theory for Nonsignatories $\tilde{A} \not \in \hat{a}, \neg \hat{a}, \not \in (2017)$ 8 Journal of International Dispute Settlement 610.] The important determination is whether such a non-

signatory intended to effect legal relations with the signatory parties and be bound by the arbitration agreement. There may arise situations where

persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may intend

to be bound by the terms of the agreement. In other words, the issue of who is a $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "party $\tilde{A}\phi\hat{a},\neg$ to an arbitration agreement is primarily an issue of

consent.

67. Section 2 of the Contract Act provides that when a person signifies their willingness to do or to abstain from doing anything, with a view to

obtaining the assent of that other to such act or abstinence, is said to make a proposal. The proposal is said to be accepted when the person to whom

the proposal is made signifies their assent. A proposal becomes promise upon acceptance. Every promise and every set of promises, forming the

consideration for each other, is an agreement. Importantly, Section 9 provides that a promise is said to be express if the proposal or acceptance of any

promise is made in words, while a promise is said to be implied if such proposal or acceptance is $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ made otherwise than in words. $\tilde{A} \not \in \hat{a}, \neg$ Thus, a

contract may either be express or implied.

68. Chitty on Contracts explains the difference between express and implied contracts as follows:

 \tilde{A} ¢â,¬Å"Contracts may either be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is

manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so

stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to

pay the fare, and a promise by the operator of the bus to carry him safely to his destination. [\tilde{A} ¢ \hat{a} , $\neg \hat{A}$!] Express and implied contracts are both contracts in

the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the

other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of

an express contract are often implied, it follows that the distinction between express and implied contracts has little importance. $\tilde{A} \notin \hat{a}, \neg$ [Chitty on

Contracts, Hugh Beale (ed) (32nd edn, Sweet and Maxwell, 2015) para 1-104]

69. The above exposition gives rise to the inference that in case of an implied contract, the question revolves around the determination of the consent

of the parties to be bound by the terms of the contract. Such determination is manifested through the acts or conduct. The theory of implied contract

by conduct has also been accepted by this Court. In Haji Mohammed Ishaq v. Mohamad Iqbal (1978) 2 SCC 493, the plaintiff supplied tobacco to the

defendant. Although there was no express agreement between the parties, the defendant accepted the goods, but allegedly failed to clear the

outstanding dues despite repeated demands raised by the plaintiff. A Bench of three Judges of this Court observed that the conduct of the defendants

in accepting the goods and not repudiating any of the demand letters raised by the plaintiff $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "clearly showed that a direct contract which in law is

called an implied contract by conduct was brough about between them.ââ,¬â€≀ Under the Indian contract law, it is posited that actions or conduct can be an

indicator of consent of a party to be bound by a contract. This also applies to an arbitration agreement considering the fact that it is a creature of

contract. However, an arbitration agreement also has to meet the requirements laid down under the Arbitration Act to be valid and enforceable.

70. Section 2(h) of the Arbitration Act defines a $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "party $\tilde{A}\phi\hat{a}$, \neg to mean a party to an arbitration agreement. Section 7 defines an arbitration agreement

to mean 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

 \tilde{A} ¢â,¬Å"defined legal relationship. \tilde{A} ¢â,¬ Section 7 requires that an arbitration agreement has to be in writing. Section 7 indicates the circumstances in which it

is regarded as an agreement in writing. Such an agreement may be embodied in a document, an exchange of communications, including in the

electronic form, or in a statement of claim which is not traversed in the defence. In Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1, this

Court observed that a legal relationship means a relationship which gives rise to legal obligations and duties, and confers a right. Such a right may be

contractual or non-contractual. In case of a non-contractual legal relationship, the cause of action arises in tort, restitution, breach of statutory duty, or

some other non-contractual cause of action. Thus, the legislative intent underlying Section 7 suggests that any legal relationship, including relationships

where there is no contract between the persons or entities, but whose actions or conduct has given rise to a relationship, could form a subject matter

of an arbitration agreement under Section 7. This approach is in line with the observations of Lord Hoffman in Fiona Trust and Holding Company v.

Privalov where it was observed that $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "the construction of an arbitration clause should start from the assumption that the parties, as rational

businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by

the same tribunal.ââ,¬â€ (2007] UKHL 40]

(emphasis supplied)

71. Section 7(3) requires an arbitration agreement to be in writing. Section 7(4) lays down three circumstances to elaborate when an arbitration

agreement can be said to be in writing. According to the first circumstance laid down under Section 7(4)(a), an arbitration agreement is in writing if it

is signed by the parties. This circumstance refers to a situation where the parties have formally executed and expressly assumed the status of parties

by attesting their signatures to the arbitration agreement or the underlying contract containing the arbitration agreement. In such situations, the courts

or tribunals only need to refer to the signature page or the recitals to figure out the parties to the arbitration agreement.

72. Section 7(4)(b) provides the second circumstance, according to which an arbitration agreement is in writing if it is contained in an exchange of

letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the

agreement. According to this provision, the existence of an arbitration agreement can be inferred from various documents duly approved by the

parties. [Shakti Bhog Foods Limited v. Kola Shipping Ltd, (2009) 2 SCC 134; Trimex International FZE Ltd v. Vedanta Aluminium Ltd, (2010) 3 SCC

1] Section 7(4)(b) dispenses with the conventional sense of an agreement as a document with signatories. Rather, it emphasizes on the manifestation

of the consent of persons or entities through their actions of exchanging documents. However, the important aspect of the said provision lies in the

fact that the parties should be able to record their agreement through a documentary record of evidence. In Great Offshore Ltd. v. Iranian Offshore

Engineering and Construction Company (2008) 14 SCC 240, this Court observed that Section 7(4)(b) requires the court to ask whether a record of

agreement is found in the exchange of letters, telex, telegrams, or other means of telecommunication. Thus, the act of agreeing by the persons or

entities has to be inferred or derived by the courts or tribunals from the relevant documents and communication, neither of which can be equated with

a conventional contract.

73. The third circumstance is provided under Section 7(4)(c), according to which an arbitration agreement is in writing if it is contained in 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. A two-Judge Bench

of this Court clarified in S N Prasad v. Monnet Finance Limited (2011) 1 SCC 320 that there will be an ââ,¬Å"exchange of statements of claim and

defence \tilde{A} ¢ \hat{a} , \neg for the purposes of Section 7(4)(c) if there is an assertion of the existence of an arbitration agreement in any suit, petition or application

filed before any court or tribunal, and if there is no denial of it in the defence, counter, or written statement. Thus, in the third circumstance the court

proceeds on the assumption that the conduct of the person or entity in not denying the existence of an arbitration agreement leads to the conclusive

proof of its existence. All the three circumstances contained in Section 7(4) are geared towards determining the mutual intention of the parties to be

bound by the arbitration agreement.

- 74. Section 7 of the Arbitration Act contains two aspects: a substantive aspect and a formal aspect. The substantive aspect is contained is Section
- 7(1) which allows parties to submit disputes arising between them in respect of a defined legal relationship to arbitration. The legal relationships

between and among parties could either be contractual or non-contractual. For legal relations to be contractual in nature, they ought to meet the

requirements of the Indian contract law as contained in the Contract Act. It has been shown in the preceding paragraphs that a contract can either be

express or implied, which is inferred on the basis of action or conduct of the parties. Thus, it is not necessary for the persons or entities to be

signatories to a contract to enter into a legal relationship - the only important aspect to be determined is whether they intended or consented to enter

into the legal relationship by the dint of their action or conduct.

75. The second aspect is contained in Section 7(3) which stipulates the requirement of a written arbitration agreement. A written arbitration

agreement need not be signed by the parties if there is a record of agreement.63 The mandatory requirement of a written arbitration agreement is

merely to ensure that there is a clearly established record of the consent of the parties to refer their disputes to arbitration to the exclusion of the

domestic courts.

76. Section 2(h) read with Section 7 does not expressly require the $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "party $\tilde{A}\phi\hat{a}$, \neg to be a signatory to an arbitration agreement or the underlying contract

containing the arbitration agreement. This interpretation is in line with the general trend in national and international legislations that a signature is not

necessary for an arbitration agreement. The UNCITRAL Model Law as amended in 2006 lays down the writing requirement for an arbitration

agreement under Article 7 in the following terms:

 \tilde{A} ¢â,¬Å"(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been

concluded orally, by conduct, or by other means.ââ,¬â€€

The above provision states that an arbitration agreement may be entered into in any form, for example orally or tacitly, as long as the content of the

agreement is recorded. It eliminates the requirement of the signature of parties or an exchange of messages between the parties.

77. Article II paragraph 2 of the New York Convention defines $\tilde{A}\phi\hat{a},\neg\hat{A}$ "agreement in writing $\tilde{A}\phi\hat{a},\neg$ to include an arbitral clause in a contract or an arbitration

agreement, signed by the parties or contained in an exchange of letters or telegrams. Article 7 of the UNCITRAL Model Law establishes a more

favourable requirement for a written arbitration agreement. In 2006, UNCITRAL recommended that the circumstances described in Article II

paragraph 2 of the New York Convention $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "be applied recognizing that the circumstances described therein are not exhaustive. $\tilde{A}\phi\hat{a}, \neg$ [UNCITRAL

Model Law on International Commercial Arbitration, Recommendation regarding the interpretation of article II, paragraph 2, and article VII.

paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, (adopted by the

UNCITRAL on 7 July 2006) 39.] Additionally, it also recommended that Article 7 paragraph 1 of the UNCITRAL Model Law should be applied

 $\tilde{A}\phi\hat{a}$, $-\tilde{A}$ "to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought

to be relied upon, to seek recognition of the validity of such an arbitration agreement. $\tilde{A}\phi\hat{a}$, \neg The Arbitration Act is largely based on the UNCITRAL

Model Law. Therefore, the UNCITRAL Model Law could be referred to while construing the provisions of the Arbitration Act. [Sundaram Finance

Ltd v. NEPC India Ltd, (1999) 2 SCC 479, para 9; P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation, (2009) 2

SCC 494, para 27.] Although the amended Section 7 of the UNCITRAL Model Law has not been adopted in the Indian law, it reflects the modern

commercial reality where substance is given precedence over technical legal formalities. [Redfern and Hunter on International Arbitration (7th edn,

Oxford University Press, 2023) para 2.23.]

78. Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions: first, arbitration agreements arise

out of a legal relationship between or among persons or entities which may be contractual or otherwise; second, in situations where the legal

relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; third, it is not

necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it; fourth, in case of non-signatory parties, the

important determination for the courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the

underlying contract containing the arbitration agreement through their acts or conduct; fifth, the requirement of a written arbitration agreement has to

be adhered to strictly, but the form in which such agreement is recorded is irrelevant; sixth, the requirement of a written arbitration agreement does

not exclude the possibility of binding nonsignatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and

seventh, once the validity of an arbitration agreement is established, the court or tribunal can determine the issue of which parties are bound by such

agreement.

79. It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or

entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement

may be held to be bound by such agreement. As mentioned in the preceding paragraphs, the doctrine of privity limits the imposition of rights and

liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in

terms of the reliefs and remedies because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the courts

or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an

arbitration agreement, the courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for

evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement.

[Gary Born (n 44) 1531.]

80. Gary Born suggests that the legal theories and doctrines provide a basis for determining the real intent of parties to be bound by an arbitration

agreement. Therefore, it is incorrect to use terminologies such as $\tilde{A}\phi\hat{a},\neg \tilde{E}$ extension $\tilde{A}\phi\hat{a},\neg \hat{a},\phi$ of an arbitration agreement to non-signatories or $\tilde{A}\phi\hat{a},\neg \tilde{E}$ exthird parties':

 $\tilde{A}\phi\hat{a}_{,}$ - \hat{A} "Judicial case law and commentary on international arbitration sometimes make reference to the $\tilde{A}\phi\hat{a}_{,}$ - \hat{A} "extension $\tilde{A}\phi\hat{a}_{,}$ - \hat{A} of an arbitration agreement to

non-signatories, or to $\tilde{A} \not \in \hat{a}, \neg \mathring{A}$ "third parties $\tilde{A} \not \in \hat{a}, \neg$ on the basis of one or more of the foregoing theories. These expression are inaccurate, in that they imply that

an entity which is not a party to an arbitration agreement is nonetheless subject to that agreement's effects, by virtue of something other than the

parties' consent. Contrary to the references to $\tilde{A}\phi\hat{a},\neg\hat{A}$ "extension $\tilde{A}\phi\hat{a},\neg$ or $\tilde{A}\phi\hat{a},\neg\hat{A}$ "third parties $\tilde{A}\phi\hat{a},\neg$, most of the theories $[\tilde{A}\phi\hat{a},\neg\hat{A}']$ provide a basis for concluding that an

entity is in reality a party to the arbitration agreement - which therefore does not need to be $\tilde{A}\phi\hat{a},\neg\hat{A}$ "extended $\tilde{A}\phi\hat{a},\neg$ to a $\tilde{A}\phi\hat{a},\neg\hat{A}$ " third party $\tilde{A}\phi\hat{a},\neg$ - because that

party's actions constitute consent to the agreement, or otherwise bind it to the agreement, notwithstanding the lack of its formal execution of the

agreement. The arbitration agreement is therefore not ordinarily $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "extended $\tilde{A}\phi\hat{a}, \neg$, but rather the true parties that have consented to the arbitration

agreement are identified.ââ,¬â€<

81. Courts and tribunals across the world have been applying traditional contractual and commercial doctrines to determine the consent of the

nonsignatory parties to be bound by the arbitration agreement. Generally, consent based theories such as agency, novation, assignment, operation of

law, merger and succession, and third party beneficiaries have been applied in different jurisdictions. In exceptional circumstances, non-consensual

theories such as piercing the corporate veil or alter ego and estoppel have also been applied to bind to bind a non-signatory party to an arbitration

agreement. The group of companies doctrine is one such consent-based doctrine which has been applied, albeit controversially, for identifying the real

intention of the parties to bind a non-signatory to an arbitration agreement.

- E. Group of Companies Doctrine
- i. Separate legal personality
- 82. The phenomenon of group companies is the modern reality of economic life and business organisation. Group companies are a set of separate

firms linked together in formal or informal structures under the control of a parent company. The group companies can be defined in the Indian

context as $\tilde{A} \not \in \hat{a}, \neg \mathring{A}$ "an agglomeration of privately held and publicly traded firms operating in different lines of business, each of which is incorporated as a

separate legal entity, but which are collectively under the entrepreneurial, financial, and strategic control of a common authority, typically a family, and

are linked by trust-based relationships forged around a similar persona, ethnicity, or community. $\tilde{A}\phi\hat{a}$, \neg [Jayati Sarkar, $\tilde{A}\phi\hat{a}$, \neg EœBusiness Groups in India $\tilde{A}\phi\hat{a}$, $\neg\hat{a}$, ϕ in

Asli Coplan, Takashi Hikino, and James Lincoln (eds) The Oxford Handbook of Business Groups (2010) 299] A group company involving the parent

and subsidiary companies are created for myriad purposes such as limiting the liability of the parent corporation, facilitating international trade, entering

into business ventures with investors, establishing domestic corporate residence, and avoiding tax liability.

83. The principle of separate legal personality has been the cornerstone of corporate law. In Salomon v. Salomon [1897] AC 22, the House of Lords

famously observed that a company is at law a different person altogether from the promoters, directors, shareholders, and employees. The principle of

separate legal personality equally applies to corporate groups. A parent company is not generally held to be liable for the actions of the subsidiary

company of which it is a direct or indirect shareholder. The Companies Act, 2013 [ââ,¬Å"2013 Actââ,¬] has statutorily recognized a subsidiary company

as a separate legal entity. [Balwant Rai Saluja v. Air India, (2014) 9 SCC 407] Section 2(46) of the 2013 Act defines a holding company as a

company of which one or more other companies are subsidiary companies. Section 2(87) defines $\tilde{A} \not \in \hat{a}, \neg \mathring{A}$ "subsidiary company $\tilde{A} \not \in \hat{a}, \neg$ to mean a company in

which the holding company exercises control over the composition of the Board of Directors and has a controlling interest of at least 50 percent over

the voting rights. Although a holding company owns a controlling interest in the subsidiary company, they are considered as separate legal entities.

Group companies $\tilde{A} \notin \hat{a}, \neg \hat{a}, \notin \hat{c}$ structures allow multinational corporations to structure their businesses at both the national and international level to leverage

better returns for the investors and ensure business growth of the corporation.

84. A Bench of three Judges of this Court in Vodafone International Holding BV v. Union of India (2012) 6 SCC 613 emphasized the principles of

corporate separateness in the following terms:

101. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent has nothing to do with its

separate legal existence. If the owned company is wound up, the liquidator, and its parent company, would get hold of the assets of the subsidiary. In

none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a

subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having

power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will

look to see whether there are separate commercial interests which should be gained.ââ,¬â€€

85. The separateness of corporate personality will be ignored by courts in exceptional situations where a company is used as a means by the members

and shareholders to carry out fraud or evade tax liabilities. If the court, on the basis of factual evidence, determines that the company was acting as an

agent of the members or shareholders, it will ignore the separate personality of the company to attribute liability to the individuals. In Tata Engineering

and Locomotive Co Ltd. v. State of Bihar (1964) 6 SCR 885, the issue before a Constitution Bench of this Court was whether a company could be

treated as a citizen for the purposes of maintaining a writ petition under Article 32 of the Constitution. The company urged that the corporate veil

should be lifted to treat the petition as one filed by the shareholders. This Court held that the veil of a corporation can be lifted where fraud is intended

to be prevented or trading with an enemy is sought to be defeated.

86. In case of group companies, there may arise situations where a holding company completely dominates the affairs of the subsidiary company, to

the extent of misusing its control, to avoid or conceal liability. In such situations, the courts apply the doctrine of $\tilde{A}\phi\hat{a},\neg\hat{A}$ "alter eqo $\tilde{A}\phi\hat{a},\neg$ or piercing the

corporate veil to disregard the corporate separateness between the two companies and treat them as a single entity [Gary Born (n 44) 1545.]. In LIC

v. Escorts Ltd. (1986) 1 SCC 264, a Constitution Bench of this Court noted that the principle of distinct legal personality may be ignored where the

associate companies are inextricably connected as to be, in reality, part of one concern. Speaking for the Bench, Justice O Chinnappa Reddy

observed:

 $\tilde{A}\phi\hat{a}, \tilde{A}^{\dagger}$ 90. [$\tilde{A}\phi\hat{a}, \tilde{A}^{\dagger}$] Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or

fraud, or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated

companies are inextricable connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases

where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved,

the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc.ââ,¬â€∢

87. The application of the doctrine of lifting the corporate veil rests on the overriding considerations of justice and equity. [Delhi Development

Authority v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 662] Often, the courts pierce the corporate veil when maintaining the separateness of

corporate personality is found opposed to justice, convenience, and public interests. [Kapila Hingorani v. State of Bihar, (2003) 6 SCC 1] In Balwant

Rai Saluja v. Air India (2014) 9 SCC 407, this Court cautioned that the principle of piercing the corporate veil should be applied in a restrictive manner

and only in scenarios where it is evident that the subsidiary company was a mere camouflage deliberately created by the holding company for the

purpose of avoiding liability. It was further observed that the intent of piercing the corporate veil must be such that would seek to remedy a wrong

done by the holding company. In the context of arbitration, the principle of piercing the corporate veil has been sparingly used because it disregards the

intention of the parties by emphasizing on the overriding considerations of good faith and equity to bind the non-signatories to an arbitration agreement.

88. Moreover, since the companies in a group have separate legal personality, the presence of common shareholders or directors cannot lead to the

conclusion that the subsidiary company will be bound by the acts of the holding company. The statements or representations made by promoters or

directors in their personal capacity would not bind a company. Similarly, the mere fact that the two companies have common shareholders or a

common Board of Directors will not constitute a sufficient ground to conclude that they are a single economic entity. The single economic entity or the

single economic unit theory imposes general enterprise liability on the corporate group. In D H N Food Distributors Ltd. v. Tower Hamlets London

Borough Council [1976] 1 WLR 852 (2), Lord Denning held that a group of three companies should be treated as a single economic entity on the basis

of two factors: first, the parent company owned all the shares of the subsidiary companies to the extent that it controlled every movement of the given

subsidiary companies; and second, all the three companies in the group virtually acted as partners and could not be treated separately. Thus, the

determination of whether two or more companies constitute a single economic entity depends upon the concerted efforts of the companies to act in

pursuance of a common endeavour or enterprise.

89. From the above discussion, we can infer that entities within a corporate group have separate legal personality, which cannot be ignored save in

exceptional circumstances such as fraud. The distinction between a parent company and its subsidiary is fundamental, and cannot be easily abridged

by taking recourse to economic convenience. [Bank of Tokyo v. Karoon, (1986) 3 All ER 468] Legally, the rights and liabilities of a parent company

cannot be transferred to the subsidiary company, and vice versa, unless, there is a strong legal basis for doing so.

ii. Adopting a pragmatic approach to consent

90. In the context of arbitration law, the intention of the parties has to be derived from the words used in the arbitration agreement. While construing

the arbitration agreement, it is the duty of the court to not delve deep into the intricacies of the human mind, but only consider the expressed intentions

of the parties. [Kamla Devi v. Takhatmal Land, AIR 1964 SC 859; Bangalore Electricity Supply Co Ltd v. E S Solar Power (P) Ltd, (2021) 6 SCC

718] The words used in the contract reflect the commercial understanding between the parties. The intention of the parties has to be ascertained from

the words used in the contract, considered in light of the surrounding circumstances and the object of such contract. [Bank of India v. K Mohandas,

(2009) 5 SCC 313; M Dayanand Reddy v. A P Industrial Infrastructure Corporation Ltd, (1993) 3 SCC 137]

91. An arbitration agreement encapsulates the commercial understanding of business entities as regards to the mode and manner of settlement of

disputes that may arise between them in respect of their legal relationship. In most situations, the language of the contract is only suggestive of the

intention of the signatories to such contract and not the non-signatories. However, there may arise situations where a person or entity may not sign an

arbitration agreement, yet give the appearance of being a veritable party to such arbitration agreement due to their legal relationship with the signatory

parties and involvement in the performance of the underlying contract. Especially in cases involving complex transactions involving multiple parties and

contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to

be bound by the ensuing burdens, including arbitration.

92. Modern 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. In such situations, emphasis on formal consent will lead to

the exclusion of such non-signatories from the ambit of the arbitration agreement, leading to multiplicity of proceedings and fragmentation of disputes.

In A Ayyasamy v. A Paramsivam (2016) 10 SCC 386, this Court observed that it is the duty of the courts ââ,¬Å"to impart to that commercial

understanding a sense of business efficacy. $\tilde{A} \notin \hat{a}$, \neg The courts must interpret contracts in a manner that would give them a sense of efficacy rather than

invalidating the commercial interests of the parties. The meaning of the contract must be gathered by adopting a common sense approach, which

should $\tilde{A}\phi\hat{a}$, $-\hat{A}$ "not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation. $\tilde{A}\phi\hat{a}$, [Union of India v. D N Revri, (1976) 4 SCC 147]

Therefore, there is a need to adopt a modern approach to consent, which takes into consideration the circumstances, apparent conduct, and

commercial facets of business transactions.

93. As Professor Hanotiau suggests, there is a need to adopt a modern and pragmatic approach to consent:

 $\tilde{A}\phi\hat{a}, \tilde{A}$ "I would suggest that it is more accurate to refer to a modern approach to consent; an approach that is more pragmatic, more focussed on an

analysis of facts, which places an emphasis on commercial practice, economic reality, trade usages, and the complex and multifaceted dimensions of

large projects involving group of companies and connected agreements in multiparty multi-contract scenarios; an approach that is no longer restricted

to express consent but that takes into consideration all its various expressions and tends to give much more importance than before to the conduct of

the individuals or companies concerned.ââ,¬â€⋅85

94. It has been urged before us that where a written arbitration agreement clearly sets out the parties to it, the courts or tribunals cannot read into the

agreement an intention to bind persons or entities other than the signatory parties. Reliance was placed on Roop Kumar v. Mohan Thedani,86 where

this Court observed that \tilde{A} ¢ \hat{a} , $\neg \hat{A}$ "wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the

repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter

them. \tilde{A} ¢ \hat{a} , \neg Consequently, it was urged that the courts or tribunals cannot interpret the arbitration agreement in a manner so as to expand its reach to

parties not named in the agreement.

95. Arbitration law is an autonomous legal field. While the main purpose of corporate law and contract law is imputation of substantive legal liability,

the main purpose behind the law of arbitration is to determine whether an arbitral tribunal has jurisdiction over the dispute arising between parties to an

arbitration agreement. On the one hand, the courts and tribunals cannot lightly brush aside the decision of the parties to not make a person or entity a

party to the arbitration agreement. The fact that the non-signatory did not put pen to paper may be an indicator of its intention to not assume any rights

or responsibilities under the arbitration agreement. On the other hand, courts and tribunals cannot adopt a rigid approach to exclude all persons or

entities who, through their conduct and relationship with the signatory parties, intended to be bound by the underlying contract containing the arbitration

agreement. The area of arbitration law not only concerns domestic law, but it also encompasses the international law, particularly when it pertains to

the enforcement of international arbitral awards. Therefore, this Court ought to adopt a balanced approach without comprising on the basic principles

of arbitration law, contract law, and company law to ensure that the resultant legal framework is consistent with internationally accepted practices and

principles.

96. A formalistic construction of an arbitration agreement would suggest that the decision of a party to not sign an arbitration agreement should be

construed to mean that the mutual intention of the parties was to exclude that party from the ambit of the arbitration agreement. Indeed, corporate

entities have the commercial and contractual freedom to structure their businesses in a manner to limit their liability. However, there have been

situations where a corporate entity deliberately made an effort to be not bound by the underlying contract containing the arbitration agreement, but

was actively involved in the negotiation and performance of the contract. The level of the non-signatory party's involvement was to the extent of

making the other party believe that it was a veritable party to the contract, and the arbitration agreement contained under it. Therefore, the group of

companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual

arrangements. [Gary Born (n 44) 1568.]

97. Increasingly, multinational groups often adopt new and sophisticated corporate structures for execution and delivery of complex commercial

transactions such as construction contracts, concession contracts, license agreements, long-term supply contracts, banking and financial transactions,

and maritime contracts. For the execution of such contracts, corporate structures may take the form of groups based on equity, joint ventures, and

informal alliances. [Stavros Brekoulakis, $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}ceParties$ in International Arbitration: Consent v. Commercial Reality $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ in Stavros Brekoulakis, Julian DM

Lew, et al (eds) in $\tilde{A}\phi\hat{a}$, $\tilde{\Xi}$ \tilde{E} The Evolution and Future of International Arbitration $\tilde{A}\phi\hat{a}$, \tilde{a} , ϕ (2016) 119, 120.] A multi-corporate structure helps a group in

adopting commercially effective models of operation as different companies can get involved at different stages of a single transaction. Often, persons

or entities, who are not signatories to the underlying contract containing the arbitration agreement, are involved in the negotiation, performance, or

termination of the contract. In the context of arbitration law, the challenge arises when only one member of the group signs the arbitration agreement,

to the exclusion of other members. Should the non-signatories be excluded from the arbitration proceedings, even though they were implicated in the

dispute which forms the subject matter of arbitration? As a response to this challenge, arbitration law has developed and adopted the group of

companies doctrine, to allow or compel a non-signatory party to be bound by an arbitration agreement.

- iii. Group of companies doctrine a fact based doctrine
- 98. The group of companies doctrine is used in the context of companies which are related to each other by virtue of their being a part of the same

corporate group. Since every company in a group has a separate legal personality, a contract formally entered by one member of a group will not be

binding on the other members by virtue of the limited liability principle. The group of companies doctrine is used to bind a non-signatory company

within a group to an arbitration agreement which has been signed by other member of the group. [UNCITRAL, \tilde{A} ¢â, \neg EœSettlement of Commercial

Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written

form of arbitration agreement: Report of the Secretary General \tilde{A} $\hat{\phi}$ \hat{a} , \hat{a} , $\hat{\phi}$ A/CN.9/WG.II/WP.108/Add.1 (26 January 2000)] The underlying basis of 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. In other words, the group of companies doctrine is a means of identifying the

common intention of the parties to bind a non-signatory to arbitration agreement by emphasizing and analysing the corporate affiliation of the distinct

legal entities. [Gary Born (n 44) 1563.]

99. The group of companies doctrine has been a subject of rigorous academic debate among practitioners of arbitration law and academics with

domain expertise. The first view questions the necessity of adopting the doctrine by suggesting that the determination of consent in complex multi-

party arbitration can be done on the basis of traditional contractual and commercial law theories. Professor Bernard Hanotiau suggests that the group

of companies doctrine should be discarded because it has been used as a $\tilde{A}\phi\hat{a},\neg \tilde{A}$ "shortcut to avoid legal reasoning $\tilde{A}\phi\hat{a},\neg$ leading to a distorted approach by

courts and arbitral tribunals. [Hanotiau (n 85) 546.] However, Professor Hanotiau does concede that the existence of a group of companies may be a

relevant factual element to determine whether the conduct of a non-signatory party amounts to consent.

100. In contrast, the second view suggests that the group of companies doctrine is an integral aspect of arbitration law. According to this view, the

existence of specific patterns of corporate structure could be a useful factual indicator to determine the common intention of the parties to make the

non-signatory a party to the arbitration agreement. [Stavros Brekoulakis, $\tilde{A}\phi\hat{a}$, $\neg \ddot{E}$ ϖ Parties in International Arbitration: Consent v. Commercial Reality $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ in

Stavros Brekoulakis, Julian DM Lew, et al (eds) $\tilde{A}\phi\hat{a},\neg\tilde{E}$ \tilde{c} The Evolution and Future of International Arbitration $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ (2016) 119, 137.] For instance, the

active involvement of a non-signatory group company in the facilitation and performance of a commercial project helmed by other signatory

companies of the group can be considered as an indication that the non-signatory party also consented to arbitrate. Moreover, Gary Born also suggests

that the group of companies doctrine is helpful because it allows the courts to go beyond the objective intentions of the parties to determine their

dynamic subjective intentions both before, during, and after the execution of the contract. [Gary Born (n 44) 1568.] According to Born, the doctrine

also promotes efficacy of arbitration agreements by prohibiting circumvention of arbitration through satellite litigation by non-signatory parties within a

group. We are broadly in agreement with this view for the reasons to follow.

101. The group of companies doctrine was developed by international arbitral tribunals specifically in the context of arbitration, and is not generally

used in other areas of law. [Gary Born (n 44) 1559.] Although the existence of a group of companies is a necessary condition, it is not the sufficient

condition to determine the intention of the parties. In almost all formulations, the courts and tribunals have cautioned that the mere membership of a

non-signatory in a group of companies is not enough to bind it to the arbitration agreement. Rather, the courts need to determine: first, the existence of

a group of companies; and second, the conduct of the signatory and non-signatory parties which indicate their common intention to make the non-

signatory a party to the arbitration agreement. [Gary Born (n 44) 1562.] Thus, the group of companies doctrine is similar to other consent based

doctrines such as agency, assignment, assumption, and guarantee to the extent that it is ordinarily applied as a means of identifying the common

intention of the parties to bind the non-signatory to the arbitration agreement.

102. The above position was explicitly adopted by the ICC Tribunal in Dow Chemicals (supra) where it held that an arbitration agreement signed by

certain companies of a corporate group will bind the other non-signatory members only where all the parties intended and understood the

nonsignatories to be the $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "veritable parties $\tilde{A}\phi\hat{a}, \neg$ to the underlying contract containing the arbitration agreement based on their participation in the

 $\tilde{A}\phi\hat{a},\neg\hat{A}$ "conclusion, performance, or termination of the contracts $\tilde{A}\phi\hat{a},\neg$. Thus, the existence of a group of companies is a factual element that the court or

tribunal has to consider when analysing the consent of the parties. It inevitably adds an extra layer of criteria to an exercise which at its core is

preponderant on determining the consent of the parties in case of complex transactions involving multiple parties and agreements.

103. In Chloro Control (supra), this Court rightly observed that a non-signatory could be subjected to arbitration provided the underlying transactions

were with a group of companies and there was a clear intention of the parties to bind both the signatory as well as non-signatory parties to the

arbitration agreement. This legal proposition has been reiterated in a series of subsequent decisions of this Court including Canara Bank (supra) and

Discovery Enterprises (supra). Further, this Court in Cheran Properties (supra) held that the group of companies doctrine helps in decoding the

layered structure of commercial arrangements to unravel the true intention of the parties to bind someone who is not formally a signatory to the

contract, but has $\tilde{A} \notin \hat{a}, \neg \hat{A}$ "assumed $\tilde{A} \notin \hat{a}, \neg$ the obligation to be bound by the actions of a signatory. This court explained the purport of the doctrine to discern the

ââ,¬Å"trueââ,¬â€≀ party in interest:

 $\tilde{A}\phi\hat{a}_{,}$ "25. [$\tilde{A}\phi\hat{a}_{,}$ ¬Â \hat{l}] The group of companies doctrine has been applied to pierce the corporate veil to locate the $\tilde{A}\phi\hat{a}_{,}$ "true $\tilde{A}\phi\hat{a}_{,}$ ¬ party in interest, and more

significantly, to target the creditworthy member of a group of companies. Through the extension of this doctrine is met with resistance on the basis of

the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances

relating to the entry into and performance of the underlying contract.ââ,¬â€€

104. In Cox and Kings (supra), Surya Kant, J questioned whether the principles of alter ego or piercing the corporate veil can alone justify the

application of the group of companies doctrine even in the absence of implied consent. This Court in Cheran Properties (supra) clarified that there is

an important distinction between the group of companies doctrine and the principle of veil piercing or alter ego. The principle of alter ego disregards

the corporate separateness and the intentions of the parties in view of the overriding considerations of equity and good faith. In contrast, the group of

companies 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. Therefore, the principle of alter ego or piercing the corporate veil cannot be the basis for the

application of the group of companies doctrine.

iv. The determination of mutual intention

105. In multi-party agreements, the courts or tribunals will have to examine the corporate structure to determine whether both the signatory and

nonsignatory parties belong to the same group. This evaluation is fact specific and must be carried out in accordance with the appropriate principles of

company law. Once the existence of the corporate group is established, the next step is the determination of whether there was a mutual intention of

all the parties to bind the non-signatory to the arbitration agreement.

106. The group of companies doctrine requires the courts and tribunals to consider the commercial circumstances and the conduct of the parties to

evince the common intention of the parties to arbitrate. It is important to note that the group of companies doctrine concerns only the parties to the

arbitration agreement and not the underlying commercial contract. [Gary Born (n 44) 1567] Consequently, a non-signatory could be held to be a party

to the arbitration agreement without becoming a formal party to the underlying contract. The existence of a group companies is one of the essential

factors to determine whether the conduct amounts to consent but membership of a group is not sufficient in itself. This has been the consistent position

of law, starting from the Dow Chemicals (supra) award, where it was observed that the common intention of the parties to bind the non-signatory

party to the arbitration can be inferred from the \tilde{A} ¢â,¬Å"circumstances that surround the conclusion and characterize the performance and later the

termination of the contracts. \tilde{A} ϕ \hat{a} , \neg In other words, it was held that a non-signatory party could be considered as a \tilde{A} ϕ \hat{a} , \neg \hat{A} "true party \tilde{A} ϕ \hat{a} , \neg to the arbitration

agreement on the basis of their role in the conclusion, performance, or termination of the underlying contract containing the arbitration agreement.

107. This Court in Chloro Controls (supra) laid down four factual indices that the courts or tribunals should consider to bind a non-signatory party to

arbitration agreement. It is important to extract the relevant paragraphs in full:

 \tilde{A} ¢â,- \tilde{A} "72. This evolves the principle that a non-signatory could be subjected to arbitration provided these transactions were with group of companies and

there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "intention of the parties $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "intention of the parties $\tilde{A}\phi\hat{a}, \neg \hat{A}\phi\hat{a}, \neg \hat{A}\phi\hat{a}$ intention of the parties $\tilde{A}\phi\hat{a}, \neg \hat{A}\phi\hat{a}, \neg \hat{A}\phi\hat{a}$ intention of the parties $\tilde{A}\phi\hat{a}, \neg \hat{A}\phi\hat{a}, \neg \hat{A}\phi\hat{a}$ intention of the parties $\tilde{A}\phi\hat{a}, \neg \hat{A}\phi\hat$

is a very significant feature which must be established before the scope of the arbitration can be said to include the signatory as well as the

nonsignatory party.ââ,¬â€∢

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court

will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the

subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where

performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for

achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite

reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the

reference of even non-signatory parties would fall within the exception afore-discussed.ââ,¬â€€

(emphasis supplied)

108. In Cox and Kings (supra), Justice Surya Kant observed a contradiction in terms of the above extracted paragraphs 72 and 73 of Chloro Controls

(supra). According to Justice Surya Kant, on the one hand, Chloro Controls (supra) emphasizes on the $\tilde{A}\phi\hat{a},\neg\hat{A}$ "intention of the parties $\tilde{A}\phi\hat{a},\neg$, while on the

other hand it allows joinder of non-signatory parties to arbitration proceedings $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "without their prior consent $\tilde{A}\phi\hat{a}, \neg$. Justice Surya Kant is indeed correct

in noticing this inconsistency in the observations in the above two paragraphs. Para 72 underlines mutual intent while para 73 seems to move away

from it by suggesting an absence of prior consent as well. We would like to clarify that the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "without their prior consent $\tilde{A}\phi\hat{a},\neg$ has to be

construed as \tilde{A} ¢â,¬Å"without prior formal consent to the arbitration agreement or the underlying contract containing the arbitration agreement. \tilde{A} ¢â,¬ Reading

the above two paragraphs harmoniously, it is evident that paragraph 72 emphasizes on determining the $\tilde{A}\phi\hat{a}, \neg \hat{A}$ intention of the parties $\tilde{A}\phi\hat{a}, \neg$ to bind a non-

signatory party to an arbitration agreement. In paragraph 73, the Court deals with the tests for joining a nonsignatory party which has not formally

consented to the arbitration agreement. Furthermore, the said paragraph enlist the cumulative factors for deciphering the mutual intention of the parties

to join non-signatory parties to the arbitration agreement. In view of the above clarification, we are of the opinion that so construed there would be no

inconsistency between paragraphs 72 and 73 of Chloro Controls (supra).

109. One of the contentions that has been raised before us pertains to the observations in paragraph 73 of Chloro Controls (supra) that the composite

reference of all the parties should $\tilde{A}\phi\hat{a},\neg\hat{A}$ "serve the ends of justice $\tilde{A}\phi\hat{a},\neg$. It was contended that the equity jurisdiction doesn't generally apply to arbitration

agreements because they are in the realm of private law. Since arbitration is a matter of consent, interests of justice and equity cannot be the sole

grounds for invoking arbitration agreement. The primary test to apply the group of companies doctrine is by determining the intention of the parties on

the basis of the underlying factual circumstances. The application of the group of companies doctrine will serve to stymie satellite litigation by non-

signatory members of the corporate group, thereby ensuring the efficacy of the agreement between the parties. Avoiding multiplicity of proceedings

and fragmentation of disputes is certainly in the interests of justice. However, it can never be the sole consideration to invoke the group of companies

doctrine.

110. In Discovery Enterprises (supra), this Court refined and clarified the cumulative factors that the courts and tribunals should consider in deciding

whether a company within a group of companies is bound by the arbitration agreement:

ââ,¬Å"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by

it, the law considers the following factors:

- (i) The mutual intent of the parties;
- (ii) The relationship of a non-signatory to a party which is a signatory to the agreement;
- (iii) The commonality of the subject-matter;
- (iv) The composite nature of the transactions; and
- (v) The performance of the contract.ââ,¬â€
- 111. Since the group of companies doctrine is a consent based theory, its application depends upon the consideration of a variety of factual elements to

establish the mutual intention of all the parties involved. In other words, the group of companies doctrine is a means to infer the mutual intentions of

both the signatory and non-signatory parties to be bound by the arbitration agreement. 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. The other factors such as the commonality of the subject matter, composite nature of the transactions, and the

performance of the contract ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties to bind the

non-signatory party to the arbitration agreement. The party seeking joinder of a non-signatory bears the burden of proof of satisfying the above factors

to the satisfaction of the court or tribunal, as the case may be.

112. Section 7 of the Arbitration Act broadly talks about an agreement by the parties in respect of a defined legal relationship, whether contractual or

not. Such a legal relationship must give rise to legal obligations and duties. In a corporate group, a company may have various related companies. The

legal relationship must be analysed in the context of the underlying contract containing the arbitration agreement. The nature of the contractual

relationship can either be formally encrusted in the underlying contract, or it can also be inferred from the conduct of the signatory and non-signatory

parties with respect to such contract. However, we clarify that mere presence of a commercial relationship between the signatory and non-signatory

parties is not sufficient to infer $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "legal relationship $\tilde{A}\phi\hat{a}, \neg$ between and among the parties. If this factor is applied solely, any related entity or company

may be impleaded even when it does not have any rights or obligations under the underlying contract and did not take part in the performance of the

contract. The group of companies doctrine cannot be applied to abrogate party consent and autonomy. The doctrine, properly conceptualised and

applied, gives effect to mutual intent and autonomy.

113. In Canara Bank (supra), this Court observed that the group of companies doctrine can also be invoked in cases where a \tilde{A} ¢ \tilde{a} , \tilde{A} "tight group structure

with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. ââ,¬ In Cox and Kings (supra),

Justice Surya Kant observed that applying this approach has the tendency to overlook the principle of corporate separateness and dispense with the

consent of the parties. There is weight in the caution expressed by Justice Surya Kant. The presence of commercial relationships between a party and

a non-signatory cannot be the sole criteria to bind non-signatory parties to the arbitration agreement. Adopting such an approach would bind all the

non-signatories within a corporate group, even though they are not related to the contractual obligations under consideration, to the arbitration

agreement. Consequently, such an approach will lead to the violation of the basic legal tenet of arbitration - the necessity of consent, either express or

implied, to be bound by an arbitration agreement. Moreover, the imposition of liability on a non-signatory company within a group for the acts of other

members of the group merely on the basis of the fact that they belong to a $\tilde{A}\phi\hat{a},\neg\hat{A}$ "single economic unit $\tilde{A}\phi\hat{a},\neg$ will ride roughshod over the principle of distinct

corporate personality. The objective of the group of companies doctrine is to identify the mutual intentions of the parties without disregarding the legal

personality of the entities.

114. In Dow Chemicals (supra), it was held that a group of companies constitutes the same economic reality, which has to be considered by the

arbitral tribunal while deciding on its jurisdiction. According to the tribunal, the presence of the group of companies is merely an additional factor that

the tribunal may consider to determine the mutual intention of the parties. In Canara Bank (supra), this Court did not apply the group of companies

doctrine solely on the basis that the companies belonged to a single economic unit. Rather, it was held that there was an implied or tacit consent by the

non-signatory party (CANFINA) to being impleaded in the arbitral proceedings. The presence of strong organizational links and financial links

between the signatory and nonsignatory parties is only one of the factual elements that the court or tribunal may consider to determine the legal

relationship between the signatory and non-signatory parties. We accordingly clarify that the principle of $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ "single economic entity $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ cannot be used

as a sole basis to invoke the group of companies doctrine.

115. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration

agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter

indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject

matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should

also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination

of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.

116. In case of a composite transaction involving multiple agreements, it would be incumbent for the courts and tribunals to assess whether the

agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in Canara Bank (supra) observed that a composite

transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible

without the aid, execution, and performance of the supplementary or ancillary agreements.

117. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are

disputes and differences $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "in connection with $\tilde{A}\phi\hat{a},\neg$ the main agreement and also disputes $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "connected with $\tilde{A}\phi\hat{a},\neg$ the subject-matter of the principal

agreement. [Olympus Superstructures (P) Ltd v. Meena Vijay Khetan, (1999) 5 SCC 651] In Chloro Controls (supra), this Court clarified that the

principle of $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "composite performance $\tilde{A}\phi\hat{a}, \neg$ would have to be gathered from the conjoint reading of the principal and supplementary agreements on the

one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the

signatory and nonsignatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the

non-signatory party to be bound by the arbitration agreement. Thus, the application of the group of companies doctrine in case of composite

transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing

so have evinced a mutual intent to be bound by the agreement to arbitrate.

118. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the courts

and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement.

The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the

nonsignatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle

of International Commercial Contract, 2016 [UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3] provides that the

subjective intention of the parties could be ascertained by having regard to the following circumstances:

- (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.
- 119. In Dow Chemicals (supra), consent of the non-signatory parties to arbitrate was implied primarily in view of their predominant participation in the

conclusion, performance, and termination of contracts. Similarly, this Court in Canara Bank (supra) observed that a non-signatory entity may be bound

by an arbitration agreement where a parent or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory

entity of the group has been engaged in the negotiation or performance of the commercial contract.

120. In Reckitt Benckiser (supra), this Court was called upon to determine whether the representation of a purported promoter of a non-signatory

entity would bind it to the said representation. In that case, the applicant entered into an agreement with an Indian company for the supply of packing

materials. During the stage of negotiation, the applicant circulated a draft of the agreement by email with the Indian company. This email was reverted

by one Mr. Frederick Reynders, who the applicant claimed was the promoter of a Belgian sister company of the Indian company. The Belgian

company was a non-signatory to the agreement. Yet, the applicant sought to implead the Belgian company on the basis that it had participated during

the negotiations preceding the execution of the agreement. This Court refused to allow the joinder of the Belgian company to the arbitration agreement

on the grounds that Mr. Reynders was not the promoter of the Belgian company, and was therefore not acting in that capacity on or behalf of the

company and the applicant failed to discharge its burden to prove that the Belgian company consented to the arbitration agreement.

121. Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a

number of reasons. First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable

party to the contract containing the arbitration agreement; second, the conduct of the nonsignatory may be in harmony with the conduct of the other

members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other

party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.

v. Threshold standard

122. In Cox and Kings (supra), Justice Surya Kant observed that Reckitt Benckiser (supra) fixed a higher threshold of evidence for the application of

the group of companies doctrine as compared to earlier decisions of this Court. This Court's approach is Reckitt Benckiser (supra) is indicative of the

fact that the mere presence of a group of companies is not the sole or determinative factor to bind a non-signatory to an arbitration agreement. Rather,

the courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. The

nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed

obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and

substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance

of the contract is not sufficient to infer the consent of the nonsignatory to be bound by the underlying contract or its arbitration agreement. 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.

123. An arbitration agreement is a distinct and separate agreement from the substantive commercial contract which contains the arbitration

agreement. An arbitration agreement is independent of the other terms of the contract, to the extent that nullification of the contract will not lead to

invalidation of the arbitration agreement. [Reliance Industries Ltd v. Union of India, (2014) 7 SCC 603] The concept of separability of the arbitration

agreement from the underlying contract ensures that the intention of the parties to resolve the disputes through arbitration does not vanish merely

because of a challenge to the legal validity of the underlying contract. [Enercon (India) Ltd v. Enercon Gmbh, (2014) 5 SCC 1] To join a non-signatory

to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the

underlying contract containing the arbitration agreement. [Gary Born (n 44) 1545]

124. Stavros Brekoulakis argues that the application of legal theories such as group of companies doctrine rests on an assumption that an arbitration

agreement requires $\tilde{A}\phi\hat{a}$, $-\mathring{A}$ "less consent $\tilde{A}\phi\hat{a}$, - or $\tilde{A}\phi\hat{a}$, $-\mathring{A}$ "less evidence of consent $\tilde{A}\phi\hat{a}$, - than the underlying contract containing the arbitration agreement. [Stavros

Brekoulakis, ââ,¬ËœRethinking Consent in International Commercial Arbitration: A General Theory for Nonsignatoriesââ,¬â,¢ (2017) 8 Journal of

International Dispute Settlement 610, 621.] Brekoulakis further notes that the assumption that implied consent of a non-signatory to the underlying

contract is sufficient to constitute consent to the arbitration agreement contained in such contract militates against the principle of separability of

contracts. [Stavros Brekoulakis, $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}\phi$ Parties in International Arbitration: Consent v. Commercial Reality $\tilde{A}\phi\hat{a}$, $\neg \hat{a}, \phi$ in Stavros Brekoulakis, Julian DM Lew, et

al (eds) ââ,¬ËœThe Evolution and Future of International Arbitrationââ,¬â,¢ (2016) 119, 148.]

125. The non-signatory's participation in the negotiation, performance, or termination of the contract can give rise to the implied consent of it being

bound by the contract. Brekoulakis rightly points out an anomalous situation where the legal theories such as the group of companies doctrine treat

consent as a functional legal construct without actually determining the main question - whether the arbitral tribunal has jurisdiction over the parties

(and non-signatory parties) to resolve the disputes? [Ibid, at 121.]

126. The involvement of a non-signatory in the negotiation, performance, or termination of the underlying contract could be an important indicator of

the fact that such non-signatory accepted to be bound by the contract. However, transposition of such consent to an arbitration agreement is a legal

fiction to accommodate commercial reality. The contemporary commercial reality suggests that different companies within a group often become

involved in different stages of execution and performance of a contractual transaction. For instance, a non-signatory may merely participate in the

performance of a contract to carry out a specific task or assist the parent company. Such incidental involvement in the contractual performance is

insufficient to constitute consent to the underlying contract, let alone the arbitration agreement. Rather, it has been suggested that it should also be

considered whether the commercial dispute sufficiently implicates the non-signatory party for the arbitral tribunal to exercise its jurisdiction.

[Brekoulakis (n 102) 629.] The emphasis on the scope of the jurisdiction of the arbitral tribunal with respect to the subject matter of the dispute

between the signatory parties would ensure effective arbitration and prevent unnecessary fragmentation of disputes. It also adequately accounts for

the lack of formal consent on behalf of the nonsignatory to the arbitration agreement (and the ensuing procedural aspects such as the constitution of

arbitral tribunal) by considering facts and circumstances, such as close relationship and composite transactions, which indicates that there was a

mutual understanding or convergence among all the parties to treat non-signatory as parties to the arbitration agreement. [Karim Youssef, $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}\varpi$ The

Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Group of Companiesââ,¬â,¢ in Multiparty Arbitration: Dossiers of the ICC

Institute of Worlds Business Law, Volume 7 (2010) 71, 79.]

127. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality

where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if

the factors laid down under Discovery Enterprises (supra) are applied holistically. For instance, the involvement of the non-signatory in the

performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is

an important aspect. Other factors such as the composite nature of transaction and commonality of subject matter would suggest that the claims

against the non-signatory were strongly inter-linked with the subject matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be

inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial

obligations which are intricately linked to the subject matter, are not actually strangers to the dispute between the signatory parties.

128. We hold that all the cumulative factors laid down in Discovery Enterprises (supra) must be considered while determining the applicability of the

group of companies doctrine. However, the application of the above factors has to be fact-specific, and this Court cannot tie the hands of the courts or

tribunals by laying down how much weightage they ought to give to the above factors. This approach ensures that a dogmatic emphasis on express

consent is eschewed in favour of a modern approach to consent which focuses on the factual analysis, complexity of commercial projects, and thereby

increases the relevance of arbitration in multi-party disputes. Moreover, it is also keeping in line with the objectives of the Arbitration Act which aims

to make the Indian arbitration law more responsive to the contemporary requirements.

F. The group of companies doctrine has independent existence

129. In Cox and Kings (supra), Chief Justice Ramana observed that Chloro Controls (supra), and the series of subsequent decisions, have not

appropriately dealt with the scope and ambit of the phrase $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ as appearing under Sections 8 and 45 of the Arbitration

Act. Connectedly, one of the issues that arises for the consideration of this Court is whether the phrase $\tilde{A}\phi\hat{a},\neg \tilde{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ could be

interpreted to include the group of companies doctrine.

130. The Arbitration Act does not define the phrase $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "person claiming through or under $\tilde{A}\phi\hat{a}$, $\neg a$ party. A person $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}$, $\neg a$

party is not a signatory to the contract or agreement, but can assert a right through or under the signatory party. Russel on Arbitration states that an

assignee can invoke the arbitration agreement as a person $\tilde{A}\phi\hat{a},\neg\mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ a party to the arbitration agreement. [Russel on Arbitration

(23rd edn, 2007) 99 para 3-018] An assignee takes the assigned right under a contract with both the benefit and burden of the arbitration clause.

[Schiffahrtsââ,-"gesellschaft Detlev von Appen v Voest Alpine Intertrading, [1997] EWCA Civ 1420.] Similarly, the English courts have held that a

transferee or subrogate can claim through or under a party to the arbitration agreement. [Through Transport Mutual Insurance Association (Eurasia)

Ltd v. New India Assurance Co Ltd, [2005] EWHC 455 (Comm); West Tankers Inc. v. Allianz Spa, [2012] EWCA Civ 27.] Under the English law,

the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation. In these situations, the

assignees or representatives become successors to the signatory party's interests under the arbitration agreement. They step into

signatory party, from whom they derive the right to arbitrate, rather than claiming an independent right under the arbitration agreement.

131. The scope of an arbitration agreement under the English law is limited to the parties who entered into it and those claiming through or under

them. [Section 82(2) of the English Arbitration Act, 1996] In Roussel-Uclaf (supra), it was held that a subsidiary company can invoke the arbitration

agreement on the basis that it is $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ the parent company because of the close relationship between the two companies.

However, Roussel-Uclaf (supra) was expressly overruled by the Court of Appeal in Sancheti (supra) on the ground that a mere legal or commercial

connection is not sufficient for a person to claim through or under a party to an arbitration agreement.

132. The scope of the phrase \tilde{A} ¢ \hat{a} ,¬ \tilde{A} "claiming through or under \tilde{A} ¢ \hat{a} ,¬ has been evaluated by other common law jurisdictions. In Tanning Research

Laboratories Inc v. O'Brien, [1990] HCA 8 the issue before the High Court of Australia was whether a liquidator could be regarded as a person

 $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ a party to an arbitration agreement. The High Court construed the words $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "through $\tilde{A}\phi\hat{a}, \neg$ or $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "under $\tilde{A}\phi\hat{a}, \neg$ to hold that

the liquidator had a derivative interest through the company. The relevant observation is extracted below:

 \tilde{A} ¢â,¬Å"[T]he prepositions \tilde{A} ¢â,¬Å"through \tilde{A} ¢â,¬ or \tilde{A} ¢â,¬Å"under \tilde{A} ¢â,¬ convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of

action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been

vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A

liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in

or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies

were vested in or exercisable by the bankrupt.ââ,¬â€∢

The test of derivative action conveys that a third party's cause of action is derived from the original party to the arbitration agreement. The third party

cannot be saddled with new duties and liabilities to which it has not consented. They can only be held liable or entitled to the extent they derive their

rights or entitlements from the original party to the agreement.

133. The above formulation was further clarified by the Australian High Court in Rinehart v. Hancock Prospecting Pty Ltd. [2019] HCA 13, where it

observed that the ultimate test in Tanning Research (supra) was whether an essential element of the defence was or is vested in or exercisable by the

party to the arbitration agreement. In Rinehart (supra), the Court was dealing with a situation where a signatory party had assigned mining tenements

in breach of trust. It was held that assignees stand in the same position vis- $\tilde{A}f$ -vis the claimant as the assignor since the $\tilde{A}\phi$ a, \tilde{A} assignee [took] its stand

upon a ground which [was] available to the assignor. $\tilde{A}\phi\hat{a}$, \neg The Court concluded that the assignees were persons claiming through or under the signatory

parties on the basis that the parties to the arbitration agreement had agreed that any dispute as to the beneficial title to the mining tenements would be

determined by arbitration. Since the third parties accepted the benefits of the agreement, it was held that they must also accept the burdens of its

stipulated conditions, including arbitration.

134. In Rinehart (supra), the Australian High Court's approach is similar to the doctrine of equitable estoppel developed by the US Courts, to the

effect that a non-signatory party who elects to take the benefit of some aspects of the contract, must also accept the burden of it. [Vicky Priskich,

 $\tilde{A}\phi\hat{a},\neg\ddot{E}$ \otimes Binding non-signatories to arbitration agreements $\tilde{A}\phi\hat{a},\neg$ " who are person $\tilde{A}\phi\hat{a},\neg\ddot{E}$ \otimes claiming through or under $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ a party? $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ (2019) 35(3) Arbitration

International 375-386.] However, we cannot adopt the Rinehart (supra) position in the context of the phrase $\tilde{A}\phi\hat{a}$, $\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}$, \neg as doing

so would be contrary to the common law position and the legislative intent underpinning the Arbitration Act, as will be discussed below.

135. An analysis of the cases cited above establishes the following propositions of law: first, the typical scenarios where a person or entity can claim

through or under a party are assignment, subrogation, and novation; second, a person $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg \hat{A}$ " can assert a right in a derivative

capacity, that is through the party to the arbitration agreement, to participate in the agreement; third, the persons claiming through or under do not

possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest; and fourth, mere legal

or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party.

i. Party and Persons ââ,¬Å"claiming through or underââ,¬â€ are different

136. The 246th Law Commission suggested that the definition of $\tilde{A}\phi\hat{a},\neg\hat{A}$ "party $\tilde{A}\phi\hat{a},\neg$ under section 2(1)(h) of the Arbitration Act be amended to include the

words \tilde{A} ¢â,¬Å"or any persons claiming through or under such party \tilde{A} ¢â,¬. The Commission reasoned that in appropriate contexts, a party also include persons

 $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ a signatory party such as successors-in-interest. However, the suggested amendment was not carried out by

Parliament.

137. The word $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "claim $\tilde{A}\phi\hat{a}, \neg$ is of very extensive significance embracing every species of legal demand. In the ordinary sense, it means to demand as

one's own or as one's right. [Black \tilde{A} ¢ \hat{a} , $\neg \hat{a}$,¢s Law Dictionary (5th edn, 1979) 224] A \tilde{A} ¢ \hat{a} , $\neg \hat{A}$ "claim \tilde{A} ¢ \hat{a} , \neg also means assertion of a cause of action. [P

Ramanatha Aiyar \tilde{A} ¢ \hat{a} , $\neg \hat{a}$,¢s, The Law Lexicon (1997) 330] The expression \tilde{A} ¢ \hat{a} , $\neg \hat{A}$ "through \tilde{A} ¢ \hat{a} , \neg connotes \tilde{A} ¢ \hat{a} , $\neg \hat{A}$ "by means of, in consequence of, by reason of. \tilde{A} ¢ \hat{a} , \neg

[Blackââ,¬â,¢s Law Dictionary (5th edn, 1979) 1328] The term ââ,¬Å"underââ,¬ is used with reference to an inferior or subordinate position. P Ramanatha

Aiyar's Law Lexicon defines $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming under $\tilde{A}\phi\hat{a},\neg$ or $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming under him $\tilde{A}\phi\hat{a},\neg$ to denote a person putting forward a claim under derived rights. [P

Ramanatha Aiyar \tilde{A} ¢ \hat{a} , $\neg \hat{a}$, ¢s, The Law Lexicon (1997) 331] When the above definitions are read harmoniously, it gives rise to an inference that a person

 $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ is asserting their legal demand or cause of action in an intermediate or derivative capacity. We can also conclude that

a person $\tilde{A}\phi\hat{a},\neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ has inferior or subordinate rights in comparison to the party from which it is deriving its claim or right.

Therefore, a person $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ cannot be a $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "party $\tilde{A}\phi\hat{a}, \neg$ to an arbitration agreement on its own terms because it only stands in

the shoes of the original signatory party.

138. An arbitration is founded upon the consent of the parties to refer their disputes to an alternative dispute resolution mechanism. Consequently, third

parties typically cannot be compelled to arbitrate based on an agreement to which they have not consented. The phrase $\tilde{A}\phi\hat{a}$, \tilde{A}^{*} claiming through or

under $\tilde{A}\phi \hat{a}$, has not been used either in Section 2(1)(h) or Section 7 of the Arbitration Act. This is because those provisions are based on the concept of

party autonomy and party independence, which requires the party to provide consent to submit their disputes to arbitration. On the contrary, a person

claiming through or under a party to an arbitration agreement is merely standing in the shoes of the original party to the extent that it is merely agitating

the right of the original party to the arbitration agreement.

139. The phrase $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ has been used in Sections 8, 35, and 45 in their specific contexts. Section 8 contains a mandate that

when an action is brought before a judicial authority which is the subject of an arbitration agreement, the dispute shall be referred to arbitration on an

application made by a party or any person claiming through or under him. As mentioned above, the phrase $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}$, \neg was

inserted in Section 8 to bring it in line with Section 45. Sections 8 and 45 are peremptory in nature mandating the court to refer the parties to arbitration

if there is a valid arbitration agreement. [Agri Gold Exims Ltd v. Sri Lakshmi Knits & Wovens, (2007) 3 SCC 686] In A Ayyasamy (supra), it was

held that Section 8 imposes an affirmative obligation on every judicial authority to \tilde{A} ¢ \hat{a} ,¬ \hat{A} *hold down parties to the terms of the agreement entered into

between them to refer disputes to arbitration. \tilde{A} $\hat{\phi}$ \hat{a} , \neg [(2016) 10 SCC 386] Thus, the legislative intent behind Sections 8 and 45 is to ensure that parties fulfil

their mutual intention of settling disputes arising between or among them by way of arbitration.

140. Section 35 of the Arbitration Act provides that an arbitral award shall be final and binding on the parties and persons claiming under them

respectively. In Cheran Properties (supra), this Court rightly observed that the expression $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "persons claiming under them $\tilde{A}\phi\hat{a}, \neg \hat{A}$ " is $\tilde{A}\phi\hat{a}, \neg \hat{A}$ " a legislative

recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as

a party to the proceedings. $\tilde{A}\phi\hat{a}$, \neg It was further observed that $\tilde{A}\phi\hat{a}$, \neg Å"[h]aving derived its capacity from a party and being in the same position as a party to

the proceedings binds a person who claims under it. $\tilde{A}\phi\hat{a}$, \vec{a} , Similarly, Section 73 also provides that a settlement agreement signed by the parties shall be

final and binding ââ,¬Å"on the parties and persons claiming under them respectively.ââ,¬â€€

141. Sections 8, 35, and 45 use the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "parties or any person claiming through or under $\tilde{A}\phi\hat{a},\neg$. The word $\tilde{A}\phi\hat{a},\neg\hat{A}$ "or $\tilde{A}\phi\hat{a},\neg$ is used in Section 8 and 45 as a

disjunctive particle to express an alternative or give a choice between $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "parties $\tilde{A}\phi\hat{a}, \neg \hat{A}$ " any person claiming through or under $\tilde{A}\phi\hat{a}, \neg \hat{A}$. Consequently,

either the party to an arbitration agreement or any person claiming through or under the party can make an application to the judicial authority to refer

the dispute to arbitration. It is in the interest of respecting the intention of the parties and promoting commercial efficacy, that the above provisions

allow either the party or any person ââ,¬Â"claiming through or under himââ,¬â€ to refer the disputes to arbitration.

142. On the other hand, Sections 35 and 73 use the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "parties and persons claiming under them $\tilde{A}\phi\hat{a},\neg$. The use of the word $\tilde{A}\phi\hat{a},\neg\hat{A}$ "and $\tilde{A}\phi\hat{a},\neg$ in Sections

35 and 73 conveys the idea that $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "parties $\tilde{A}\phi\hat{a}, \neg$ is to be added or taken together with the subsequent phrase $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "any person claiming through or

under. \tilde{A} ¢ \hat{a} , \neg The above provisions provide that an arbitration award binds not only the parties but also all such persons who derive their capacity from the

party to the arbitration agreement. Again, the foundational basis for this provision is commercial efficacy as it ensures that an arbitral award leads to

finality, such that both the parties and all persons claiming through or under them do not reagitate the claims. Moreover, the use of the word $\tilde{A}\phi\hat{a}, \neg \hat{A}$ and $\tilde{A}\phi\hat{a}, \neg \hat{A}$

in Sections 35 and 73 leads to an unmistakable conclusion that under the Arbitration Act, the concept of a $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "party $\tilde{A}\phi\hat{a}, \neg \hat{a} \in \mathcal{A}$ is distinct and different from the

concept of ââ,¬Â"persons claiming through or underââ,¬â€ a party to the arbitration agreement.

- ii. The approach adopted by this Court in Chloro Controls is Incorrect
- 143. This Court in Chloro Controls (supra) observed : first, that the use of the expression $\tilde{A}\phi\hat{a},\neg\hat{A}$ "any person $\tilde{A}\phi\hat{a},\neg$ reflects the legislative intent of enlarging

the scope of the words beyond the $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "parties $\tilde{A}\phi\hat{a},\neg$ who are signatory to the arbitration agreement; second, a signatory party to an arbitration agreement

may have a legal relationship with the party claiming through or under the party on the basis of the group of companies doctrine; and third, in case of a

multi-party contract, a subsidiary company which $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "derives $\tilde{A}\phi\hat{a}, \neg$ its basic interest from the parent contract would be covered under the expression

ââ,¬Å"claiming though or under.ââ,¬â€<

144. The first proposition of law relies on the construction of the expression $\tilde{A}\phi\hat{a}, \neg \hat{A}$ any person $\tilde{A}\phi\hat{a}, \neg \hat{A}$ to conclude that the language of Section 45 has wider

import. However, the expression $\tilde{A}\phi\hat{a},\neg\hat{A}$ "any person $\tilde{A}\phi\hat{a},\neg$ cannot be singled out and construed devoid of its context. The context, in terms of Section 8 and

45, is provided by the subsequent phrase - $\tilde{A}\phi\hat{a}$, $\neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}$, $\neg A$. Therefore, such $\tilde{A}\phi\hat{a}$, $\neg \mathring{A}$ "any persons $\tilde{A}\phi\hat{a}$, $\neg A$ " are acting only in a derivative

capacity. Since an arbitration agreement excludes the jurisdiction of national courts, it is essential that the parties consent, either expressly or impliedly,

to submit their dispute to the arbitral tribunal.

145. The second and third proposition of law states that a non-signatory party may claim through or under a signatory party by virtue of its legal or

commercial relationship with the latter. However, this proposition is contrary to the common law position as evidenced in Sancheti (supra) and Tanning

Research Laboratories (supra) according to which a mere legal or commercial connection is not sufficient to allow a non-signatory to claim through or

under a party to the arbitration agreement. In A Ayyasamy (supra), this Court observed that the Arbitration Act should be interpreted \tilde{A} ¢ \hat{a} , \neg Å"so as to

bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world.ââ,¬â€∢ Therefore,

even though a subsidiary derives interests or benefits from a contract entered into by the company within a group, they would not be covered under

the expression ââ,¬Å"claiming through or underââ,¬â€ merely on the basis that it shares a legal or commercial relationship with the parties.

146. One of the questions that has been referred before us is whether the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ in Section 8 could be interpreted to

include the group of companies doctrine. The group of companies doctrine is founded on the mutual intention of the parties to determine if the non-

signatory entity within a group could be made a party to the arbitration agreement in its own right. Such non-signatory entity is not \tilde{A} ¢ \hat{a} , \tilde{A} "claiming

through or under \tilde{A} ϕ \hat{a} , \neg a signatory party. As mentioned above, the phrase \tilde{A} ϕ \hat{a} , \neg \hat{A} "claiming through or under \tilde{A} ϕ \hat{a} , \neg is used in the context of successors in interest

that act in a derivative capacity and substitute the signatory party to the arbitration agreement. To the contrary, the group of companies doctrine is

used to bind the non-signatory to the arbitration agreement so that it can agitate the benefits and be subject to the burdens that it derived or is

conferred in the course of the performance of the contract. The doctrine can be used to bind a non-signatory party to the arbitration agreement

regardless of the phrase ââ,¬Å"claiming through or underââ,¬â€⋅ as appearing in Sections 8 and 45 of the Arbitration Act.

147. In Chloro Controls (supra), this Court joined the non-signatory entities as parties to the arbitration agreement in their own rights on the basis that

they were signatories to ancillary agreements which were closely interlinked with the performance of the principal agreement containing the

arbitration agreement. This Court in Chloro Controls (supra) reasoned that the nonsignatory entities, being part of the same corporate group as the

signatory parties, were subsidiaries in interest or subsidiary companies, and therefore were $\tilde{A}\phi\hat{a},\neg\hat{A}$ claiming through or under $\tilde{A}\phi\hat{a},\neg$ the signatory parties. As

held above, the phrase $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ only applies to entities acting in a derivative capacity and not with respect to joinder of parties

in their own right. Therefore, we hold that the approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies

doctrine to the phrase $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a}$, \neg is erroneous and against the well-established principles of contract and commercial law. As

observed above, the existence of the group of companies doctrine is intrinsically found on the principle of the mutual intent of parties to a commercial

bargain.

148. Chief Justice N.V. Ramana also sought our consideration on the question of whether the $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "group of companies doctrine $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$ see expounded by

Chloro Controls (supra) and subsequent judgments is valid in law. The group of companies doctrine has important utility in determining the mutual

intention of the parties in the context of complex transactions involving multiple parties and multiple agreements. Moreover, the doctrine has been

substantively entrenched in the Indian arbitration jurisprudence. We are aware of the fact that the group of companies doctrine has not found favor in

some other jurisdictions, including in English law. However, we deem it appropriate to retain the doctrine which has held the field in Indian

jurisprudence though by firmly establishing it within the realm of the mutual consent or the mutual intent of the parties to a commercial bargain. This

will ensure on the one hand that Indian arbitration law retains a sense of dynamism so as to respond to contemporary challenges. At the same time,

structuring the doctrine in the manner suggested so as to ground it in settled principles governing the elucidation of mutual intent is necessary. This will

ensure that the doctrine has a jurisprudential foundation in party autonomy and consent to arbitrate.

149. Although the issue before us largely concerns the application of the group of companies doctrine in the Indian context, this Court cannot be

oblivious to the changing currents in the international arbitration jurisprudence. In deciding the contours of the group of companies doctrine, we have

reiterated the general legal proposition that non-signatory persons or entities can also be bound by an arbitration agreement. The basis for such joinder

stems from the harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act. Since the scope of this judgment was limited to the

group of companies doctrine, any authoritative determination given by this Court in the course of this judgment should not be interpreted to exclude the

application of other doctrines and principles for binding non-signatories to arbitration agreements. However, we also need to be mindful of the fact that

the Indian courts and tribunals should not adopt an overzealous approach to extending the jurisdiction of arbitral tribunals to non-signatory parties

merely on the ground that they are part of a corporate group.

150. In Cheran Properties (supra), this Court found the non-signatory to be $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$ the signatory party to the arbitration

agreement and not as a $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "party $\tilde{A}\phi\hat{a},\neg$ to the arbitration agreement. In that case, this Court was dealing with an issue pertaining to enforcement of an

arbitral award. On the available facts and circumstances, the Court held that the non-signatory was a nominee of the signatory party under the

underlying commercial contract, and therefore was acting in a derivative capacity. In Canara Bank (supra) this Court indirectly adopted the principle

of estoppel to bind the non-signatory on the basis that it had already participated in the judicial proceedings before the High Court, and cannot

subsequently deny being a party to the proceedings before the arbitral tribunal. In Discovery Enterprises (supra), this Court remanded the matter back

to the arbitral tribunal to decide afresh the application for discovery and inspection by applying the group of companies doctrine. Therefore, we can

conclude that the observations pertaining to the group of companies doctrine were rendered in the facts and circumstances of each case. We have

harmonized the divergent strands of law emanating from these judgments in the preceding paragraphs.

151. In Law's Empire, Ronald Dworkin proposed a hypothetical where a group of novelists write a novel seriatim, each novelist interpreting the

chapters given to them to write a new chapter. [Ronald Dworkin, Lawââ,¬â,,¢s Empire (Belknap Press, Harvard University Press 1986) 229.] The

novelists are expected to $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "take their responsibilities of continuity more seriously $\tilde{A}\phi\hat{a}$, \neg to create $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ " a single unified novel that is the best it can be. $\tilde{A}\phi\hat{a}$, \neg

[lbid.] Chloro Controls (supra) was the first chapter in the group of companies doctrine in Indian arbitration jurisprudence. The series of subsequent

judgments starting from Cheran Properties (supra) and ending with Cox and Kings (supra) were the incremental chapters - each adding further

dimensions to the theory already propounded in the previous chapters. In this case, we have added another chapter to the theory of group of

companies doctrine. Our aim was to make further progress in the course of evolution of arbitration law. In the process, we have tweaked the plotline

to make the novel a more coherent read, instead of rewriting or discarding the previous chapters.

iii. Power of the Courts to issue directions under Section 9

152. In Cox and Kings (supra), Chief Justice Ramana observed that establishing the group of companies doctrine in the phrase \tilde{A} ¢â,¬Å"claiming through or

under \tilde{A} ¢ \hat{a} ,¬ creates an anomalous situation where a party \tilde{A} ¢ \hat{a} ,¬ \hat{A} "claiming through or under \tilde{A} ¢ \hat{a} ,¬ could be referred to an arbitration agreement, but would not

have a right to seek relief under Section 9 of the Arbitration Act. Section 9 allows a $\tilde{A}\phi\hat{a},\neg \mathring{A}$ "party $\tilde{A}\phi\hat{a},\neg$ to approach the court to seek interim measures such

as appointment of a guardian for a minor or person of unsound mind, custody or sale of any goods which are the subject matter of the arbitration

agreement, and appointment of receiver.

153. The group of companies doctrine is based on determining the mutual intention to join the non-signatory as a ââ,¬Å"veritableââ,¬â€≀ party to the arbitration

agreement. Once a tribunal comes to the determination that a non-signatory is a party to the arbitration agreement, such non-signatory party can apply

for interim measures under Section 9 of the Arbitration Act. Establishing the legal basis for the application of the group of companies doctrine in the

definition of $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "party $\tilde{A}\phi\hat{a}, \neg \hat{a} \in \mathcal{C}$ under Section 2(1)(h) read with Section 7 of the Arbitration Act resolves the anomality pointed out by Chief Justice Ramana.

G. The standard of determination at the referral stage - Sections 8 and 11

154. The last but not the least issue that arises for our consideration pertains to the stage of applicability of the group of companies doctrine under the

Arbitration Act. In Cox and Kings (supra), Chief Justice Ramana observed that there is a need to have a relook at the scope of judicial reference at

the stage of Sections 8 and 11 of the Arbitration Act considering the ambit of the unamended Section 2(1)(h). Section 5 of the Arbitration Act

provides that $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ "no judicial authority shall intervene except where so provided in this Part. $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ "no judicial authority shall intervene except where so provided in this Part. $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ "so provided $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ "so contained in

Sections 8 and 11 which mandate the courts to refer the parties to arbitration. Under Section 8, the court has to $\tilde{A}\phi\hat{a},\neg\hat{A}$ "prima facie $\tilde{A}\phi\hat{a},\neg$ ascertain the

existence of a valid arbitration agreement before referring the parties to arbitration. Section 11 empowers the Supreme Court and High Courts to

appoint arbitrators on the failure of the parties to comply with the agreed arbitration procedure. Section 11 could be invoked in situation where a

dispute has arisen and one of the parties to the arbitration agreement unsuccessfully invoked the agreed procedure for the appointment of an arbitrator

due to the non-cooperation of the other party.

155. In SBP & Co v. Patel Engineering Ltd.,122 a seven-Judge Bench of this Court was called upon to determine the scope of the powers of the

Chief Justice or their designate under Section 11 of the Arbitration Act. It was held that the Chief Justice or the designated judge will have the powers

to determine the jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence of a live claim, the existence of the

condition for the exercise of their powers, and the qualifications of the arbitrators. Furthermore, it was held that the Chief Justice has to decide

whether there is an arbitration agreement as defined under the Arbitration Act and whether the person who has made a request is party to such an

agreement.

156. In 2015, the Arbitration Act was amended to insert Section 11(6-A). The said provision reads as follows:

 \tilde{A} ¢â,¬Å"(6A) The Supreme Court, or as the case may be, the High Court, while considering any application under sub-section (4) or subsection (5) or

(sub-section (6), shall, notwithstanding any judgment, decree, or order of any Court, confine to the examination of the existence of an arbitration

agreement.ââ,¬â€<

By virtue of non-obstante clause, Section 11(6A) has set out a new position, which takes away the basis of the position laid down in Patel Engineering

(supra). In 2019, the Parliament passed the Arbitration and Conciliation (Amendment) Act, 2019 omitting Section 11(6-A). However, the amendment

to Section 11(6-A) is yet to be notified. Till such time, Section 11 as amended in 2015 will continue to remain in force.

157. When deciding the referral issue, the scope of reference under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to

look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the existence of the examination of

an arbitration agreement.

158. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the

arbitral tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement.

Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal. [Uttarakhand Purv

Sainik Kalyan Nigam Ltd. v. Northern Coal Field, (2020) 2 SCC 455] The doctrine of competence-competence is intended to minimize judicial

intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence

of the arbitral tribunal.

159. In Vidya Drolia (supra), Justice N.V. Ramana (as the learned Chief Justice then was) held that the amendment to Section 8 rectified the

shortcomings pointed out in Chloro Controls (supra) with respect to domestic arbitration. He further observed that the issue of determination of parties

to an arbitration agreement is a complicated exercise, and should best be left to the arbitral tribunals:

 \tilde{A} ¢â,¬Å"239. [\tilde{A} ¢â,¬Â'] Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good

faith, etc. in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8

on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.ââ,¬â€€

160. In Pravin Electricals Pvt Ltd. v. Galaxy Infra and Engineering Pvt Ltd., (2021) 5 SCC 671 a Bench of three Judges of this Court was called upon

to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the

Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court

prima facie opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties. Therefore, the

issue of existence of a valid arbitration agreement was referred to be decided by the arbitral tribunal after conducting a detailed examination of

documentary evidence and cross-examination of witnesses.

161. The above position of law leads us to the inevitable conclusion that at the referral stage, the court only has to determine the prima facie existence

of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal. The referral court

should not unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction. In Shin-Etsu

Chemical Co Ltd. v. Aksh Optifibre Ltd. (2005) 7 SCC 234, this Court observed that there are distinct advantages to leaving the final determination on

matters pertaining to the validity of an arbitration agreement to the tribunal:

74. [$\tilde{A}\phi\hat{a}, \neg\hat{A}i$] Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon

purely a prima facie view, nothing prevents the arbitrator from trying the issue fully rendering a final decision thereupon. If the arbitrator finds the

agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid,

inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceedings to arbitration, and the

arbitrator after fully trying the issue has found that there is no scope for arbitration.ââ,¬â€€

162. In Chloro Controls (supra), this Court held that it is the legislative intent of Section 45 of the Arbitration Act to give a finding on whether an

arbitration agreement is \tilde{A} ¢ \hat{a} ,¬ \dot{A} "null and void, inoperative and incapable of being performed \tilde{A} ¢ \hat{a} ,¬ before referring the parties to arbitration. In 2019, the

expression $\tilde{A}\phi\hat{a}$, $-\hat{A}$ "unless it prima facie finds $\tilde{A}\phi\hat{a}$, - was inserted in Section 45. In view of the legislative amendment, the basis of the above holding of Chloro

Controls (supra) has been expressly taken away. The present position of law is that the referral court only needs to give a prima facie finding on the

validity or existence of an arbitration agreement.

163. In Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar (2011) 11 SCC 375, a two-Judge Bench of this Court held that when a third party is

impleaded in a petition under Section 11(6) of the Arbitration Act, the referral court should delete or exclude such third party from the array of parties

before referring the matter to the tribunal. This observation was made prior to the decision of this Court in Chloro Controls (supra) and is no longer

relevant in light of the current position of law. Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the

referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the arbitral

tribunal to decide whether the nonsignatory is bound by the arbitration agreement.

164. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a

signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory

party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence

of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a

determination, the referral court should leave it for the arbitral tribunal to decide whether the nonsignatory party is indeed a party to the arbitration

agreement on the basis of the factual evidence and application of legal doctrine. The tribunal can delve into the factual, circumstantial, and legal

aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the tribunal should comply with the

requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the

arbitral tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true

parties to an arbitration agreement to be decided by arbitral tribunal under Section 16.

- H. Conclusions
- 165. In view of the discussion above, we arrive at the following conclusions:
- a. The definition of $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "parties $\tilde{A}\phi\hat{a}, \neg$ under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory

parties;

- b. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;
- c. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;
- d. Under the Arbitration Act, the concept of a $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "party $\tilde{A}\phi\hat{a}$, \neg is distinct and different from the concept of $\tilde{A}\phi\hat{a}$, $\neg \hat{A}$ "persons claiming through or under $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$

party to the arbitration agreement;

e. The underlying basis for the application of 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 nonsignatory party to the arbitration agreement;

- f. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine;
- g. The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h)

along with Section 7 of the Arbitration Act;

h. To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in

Discovery Enterprises (supra). Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine;

- i. The persons ââ,¬Å"claiming through or underââ,¬â€ can only assert a right in a derivative capacity;
- j. The approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies doctrine to the phrase $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "claiming through

or underââ,¬â€ is erroneous and against the well-established principles of contract law and corporate law;

k. The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the

parties in the context of complex transactions involving multiple parties and multiple agreements;

I. At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration

agreement; and

m. In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be

interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.

166. We answer the questions of law referred to this Constitution Bench in the above terms. The Registry shall place the matters before the Regular

Bench for disposal after obtaining the directions of the Chief Justice of India on the administrative side.

Index

A. Introduction

 \tilde{A} ¢â,¬Â¦ \tilde{A}

B. Civil Remedy and Arbitration

碉,¬ÂŀÁ¢â,¬ÂŀÁ¢ã,¬Âh¢ã,

i. Arbitration Agreement is a Contract

 $\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat{A}|\tilde{A}\phi\hat{a},\neg\hat$

ii. Section 7(4)(b)

 $\tilde{A}\phi\hat{a}, \neg\hat{A}\dot{i}\tilde{A}\phi\hat{a}, \neg\hat{A}\dot{i}\tilde{A}$

C. Group of Companies Doctrine

 $\bar{A}\phi\hat{a}, \neg \hat{A}i\bar{A}\phi\hat{a}, \neg \hat{A}i\bar{A}\phi\hat{a},$

i. International Perspectives

碉,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ¢â,¬ÂŀÁ

- ii. Indian Precedents on the Group of Companies Doctrine ââ,¬Â¦
- D. Group of Companies Doctrine in the Context of Section 7 ââ,¬Â¦

E. Conclusion

 $\tilde{A}\phi\hat{a}, \neg\hat{A}\tilde{I}\tilde{A}\phi\hat{a}, \neg\hat{A}\tilde{I}\tilde{A}$

P.S. Narasimha, J

A. Introduction

1. The reference to this Constitution Bench is for an authoritative determination of the applicability of the $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}\omega$ Group of Companies doctrine $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ to

proceedings under the Arbitration and Conciliation Act, 1996 [Hereinafter referred to as the Act], and if found to be applicable and statutorily

anchored, to delineate its precise contours.

2. In the reference order, Chief Justice N.V. Ramana highlighted the variations in the exposition and application of the doctrine as it has evolved in

India. He questioned the statutory source of the doctrine in the phrase $\tilde{A}\phi\hat{a}, \neg A$ "claiming through or under $\tilde{A}\phi\hat{a}, \neg$, which appears in Sections 8 and 45 of the

Act. He also cautioned that maintaining the separate legal identities of members within the same group of companies is a fundamental principle of

corporate and contract law. In this light, the specific questions formulated and referred to this Constitution Bench by Chief Justice N.V. Ramana, [For

himself and for Justice A.S. Bopanna] are as follows:

 \tilde{A} ¢â,¬Å"(a) Whether phrase \tilde{A} ¢â,¬Å"claiming through or under \tilde{A} ¢â,¬ in Sections 8 and 11 [The phrase \tilde{A} ¢â,¬Å"claiming through or under \tilde{A} ¢â,¬ does not appear in Section

11. Rather, the reference to Section 11 must be read as Section 45 that contains this phrase] could be interpreted to include $\tilde{A}\phi\hat{a}, -\tilde{A}$ "Group of

Companiesââ,¬â€ doctrine?

(b) Whether the ââ,¬Å"Group of Companiesââ,¬ doctrine as expounded by Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water

Purification Inc., (2013) 1 SCC 641 [2012 INSC 436].] and subsequent judgments are valid in law? \tilde{A} ¢ \hat{a} , \neg [Cox and Kings Ltd v. SAP India Pvt Ltd,

(2022) 8 SCC 1, para 54 [2022 INSC 523].]

3. Justice Surya Kant concurred with Chief Justice Ramana and supplemented his reasons for reference. At the outset, he emphasised the need to

retain the doctrine in India to keep pace with the complexity of multi-party business transactions, where certain persons do not formally sign the

contract but are involved in its negotiation and performance. Especially in India, with large number of family-run business groups, he expressed that

the inclusion of the non-signatory company is essential for effective and complete dispute resolution through arbitration. However, he also indicated

the need to iron out inconsistencies in the formulation of the doctrine. He questioned the reliance on equity considerations and $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}$ cosingle economic

reality $\tilde{A}\phi\hat{a}$, $\neg\hat{a}$, ϕ to determine non-signatories to be parties, as these undermine well-entrenched principles of party autonomy and separate legal entity. In

this light, for an authoritative determination of the contours of the doctrine, he framed the following questions:

 \tilde{A} ¢â,¬Å"(a) Whether the Group of Companies doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent

of any statutory provision?

- (b) Whether the Group of Companies doctrine should continue to be invoked on the basis of the principle of $\tilde{A}\phi\hat{a},\neg\hat{A}$ "single economic reality $\tilde{A}\phi\hat{a},\neg\hat{a}$ " \hat{A} " is included as $\hat{A}\phi\hat{a},\neg\hat{A}$."
- (c) Whether the Group of Companies doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the

parties?

(d) Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies doctrine into operation

even in the absence of implied consent?ââ,¬â€ [ibid, para 104.]

4. I have had the advantage of going through the erudite and comprehensive opinion of the learned Chief Justice. While I agree with his reasoning and

conclusions, I consider it necessary to supplement them with my own reasoning on some important aspects. The broad question before us relates to

the $\tilde{A}\phi\hat{a}$, $\neg \ddot{E}$ coparties' to an $\tilde{A}\phi\hat{a}$, $\neg \ddot{E}$ coarbitration agreement $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ . This question must take us to Section 7 of the Act that defines an $\tilde{A}\phi\hat{a}$, $\neg \ddot{E}$ coarbitration agreement $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ as

under:

 $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "7. Arbitration agreement. $\tilde{A}\phi\hat{a}, \neg$ "(1) In this Part, $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "arbitration agreement $\tilde{A}\phi\hat{a}, \neg$ 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 inââ,¬
- (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.ââ,¬â€€

5. It is evident from the above-referred statutory prescription that an $\tilde{A}\phi\hat{a},\neg\ddot{E}$ cearbitration agreement $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ is described in sub-section (1) of Section 7 as,

 \tilde{A} ¢â,¬Å"an agreement by the parties \tilde{A} ¢â,¬. Both these expressions, \tilde{A} ¢â,¬ \tilde{E} æagreement \tilde{A} ¢â,¬â,¢ and \tilde{A} ¢â,¬ \tilde{E} æparties' are important for our consideration. For a proper

understanding of these expressions, it is necessary to examine the place of arbitration as a dispute redressal mechanism in the larger body of

institutional remedies in civil law.

- B. Civil Remedy and Arbitration
- 6. In our legal system, access to civil courts is a standard judicial remedy. Civil courts have the jurisdiction to try all civil suits, and any agreement to

restrict the remedy is declared void under Section 28 of the Indian Contract Act, 1872. However, exceptions to Section 28 save a \tilde{A} ¢â,-Å"contract to

refer to arbitration $\tilde{A} \notin \hat{a}$, any dispute that has arisen or may arise between two or more persons. Thus, a restriction on accessing civil remedy is saved

under Section 28 of the Contract Act, if there is a contract to arbitrate.

Section 9 of the Code of Civil Procedure, 1908 reads:

 $\tilde{A}\phi\hat{a}, \neg \mathring{A}$ "9. Courts to try all civil suits unless barred. $\tilde{A}\phi\hat{a}, \neg$ "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a

civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Explanation I. \tilde{A} ¢ \hat{a} ,¬"A suit in which the right to property or to

an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or

ceremonies.

Explanation II. $\tilde{A} \notin \hat{a}, \neg$ "For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or

whether or not such office is attached to a particular place.ââ,¬â€€

Hereinafter the ââ,¬ËœContract Actââ,¬â,¢. The relevant portion of Section 28, Indian Contract Act, 1872 reads:

ââ,¬Å"28. Agreements in restraint of legal proceedings, void. ââ,¬"Every agreement, ââ,¬

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in

the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or (b) which extinguishes the rights of any party thereto, or

discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from

enforcing his rights, is void to that extent.ââ,¬â€∢

9 The relevant portion of Section 28, Indian Contract Act, 1872 reads:

ââ,¬Å"Exception 1. ââ,¬"Saving of contract to refer to arbitration dispute that may arise. ââ,¬"This section shall not render illegal a contract, by

which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to

arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2. $\tilde{A}\phi\hat{a}, \neg$ "Saving of contract to refer questions that have already arisen.

 \tilde{A} ¢â,¬"Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them

which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.ââ,¬â€€

7. A $\tilde{A}\phi\hat{a}, \neg \tilde{E}$ contract $\tilde{A}\phi\hat{a}, \neg \hat{a}, \phi$ is defined under the Contract Act as an agreement enforceable by law. Agreement is formed when a promise or mutual

promises (defined in Section 2(b)) are reciprocated with a consideration (defined in Section 2(d)), and these promises can either be express (when its

proposal or acceptance is in words) or implied (when its proposal or acceptance is otherwise than in words). An agreement is legally enforceable as a

contract if it is formed with the free consent of parties who are competent to contract, for a lawful consideration and lawful object.

Section 2(h) of the Indian Contract Act, 1872 reads:

ââ,¬Å"(h) An agreement enforceable by law is a contract;ââ,¬â€€

Section 2(e), Indian Contract Act 1872 reads:

ââ,¬Â"(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;ââ,¬â€ €

Section 2(b), Indian Contract Act 1872 reads:

 \tilde{A} ¢â,¬Å"(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted,

becomes a promise;ââ,¬â€∢

- i. Arbitration Agreement is a Contract
- 8. An arbitration agreement is more specifically defined in Section 7(1) of the 1996 Act as an $\tilde{A} \not \in \hat{a}, \neg \hat{A}$ "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.ââ,¬â€≀ The

use of the phrase $\tilde{A}\phi\hat{a}$, $\neg \tilde{E}$ cowhether contractual or not $\tilde{A}\phi\hat{a}$, $\neg \hat{a}$, ϕ qualifies the dispute, not the agreement; an arbitration agreement must always be a contract, but

the dispute that is referred to arbitration need not necessarily be contractual, suffice it to be arising out of a $\tilde{A}\phi\hat{a},\neg\hat{A}$ defined legal relationship $\tilde{A}\phi\hat{a},\neg$. [Vidya

Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, para 24 [2020 INSC 697]; Gemini Bay Transcription Pvt Ltd v. Integrated Sales Service Ltd,

(2022) 1 SCC 753, para 30 [2021 INSC 392]]

9. Arbitration Agreement must be in writing, as against an oral agreement. However, it need not be signed document: India has adopted the

UNCITRAL model [UNCITRAL Model Law on International Commercial Arbitration, 1985.] which lays emphasis on the substance of an

agreement, rather than its form, to determine the existence of the agreement to arbitrate. Sub-Section (2) of Section 7 incorporates this principle and

recognises an agreement, either in the form of an arbitration clause in the contract or in the form of a separate agreement.

10. Section 7(3) mandates that an arbitration agreement shall be in writing, meaning that the arbitration agreement must be in express terms.

Subsequently, Section 7(4) declares that an arbitration agreement $\tilde{A}\phi\hat{a},\neg \mathring{A}$ is in writing $\tilde{A}\phi\hat{a},\neg$ if it is contained in : (a) a document signed by the parties; (b)

exchange of correspondence that provides the record of the agreement; and (c) admission in the proceedings, i.e., the statement of claim and defence.

It is evident from the deliberate language of Section 7 that the arbitration agreement must be in a written form, in contradistinction to an oral

agreement, and at the same time, that it is not necessary for it to be signed by the parties. [Jugal Kishore Rameshwardas v. Goolbai Hormusji, (1955)

2 SCR 857, para 7 [1955 INSC 22]; Caravel Shipping Services (P) Ltd v. Premier Sea Foods Exim (P) Ltd, (2019) 11 SCC 461, para 8 [2018 INSC

1008].] A signed document containing the arbitration agreement is only one of the written forms, where the signature of the party is absolute proof for

the existence and privity of the contract.

11. Section 7 therefore comprehensively defines what an arbitration agreement is and also from where it is to be identified. The referral court under

Sections 8, 11 or 45 of the Act, or the arbitral tribunal, is the forum that identifies and deciphers the existence of an arbitration agreement and its

parties. The real question, however, is how must the court or tribunal make this determination, particularly when a non-signatory seeks to initiate

arbitration, or is sought to be made party by a signatory. Apart from the standard methods of drawing inferences by interpreting the express language

employed in the agreement, what are the other external aids to assist the court or the arbitral tribunal in constructing the existence of the arbitration

agreement with the non-signatory, is the question that we are called upon to answer.

ii. Section 7(4)(b)

12. An arbitration agreement with non-signatories is to be inferred from the record of the agreement consisting the exchange of correspondence such

as letters, telex, telegrams, and other telecommunication and electronic communication, wherein it \tilde{A} ¢ \hat{a} ,¬ \mathring{A} "unequivocally and clearly emerge(s) that the

parties were ad idemââ,¬. [Rickmers Verwaltung Gmbh v. Indian Oil Corporation Ltd, (1999) 1 SCC 1, para 13 [1998 INSC 436].] In Rickmers

Verwaltung Gmbh v. Indian Oil Corporation Ltd. [ibid; also see MTNL v. Canara Bank, (2020) 12 SCC 767, para 9.3 [2019 INSC 881].], this Court

referred to the role of courts while considering the existence of an arbitration agreement as under:

 \tilde{A} ¢â,¬Å"12. \tilde{A} ¢â,¬Å'The question, however, is : can any agreement be spelt out from the correspondence between the parties in the instant case?

13. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive

at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the

court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar

as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge

that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through

correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the

intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be

gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting

of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a

binding contract was capable of being spelt out from the correspondence.

14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached

between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In

the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be

said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between

the parties and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence relied

upon by the learned Single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that

the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and

entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were

completed giving rise to a binding contractââ,¬Â¦Ã¢â,¬â€€

Further in Babanrao Rajaram Pund v. Samarth Builders and Developers (2022) 9 SCC 691 [2022 INSC 935], this Court held:

 \tilde{A} ¢â,¬Å"29. It is thus imperative upon the courts to give greater emphasis to the substance of the clause, predicated upon the evident intent and objectives

of the parties to choose a specific form of dispute resolution to manage conflicts between them. The intention of the parties that flows from the

substance of the agreement to resolve their dispute by arbitration are to be given due weightage. It is crystal clear to us that Clause 18, in this case,

contemplates a binding reference to arbitration between the parties and it ought to have been given full effect by the High Court.ââ,¬â€○

The parties must mutually intend to refer their differences to arbitration as consent is the source of the arbitral tribunal's jurisdiction over them. [KK

Modi v. KN Modi, (1998) 3 SCC 573, para 17 [1998 INSC 63]; Bihar State Mineral Development Corporation v. Encon Builders (I) Pvt Ltd, (2003) 7

SCC 418, para 13 [2003 INSC 409]]

13. The settled jurisprudence under Section 7(4)(b) is that the non-signatory's consent to an arbitration agreement can be made out from its conduct by

way of exchange of letters, telegrams and other forms of written communication. [Shakti Bhog Foods v. Kola Shipping Ltd, (2009) 2 SCC 134, para

17 [2008 INSC 1081]] These correspondences constitute the written record of the agreement. In Smita Conductors v. Euro Alloys (2001) 7 SCC 728

[2001 INSC 417], this Court was tasked with determining whether certain correspondences by the appellant therein, that were not addressed to the

respondent, showed the appellant's consent to arbitration as per the Article II(2) of the New York Convention, under the Foreign Awards

(Recognition and Enforcement) Act, 1961. The Court noted that the contracts containing the arbitration clause were not signed by the appellant, nor

were there any letters or telegrams between the appellant and respondent where the appellant expressly assented to these contracts. Rather, it relied

on correspondences by the appellant to a bank where it acted in pursuance of the terms of the contract, as providing a record of the arbitration

agreement. [ibid, paras 6-7] Therefore, even in the absence of a signature, the non-signatory's consent to arbitration can be gathered from its written

correspondence (even with third parties) that shows its conduct pursuant to the contract containing the arbitration agreement.

14. This principle has been consistently applied by the Court to determine whether the non-signatory is a party to an arbitration agreement in

accordance with Section 7(4)(b). [Unissi (India) Pvt Ltd v. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107 [2008

INSC 1111]; Powertech World Wide Ltd v. Delvin international General Trading LLC, (2012) 1 SCC 361 [2011 INSC 799]; Govind Rubber v. Louids

Dreyfus Commodities Asia Pvt Ltd, (2015) 13 SCC 477 [2014 INSC 1042].] Our courts and tribunals have sufficiently developed the interpretive tools

to determine the intention of the parties to refer disputes to arbitration by construing the express language in the correspondence. It has also been held

that once the terms of the contract show that there is an intention to refer disputes to arbitration, parties cannot $\tilde{A}\phi\hat{a}, \neg A$ "wriggle out $\tilde{A}\phi\hat{a}, \neg$ of the arbitration

agreement. [Unissi (India) (supra), paras 16-19; Govind Rubber (supra), paras 21-22.]

15. Having considered the statutory scheme and also the consistent approach of this Court in interpreting and construing the existence or lack of

intention to arbitrate, the following principle can be restated:

i. An arbitration agreement is a contract. It must meet the requirements of an agreement enforceable by law under the Indian Contract Act, 1872.

[Vidya Drolia (supra), para 21.]

ii. Section 7(2) of the Arbitration and Conciliation Act, 1996 recognises the existence of an arbitration agreement in substance, rather than in form.

[Nimet Resources Inc v. Essar Steels Ltd, (2000) 7 SCC 497, para 5; Babanrao Rajaram Pund (supra), paras 15 and 29.] The agreement may be in

the form of an arbitration clause in a contract or it may be in the form of a separate agreement.

iii. Section 7(3) mandates that the arbitration agreement shall be in writing, as against an oral agreement. However, the written form of the document

evidencing the agreement need not be signed by the parties. [Jugal Kishore Rameshwardas (supra), para 7; Rickmers Verwaltung Gmbh (supra), para

12; Shakti Bhog Foods Ltd (supra), para 17; Caravel Shipping Services (P) Ltd (supra), para 8.]

iv. $\tilde{A}\phi\hat{a},\neg\tilde{E}$ eParty $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ is defined in Section 2(1)(h) as $\tilde{A}\phi\hat{a},\neg\hat{A}$ a party to an arbitration agreement $\tilde{A}\phi\hat{a},\neg$. The determination of the arbitration agreement and its

parties are inextricably connected with one another, their existence is based on the written agreement.

v. If the arbitration agreement is evidenced in the written form as contained in a document signed by the parties (Section 7(4)(a)), the parties to the

agreement are evidently those who have signed the agreement.

vi. If the arbitration agreement is evidenced in the written form as contained as admissions in pleadings comprising statements of claim and defence

(Section 7(4)(c)), parties to this agreement would be evident from the statements of claim and defence and the admissions made therein.

vii. The arbitration agreement may also be in writing if it is contained in the record of the agreement comprising exchange of letters, telegrams

or other means of telecommunication including communication through electronic means (Section 7(4)(b)). In these instances, parties to the agreement

as well as the existence of the arbitration agreement is a matter of interpretation and construction by the referral court or arbitral tribunal. The inquiry

under Section 7(4)(b) is to determine whether there exists an agreement for referring the matter to arbitration, and who are the parties to such an

agreement.

viii. The referral court or the arbitral tribunal, while considering the claim of a non-signatory for reference, or the objection of a non-signatory to the

inclusion in an arbitration, will primarily examine the record of agreement under Section 7(4)(b) and consider the express language employed by the

parties.

ix. Once the express terms are ascertained, [Rickmers Verwaltung Gmbh (supra), para 13; MTNL v. Canara Bank (supra), para 9.3.] their meaning

is a matter of construction by the court or arbitral tribunal. The object of such construction is to discover the intention of the parties. [Bangalore

Electricity Supply Company Ltd (BESCOM) v. E.S. Solar Power Pvt Ltd (2021) 6 SCC 718, paras 16 and 17; Food Corporation of India v. Abhijit

Paul 2022 SCC OnLine SC 1605, para 27 [2022 INSC 1216]; Lewison, The Interpretation of Contracts (6th edn, Sweet and Maxwell 2016) para 2.01,

27.] Intention must always be ascertained through the words actually used, for there is no intention independent of the language employed by the

parties.

x. For the purpose of ascertaining the true meaning of the express words, the court or tribunal may also look into the surrounding circumstances such

as the nature and object of the contract, [Bank of India v. K. Mohandas (2009) 5 SCC 313, para 28 [2009 INSC 417].] and conduct of the parties

during the formation, implementation, and discharge of the contract. [Godhra Electricity Co Ltd v. State of Gujarat (1975) 1 SCC 199, paras 11, 16

[1974 INSC 174]; McDermott International Inc v. Burn Standard Co Ltd (2006) 11 SCC 181, para 112 [2006 INSC 326].] Trade practices also

assume importance in determining the meaning of the language employed by the parties. [ONGC v. Saw Pipes Ltd (2003) 5 SCC 705, para 13 [2003

INSC 241].] While interpreting the contract, courts or tribunals adopt well-established principles of construction. These principles are in the nature of

guidelines for the court to presume the intention of the parties.

xi. As the arbitration agreement is confined to a written document contained in the material specified in Section 7(4)(b) and the interpretation and

construction is based on its text, Sections 91 and 92 of the Indian Evidence Act, 1872 disable adducing of oral evidence. [See Roop Kumar v. Mohan

Thedani (2003) 6 SCC 595, paras 13, 16-18 [2003 INSC 206].] This is necessary to prevent a referral proceeding from being converted into a full-

fledged trial. If the arbitration agreement cannot be deduced from the record of agreement as provided in Section 7(4)(b), the inquiry must conclude.

This approach is in consonance with the requirement of a written agreement and also subserves the important policy consideration as surmised in

Section 5 of the Act.

16. It is in the context of the above referred legal regime, statutory as well as precedential, that we need to consider the questions referred to this

Constitution Bench - whether the Group of Companies Doctrine is part of Indian arbitration jurisprudence and whether it has any statutory basis.

- C. Group of Companies Doctrine
- i. International Perspectives

17. I am in complete agreement with the opinion of the learned Chief Justice, who has in his scholarly exposition considered this matter in great detail.

He has examined the precedents on the applicability of the doctrine in France, England, Switzerland, and the USA.

18. The Group of Companies Doctrine was formulated and initially applied by international arbitral tribunals to determine whether a person who has

not formally signed an arbitration agreement can be made party to it. It is one of the various legal theories used to determine whether a non-signatory

is a party to the arbitration agreement. Before we proceed to the doctrine itself, it may be relevant for us to briefly set out the other legal bases, so as

to locate the doctrine in the broader jurisprudence on nonsignatories being a party.

19. The legal bases for making a non-signatory a party can be classified as consensual and non-consensual. The consensual theories that are focused

on determining the mutual intent of the parties include agency, implied consent, and assignment and transfer of contractual rights, and the non-

consensual theories that are based on equity considerations include alter ego/piercing the corporate veil, estoppel, succession, and apparent authority.

[Gary Born, International Commercial Arbitration, vol 1 (3rd edn, Kluwer Law International 2021) 1531.] The formulation of these principles, whether

consensual or non-consensual, is not new. They are derived from general principles of contractual law and corporate law. [ibid 1525.]

20. The Group of Companies doctrine was formulated and theorised exclusively in international arbitration jurisprudence to specifically determine

whether a company which is a non-signatory is party to the arbitration agreement. Gary Born clarifies that this principle is not evoked outside the

context of arbitration. [ibid 1559.]

- 21. With this background, I will now discuss the doctrine along with other considerations and legal tests that guide its application.
- 22. The doctrine was first developed by a French arbitral tribunal in an interim award by the International Chamber of Commerce in Dow Chemical v.

Isover Saint Gobain ICC Case No. 4131, 23 September 1982.. In this case, Dow Chemical A.G. and Dow Chemical Europe (fully-owned subsidiaries

of Dow Chemical Company (USA)) were signatories to two separate agreements containing arbitration clauses with Isover Saint Gobain. Dow

Chemical France, a non-signatory to these agreements but a member of the Dow group, effectuated the deliveries under these agreements. When

disputes arose and Isover instituted suits in the French courts against all four Dow companies, both the signatory and the non-signatory Dow

companies instituted arbitral proceedings. Isover objected to the arbitral tribunal's jurisdiction to render an award with respect to Dow Chemical

France and Dow Chemical Company (USA), as they were non-signatories. On the other hand, the non-signatory companies argued that they can

invoke arbitration due to their involvement in the conclusion and performance of these contracts, and by virtue of them being in the same group of

companies.

23. The Arbitral Tribunal applied French law to determine whether the non-signatories are parties ââ,¬Å"by reference to the common intent of the

parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterize the performance and later the

termination of the contracts in which they appearââ,¬. It held that Dow Chemical France and Dow Chemical Company (USA) were central to the

negotiation and conclusion of both contracts. Further, they were also involved in the performance of the contracts and their subsequent termination

since Dow Chemical France effected the deliveries and Dow Chemical Company (USA) owned the trademarks for the goods and also exercised

absolute control over its subsidiaries. Relying on these facts, the Tribunal concluded that both companies participated in the conclusion, performance,

and termination of the contracts. It held:

 \tilde{A} ¢â,-Å"Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same

economic reality (une r $\tilde{A}f\hat{A}$ ©alit $\tilde{A}f\hat{A}$ © $\tilde{A}f\hat{A}$ ©conomique unique) of which the arbitral tribunal should take account when it rules on its own

jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules.

Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other

companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in

accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have

been principally concerned by them and the disputes to which they may give rise.ââ,¬â€¹ ibid.

24. From the above extracts, it is clear that membership in the same group of companies or $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "same economic reality $\tilde{A}\phi\hat{a}, \neg \hat{A}$ " were neither the sole nor the

guiding factors to hold that the non-signatory companies were parties. Rather, the Tribunal's emphasis was on the mutual intent of the parties,

gathered from their conduct in the conclusion, performance, and termination of the contracts. [Also see Born (supra) 1561; Bernard Hanotiau,

 $\tilde{A}\phi\hat{a},\neg\tilde{E}$ \tilde{C} Chapter 14: Group of Companies in International Arbitration $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ in Loukas A. Mistelis and Julian D.M. Lew (ed), Pervasive Problems in

International Arbitration, vol 15 (Kluwer Law International 2006), 286.]

25. The subsequent exposition and application of the doctrine by French arbitral tribunals and courts also largely reflects a focus on mutual intent,

rather than mere membership in the same group, which has been held to be insufficient in and of itself to make the non-signatory a party. [Born

(supra) 1562-1563.] In Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan, the Paris Court of

Appeal enforced the arbitral award against the Pakistan government (non-signatory) as its conduct through involvement in the negotiation and

performance of the contract reflected common will to be a party to the arbitration. [Case No. 9-28533, dated 17 February 2011 (Paris Cour

 $d\tilde{A}\phi\hat{a}, -\hat{a}, \phi Appel$).] Common will must be ascertained according to the principles of good faith (parties must not be allowed to evade commitments) and

effectiveness (when parties insert an arbitration clause, it must be presumed that their intent is to be governed by the arbitration). [Malakoff

Corporation Berhad and TLEMCEN Desalination Investment Company v. Algerian Energy Company SA and Hyflux Limited, Case No. 21-07296,

dated 13 June 2023 (Paris Cour dââ,¬â,,¢Appel).]

26. The focus on mutual intention reflects a fundamental difference between the Group of Companies doctrine and $\tilde{A}\phi\hat{a},\neg\tilde{E}$ expiercing the veil $\tilde{A}\phi\hat{a},\neg\hat{a},\phi$ or alter

ego. In veil-piercing, the separate legal identities of the parent and subsidiary companies are disregarded or nullified on equity and fairness

considerations (such as to prevent fraud). Application of the Group of Companies doctrine does not result in lifting the corporate veil, and is rather

based on identifying the mutual intention of the parties. [Born (supra) 1563.]

27. The doctrine has not been accepted in the same terms across the world.

28. In UK, in Peterson Farms Inc v. C&M Farming Ltd. [[2004] EWHC 121 (Comm); Mayor and Commonalty & Citizens of the City of London v.

Ashok Sancheti, [2008] EWCA Civ 1283.], the Court rejected the applicability of the doctrine in English law. The separate legal identities of the

parent and subsidiary companies is held to be a fundamental legal tenet. [Bank of Tokyo Ltd v. Karoon, [1987] AC 45.] In the Dallah case, the UK

Supreme Court differed from the Paris Court of Appeal on enforcing the arbitral award against the Government of Pakistan (non-signatory). Even

after applying French law to determine when a non-signatory is a party, based on the material before it, the Court held there was no mutual intention in

this case to make the Government of Pakistan a party. [[2010] UKSC 46.] Similarly, in Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait),

[[2021] UKSC 48.] the UK Supreme Court did not enforce the arbitral award against the non-signatory company as there was no material to show

that it was a party as per the terms of the contract.

29. Similarly, Singapore courts have also rejected the applicability of the Group of Companies doctrine by emphasising the fundamental corporate law

principle of separate legal identities. [Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd [2014] SGHC 181.]

30. Swiss courts, on the other hand, have allowed for nonsignatories to be made party to the arbitration agreement based on their conduct, manifesting

implied consent. The Swiss Federal Court has held that an arbitration agreement must itself be in writing as per Article 178 of the Swiss Private

International Law Act. However, the question of whether a non-signatory is a party to such written arbitration agreement can be determined by

reference to its involvement in the preparation and performance of the contract containing the arbitration clause, which reflects its intent to be party to

such arbitration agreement. [X	et al v. Z,	4A_115/2003; A	, v. B	Ltd., 4A_376/2008; X
V				

Υ.	Engineering and Y	S.p.A., 4A	_450/2013.]

31. American courts also do not expressly rely on the Group of Companies doctrine to determine whether a non-signatory is a party. Rather, they use

principles such as equitable estoppel, assumption, piercing the corporate veil, alter ego, and waiver. [GE Energy Power Conversion France SAS Corp.,

FKA Converteam SAS v. Outokumpu Stainless USA, LLC, et al., Case No. 18-1048 (1 June 2020).] In the recent decision in GE Energy Power

Conversion v. Outokumpu Stainless, the US Supreme Court relied on equitable estoppel to hold that a non-signatory can compel arbitration where a

signatory is relying on terms of the contract to make its claim against the non-signatory. [ibid.] American courts have also relied on implied consent,

[McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co. Inc., 741 F.2d 342 (11th Cir. 1984).] third party beneficiary, [Nauru Phosphate Royalties,

Inc. v. Drago Daic Interests, Inc. 138 F.3d 160 (5th Cir. 1998).] and general contractual and agency law principles to hold that a non-signatory is a

party. [Sarhank Group v. Oracle Corp, 404 F. 3d 657 (2nd Cir. 2005).]

32. This comparative perspective makes it clear that a determination of parties to an arbitration agreement that is based on mutual intention can take

place without reference to whether the non-signatory is a part of the group of companies. In fact, Bernard Hanotiau, an international arbitration

scholar, argues that the award in Dow Chemical has been misinterpreted to give rise to the Group of Companies doctrine. Rather, he emphasises that

the real implication of Dow is that it enables us to determine whether a non-signatory is a party by reference to its conduct that reflects its consent. In

this light, he argues that any reference to a group of companies is unnecessary as membership within the same group is not a determinative factor in

the inquiry of who is a party to the arbitration agreement. [Bernard Hanotiau, $\tilde{A}\phi\hat{a}$,¬ \tilde{E} consent to Arbitration: Do We Share a Common Vision? $\tilde{A}\phi\hat{a}$,¬ \hat{a} , ϕ (2011)

27(4) Arbitration International 539.]

- 33. The conclusions from the above analysis can be succinctly put forth as follows:
- i. Various jurisdictions use both consensual and non-consensual legal principles to determine whether a nonsignatory is a party to an arbitration

agreement.[Born (supra), 1531.]

ii. The Group of Companies doctrine is applied irrespective of the distinct juridical identities of each member of the group when they share a common

economic reality by virtue of their role in the formation, performance, and termination of the contract. The principle is based on mutual intention of all

the parties to settle the dispute through arbitration. [Dow Chemical (supra).]

iii. The acceptance of the doctrine is highly contested across jurisdictions. The doctrine was developed in France and is applied there by emphasising

mutual consent of the signatory and non-signatory companies. [Dallah Real Estate (supra) [Paris Cour dââ,¬â,¢Appel]; Malakoff Corporation (supra).]

iv. On the other hand, countries like the United Kingdom [Peterson Farms (supra).] and Singapore [Manuchar Steel (supra).] have expressly rejected the doctrine and have emphasised the fundamentality of separate legal personalities of members within the same group. v. Some jurisdictions, such as Switzerland [X._____ et al v. Z.____, 4A_115/2003; A.___ 4A_376/2008; X._ _ Engineering and Y._____ S.p.A., 4A_450/2013.] and the USA, [GE Energy Power Conversion (supra); McBro v. Y.____ Planning & Dev. Co (supra); Nauru Phosphate Royalties, Inc. (supra); Sarhank Group (supra).] have not accepted the Group of Companies doctrine in those terms. However, they invoke other legal principles to hold a non-signatory to be a party to the arbitration agreement (such as conduct, implied consent, contractual and agency principles). vi. American courts also solely rely on equity considerations (non-consensual) to hold a non-signatory to be party, such as when they apply equitable estoppel and veil piercing/alter ego. [GE Energy Power Conversion (supra).] ii. Indian Precedents on the Group of Companies Doctrine 34. I will now consider the application of the Group of Companies doctrine by our courts and formulate principles that arise from the precedents. 35. I am in agreement with the detailed analysis of the Indian case-law on this doctrine by the learned Chief Justice. The position of law in India can broadly be divided as it existed before and after the decision in Chloro Controls (supra). I have already referred to the decisions interpreting and applying Section 7(4)(b) in Part B(ii) of my opinion. The decisions cited therein recognise the possibility of a non-signatory company being a party to the arbitration. I have also referred to the reasoning in those decisions where the Court has examined the record of the agreement and constructed the existence of an arbitration agreement based on the express language, coupled with the consent of the parties. 36. Two decisions of this Court which preceded Chloro Controls (supra), namely, Sukanya Holdings [Sukanya Holdings v. Jayesh H Pandya (2003) 5

SCC 531 [2003 INSC 230].] and Indowind Energy [Indowind Energy Ltd v. Wescare (India) Ltd (2010) 5 SCC 306 [2010 INSC 246].] were based

on a strict interpretation of Section 7 and considered that parties to an agreement are limited to its signatories.

37. There was a definitive shift in this position from the case of Chloro Controls v. Severen Trent (supra). Arising out of the conspectus of a multi-

party multi-contractual dispute, a petition for reference to arbitration under Section 45 of the Act was filed in a suit, despite asymmetry in the parties to

the contracts and the parties to the arbitration agreement. Interpreting the words and phrases $\tilde{A}\phi\hat{a}, \neg \hat{A}$ any person $\tilde{A}\phi\hat{a}, \neg \hat{A}$ claiming through or under $\tilde{A}\phi\hat{a}, \neg \hat{A}$ and

ââ,¬Å"shallââ,¬â€ in Section 45 of the Court, this Court enlarged the scope of reference for the first time, to bind non-signatories.

38. It noted that if a claim is made against or by someone who is not originally a signatory to an arbitration agreement, the Group of Companies

doctrine can bind the \tilde{A} ¢â,¬Å"non-signatory affiliates or sister or parent concerns \tilde{A} ¢â,¬ to arbitration, \tilde{A} ¢â,¬Å"if the circumstances demonstrate that the mutual

intention of all the parties was to bind both the signatories and the non-signatory affiliates.ââ,¬â€≀ [Chloro Controls (supra), para 71.] The Court noted in the

following words:

 \tilde{A} ¢â,-Å"72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group

of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words,

 \tilde{A} ¢â,¬Å"intention of the parties \tilde{A} ¢â,¬ is a very significant feature which must be established before the scope of arbitration can be said to include

the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases.

The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct

commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a

composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the

supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the disputeââ,¬Â¦Ã¢â,¬â€∢

(emphasis supplied)

39. In his opinion, the learned Chief Justice has considered the concern of Justice Surya Kant about an apparent contradiction between the above-

referred paragraphs 72 and 73, and has correctly reconciled the two paragraphs. I am in agreement with the same.

40. In this context, it is critical to emphasize that the Court in Chloro Controls was interpreting Section 45, in Part II of the Act, in particular, the

phrase \tilde{A} ¢â,¬Å"claiming through or under \tilde{A} ¢â,¬. The conclusion to include non-signatories to the arbitration agreement pivoted on their derivative claim to

being a party to the arbitration agreement. The Group of Companies doctrine thus found recognition in the interpretation of the phrases of Section 45

of the Act. Further, for the derivative action to pass muster, $\tilde{A}\phi\hat{a}, \neg A$ "a clear intention $\tilde{A}\phi\hat{a}, \neg A$ of the signatories and non-signatories had to be ascertained,

through the circumstances delineated by the Court, i.e., i) direct relationship with the party to the agreement, ii) commonality of subject matter, iii)

composite nature of transaction, and iv) interlinked performance of the contract.

41. In 2015, the Law Commission of India's 246th Report acknowledged this interpretation of Section 45 to the Act. In the pursuant amendments,

Section 8 in Part I of the Act was amended to mirror the language of Section 45; thus, parties in domestic arbitrations could also petition for reference

to arbitration in a derivative capacity.

The amended Section 8(1) of Arbitration and Conciliation Act 1996 reads as under:

ââ,¬Å"8. Power to refer parties to arbitration where there is an arbitration agreement.ââ,¬" (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 judgment,

decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement

exists.ââ.¬â€∢

42. We will now examine the application of the Group of Companies doctrine in the subsequent cases. In Duro Felguera, S.A. v. Gangavaram Port

Ltd. (2017) 9 SCC 729 [2017 INSC 1026], the application of the doctrine as recognised in Chloro Controls (supra) was not applied on the facts of that

case.

43. Until now, the precedents pertained to situations where the parties invoked the pre-referral jurisdiction of the courts. In Cheran Properties Ltd. v.

Kasturi and Sons Ltd. (2018) 16 SCC 413 [2018 INSC 394], the Court was approached at the enforcement stage. [The respondent sold shares of its

subsidiary company to one K.C. Palanisamy, who undertook to discharge the outstanding liabilities of this company. Clause 14 of this agreement

recognised the right of K.C. Palanisamy to sell or transfer his holdings in the company to any other person of his choice, provided that transferee

accepts the terms of the agreement regarding the management and financial aspects of the company. This agreement also contained an arbitration

clause. K.C. Palaniswamy nominated the appellant to receive 95% of the shares that were to be transferred to him. Subsequently, disputes arose and

an arbitral tribunal directed him to return the share certificates and title documents. The appellant was made party to the proceedings filed by the

respondents to enforce the arbitral award.] The Court allowed the enforcement of an arbitral award against a subsequent purchaser of shares under

Section 35 of the Act, interpreting the phrase $\tilde{A}\phi\hat{a}, \neg \hat{A}$ "persons claiming under them $\tilde{A}\phi\hat{a}, \neg$. However, expositions pertaining to the Group of Companies

doctrine were observed in the judgment, in response to certain arguments advanced before the Court. In that context, the Court made the following

observations:

 \tilde{A} ¢â,¬Å"23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and

agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an

intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration

agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was

intended to be ascribed to them. Therefore, factors such as the relationship of a nonsignatory 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 effort is to find the true essence of the business arrangement and to unravel

from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the

obligation to be bound by the actions of a signatory.ââ,¬â€ [ibid, para 23.]

44. The Court did not rely on the Group of Companies doctrine. Yet, Cheran (supra) is an important case to demonstrate that a non-signatory

company can be determined to be a party to an arbitration agreement, based on factors such as relationship of the non-signatory with the signatory

parties, commonality of subject-matter, and composite nature of transaction. It is also possible for the court to construct such an agreement where the

intention of a business arrangement is apparent and the non-signatories have bound themselves by their conduct to fulfill such business arrangement.

45. The subsequent decision in Ameet Lalchand Shah v. Rishabh Enterprises (2018) 15 SCC 678 [2018 INSC 450] is yet another instance where this

Court has allowed a non-signatory to be party to an arbitration agreement, in connected contracts, on the ground of business efficacy, noting that all

agreements were executed for a single commercial project. This approach was noted in the subsequent decision of Discovery Enterprises, [ONGC v.

Discovery Enterprises Pvt Ltd (2022) 8 SCC 42 [2022 INSC 483].] where learned Chief Justice has noted:

 \tilde{A} ¢â,¬Å"In Ameet Lalchand, the Court did not explicitly invoke the group of companies doctrine to bind a non-signatory, rather it relied on

Chloro Controls to hold that a 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.Ā¢â,¬â€ ibid, para 28.

(emphasis supplied)

221. In Reckitt Benckiser (India) Pvt Ltd. v. Reynders Label Printing India Pvt Ltd. (2019) 7 SCC 62 [2019 INSC 700], the Court inferred that since

the non-signatory neither signed the arbitration agreement nor had any causal connection with the negotiation or execution of the agreement, an intent

to consent to the arbitration agreement could not be discerned. Hence, the non-signatory was not bound by the arbitration agreement. [ibid, para 12]

Thus, in Reckitt, the Court reverted to the approach of ascertaining mutual intention of the parties for applying the doctrine, although it did not result in

the nonsignatory being made a party to the arbitration.

222. MTNL v. Canara Bank (2020) 12 SCC 767 [2019 INSC 881] is the decision which acknowledged the Group of Companies doctrine, formulated

its principles, and applied them to the proceedings by recognising CANFINA, a nonsignatory, to be party to the arbitration agreement. The Court held:

 \tilde{A} ¢â,¬Å"10.5. The group of companies doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is

entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the

arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the

signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration

agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the

nonsignatory entity on the group has been 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.

10.6. The circumstances in which the $\tilde{A}\phi\hat{a},\neg\hat{A}$ "group of companies $\tilde{A}\phi\hat{a},\neg$ doctrine could be invoked to bind the non-signatory affiliate of a parent

company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the

arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A

 \tilde{A} ¢â,¬Å"composite transaction \tilde{A} ¢â,¬ refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be

feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and

collectively having a bearing on the dispute.

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and

financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories

have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to

financially support or restructure other members of the group.ââ,¬â€€

48. Finally, in ONGC v. Discovery Enterprises Pvt Ltd. Discovery Enterprises (supra), while the decision on whether the non-signatory was a party

was remitted to the arbitral tribunal, the Court undertook a comprehensive review of the academic literature and judicial pronouncements on the issue.

The court compendiously concluded the following:

 \tilde{A} ¢â, $^{-}$ Å"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be

bound by it, the law considers the following factors:

- (i) The mutual intent of the parties;
- (ii) The relationship of a non-signatory to a party which is a signatory to the agreement;
- (iii) The commonality of the subject-matter;
- (iv) The composite nature of the transaction; and
- (v) The performance of the contract.

41. Consent and party autonomy are undergirded in Section 7 of the 1996 Act. However, a 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 egoââ,¬Â¦Ã¢â,¬â€○

49. What emerges from the aforementioned precedents is that:

i. The Group of Companies doctrine was adopted and applied in Indian arbitration jurisprudence in Chloro Controls (supra), where the Court read the

doctrine into the phrase $\tilde{A}\phi\hat{a}$, $\neg \mathring{A}$ "claiming through or under $\tilde{A}\phi\hat{a}$, \neg in Section 45. It held that a non-signatory affiliate or sister or parent company can be a party

to an arbitration agreement if there is mutual intention of the signatories and non-signatories to this effect. In order to determine mutual intention, the

Court laid down factors such as direct relationship, direct commonality of subject-matter, and a composite transaction where the performance of

multiple agreements is inextricably connected. [Chloro Controls (supra), paras 72 and 73. This was later followed in Cheran Properties (supra), para

23.]

ii. Pursuant to the 2015 Amendment of Section 8, the Court made a composite reference of signatories and nonsignatories to arbitration by

emphasising that all agreements were executed for a single commercial project, [Rishabh Enterprises (supra), para 25.] but without explicitly referring

to the Group of Companies doctrine. [Discovery Enterprises (supra), para 28.]

iii. Subsequently, this Court relied on mutual intention as the test for the doctrine. However, it deviated from Chloro (supra) by prescribing the non-

signatory's causal connection with the negotiation and execution of the contract as factors to determine its mutual intent to arbitrate. [Reckitt

Benckiser (supra), para 12.]

iv. In MTNL (supra), the Court summarised the test under the doctrine as being based on the common intention of the parties to bind both signatory

and non-signatory members of the group of companies. Such common intention can be inferred from the non-signatory's involvement in negotiation

and performance of the contract (similar to Reckitt Benckiser (supra)), or from its statements that indicate its intention to be a party. [MTNL (supra),

para 10.5.] Simultaneously, the Court also referred to the test in Chloro Controls (supra) for determining mutual intention. [ibid, para 10.6.] Lastly, the

Court held the doctrine to be applicable when there is a tight group structure or single economic reality, without any reference to the intention of the

parties. [ibid, para 10.7.] However, the Court ultimately relied on implied or tacit consent by the non-signatory, evidenced by its conduct, to hold that it

is a party. [ibid, para 10.16.]

v. In Discovery (supra), the Court comprehensively reviewed the above cases and ironed out the various tests formulated in them. It held that (a)

mutual intent of the parties, (b) relationship of the non-signatory to the signatory, (c) commonality of subject-matter, (d) composite nature of

transaction, and (e) performance of the contract, are the factors to determine whether the non-signatory is a party.[Discovery Enterprises (supra),

para 40.] These factors emphasise mutual intention and draw from the tests laid down in Chloro Controls and Reckitt Benckiser but do not include the

test of single economic reality as a determinative factor, as held in MTNL (supra).

50. At this juncture, it is necessary to clarify and answer a common question referred for our consideration, i.e., whether the Group of Companies

doctrine is anchored in Sections 8 and 45 of the Act. The expression ââ,¬Å"claiming through or underââ,¬â€ employed in Sections 8 and 45 is concerned with

instances of succession and derivative rights. Learned Chief Justice has dealt with this aspect in great detail in Part F (i) and (ii) of his opinion and

held that the doctrine cannot be anchored in Sections 8 and 45 and to this extent, Chloro Controls (supra) is wrongly decided. I am in complete

agreement with his reasons and findings.

- D. Group of Companies Doctrine in the Context of Section 7
- 51. In this reference, we are tasked to determine whether the Group of Companies doctrine is in accord with the statutory regime of the Arbitration

and Conciliation Act, 1996, defining an arbitration agreement and parties thereto. The adaptation of the doctrine has been doubted, and that is the

reason for this reference. While dealing with the international perspective on the doctrine in Part C(i) of my opinion, it was noticed that the doctrine

could not attain any conceptual singularity, and it remains contested. Perhaps, this is for two reasons : first, the expression $\tilde{A}\phi\hat{a}$, $-\tilde{E}$ cesingle economic

reality $\tilde{A} \notin \hat{a}, \neg \hat{a}, \notin \hat{c}$ employed in Dow (supra) is not in line with the concept of separate legal personality of a company, and second, the doctrine is applied for

determining the intention of the parties, which is completely fact-based. For these reasons, the doctrine has remained dynamic, if not uncertain, and is

subject to many qualifications and exceptions. At the same time, there are certain advantages to adopting the doctrine, considering modern business

practices. I am of the opinion that it is necessary to entrench the doctrine within the statutory regime of the Act, to enable a court or arbitral tribunal to

apply it as a principle to decipher the intention of the parties. I find it necessary to subsume the doctrine of Group of Companies within the judicial

process under Section 7(4)(b), where a court or arbitral tribunal is called upon to determine the existence of an arbitration agreement and parties to it.

52. A conjoint reading of Section 9 of the Code of Civil Procedure and Section 28 of the Indian Contract Act informs us that the jurisdiction of an

arbitral tribunal to settle disputes between the parties, to the exclusion of ordinary civil courts, must arise out of a contract to arbitrate between them.

An arbitration agreement, being a contract, must necessarily be in writing, as against an oral agreement, but need not be signed by the parties. The

written arbitration agreement can be in the form of a document signed by the parties, or be evidenced in the record of agreement. Section 7(4)(b)

prescribes the written material from which a non-signatory's consent and intention can be deciphered by a court or arbitral tribunal.

53. The existence of an arbitration agreement with a nonsignatory is a matter of interpretation and construction. The express words employed by the

parties enable the court to ascertain the intention of the parties and their agreement to resolve disputes through arbitration. For ascertaining the true

meaning of the express words, the court or tribunal may look into the surrounding circumstances such as nature and object of the contract and the

conduct of the parties during the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or

tribunals may adopt well-established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one

such principle. It may be adopted by courts or arbitral tribunals while interpreting the record of agreement to determine whether the nonsignatory

company is a party to it.

54. Although the application of the Group of Companies doctrine in India has until now been independent of Section 7, its juxtaposition with Section

7(4)(b) case-law shows that the inquiry under both is premised on determining the mutual intention of parties to submit to arbitration. The mutual

intention of the parties is discernible from their conduct in the performance of the contract and this inquiry is common to Section 7(4)(b) jurisprudence

and the Group of Companies doctrine. Even the precedents on the doctrine, national and international, look to additional factors beyond the non-

signatory being in the same group of companies, such as commonality of subject-matter, composite nature of transaction, and interdependence of the

performance of the contracts to determine mutual intent.

55. Since the fundamental issue before the court or tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can

be subsumed within Section 7(4)(b). Consequently, the record of agreement that evidences conduct of the non-signatory in the formation,

performance, and termination of the contract and surrounding circumstances such as its direct relationship with the signatory parties, commonality of

subject-matter, and composite nature of transaction, must be comprehensively used to ascertain the existence of the arbitration agreement with the

non-signatory. In this inquiry, the fact of a non-signatory being a part of the same group of companies will strengthen its conclusion. In this light, there

is no difficulty in applying the Group of Companies doctrine as it would be statutorily anchored in Section 7 of the Act.

E. Conclusion

56. In view of the above, while concurring with the judgment of the learned Chief Justice, my conclusions are as follows:

I. An agreement to refer disputes to arbitration must be in a written form, as against an oral agreement, but need not be signed by the parties. Under

Section 7(4)(b), a 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. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper

adjudication and determination. The Group of Companies doctrine is one such principle.

II. The Group of Companies doctrine [As delineated in para 40 of Discovery Enterprises (supra).] is also premised on ascertaining the intention of the

non-signatory to be party to an arbitration agreement. The doctrine requires the intention to be gathered from additional factors such as direct

relationship with the signatory parties, commonality of subject-matter, composite nature of the transaction, and performance of the contract.

III. Since the purpose of inquiry by a court or arbitral tribunal under Section 7(4)(b) and the Group of Companies doctrine 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. The doctrine is subsumed within the statutory regime of Section 7(4)(b) for the purpose of certainty and systematic

development of law.

IV. The expression $\tilde{A}\phi\hat{a},\neg\hat{A}$ "claiming through or under $\tilde{A}\phi\hat{a},\neg$ in Sections 8 and 45 is intended to provide a derivative right; and it does not enable a non-

signatory to become a party to the arbitration agreement. The decision in Chloro Controls (supra) tracing the Group of Companies doctrine through the

phrase $\tilde{A}\phi\hat{a},\neg \mathring{A}$ claiming through or under $\tilde{A}\phi\hat{a},\neg$ in Sections 8 and 45 is erroneous. The expression $\tilde{A}\phi\hat{a},\neg \ddot{E}$ exparty $\tilde{A}\phi\hat{a},\neg \hat{a},\phi$ in Section 2(1)(h) and Section 7 is distinct

from ââ,¬Å"persons claiming through or under themââ,¬â€∢. This answers the remaining questions referred to the Constitution Bench.