

## Indian Supreme Court upholds group of companies doctrine

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*The Indian Supreme Court (Credit: Shutterstock/mukesh\_graphics)*

The Indian Supreme Court has affirmed that non-signatories can be bound by arbitration clauses under the 'group of companies' doctrine – but only when several factors indicate their implied consent.

On 6 December, **Chief Justice Dhananjaya Chandrachud** issued the judgment on behalf of the majority of the bench, in response to a petition by travel company Cox and Kings.

In his ruling, Justice Chandrachud held that Cox and Kings was permitted to pursue arbitration against the German branch of software provider SAP India, which had not signed the underlying contract.

However, the court also provided guidance on the scope of the group of companies doctrine – which allows non-signatories to be bound by an arbitration clause signed by companies from the same group in certain circumstances. It clarified that the doctrine would only apply when a series of contextual factors indicated that the non-signatory had consented to be bound by the arbitration agreement.

The dispute arose out of licence agreements between Cox and Kings and SAP India for the use of a particular software package. Cox and Kings terminated the agreement and SAP India launched proceedings under the agreement's arbitration clause, which incorporated the Indian Arbitration and Conciliation Act 1996.

Cox and Kings sought to add SAP's German branch to the proceedings, which was not a signatory to the arbitration agreement. The travel company approached the Supreme Court, seeking its intervention on the inclusion of the German branch under the group of companies doctrine.

The doctrine has been considered controversial in the arbitration community, with critics claiming that it interferes with party autonomy, contract privity and separate legal personality.

The matter was referred to the five-judge constitutional bench of the Supreme Court by the court's former chief justice **NV Ramana** last year.

In its ruling, the Supreme Court found that the doctrine is valid and applicable – and that SAP's German branch should be added as a party to the proceedings.

However, it also provided guidance on the scope of the doctrine. The court said non-signatories could be bound under the group of companies doctrine where it could be shown that cumulative “factual, circumstantial and legal aspects of the matter” point to its inclusion as a party.

Those aspects include the surrounding circumstances of the formation, performance and discharge of the contract, as well as additional factors such as direct relationship with the signatory parties, commonality of subject-matter and composite nature of the transaction.

The court said that the definition of “parties” under the Arbitration Act could include non-signatories, and the conduct of non-signatories could indicate their intention to be bound by the agreement. It found that courts or tribunals should consider all cumulative factors in each matter to assess whether they have jurisdiction over a non-signatory.

It clarified however that the doctrine stands as a separate principle in jurisprudence and could not be used to pierce the corporate veil. It emphasised that it was for the tribunal to decide if a non-signatory is bound by the arbitration agreement.

The Supreme Court found it had erred in its 2013 ruling in *Chloro Controls*, in which it upheld the group of companies doctrine based on wording in the Arbitration Act that permits persons “claiming through or under” a signatory party to bring arbitration. It clarified that persons “claiming through or under” are only entitled to lodge derivative claims, such as where rights had been assigned or novated.

**Hiroo Advani**, who represented Cox and Kings, tells GAR the Indian Supreme Court “continues its path-breaking ways and support of arbitration by allowing non-signatories to be added as parties to an arbitration”.

**Darius Khambata**, representing one of the intervenors, says the decision has “emphatically reaffirmed” the validity of the principle, whilst “clearly setting the limits of the doctrine as constrained by party autonomy and the consensual nature of arbitration”.

He tells GAR the court has clarified that the doctrine is “neither a derivative one nor based on the principle of alter ego or piercing the corporate veil” and that “notably the court has held that being part of a single economic unit cannot be the sole basis for invoking the group of companies doctrine”.

“The judgement hence sets out a clear path for tribunals to follow to determine the parties to the arbitration.”

Belgian arbitrator **Bernard Hanotiau** of Hanotiau & Van Den Berg – who has previously [criticised](#) the group of companies doctrine – tells GAR this is a “landmark decision”.

He says there have been commentators in India and abroad who had expressed disagreement with the Indian Supreme Court’s previous ruling in *Chloro Controls*, which he says saw the court uphold jurisdiction over a dispute involving multiple contracts with different parties and incompatible dispute resolution clauses.

Hanotiau says the Supreme Court’s latest decision “correctly emphasises that the determination whether a non-signatory is a party must be made by reference to its conduct that reflects its consent.”

“It further admits, rightly, that the interpretation made by the court in *Chloro Controls* of the words “claiming through or under” in Section 45 of the Arbitration Act was incorrect; that those words are intended to provide a derivative right and are not designed to enable a non-signatory to become a party to the arbitration agreement.”

Hanotiau concludes: “This is a brilliant decision in line with the jurisprudence on the same issue in leading jurisdictions of the world, carefully analysed in the reasoning.”

**Stavros Brekoulakis** of 3 Verulam Buildings – whose work is cited in the judgment alongside that of Hanotiau – tells GAR the judgment “breaks ground in jurisprudence of national judiciaries; or rather, it continues the trail of the Paris Court of Appeal decision in *Dow Chemical* 40 years ago, which is now mentioned in arbitration textbooks as an important yet entirely abandoned authority”.

Brekoulakis argues that it is well established by now that through a corporate structure, an affiliated non-signatory company cannot be bound by an arbitration agreement as this would contradict with the legal principle of consent. However, he notes that the Supreme Court has now advocated a modern and pragmatic approach to consent “which eschews dogma in favour of modern commercial realities”. He points out that the decision still holds that corporate structure alone cannot show consent, but it also recognises that commercial reality which implicates signatories and non-signatories in a commercial transaction can bring a non-signatory into the fold as a party.

He concludes: “Not everyone will agree with the decision. But I applaud the Indian Supreme Court both for its courage to test conventional thinking and its refreshing international and comparative outlook.”

In a separate concurring opinion, **Justice Pamidighantam Sri Narasimha** added analysis on the meaning of “parties” and “agreement” in relation to the Arbitration Act and the doctrine. He concluded that an arbitration agreement must be written and not oral, but does not have to be signed by the parties.

He added that a court should use the express language of the parties in the agreement to determine whether or not a non-signatory is a party to the arbitration agreement as well as the circumstances of the contract and principles – including the group of companies doctrine.

Narasimha also agreed that the group of companies doctrine could not be traced through the statutory phrase “claiming through or under”.

*In the Indian Supreme Court*

*Arbitration Petition Civil No. 38 of 2020*

*Cox and Kings Ltd v SAP India Pvt.Ltd & Anr with SLP C No.8607 of 2022 and SLP C No.5833 of 2022*

#### Bench

- Chief Justice Dhananjaya Chandrachud
- Justice Hrishikesh Roy
- Justice JB Pardiwala
- Justice Manoj Misra
- Justice Pamidighantam Sri Narasimha

#### Counsel to Cox and Kings

- Hiroo Advani
- Divyakant Lahoti

#### Counsel to SAP

- Ritin Rai
- JSA

Partners **Farhad Sorabjee, Dheeraj Nair, Pratik Pawar, Shanaya Cyrus Irani** and Kumar Kislay, senior associate **Siddhesh Pradhan** and associate **Aishna Jain**

#### Counsel to intervenors

- AM Singhvi
- Kapil Sibal
- Nakul Dewan
- Sanjoy Ghose
- Pallav Mongia
- Meenakshi Arora
- Darius Khambata

#### Counsel to Union of India

- Solicitor General **Tushar Mehta**

## Documents

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Judgment



## Susannah Moody

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