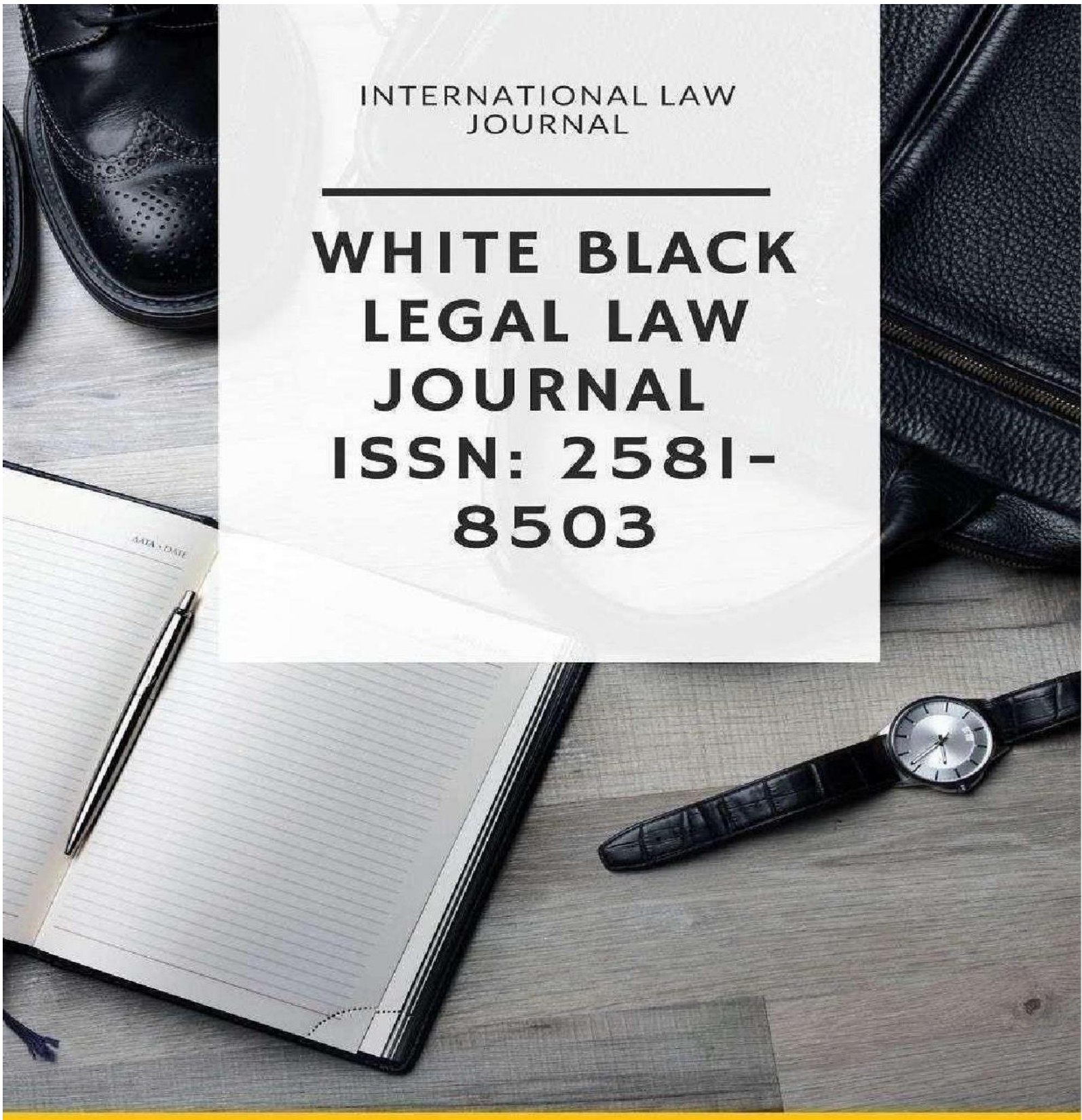

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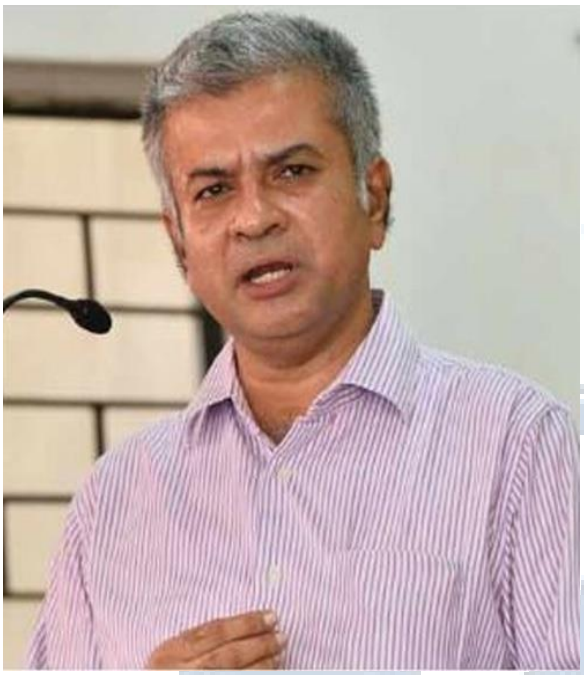

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ALIGNING MODERN COMMERCIAL REALITIES WITH CONSENSUAL NATURE OF ARBITRATION: INDIAN JUDICIARY QUEST TO LEGITIMIZE DOCTRINE OF GROUP OF COMPANIES

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ABSTRACT

The consensual nature of arbitration made it a favourable method of dispute resolution in linear bilateral transactions, but it fails to accommodate modern commercial transactions typically complex, multiparty and multi-layered. Modern commercial reality includes the adoption of new sophisticated corporate structures based on equity, joint ventures or alliances, unlike linear parent-subsidiary organizations. These sophisticated corporate structures create confusion in identifying true parties to the arbitration agreement to be impleaded in case of dispute. Signatory parties' express consent to be bound by the arbitration agreement qualifies them to be true parties to the arbitration agreement, but the difficulty rests in the impleadment of non-signatory parties. A particular method for impleadment of non-signatory parties is highly debatable Doctrine of Group Companies.

This article tries to align the consensual nature of arbitration with modern commercial reality by delving into the origin and evolution of doctrine in Indian and International Arbitration Jurisprudence with the quest of the Indian Judiciary to legitimize the doctrine, and subsequent inconsistencies created by Apex Court in the process of legitimization. The shift of Indian Judicial stance from Chloro Controls to Cox & Kings, in other words, the shifting of the legal basis of

doctrine from phrase "claiming through or under" to Section 7(b)(4) of the Arbitration and Conciliation Act of 1996 is discussed. Article deals with the question of whether subsuming the doctrine under Section 7(4)(b) is a judicial innovation or a new confusion questioning in itself the independent nature of doctrine. Other alternatives like providing more emphasis on evidence on record in addition to the doctrine to align it with consensual nature of arbitration, rather than setting a rigid formula are proposed.

INTRODUCTION

Over the last two decades, the concepts of International and Indian arbitration have been subjected to diverse reformations in their various dimensions encompassing the evolution of arbitration and its consensual nature. The fundamental concept that the responsibilities and rights outlined in an arbitration agreement are binding solely upon the involved parties is a direct reflection of the principle of privity of contract, acknowledged in both civil and common law systems.[1] Consent not only establishes the jurisdiction but also delineates its scope. Hence, it is unsurprising that the consensual aspect is regarded as a distinctive characteristic of arbitration.

Article 7(1)[2] of the UNCITRAL Model Law 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." Similar provisions can be found in other national arbitration laws. It is the signature in an agreement that is the "customary implementation of an agreement to arbitrate".[3] However, a written contract does not necessarily require that parties put their signatures to the document embodying the terms of the agreement. Therefore, the term "non-signatories," as opposed to the traditional term "third parties," appears more appropriate in delineating circumstances wherein consent to arbitration is articulated through modalities other than formal signatures.[4] Fundamentally, the identification of a "party" to an arbitration agreement primarily hinges upon the aspect of consent.a In nearly all instances, international arbitration conventions and domestic arbitration enactments lack explicit provisions guiding the determination of parties within an international arbitration agreement. The most straightforward and least contentious situation where a non-signatory becomes bound by an arbitration agreement occurs when an agent enters into a

[1] Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).
[2] UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended in 2006) art 7(1).
[3] *Sarhank Group v Oracle Corp*oration [2005] 2d Cir 657, 665.
[4] *McBro Planning & Develop v Triangle Elec* [1984] 11th Cir 741 F.2d 342.

contract on behalf of its principal.[5] Based on equitable, not consensual, reasons, non-signatories are either required or allowed to take part in arbitration proceedings, with the application of doctrines, such as equitable estoppel, alter ego, and apparent or ostensible power, falls under this category. Another significant, although contentious, mechanism for binding non-signatories to an arbitration agreement is the "group of companies" doctrine. This doctrine posits that non-signatories to a contract may be regarded as parties to the linked arbitration clause. The so-called "group of companies" doctrine, supposedly rooted in the Dow Chemical case[6], aims to entangle third parties within an arbitration agreement.

However, consensus is yet to be reached regarding the precise interpretation or boundaries delineating this doctrine. Advocates of the doctrine consider it as a foundation for determining implied consent using objective patterns. While opponents contend that the doctrine serves as a shortcut to avoid legal reasoning. Given these opposing viewpoints, it becomes imperative to scrutinize the recent landmark judgement of Cox and Kings Ltd[7], where the Supreme Court has sought to provide clarity on its applicability.

- **Genesis of doctrine of group companies**

On 23rd September 1982, an interim arbitral award rendered by a distinguished arbitral tribunal seated in France in ICC Case No. 4131, popularly known as Dow Chemical[8] (Dow Chemical v. Isover Saint Gobain, Interim Award, (1982)), is often marked as a genesis of Doctrine of Group Companies. But, deliberating Dow Chemical as an exclusive architect of the Doctrine would not be justified, since the paradigm shift from legal principle of privity of contract to considering modern economic reality and incorporating non-signatory parties under the purview of the arbitration agreement or arbitration clause of a contract commenced in 1975 within the jurisdiction of France.[9] (Bernard Hanotiau, 2022) The arbitral award rendered in ICC Case No. 1434 (Bernard Hanotiau L. , 2022) determined that the intention of the company to enter into a contractual relationship with a group of companies implies the intention to be bound by the arbitration agreement. It further stated that non-signatory companies of the group cannot absolve themselves of burdens by sheltering behind the literal text of the contract. Correspondingly, the arbitral award in ICC Case No. 2375,

[5] *Thomson-CSF SA v American Arbitration* [1995] 2d Cir 64 F.3d 773, 776.
[6] *Dow Chemical v Isover Saint Gobain* [1982] ICC 4131.
[7] Cox *and Kings Ltd v SAP India Ltd* (2023) SCC OnLine 1634.
[8] *Dow Chemical* (n 6).
[9] Bernard Hanotiau and Leonardo Ohlrogge, '40th Year Anniversary of the Dow Chemical Award' (2022) Vol 40 ASA Bulletin 300-308.

1975 (Hanotiau, 'Consent to Arbitration : Do We Share a Chemical Vision?', [2011] 027 (4) ; Born; Kelsen, [1977]; Irani, [2020] 9 (2) Indian Journal of Arbitration Law 33)affirmed that the intention of the signatory parties to subject their subsidiaries to the agreement implies the intention of all indissolubly linked companies to be committed to the agreement. In the both instances, non-signatory parties were encompassed within the arbitration clause since it was instituted that the arbitration clause was entered by the related entities with the intention to bind the whole group.

However, the Doctrine of Group Companies gained formal acknowledgement within the realm of International Arbitration subsequent to Dow Chemicals because unlike preceding awards, the Dow Chemical was not solely based on the fact that same group companies formed a single unity. Instead, arbitrators relied their decision on two terms – "implied consent" to be determined by conduct of the non-signatory parties and "common intention" of all the parties to be bound by the agreement. The latter entails that not only the signatory parties, but also the non-signatory parties should have intended or have given rise to other parties to reasonably believe that they have intended to be bound by the arbitration clause.[10] Conduct includes the participation of said parties in negotiation, execution, performance or termination of the agreement. The conduct of non-signatory parties gives rise to the presumption that the said parties possessed knowledge of the arbitration agreement.[11] Subsequently, the two terms assumed a central role in the evolution of doctrine within Indian Arbitration Jurisprudence, as shall be discussed afterwards.

- ***Evolution of Doctrine in International Arbitration Jurisprudence***

As previously mentioned, Dow Chemical played a pivotal role in firmly instituting the Doctrine of Group Companies within French Arbitration Jurisprudence. Under the French law, it is posited that an arbitration agreement can be extended to non-signatory parties if all the parties had a common intention to be bound by the agreement, which 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.[12]

In the realm of Swiss general law, it has not been disinclined to extending arbitration agreement to non-signatory parties in cases of assignment of a claim, assumption of debt or delegation of a contract.[13] Nevertheless in 1996, the Swiss Federal Supreme Court held that binding non-signatory

[10] Yves Derains, 'Is there a Group of Companies Doctrine?' (2013) Vol 7 Dossier of the ICC Institute of World Business Law 131-145.
[11] V 2000 (formerly Jaguar France) v Project XS (1996) Rev Arb 67.
[12] *Cox & Kings Ltd* (n 7).
[13] *A, B, C v. D and State of Libya* (2018) 4A 636.

parties to arbitration proceedings as they belonged to the same group of companies is not a sufficient justification. In consonance with the principles akin to Dow Chemical, the court asserted that if there is an independent and formally valid manifestation of consent, which may be express or implied by conduct binds non-signatory parties. The law further developed in 2008 when the Federal Court expounded that certain behaviour or conduct have the potential to serve as a substitute for compliance with a formal requirement of signatures of parties of an arbitration agreement. Consequently, one may reasonably infer that the developmental trajectory of the doctrine in Switzerland mirrors that of France. While the former explicitly rejects the condition of non-signatory to be a part of group of companies, the latter, although not denied the condition, has incidentally referenced the notion of "group of companies".[14] (Bernard Hanotiau L. O., 2022)

The Arbitration Jurisprudence in England, in contrast to the approaches taken by France and Switzerland, adopted a conservative stance by strictly adhering to the doctrine of privity. It did not explicitly preclude the expansion of the jurisdiction of the arbitration agreement to non-signatory parties, the group of companies doctrine was rejected as a valid basis for impleadment. (Peterson Farms INC v. C & M Farming Limited, [2004] EWHC 121 (Comm)) The interpretation finds supports in the phrase "any person claiming under or through a party to the agreement"[15] indicating that non-signatory parties can claim a benefit or be burdened through impleadment only if they are claiming through the original party to the agreement. The Court of Chancery Divison in 'Roussel-Ulcaf v GD Searle and Co Ltd'[16] (Roussel-Uclaf v. G D Searlea and Co Ltd., [1978] 1 Lloyd's Rep) held that the phrase "any person claiming under or through a party to the agreement"[17] confers derivative rights to non-signatory parties to claim, contingent upon the proximate relationship between the parent company and subsidiary company. In the City of London v. Sancheti[18] the Court of Appeal overturned Roussel-Uclaf establishing that an entity cannot be deemed to be claiming through or under solely because on the basis of legal commercial connection between them. Consequently, it can be inferred that the prevailing legal stance in England emphasizes the principle that "contracts are not to be lightly implied" and the court "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.[19] (Blackpool and Fylde Aero Club Ltd. v. Blackpool B. Council, 1990)"

The Arbitration Jurisprudence in Singapore expressly rejected the group of companies doctrine[20]

[14] Hanotiau (n 9).
[15] English Arbitration Act 1996, s 82(2).
[16] Roussel-Ulcaf v GD Searle and Co Ltd [1978] 1 Lloyd's Rep.
[17] EAA 1996, s 82(2).
[18] *City of London v Sancheti* [2008] EWCA Civ 1283.
[19] *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195.
[20] *Manuchar Steel Hong Kong Ltd V Star Pacific Line Pte Ltd* [2014] SGHC 181.

(2014) on two grounds – first, it disapproves of the fundamental consensual basis of an arbitration agreement and second, it dispenses with well-established commercial law doctrine of separate legal identity.

Although the legal position within the Arbitration Jurisprudences of France, England and Singapore regarding the legal validity of the doctrine of group companies varies, a similarity emerges in their recognition of the "conduct" of non-signatory parties as an essential element to implead them in arbitration proceedings independent of the application of the doctrine of group companies. These divergent positions raise the question of whether Arbitration Jurisprudences necessitates the Doctrine of Group Companies to implead non-signatory parties, particularly in light of increasing modern commercial multiparty and multifaceted contracts. The alternative perspective posits that the "conduct" of non-signatory parties would be suffice to implead them. As India's commercial landscape evolves with increase in complex contracts, the ambiguity invariably persists within Indian Arbitration Jurisprudence as well.

- ***Advent and Evolution of Doctrine of Group Companies in Indian Arbitration Jurisprudence***

Chloro Controls[21] (Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc , [2013]) marks the advent of Doctrine of Group companies in Indian Arbitration Jurisprudence and instigated substantial changes to the law on joinder of non-signatory parties. The evolution of law in India can be traced in two distinctive phases – the Pre Chloro era and the Post Chloro era. The major difference between the two era is in the nuanced interpretation of term "party" as defined in Section 2(1)(h).[22] The pre chloro era prevailed strict interpretation of the term "party" on the ground that arbitration agreement being a creature of contract, fundamentally based on concept of consent should comply with the basic tenets of Indian Contract Act, 1872. Contrastingly, the post chloro era introduced a novel approach to identify true parties to the arbitration agreement by placing greater emphasis on the implied consent of the parties, determined by the conduct of non-signatory parties.

a) ***The pre chloro era***

Pre Chloro, the Courts construed the term "party" as party to an arbitration agreement in Section

[21] *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641.
[22] The Arbitration and Conciliation Act, 1996 (26 of 1996) s 2(1)(h).

2(1)(h)[23] only limited to signatory parties. Initial instance of this construction is evident in Sukanya Holdings[24] (Sukanya Holdings (P) Ltd. v. Jayesh H Pandya , [2003] 5 SCC 531) case, where the Apex Court affirmed the High Court decision of rejecting application for joinder of non-signatory parties to arbitration agreement. In 2008, Supreme Court in Sumitomo[25] altered its interpretation and extended that a party to an arbitration agreement means party to judicial proceedings. However, this stance was problematic as it seemingly compromised the fundamental consensual nature of arbitration, permitting joinder of any party involved in Judicial proceedings without due consideration of the said parties' formal consent, implied consent or conduct. The legacy of strict interpretation persisted until 2010 when in Indo wind Energy Ltd.[26] (Indowind Energy Ltd. v. Wescasre (I) Ltd. 5 SCC 306, (2010)) the Supreme Court confirmed that signature of parties constitutes formal consent and unequivocal indication of their intent to be bound by arbitration agreement or clause. Conversely, a party's refusal to sign implies a mutual intention not to be party to an arbitration agreement.

Supreme Court's strict interpretation of Section 2(1)(h)[27] and insistence on formal consent, without any allowance for implied consent, underscores the narrow approach adopted by Indian Courts. This perspective may be attributed to the linear bilateral nature transaction or because of firmly-established doctrines of contract and commercial laws like privity of contract[28] (Tweddle v. Atkinson. , [1861]) and separate legal identity[29] did not permit it so. Regardless of the rationale, the multiplicity of proceedings and fragmentation of disputes through satellite litigation by non-signatory parties have created complexities.[30]

b) ***The post chloro era***

In the case of Chloro Controls, the Supreme Court legitimized group of companies doctrine within Indian Arbitration Jurisprudence, specifically under phrase "at the request of one of the parties or any person claiming through or under him" embodied in Section 45[31] of the Arbitration Act, owing to difficulties of multiplicity of proceedings and fragmentation of disputes. However, these

[23] Ibid.
[24] *Sukanya Holdings (P) Ltd v Jayesh H Pandya* (2003) 5 SCC 531.
[25] *Sumitomo Corporation v CDC Financial Services (Mauritius) Ltd* (2008) 4 SCC 91.
[26] *Indowind Energy Ltd v Wescasre (I) Ltd* (2010) 5 SCC 306.
[27] A & CA 1996, s 2(1)(h).
[28] *Tweddle v. Atkinson* (1861) 1 B&S 393.
[29] *Saloman v A Saloman & Co Ltd* [1896] UKHL 1 [189] AC 22.
[30] Born (n 1).
[31] A & CA 1996, s 45.

challenges were insufficient to establish exceptions against firmly-established doctrine of privity of contract or separate legal personality. The pivotal challenge confronting the court revolved around the delicate balance between adhering to the principles of natural justice and providing an opportunity for non-signatory parties to raise objections concerning the jurisdiction of the arbitral tribunal. This was particularly pertinent when non-signatory parties were implicated in the dispute due to their legal relationship with signatory parties. The contention arose from the assertion that arbitration agreements, being within the realm of private law, exempt the application of equity jurisdiction.

Consequently, the court was tasked with three primary objectives:

i. To determine the scope of Section 45 of the Arbitration Act.

ii. To determine legal relationship between the signatory and non-signatory parties for the latter to "claim through or under" the former.

iii. To determine whether composite reference of parties would serve ends of justice.

The legal principle then developed by Supreme Court 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, "intention of the parties" 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."[32] However, the further ruling of the court to subject non-signatory without their prior consent in exceptional cases like direct relationship, direct commonality and composite nature transaction, and legitimizing the doctrine under Section 45[33] without considering the corresponding provision of Section 8[34] created inconsistencies with regard to application of doctrine of group companies.

The initial inconsistency between Section 45 and Section 8 was rectified by the legislature through the enactment of the Arbitration and Conciliation (Amendment) Act, 2015, prompted by the recommendations in the Law Commission of India Report in 2014.[35] The Commission proposed the addition of the phrase "claiming through or under" in Section 8 to align Indian domestic arbitration law with international jurisprudence. However, it is crucial to note that the legislature

[32] *Chloro Controls* (n 21) (72).
[33] A & CA 1996, s 45.
[34] A & CA 1996, s 8.
[35] Law Commission of India 'Amendments to the Arbitration and Conciliation Act, 1996' (Law Com No. 246, August 2014)

did not introduce any modifications to the language of Section 2(1)(h) and Section 7[36], thereby perpetuating another layer of inconsistency, as will be elaborated upon subsequently. The latter inconsistency was addressed through a recent judgment in Cox & Kings Ltd,[37] (Cox & Kings v. SAP Ltd. India (supra) as will be discussed in Part II and III.

- ***Developments in post chloro era***

Following the amendments in 2015, the precedent established in Chloro Controls underwent refinements in subsequent cases. In Cheran Properties[38] (Cheran Properties Ltd. v. Kasturi And Sons Ltd., 2018) under Section 35[39] phrase "parties and person claiming under them" the Supreme Court allowed the final arbitral award binding on the all the parties, whether signatory or non-signatory to ensure finality of award. Notably, in this instance, the Court did not explicitly apply the Doctrine of Group Companies; instead, it interpreted Section 35 in a manner that permits the application of the doctrine.[40] However, it is noteworthy that the Supreme Court in Cheran Properties failed to recognize the distinction in the language employed between Section 35 and Section 45. While the former uses the phrase "parties and persons claiming under them," the latter employs the phrase "parties or any person claiming through or under him." This discrepancy resulted in another irregularity, which has subsequently been addressed by a five-judge bench in the Cox and Kings case, as will be discussed in Part II.

The Court in Ameet Lalchand Shah[41] (Ameet Lalchand v. Rishabh Enterprises & Anr, 2017) held that a party to an interconnected agreement would be bound by the arbitration clause in the principal agreement and observed that composite nature transactions could be effectively resolved by referring all of them under single arbitration process. In Reckitt Benckiser,[42] court held even if the non-signatory parties and signatory parties belonged to the same corporate group, the participation of non-signatory parties in the negotiation and performance of the contract is the key determinant to determine intention of the parties to bound by arbitration agreement. In Canara Bank,[43] the court enunciated a principle applicable in case where is tight group structure with strong organizational and financial links that the parties constitute single economic reality. In such an instance the

[36] A & CA 1996, s 7.
[37] *Cox & Kings Ltd* (n 7).
[38] *Cheran Properties Limited v Kasturi & Sons Limited & Ors* (2018) 16 SCC 413.
[39] A & CA 1996, s 35.
[40] *Cheran Properties Limited* (n 38) (23).
[41] *Ameet Lalchand Shah and Ors v Rishabh Enterprises* (2018) 15 SCC 67.
[42] *Reckitt Benckiser (India) (P) Ltd v Reynders Label Printing (India) (P) Ltd* (2019) 7 SCC 6.
[43] *Mahanagar Telephone Nigam Ltd v Canara Bank* (2020) 12 SCC 767.

doctrine of group companies can be invoked.

The last in the series of cases which followed legal reasoning laid down in Chloro Control is the Discovery Enterprises.[44] In an appeal under Section 37(1)(a)[45] before the Supreme Court, ONGC sought the joinder of non-signatory parties in arbitral proceedings. The court, relying on the precedents set in Chloro Controls, granted permission for the joinder of non-signatory parties. It is crucial to note that Section 37(1)(a) was inserted by an amendment in 2015, following the recommendation of Law Commission report in 2014.[46] The amendment allowed the concerned parties to appeal before court in case if arbitral tribunal refuses to refer parties to arbitration proceedings under Section 8.[47] Notably, the legislature intentionally included non-impleadment of persons or parties claiming through or under them as a ground for appeal, aiming to facilitate the application of doctrine of group companies.

Through this comprehensive analysis, it can be deduced that the doctrine of group companies evolved incrementally in Indian Arbitration Jurisprudence. Throughout this evolution, the judicial stance introduced various ambiguities and inconsistencies between sections until the Supreme Court elucidated a distinct rationale in Cox and Kings, as will be discussed in Part II.

THE QUEST OF INDIAN JUDICIARY TO LEGITIMIZE THE DOCTRINE AND SUBSEQUENT INCONSISTENCIES CREATED:

By inception of the doctrine of group companies within the phrase "claiming through or under" in Chloro Controls[48] temporarily brought an end to the quest for legitimizing the doctrine, aiming to ensure its proper and effective application. However, by officially endorsing the doctrine under Section 45[49], which pertains to International Arbitration Agreements, the court overlooked the corresponding provision of Section 8[50] dealing with domestic arbitration agreements, thereby introducing an inconsistency which was perpetuated by subsequent cases. To rectify this inconsistency the legislature amended Section 8 by inserting phrase "claiming through or under".

[44] *Oil and Natural Gas Corporation Ltd v Discovery Enterprises* (2022) 8 SCC 42.
[45] A & CA 1996, s 37(1)(a).
[46] Law Commission (n 35).
[47] A & CA 1996, s 8.
[48] *Chloro Controls* (n 21).
[49] A & CA 1996, s 45.
[50] A & CA 1996, s 8.

Nevertheless, the legislature did not bring about any alterations in the language of Section 2(1)(h)[51] and Section 7[52] as recommended by the Law Commission Report in 2014.[53] (12th Law Commission Report , (2014)) Section 2(1)(h) defines party as one to an arbitration agreement and Section 7 further defines an arbitration agreement which contains a phrase "legal relationship whether contractual or not". This phrase allows broader interpretation as disputes arise between parties need not be contractual, enabling the impleadment of non-signatory parties in cases of disputes provided a legal relationship exists between non-signatory and signatory parties.[54]

Perhaps the legislative intent behind not inserting the phrase "claiming through or under" in Section 2(1)(h) and Section 7 would have been to prevent the exploitative application of the doctrine of group companies and to maintain a harmonious balance between impleadment of non-signatory parties and their private autonomy. Inserting the phrase under section 2(1)(h) would imply the application of doctrine without any stipulations like legal relationship between the parties or conduct of non-signatory parties.

Another inconsistency arising from Chloro Carbon is that paragraph 72 of the judgement states "intention of the parties"[55] and paragraph 73 states "without their prior consent".[56] On the one hand, Chloro Controls emphasizes the "intention of the parties", while on the other hand, it allows the joinder of non-signatory parties to arbitration proceedings "without their prior consent".

It is noteworthy that the Supreme Court in Cheran properties[57] observed the expression "person claiming through or under" in Sections 35[58] and 73[59] as a legislative recognition of the doctrine, stating that not only the parties but also every person whose position is derived from and is the same as a party to the proceedings. However, in Chloro Controls, the court relied on Section 45[60] to recognise the doctrine. The language disparity of Section 35[61] and Section 45, indicated by the use of the words "and" and "or," respectively, further accentuates these inconsistencies.

[51] A & CA 1996, s 2(1)(h).
[52] A & CA 1996, s 7.
[53] Law Commission (n 35).
[54] *Cox and Kings Ltd* (n 7) (181).
[55] *Chloro Controls* (n 21) (72).
[56] *Chloro Controls* (n 21) (73).
[57] *Cheran Properties* (n 38).
[58] A & CA 1996, s 35.
[59] A & CA 1996, s 73.
[60] A & CA 1996, s 45.
[61] A & CA 1996, s 35.

These inconsistencies unintentionally emerged due to the inception of the doctrine under Section 45, without holistic consideration of other provisions of the Arbitration and Conciliation Act, of 1996. Addressing how these inconsistencies were rectified by the Supreme Court with an increase in sophisticated multiparty, multilayered contracts is discussed in Part III.

THE SHIFT IN DOCTRINE'S LEGAL BASIS

The Supreme Court in Cox and Kings[62] held Chloro Control[63] was erroneous to the extent that it traced the doctrine to the phrase "claiming through or under". The error stems from the fact that incepting the doctrine within the phrase results in stepping of non-signatory parties into the shoes of signatory parties, deriving the right to arbitrate from them, instead of claiming an independent right under the arbitration agreement. In alternative terms, non-signatory parties would only assert a right in a derivative capacity;[64] they would lack any independent right to stand as parties to an arbitration agreement. This could pose a significant drawback, especially in the context of complex multiparty, multilayered contracts. For instance, if a non-signatory party exercises its derivative rights and claims under the signatory party, the non-signatory party's status would be "party claiming under or through" rather than "party." This distinction would preclude it from approaching the Courts to seek interim measures, as Section 9[65] allows this benefit exclusively to a party.

In addition to concerns regarding derivative rights, the inconsistency between Section 45 and 8,[66] and Section 35 and 73[67] was rectified by conferring independent validity to the doctrine of group companies, subsuming it within the statutory framework of Section 7(4)(b).[68] The court acknowledged the use of the disjunctive particle "or" in Section 8 and 45, offering an alternative or choice between "parties" or "any person claiming through or under." Accordingly, either the party to an arbitration agreement or any person claiming through or under the party possess the authority to submit an application to the judicial body for the referral of the dispute to arbitration. On a contrasting note, the conjunction "and" employed in Sections 35[69] and 73[70] signifies collective consideration of all parties, establishing that an arbitration award binds both the parties and those

[62] *Cox & Kings* (n 7).
[63] *Chloro Controls* (n 21).
[64] *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8.
[65] A & CA 1996, s 9.
[66] A & CA 1996, s 8.
[67] A & CA 1996, s 73.
[68] A & CA 1996, s 7(4)(b).
[69] A & CA 1996, s 35.
[70] A & CA 1996, s 73.

who derive their capacity from the party to the arbitration agreement. The foundational basis for the divergence is commercial efficacy[71] as disjunctive "or" respects mutual intention of the parties, while the conjunctive "and" ensures finality of arbitral award, preventing the parties from reasserting claims. Thus, the distinction between the "party" and "persons claiming through or under" is evident.[72]

Returning to the shift of legal basis of the doctrine, the underlying justification is rooted in India's conformity with the UNCITRAL model[73], wherein it upholds the principle that an arbitration agreement must be in written form, it need not to be signed. The legal principle is inculcated in Indian Arbitration Jurisprudence, evident from the language of Section 7(4)[74] which declares that an arbitration agreement "is in writing" if it is contained in a document signed by the parties; exchange of correspondence that provides the record of the agreement; and admission in the proceedings, i.e., the statement of claim and defence.

Section 7(4)(b)[75] specifically elucidates that an arbitration agreement with non-signatory parties is to be deduced from the agreement's record like exchange of letters, telex, telegraphs or other means of telecommunication, provided that it "unequivocally and clearly emerges that the parties were ad idem".[76] In Rickmers Verwaltung[77] the court deliberated on the potential existence of an agreement inferred from the correspondence.[78] The court held that the agreement cannot be affirmed unless it unmistakably and clearly arises from the correspondence that the parties were ad idem regarding the terms.[79] In Babanrao[80], the court emphasised on the substance of the clause[81], affirming that the parties must mutually intent to refer disputes to arbitral tribunal as consent being the foundation of tribunal's jurisdiction over them.[82] In light of the perspectives expressed in Rickmer and Babanrao, the court maintains that the non-signatory parties' concurrence with an arbitration arrangement can be inferred from its conduct, encompassing the exchange of letters, telegrams, and various written

[71] Cox & Kings (n 7) (148).
[72] Ibid.
[73] UNCITRAL Model Law on International Commercial Arbitration, (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended in 2006).
[74] A & CA 1996, s 7(4).
[75] A & CA 1996, s 7(4)(b).
[76] *Rickmers Verwaltung Gmbh v Indian Oil Corporation Ltd* (1999) 1 SCC 1.
[77] *Rickmers* (13).
[78] *Rickmers* (12).
[79] *Rickmers* (13).
[80] *Babanrao Rajaram Pund v Samarth Builders and Developers* (2022) 9 SCC 691.
[81] *Babanrao* (19).
[82] *KK Modi v KN Modi* (1998) 3 SCC 573 (17); *Bihar State Mineral Development Corporation v Encon Builders (I) Pvt Ltd* (2003) 7 SCC 418 (13).

communications.

Further, the court rectified the inconsistency in Paragraph 72[83] and 73[84] (highlighted in Part II) by adopting a harmonious reading that interprets the phrase "without their prior consent" as "without prior formal consent (i.e. signature) to the arbitration agreement. This shift from formal approach to pragmatic approach to consent, considers the circumstances, apparent conduct, and commercial facets of business transactions. Earlier it was 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.[85] This approach only helped to construe commercial understanding of the parties and not the intention of the parties which is to be ascertained from surrounding circumstances and the object of contract.[86] In Ayyasamy[87], the court held that the meaning of the contract must be gathered by adopting a common sense approach, which should "not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.[88] In his work, Professor Hanotiau advocates modern and pragmatic approach to consent by stating that "it is more focused on analysis of facts, 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 it takes into consideration all its various expressions and tends to give much more importance to the conduct of the individuals or companies concerned". [89] While not endorsing the doctrine of group companies as a suitable legal means to establish pragmatic and modern consent, Professor Hanotiau and Stavros Brekoulakis suggest alternative methods, as shall be discussed in Part V.

By adopting pragmatic and modern approach to consent, the court highlighted the independent nature of doctrine by subsuming the doctrine under Section7(4)(b).[90] The question whether this sudden shift amounts to judicial innovation or mere tweak in the plotline shall be discussed in Part IV.

[83] Chloro Controls (n 21) (72).
[84] Ibid (73).
[85] *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.
[86] *Bank of India v K Mohandas* (2009) 5 SCC 313; *M Dayanand Reddy v A P Industrial Infrastructure Corporation Ltd* (1993) 3 SCC 137.
[87] *Ayyasamy v A Paramsivam* (2016) 10 SCC 386.
[88] *Union of India v D N Revri* (1976) 4 SCC 147.
[89] Bernard Hanotiau, 'Consent to Arbitration : Do We Share a Common Vision?' (2011) 27 (4) Arbitration International 539, 554.
[90] A & CA 1996, s 7(4)(b).

SUBSUMPTION OF DOCTRINE: A JUDICIAL INNOVATION OR A NEW INCONSISTENCY

The exclusive rationale for subsuming the doctrine of group companies within Section7(4)(b)[91] as discussed in Part III, was to establish the existence of the doctrine independent of any phrase, which would have otherwise created many inconsistencies. To safeguard the independency of the doctrine, the court shifted to modern and pragmatic approach of consent from formalistic approach. Nevertheless, the question remains does this subsumption of doctrine constitutes judicial innovation?

Perhaps the answer to this question is not affirmative. The justification for this assertion can be traced by scrutinizing the timeline of evolution of the doctrine. In Indian jurisprudence post Chloro Control[92] case laws like Cheran Properties,[93] Ameet Lalchand Shah,[94] Reckitt Benckiser,[95] Canara Bank,[96] Discovery Enterprises[97] and even historic Dow Chemical[98] exemplified a flexible approach towards the assessment of the consent. These cases underscore a reliance on implied consent inferred from the parties' conduct, encompassing their involvement in the negotiation, execution, or termination of the contract. Similarly, in Cox & Kings,[99] the court emphasised on conduct of the parties. However, in this instance, the court substantiated its stance with the support of Section 7(4)(b), which qualifies any written correspondence as an arbitration agreement, provided it unequivocally and clearly emerge that the parties were ad idem.[100] (Rickmers Verwaltung Gmbh v. Indian Oil Corp, 1999)

Upon a comparative analysis of post Chloro case laws and Cox and King, it can be inferred that the court's emphasis consistently centred on the conduct of the non-signatory parties. Undoubtedly, over the course of progression, other stipulations were incorporated regarding application of the doctrine, but the conduct of parties remained fundamental. The divergence lies primarily in the legal basis: post Chloro cases sought to firm the doctrine under the phrase

[91] A & CA 1996, s 7(4)(b).
[92] *Chloro Controls* (n 21).
[93] *Cheran Properties* (n 38).
[94] *Ameet Lalchand Shah* (n 41).
[95] *Reckitt Benckiser* (n 42).
[96] *MTNL* (n 43).
[97] ONGC (n 44).
[98] *Dow Chemicals* (n 6).
[99] *Cox & Kings* (n 7).
[100] *Rickmers* (n 76).

"claiming through or under"[101], whereas Cox and King refrained from firming the doctrine under any specific phrase, rather subsumed it within Section7(4)(b).[102] Notably the court in Cox and King provided a legal underpinning to the conduct of non-signatory parties through the phrase 'provide a record'[103] for determining their consent, thereby affirming the independent nature of doctrine. Precedents like Rickmers[104] (1999) and Babanrao[105] (2022), as discussed in Part III, similarly (Babanrao Rajaram Pund v Samarth Builders and D evelopers , [2022] 9 SCC 691) (Tanning Research Laboratories Inc v O'Brien, [1990]) (Mahanagar Telephone Nigam Ltd v Canara Bank, [2020] 12 SCC 767)emphasised on Section7(4)(b) to establish consent of non-signatory parties based on their conduct. Consequently, the shift cannot be characterized as a judicial innovation, rather the approach adopted in these cases paved the way for the new approach to emerge systematically.

It is arguable that the subsumption of the doctrine within Section 7(4)(b) raises concerns about the potential denial of the independent nature of the doctrine. However, it must be noted that the subsumption of doctrine within a section does not amount to firming of doctrine within a section. The two concepts are different. Subsumption means simply "falling within the scope of" and presupposes the existence of an appropriate higher order.[106] It is presupposed that the doctrine of group companies existed before the subsumption of doctrine, the Apex Court has merely authorized it to ensure its effective application. As in words of Kelsenian "the proposed particular or concrete rule is authorized if subsumable under the general rule."[107] Recognizing the imperative need to authorize the doctrine, the court has subsumed it without compromising its independent nature.

CONCLUSION

The Indian Judiciary has effectively legitimized the doctrine of group companies, while preserving its independent existence. Nonetheless, a lingering query persists: Is it imperative to establish a rigid formula to align the consensual nature of arbitration with modern commercial realities, or does the ascertained implied consent of non-signatory parties through conduct suffice?

[101] A & CA 1996, s 45.
[102] A & CA 1996, s 7(4)(b).
[103] A & CA 1996, s 7(4)(b).
[104] Rickmers (n 76).
[105] Babanrao (n 80).
[106] Stanley L. Paulson, 'Subsumption, Derogation, and Noncontradiction in Legal Science' [1981] The University of Chicago Law Review 802.
[107] Harris Kelsen, 'Concept of Authority' [1977] Cambridge LJ 353.

Some Indian commentators suggest that eschewing the doctrine would not create a void in jurisprudence, rather the principle of implied consent, inferred from the conduct might suffice to bind non-signatories.[108] Stavros suggests that the application of the doctrine effectively reduces it to a legal fiction.[109] Similarly, Professor Bernard Hanotiau contends that the doctrine serves as a shortcut to avoid legal reasoning.[110] He argues that group membership is not a determinative factor in identifying true parties to the arbitration agreement, thereby deeming the nomenclature misleading.[111]

As elucidated in Part I, the notion of group of companies was incidentally referenced in Dow Chemicals[112], where the impleadment of non-signatory parties was primarily based on their conduct. Eschewing the doctrine in present modern commercial reality would not necessarily void the jurisprudence but would undeniably handicap it. This is because the doctrine is established as a precedent and a basis to consider the conduct of the parties in ascertaining their consent, thereby bridging the gap.

It is crucial to note that modern business transactions unfold through multiple layers and agreements,[113] with each successive layer introducing new party- not necessarily signatories- contributing to contract execution. Parent corporate entities often incorporate sophisticated structures to insulate themselves from liabilities, consequently placing burden onto member companies and vice versa. Therefore, the conduct of parties remains pivotal, the membership factor, though not determinative, cannot be outrightly discarded.

Nevertheless, treating the doctrine as the sole and rigid formula for aligning the consensual nature of arbitration with economic reality would be unjustified. Since the doctrine functions as a fact-based element, necessitating a comprehensive scrutiny of all evidential records alongside factors like membership, commercial reality, economic reality, trade usages etc.

The Indian Judiciary has effectively aligned the consensual nature of arbitration with modern

[108] Charlie Caher and Shanelle Irani, 'The Group of Companies Doctrine' (2020) 9(2) Indian Journal of Arbitration Law 33.
[109] Stavros Brekoulakis, 'Parties in International Arbitration: Consent v Commercial Reality' [2015] International Commercial Arbitration.
[110] Hanotiau (n 89).
[111] Ibid.
[112] Bernard Hanotiau and Leonardo Ohlrogge (n 9).
[113] *Cheran Properties* (n 38) (23).

commercial reality, as manifested in its progressive approach of acknowledging evidential records, such as exchanges of letters, telex, telegrams as valid arbitration agreements. This approach does not extend the arbitration agreement to non-signatory parties without their consent, instead it brings their implied consent to the forefront through implied arbitration agreement ascertained through exchanged correspondences.