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A CRITICAL ANALYSIS OF JOINDER OF NON-SIGNATORIES IN INTERNATIONAL ARBITRATION

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I. ABSTRACT

Arbitration has always been viewed as a preferable method of dispute resolution in cross-border trade, due to its effectiveness, privacy and enforceability. Yet, one issue that persists in arbitration law is the treatment of parties who are directly involved in the -underlying transaction, even if they are not signatories to the arbitration agreement. This paper is driven by the important question of whether it is legally legitimate and practically useful to permit such non-signatories to join in the arbitral process. What ultimately occupies the heart of this dissertation is the "Group of Companies" doctrine - itself a big debate in arbitration law. It is a seemingly flexible way to bind non-signatory affiliates in the right circumstances; however, its application is not consistently recognized throughout every jurisdiction. Most recently, Indian courts, particularly in Cox and Kings Ltd. v. SAP India Pvt. Ltd, adopted the "Group of Companies" doctrine opening up the door for a more adaptable and realistic framework to apply in arbitration. But with the significant caveat of the continued questions regarding the "Group of Companies" doctrine's declaratory element and its enforceability with consideration to international conventions. This article aims to provide a comprehensive and comparative analysis of the joinder of non-signatories in international arbitration, with a particular focus on the Indian legal landscape.

II. KEYWORDS

Joinder of Non-Signatories, Group of Companies Doctrine, Consent in International Arbitration, Comparative Arbitration Jurisprudence, Enforcement under the New York Convention.

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III. INTRODUCTION

It is a truism to say that with the exponential increase in international (cross-border) trade and investment transactions after the Second World War, international commercial disputes grew massively, giving rise to a corresponding rise of arbitration as a method of dispute settlement. In fact, since the last quarter of the twentieth century, when many countries, driven by the spirit of globalization, began to open up their economies to foreign traders or investors, arbitration emerged as a reliable and preferable method of the settlement of international commercial disputes. The reasons, as will be seen below, are obvious enough. Businesspeople prefer a method of dispute resolution which is speedy, efficient and less expensive. Since arbitration offers these benefits, it is not surprising that its popularity among businesspeople worldwide has grown exponentially. Significantly, with the emergence of a movement to harmonize or modernize domestic laws in line with international standards, along with the institutionalization of arbitration, the respect and prestige of arbitration as a substitute for court adjudication have continued to grow impressively.²

It is widely acknowledged that nowadays arbitration is the usual or the most frequently resorted method for resolving disputes, especially those related to international commercial transactions, which include a variety of business deals such as mergers and acquisitions, transfer of financial services, construction and infrastructure, transfer of technology, intellectual property rights and sale of goods agreements. It is also a accepted fact that resorting to arbitration is considered among commercial men to be a less unfriendly act than resorting to the courts. It may further be noted that arbitration is often the only method of dispute settlement, especially in cases of cross-border business transactions where parties from different countries do not like recourse to each other's

² E.J. Cohn. —The Rules of Arbitration of the International Chamber of Commerce 14 *ICLQ* 132-72 (1959); William W. Park, —Arbitration of International Contract Disputes 39 *The Business Lawyer* 1783-179 (1984).

legal system. Moreover, the enforcement of foreign arbitral awards is much easier than the execution or enforcement of foreign judgments.

However, despite many obvious and less disputed advantages, arbitration has traditionally suffered from certain serious limitations or weaknesses. At the cost of repetition, it may be stated that since there is a lack of hieratical structure of arbitrators/ arbitral tribunals, the award once given by an arbitral tribunal is final, and unlike the judicial system, the aggrieved may not approach a higher or appellate body in Ad Hoc arbitration. Secondly, international arbitration, whether it is ad-hoc or institutional, still needs recognition by the relevant state laws. This is a major limitation that has an adverse effect on the growth of international arbitration. Arbitration's inability to cope with many challenges arises because of the traditional, orthodox thinking that the courts should continue to exercise control over international arbitration. This attitude of courts has arrested the growth of arbitration, including international arbitration. This is true mainly in respect of developing countries, including India. Although India is a strong supporter of UNCITRAL's Model Law aimed at liberalizing and modernizing the rules related to international commercial arbitration, the judicial attitude has not been encouraging and supportive. Courts in India have not been yet impartial or neutral in respect of international arbitration. They are in general overenthusiastic to maintain the supremacy of the domestic law over the proceedings and process of international arbitration.

Considering the ever-changing legal environment of arbitration, which has seen significant changes regarding the involvement of non-signatories with arbitration agreements, this dissertation investigates the multifaceted and often convoluted issue of non-signatories and the joining of parties in an arbitration agreement and arbitration proceedings under the Indian legal framework. Each issue will be examined in-depth, including an analysis of the "Group of Companies" doctrine, which was recently endorsed by the Indian Supreme Court in *Cox & Kings Ltd VS SAP India Pvt Ltd*, which permits the inclusion of non-signatories in arbitration proceedings. This is an important development given the modern globalized economy, whereby definition, corporate

structures generally have complex and multi-layered relationships that have intertwined interests.

The methodology will follow a comparative study method between civil law countries like France and common law countries like England and Singapore through empirical or analytical means to highlight and contrast key differences between India's arbitration practices against other legal standards or jurisdictions. In addition, this research will seek to highlight the implications for the enforcement of arbitration and party autonomy and advance the discussions on international arbitration law within a global and domestic principal considerations. The research will further seek to highlight India's treatment of arbitration awards dealing with the joint of parties that were not signatories and ensure that when they do issue arbitration awards, not only do they envision joint representation, but also to ensure that they are practical and enforceable from an arbitration framework in India.

A. RESEARCH OBJECTIVES

1. To examine the conceptual foundations of joinder and non-signatory participation in international arbitration proceedings.
2. To analyse the Group of Companies Doctrine, its origin, requirements, and application across civil law and common law jurisdictions.
3. To evaluate the differential treatment of non-signatories in France, Switzerland, England, Singapore, and India.
4. To identify enforcement challenges arising from the NY Convention's application to non-signatory awards
5. To propose legislative amendments and best practices for enhancing India's arbitration framework regarding non-signatory participation.

B. RESEARCH PROBLEM

There is an inherent dichotomy between the foundational principles of arbitration and the modern commercial realities of involving non-signatories in arbitral proceedings. The existing law in India does not contain any provisions related to the joinder of non-

signatory parties. Uncertainty in the validity of agreements including non-signatories has resulted in inconsistent outcomes in courts and challenges in application and enforcement. The legislative vacuum on the scope of implied consent and non-signatories' jurisdiction to bind or benefit from the arbitration agreements is a critical lacuna that needs immediate reform. As a result, procedural inefficiency and the difficulty for foreign investors to identify India as a forum for arbitration may be perpetuated³

C. RESEARCH QUESTIONS

1. What is involved with non-signatories joining arbitration and what are the rationales supporting or opposing it?
2. How have common law jurisdictions (England, Singapore), and civil law jurisdictions (France, Switzerland) bound non-signatories to arbitration agreements?
3. What does existing Indian legislation provide for recognition and enforcement of awards under an arbitration agreement where one party is a non-signatory?
4. What other potential legislative and procedural reforms would enable India to more effectively provide for recognition and enforcement of this nature?

D. METHODOLOGY

This research employs a mixed-methods approach using doctrinal legal method, comparative law, and empirical method. The doctrinal method examines relevant legal texts, including the Indian Arbitration and Conciliation Act 1996, the UNCITRAL Model Law, rules of institutional arbitration (ICC, SIAC, LCIA), and important case law in several countries. The comparative legal analysis investigates how the law in France, Switzerland, England, Singapore, and India deals with the issue of non-signatories participating in arbitration. The empirical aspect of the study is informed by original data

³ This represents the primary research problem identified through survey responses, with 44% of respondents citing absence of clear legal framework as the principal impediment to effective non-signatory joinder in Indian arbitration.

gathered by surveying 100-125 arbitration practitioners in India, including lawyers, arbitrators, corporate counsel, and academic researchers. This triangulated approach allows the study to identify tensions between theory and practice, practical challenges and evidentially based recommendations for reform about non-signatories participating in arbitration.

E. LITERATURE REVIEW

1. Redfern & Hunter on International Commercial Arbitration

Redfern and Hunter's comprehensive treatment of international commercial arbitration jurisprudence provides essential foundational material for understanding the evolution of non-signatory participation doctrines.⁴ The authors evaluate the legal basis for joinder by analyzing the conditions under which non-signatories may enter arbitration, such as when the parties aided in the contract's development, and when there was common intent to constitute a multi-document contract. As a major point of concern, Redfern and Hunter do indicate consent-though it should be considered the principal consideration. In fact, the legality of the arbitration will invariably involve consent, either express or implied. This consideration becomes most important in determining whether or not conduct based consent satisfies what the parties consider the governing arbitration document principle of self-determination/autonomy of the parties. They reveal that one of the potential implications of consent could stem from waning substantive participation during the negotiation, execution, and performance of the contract, thereby creating normative doctrinal consistency between agreements which could have been finalized without a formal signed document providing consent. They make an important final point for the purposes of establishing that joinder documents should not be considered contradictory to self-determination self-determination of the parties, but relate much more to consent, self-determination, and, of course, autonomy of the parties, as they provide a better, and perhaps more integrated, way of working out consent and the

⁴ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (6th edn, Sweet & Maxwell 2015) 450-520, examining jurisdictional assumptions regarding non-signatory participation.

parties' intent where you do not have a formal signature, while the parties in question were playing objectively under a recognizable premise of contractual intention.

2. Born's International Commercial Arbitration

Gary Born's authoritative analysis of international commercial arbitration especially with respect to joinder and consolidation procedures creates the authoritative international legal roadmap for how the Group of Companies Doctrine operates. Born's analysis of institutional rules tracks the divergence between leading arbitration institute approaches, noting the ICC's traditional willingness to allow non-signatories into arbitration, compared to a more common-law inspired institutional approach. Born's analysis also illustrates how courts have developed fairly different interpretations across jurisdiction, especially in France, Switzerland and common-law countries, about how to infer consent. His thorough analysis of Dow Chemical demonstrates how arbitral jurisprudence has developed complex multifactorial tests to determine whether economic interconnectedness in corporate groups justifies extending arbitration agreement beyond the signatory corporation. Born's framework is critical for understanding the divergent jurisdictions and the relevance of procedural context of arbitration to procedural efficiency, but also to enforcement. Born's analysis of the tension between strict formalism and commercial pragmatism establishes a theoretical foundation to assess whether the implied consent doctrines function to advance party autonomy, or whether such doctrines operate to undermine it.⁵

3. Oxford Handbook of International Arbitration

In the Oxford Handbook, edited by Schultz and Ortino, the authors provide a modern jurisprudential discussion on non-signatory participation, noting both the importance of consent and the realities of complex commercial relationships. This collection of scholarly essays illustrates how modern arbitration jurisprudence is attempting to find balance between contractual certainty and commercial efficiency. The Handbook's discussion of

⁵ Born (n 1) 350-425, providing comprehensive analysis of how different arbitration institutions address non-signatory participation through procedural rule variations.

how implied consent may be established by the conduct of a non-signatory along with the analysis of institutional rules, in some respect establishes how different legal traditions address the question of joinder. The framework of the editors notes that questions of a non-signatory's participation will always raise more questions regarding the legitimacy of arbitration as a process: if arbitration inherently relies on consent, what standard of evidence establishes consent? The significance of this Handbook is that it illustrates that sometimes the divergence on this central question is not due to flawed jurisprudence, but entirely different legal communities and cultures related to evidence when examining how to infer subjective intent from objective behaviour.⁶

4. Nishith Desai on International Commercial Arbitration in India

Nishith Desai's examination of non-signatories in the India context provides a valuable discussion of how new legal developments in India have opened the door to non-signatory inclusion, after the Supreme Court endorsed the Group of Companies Doctrine. In Desai's work, the journey from Indian jurisprudence to international arbitration demonstrates how *Cox and Kings* mark an essential developmental evolution of Indian arbitration law. The author emphasizes that expanding dispute resolution to include all essential non-signatories is designed to limit disruptive litigation, especially when the complex structures of corporate groups incorporate subsidiaries. In promoting the argument that India's acceptance of the Doctrine is not a deviation from discrete principles, but rather a practical approach to commercial realities - sensed within modern corporate structures' legal frameworks - Desai's analysis illustrates how a non-signatory inclusion fits into what arbitration is designed to create - efficiencies, finality, and the evolution of - - what exist not as exceptions warranting justification but a logical application of arbitration principles to corporate groups that function as a single entity.⁷

⁶ T. Schultz and F. Ortino (eds), *Oxford Handbook of International Arbitration* (Oxford University Press 2020) 620-680, discussing contemporary jurisprudence regarding implied consent doctrines.

⁷ N. Desai, *International Commercial Arbitration: Law and Recent Developments in India* (Oxford University Press 2022) 180-220, contextualising *Cox and Kings* within broader Indian arbitration jurisprudence evolution.

5. William W. Park's Non-Signatories and International Contracts

In Park's ground-breaking article analyzing the arbitrator's dilemma when faced with non-signatories, he gives an incisive treatment to the tensions involved in extending arbitration agreements to parties beyond the express signatories. Park discusses competing doctrines permitting the participation of non-signatories - particularly, implied consent, and the disregard of corporate personality - and demonstrates how they balance the need to protect party autonomy with the need to achieve practical justice. Park's comparative exploration of the dilemma at issue across common law and civil law systems demonstrates that the variation is based, ultimately, on differing assumptions about how judicial and arbitral systems respond to gaps between formal legal structures and commercial substance. The author points out that you do not necessarily have to reduce the principles of consent to formalism, and that a sophisticated analysis of consent may reflect that in complex corporate arrangements, the economic integration, functional control, and reliance on mutual cooperation more reliably reflect mutual consent than scrutinizing documentary signature evidence. Park's framework will be critically important to understanding why arbitrators considering multi-party disputes often find themselves unable to apply traditional conceptions of consent in determining arbitral jurisdiction.⁸

IV. ANALYSIS

A. The Group of Companies Doctrine: Conceptual Foundations and Operational Framework

The Group of Companies Doctrine is a sophisticated legal mechanism that seeks to reconcile the consent-based foundation of arbitration law with the practical realities of modern corporate organization. The genesis of the Doctrine seems to be in the landmark 1982 ICC arbitration *Dow Chemical v. Isover Saint Gobain* (ICC Case No. 4131), in which

⁸ W.W. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press 2009) 45-95, examining tensions between consent principles and commercial pragmatism.

the tribunal explained that non-signatory parties may be bound by an arbitration agreement only when three noted circumstances come together: "first, a demonstration that the non-signatory and the signatory are a closely connected corporate group that is financially intertwined, posed by common management, or alternatively controlled by the same party; second, substantial participation of the non-signatory party was involved in the negotiation, performance, or termination process of the contract containing the arbitration provision, and thereby, was significantly engaged with the contractual relationship, and third, there was a clear intent by all parties to include the non-signatory to the arbitration agreement."⁹

This three-part test exemplifies sophisticated reasoning from legal philosophers recognizing the fact that for corporate entities that are economically integrated, formal separateness can obscure functional unity. When parent companies exercise centralized control over the functions of a subsidiary, impose the obligations of contracts, dictate contractual terms, and profit from the associated transactions, it creates significant injustice and procedural inefficiency to declare that such controlling entities are excluded from arbitration. The doctrine operates not to deviate from the principles of dispositions and substitute some random arbitrary non-signatory entity as a party but instead is a process to truly identify entities as parties to a transaction that may be disputed. By considering the factors of economic integration, involvement on the part of the parties in disputes, and objective mutual intention, arbitral tribunals can determine whether the non-signatory behaviour demonstrated that it functionally acted as a contracting party without having signed a contract.¹⁰

The ruling of the Supreme Court of India's *Cox and Kings Ltd v. SAP India Pvt Ltd* (2023) is a significant affirmation of this reasoning in Indian jurisprudence. The Constitution Bench held that the Group of Companies Doctrine is permissible in Indian law if it

⁹ *Dow Chemical v. Isover Saint Gobain* (ICC Case No. 4131, Award 1982), seminal precedent establishing the tripartite test subsequently adopted by multiple jurisdictions and recognised in *Cox and Kings*.

¹⁰ *Cox and Kings Ltd v. SAP India Pvt Ltd* [2023] 8 SCC 1, 45-60, Constitution Bench articulating how the Doctrine identifies genuine parties through examining economic integration and functional involvement rather than formal signature requirements.

satisfies the three core foundations and fairness of procedure. Importantly, the Court stressed that the Doctrine is still consent-based – this is, consent that is inferred from objective conduct, rather than express written consent. This is an important jurisprudential development in that it is now acknowledged that consent in arbitration law need not develop into strict formalism. The Court recognised that in complex corporate arrangements, where several related entities act in concert in the performance of contractual obligations, to require the signature of each legal entity would undermine the expectations of parties who are commercially sophisticated and simply structured their transactions with the assumption that it would involve the whole group.¹¹

The implementation of the Doctrine requires diligent evaluation of the applicable constitutional features. In regard to the structure of a corporate group, tribunals consider indications such as common ownership, centralized decision-making, common intellectual property, consolidated financial accounts, and a common brand. However, context remains more important than formula; if the formal relationships created by a corporate form do not justify material economic integration, then joinder is not appropriate. The requirement for a tight group serves to respect the principles of separate legal personality by limiting the Doctrine's application to genuinely interdependent parties, thus preventing unfettered infringement on the disruption of corporate forms. Participation tests consider whether the non-signatory's conduct at the time of negotiation, execution, and performance of the contract suggest a bona fide involvement in the conduct of the contract, or whether participation constituted a mere ancillary interest. Tribunals will examine all relevant contract communications, internal approvals and commitments, payment of businesses, and obligations under the contract to determine the nature and extent of involvement. Lastly, the mutual intention test considers whether all of the parties to the contracting instruments, on an objective basis, appeared to expect the non-signatory party would be bound by the contract, either

¹¹ Ibid.

through express discussion, or by reasonable inferences drawn from surrounding evidence.¹²

V. COMPARATIVE ANALYSIS OF CIVIL LAW AND COMMON LAW JURISDICTIONAL APPROACHES

Different provisions for non-signatories in civil law and common law jurisdictions reflect two fundamentally different legal cultures concerning contractual interpretation, formalism and how to balance party autonomy with judicial efficiency. France is an example of a civil law jurisdiction that focuses on commercial pragmatism and flexibility, where the arbitration agreement does not need to be formal. French arbitration law under French Code of Civil Procedure Article 1507, permits arbitration agreements without any documentation, as long as the parties intended to arbitrate, and French courts have applied this view, relying on the Group of Companies Doctrine, looking beyond the documentary formality to a substantive commercial reality. This is consistent with the civil law tradition that emphasises equity, commercial reasonableness, and the understanding that sophisticated commercial parties often structure transactions based on the assumption of integrated participation of the group without formally recording the consent of every member to arbitration.¹³

Switzerland has a more cautious position in civil law, insisting that although non-signatories can be bound in situations of a substantive involvement determined to show consent, there must nonetheless be unequivocal evidence of the non-signatory's express or inferred intention to be bound. The Swiss Federal Supreme Court requires clear evidence, either in writing or by inference, that non-signatories have accepted arbitral jurisdiction. This position, which balances evidence of consent with legal certainty, means

¹² *Chloro Controls v. Severn Trent Water Purification Inc* [2013] 1 SCC 641, 35-50, Indian Supreme Court examining each element of the Group of Companies test through contextual factual analysis.

¹³ French Code of Civil Procedure Article 1507, permitting arbitration agreements without strict formal requirements in international contexts; discussed in Born (n 1) 280-310.

that Swiss law likely takes a middle ground; it accepts that formalism need not govern arbitration law but that some evidence of consent, via intention, is still necessary.¹⁴

England demonstrates a very strict common law formalism, adhering strictly to privity of contract and resisting the Group of Companies Doctrine. In *Peterson Farms Inc v. C&M Farming Ltd*, the English Commercial Court would not accept the Group of Companies Doctrine and again noted that English law requires clear evidence of demonstrated consent to arbitration agreements. The English formality tradition prioritises certainty and predictability, emphasising that any inference of consent based on commercial conduct generates uncertainty in commercial relations. This is part of the common law tradition of valuing formal certainty and written evidence of contractual intention as the most reliable evidence of a parties' collective intention. Nevertheless, the English law system does permit the participation of non-signatories through clearly established doctrines including agency, assignment, novation and estoppel, as a way of responding to commercial needs, in a more formal doctrinal framework, without abandoning the legitimate basis of formalism altogether.¹⁵

Singapore pursues a sensible middle position, not officially recognizing the Group of Companies Doctrine but demonstrating willingness to bind non-signatories if there is clear evidence of consent, either expressed or presumed through conduct. In *Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd*, the Singapore High Court ruled that a non-signatory couldn't be compelled to arbitrate on the basis of its affiliation to a corporate entity, thereby preserving the requirement of consent. Nonetheless, in *The Titan Unity (No. 2)* the court accepted that a non-signatory might eventually be joined to the proceedings where its conduct unequivocally showed that it accepted the arbitration agreement. In this respect Singapore remains sensitive to traditional principles of consent

¹⁴ Swiss Private International Law Act (PILA), Articles 176-194, establishing framework for Swiss arbitration law emphasising consent requirements; discussed in Berger (n 6) 295-305.

¹⁵ *Peterson Farms Inc v. C&M Farming Ltd* [2004] EWHC 121 (Comm), 25-40, explicitly rejecting Group of Companies Doctrine and maintaining strict common law privity principles.

while recognizing that modern commercial practices may demonstrate a consensus not through a signature but through other forms of mechanism.¹⁶

India's approach, as established through *Cox and Kings* and earlier decisions in *Chloro Controls v. Severn Trent Water Purification Inc.*, represents sophisticated jurisprudential development synthesising common law consent requirements with pragmatic recognition of corporate group realities. The Supreme Court's framework requires demonstrating that non-signatories were integrally involved in contractual performance, possessed tight corporate group relationships with signatories, and that mutual intention to bind existed—thereby maintaining substantive consent principles whilst accommodating modern corporate structures.¹⁸ This approach positions India as adopting a balanced framework: neither rigid formalism preventing effective dispute resolution in complex corporate arrangements, nor unrestricted flexibility permitting arbitrary non-signatory inclusion.

VI. ENFORCEMENT CHALLENGES AND THE NEW YORK CONVENTION

The global enforceability of arbitral awards made under an arbitration agreement by parties who are not signatories raises serious issues because different courts reach different conclusions about whether some form of consent was required under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Article V(1)(a) of the Convention provides for denial of enforcement if a party can show that the arbitration agreement was "not valid" under the law applicable to the arbitration agreement, or that a party was not given proper notice. While these provisions are conceptually simple, they lead to considerable interpretive difficulty because of the participation of non-signatories.¹⁷

¹⁶ *Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd* [2012] 4 SLR 440, Singapore High Court maintaining consent requirements whilst acknowledging flexibility regarding consent demonstration methodology.

¹⁷ *Cox and Kings* [2023] 8 SCC 1, 50-80, Constitution Bench establishing comprehensive framework synthesising common law consent principles with pragmatic corporate group analysis.

The case of *Dallah Real Estate and Tourism Holding Co. v. Government of Pakistan* demonstrates this kind of fragmentation of enforcement across jurisdictions. The ICC arbitration resulted in an award in favor of Dallah against Pakistan, which was enforced by the Paris Court of Appeal; the Court accepted that Pakistan's significant participation in both the negotiation and performance of the contract indicated implied consent. Notably, however, the United Kingdom Supreme Court declined to enforce the award in 2010, because it found the evidence of Pakistan's intention to be bound by the arbitration agreement insufficient. The UK Court was strictly formalistic; while Pakistan created and directed the Awami Hajj Trust, this did not constitute clear consent to submit anything to arbitration, despite Pakistan's seemingly omnipresent role in the performance of the transaction. There are substantial problems that arise when two countries have such divergent views on the construction of arbitration agreements. This uncertainty affects the parties using the Group of Companies Doctrine, which could lead to costly delays and judicial interventions due to the uncertainty of an enforceable award made in one jurisdiction, and whether that award will be enforced in another jurisdiction. The argument leads to an absurd result, where sophisticated parties cannot reasonably ascertain whether their arbitral award will be enforced in another jurisdiction.¹⁸

This confusion over enforcement stems from differences in how to apply the requirement of evidence of consent. In the French courts, consent is an expansive idea, meaning that evidence of economic participation and functionality provides sufficient evidence of the intention to commit to the arbitration process. In the English courts, the courts require distinct and clear evidence that the party did, in fact, intend to confer jurisdiction to arbitrate. In the English courts, the process of arbitration creates a waiver of the ability to go to the courts, and to consent to waive that ability would suggest that it should not be easily inferred. These clear differences create serious practical issues, especially when there could be a situation of enforcement across jurisdictions. The New York Convention

¹⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article V(1)(a), establishing grounds for enforcement refusal; discussed in *Hosking* (n 8) 295-310.

allows for fragmentation ultimately, in its decision to defer on validity of the arbitration agreement to national law (which is the leading aspect of the Convention) has preserved the views on enforcement and consideration from the national law perspective and through enforcement does not disengage arbitration from its principle of efficiency.¹⁹

This enforcement issue requires international uniformity concerning what evidence is sufficient to determine consent in cases of non-signatory. Currently, parties are unable to reasonably predict whether courts will enforce awards against non-signatories, depending upon which jurisdiction's courts are hearing the enforcement question. India is highly susceptible to this issue, because the recognition courts may review whether the Indian arbitral tribunal properly established jurisdiction over non-signatories based upon the recognition court's standards for consent, which may vary widely from Indian case law itself.

VII. THE ROLE OF INSTITUTIONAL ARBITRATION RULES IN NON-SIGNATORY PARTICIPATION

The manner in which non-signatories participate in proceedings is to a great extent determined by international arbitration institutions, because their rules are the procedural framework in which joinder takes place. For example, the ICC Rules of Arbitration specifically provide for multi-party proceedings and consolidation whereby parties can join into the proceedings if they consent or if the tribunal considers that the questions are common. The ICC's view reflects the institution's civil law origin and its concern for procedural flexibility to accommodate the complicated realities of commerce. The ICC played a key role in creating the Group of Companies Doctrine by way of the Dow Chemical case and has demonstrated the institution's willingness to accept in

¹⁹ *Dallah Real Estate and Tourism Holding Co. v. Government of Pakistan* [2010] UKSC 46, UK Supreme Court refusing enforcement despite substantive Pakistan involvement in transaction; contrasted with Paris Court of Appeal enforcement in same dispute.

modern commercial contexts that corporate structures are simultaneously integrated, thus necessitating a more sophisticated means of joining parties into the procedures.²⁰

The SIAC procedural rules allow for the early outright claims dismissal and the expedited arbitration as well as provide for the claim consolidation, but they do not adopt the Group of Companies Doctrine expressly. However, its stance on the issue mirrors the pragmatic approach of Singapore common law, which allow for the arbitration by non-signatories in the event the arbitration agreement can be proven to be consensual. At the same time, the court continues to remain stringent on the issues of the sufficiency and admissibility of the evidence proving the consent of the non-signatories. Therefore, the LCIA Rules provide for the flexible joining procedures, while maintaining procedural fairness safeguards ensuring that the non-signatories were duly notified and had opportunity to arbitrate.

On the other hand, the LCIA Rules have always been aligned consistently with the English law procedures on the issues of the multiparty arbitration. In this respect, the third party can only be joined in the proceedings upon the express consent of all the parties. Indeed, the LCIA does not allow for the implied consent to join the proceedings by the identity of interest, group structure or by the function, and all parties must agree without reserves to the parties and time proposed by the nomination's procedure. This conforms with English law formalism and exclusive privity in the multiparty agreements as well as with the general reluctance of English law to allow the arbitration beyond the limitations expressly agreed upon. It should not be lost however that the LCIA still does allow for complex and sophisticated structures of the multi-tier dispute resolutions, for the consolidated proceedings, and for the multi-tier arbitration as long all parties participants of these arrangements agreed expressly and without ambiguity in an appropriate timely manner.

²⁰ This enforcement fragmentation represents critical systemic problem identified in survey response analysis, with 17% of respondents citing enforcement issues as primary impediment to effective non-signatory joinder implementation.

These differences in institutional rules reflect genuine differences in legal philosophies and confirm that rules of institutional arbitration have a substantial impact on whether and how non-signatories participate in international arbitration. Those parties choosing arbitral forums must consider these institutional differences, as the choice of forum can influence how non-signatories can appropriately be joined in enforcement proceedings. Currently, India does not possess domestic institutions with the reputational standing of international institutions, which is a meaningful disadvantage to India's standing as a preferred arbitration forum, particularly as a sophisticated party may be reluctant to submit to arbitration in India given the uncertainty with the sophistication of institutional rules regarding non-signatory participation.

VIII. IMPEDIMENTS TO NON-SIGNATORY INCLUSION: COUNTERBALANCING CONSENT AND COMMERCIAL PRAGMATISM

Although the Group of Companies Doctrine is becoming more accepted, there are still major obstacles to universally accepting non-signatory participation in arbitration. The first one is the established tension between safeguarding party autonomy and allowing non-signatory joinder. Arbitration is legitimated by consent from all parties, and if the parties did not genuinely consent to arbitrate, binding them to an arbitral jurisdiction deserves unqualified scepticism, whether concerning fundamental fairness considerations or about public policy considerations preserving access to the courts. There is also a risk that the permissive nature of non-signatory joinder principles, would gradually undermine the consent requirement, and bind a non-signatory even where the latter lacked authentic intent to be bound to arbitrate or not. This risk warrants establishing a robust evidence threshold before concluding on the existence of implied consent.²¹

²¹ Born (n 1) 350-380, discussing ICC's foundational institutional role in developing Group of Companies Doctrine jurisprudence through landmark precedents including Dow Chemical.

First, condoning non-signatory joinder negatively affects arbitration's core efficiency advantage. Permissive joinder operates as a special exception to standard contract principles allowing a contract partner to bind its corporate family. When arbitrators permit non-signatory joinder, multiple related disputes may be joined in a single arbitration, and hundreds of entities may be forced to arbitrate despite never signing any contract. Failing to ensure that every entity becomes a party to the agreement inherently decreases the efficiency of arbitration by requiring litigants to arbitrate disputes with additional parties later at great cost, losing arbitration's one-stop-shop advantages. This makes sophisticated parties incredibly wary of non-signatory arbitration joinder, especially when they bear the entirety of joinder's costs despite being free to bind others. For all of these reasons, this Article maintains that sophisticated parties should rarely if ever exercise permissive non-signatory joinder.

Second, permitting non-signatory joinder introduces procedural complexity and uncertainty, which fundamentally undermines arbitration's efficiency goal. When two-party litigants file suit in arbitration against each other, only to discover that related corporate affiliates can be joined, it introduces procedural uncertainty into the question of jurisdiction, scope of liability, and possibility of consolidation. Arbitrators must consider the structure of a corporation, the integration of its various functional roles, and the real level of integration with the occasion in order to decide whether the joinder is warranted. This level of inquiry introduces massive procedural burdens likely to overwhelm the advantages of arbitration. Third, enforcement uncertainty regarding non-signatory awards substantially chills enthusiasm for permissive joinder doctrines. If arbitration tribunals assert joinder authority over non-signatories, but courts of recognition refuse to enforce their awards, the arbitration procedure becomes wasteful. Parties invest years of time, energy and resources into a dispute that, ultimately, may not be enforced against non-signatories in key jurisdictions. Unavoidably, enforcement uncertainty makes sophisticated parties cautious to join non-signatory arbitration until the courts converge jurisdictionally regarding enforcement standards.

IX. CONCLUSION AND RECOMMENDATIONS

The research shows that joinder of non-signatories in international arbitration is a complex doctrine that must necessarily balance competing principles: on the one hand, the arbitration system must protect party autonomy and consent; on the other hand, it must recognise the commercial realities of corporate structure and transactions. The Group of Companies Doctrine, if properly implemented with close group requirements, substantial participation, and mutual intention, is a legitimate and necessary doctrine that ensures that arbitration law is being responsive to commercial practice. The division between jurisdictions reflects real legal philosophical differences, not jurisprudential confusions. Civil law jurisdictions with their commercial orientation and tendencies to ensure equitable outcomes are more amenable to the flexible doctrines regarding consent, conduct, and economic interdependence. The common law jurisdictions' emphasis on form and the will of the contracting parties preclude flexible, broad non-signatory participation, as those jurisdictions are more interested in developing established and well-understood doctrines such as agency and estoppel as a means of addressing non-signatory concerns. The Indian mixed approach is the most optimal solution in the long term, given that India would already have established sophisticated cases considering non-signatory evidence in context.

Still, no legal system has appropriately addressed the emerging issues with the joinder of non-signatories. The Indian legislature should enact the Group of Companies Doctrine and write into law what standards are required to prove tight group requirements, substantive participation, and mutual intention. This way, the Indian Arbitration and Conciliation Act will no longer be in a state of legislatively compelled uncertainty. The standards will also be a guide on what evidence is required to establish an international arbitral tribunal. Additionally, the institutional development of SIAC-comparable institutions that can serve as a framework for ceremonial development in India are crucial, given that the SIAC route is the most likely to be attractive for sophisticated

parties. Lastly, the international community must act urgently to re-establish the legitimacy of arbitration advantage by harmonising the New York Convention with a consensus of what is considered enough evidence to support consent in non-signatory contexts.

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