UN-MUDDLING JOINDER AND CONSOLIDATION IN INDIA: KEEPING PACE WITH INTERNATIONAL ARBITRAL PERSPECTIVES

*Arun Raghuram Mahapatra**

Abstract

In recent times, rising complex multi-party arbitrations have posed many administrative challenges for arbitral tribunals worldwide. To cut costs, save time in these proceedings, and mitigate the risk of inconsistent awards, the joinder of non-signatories and consolidation of arbitral proceedings have emerged as enticing options for parties engaged in commercial disputes. However, these alluring tools also go against ideas of party autonomy, privity, and equality, which form the basic tenet of arbitration, and their usage requires the careful exercise of thought and reason. This note aims to analyse the legal position of these procedural tools in the national and international landscape and ultimately come up with a holistic way forward for these tools.

I. Introduction

In the past few years, arbitral tribunals worldwide have been facing various difficulties due to elaborate and convoluted multi-party disputes. A rise in the multiplicity of proceedings has not only led to increased costs and time spent on arbitrations but has also brought forth the issue of conflicting awards.[1] To avoid these parallel proceedings and efficiently utilise resources, the tools of joinder and consolidation in arbitral proceedings have recently been gaining more popularity.

Various renowned international arbitral institutions have recently revised rules regarding the joinder of third parties and consolidation.[2] These provisions have resulted in a more flexible arbitration environment by providing a fairly liberal rein to parties and arbitral tribunals to enjoin third parties and consolidate proceedings.

However, these alluring tools also go against the very tenet of arbitration. An arbitration exists only due to the arbitral clauses in a contract, and the concept of privity in a contract naturally implies that only signatories to the agreement should be permitted to be a part of the arbitral proceedings. Some jurisdictions have even enshrined the arbitral tribunals, whose existence emanates from the scope of the contract, with extra powers such as enjoining parties based on implicit consent. In some other cases, the joined or consolidated parties have even been devoid of choosing arbitrators while the other parties are allowed to exercise these rights. In short, these

* Arun Raghuram Mahapatra is a third-year student at Rajiv Gandhi National University of Law, Punjab, India. The author may be contacted at arunraghurammahapatra21013@rgnul.ac.in.

1 Deepak Jain, Sanjolli K. Padhy & Muskaan Aggarwal, *Multiplicity of Arbitration Proceedings – A Study*, 2(1) IND. J. PROJECTS INFRASTRUCTURE ENERGY L. 37, 38 (2022).

2 *See* International Chamber of Commerce (ICC) Arbitration Rules, 2021 [*hereinafter* "ICC Rules"]; *See* International Centre for Dispute Resolution (ICDR) Arbitration Rules, 2021 [*hereinafter* "ICDR Rules"]; *See* London Court of International Arbitration (LCIA) Arbitration Rules, 2020 [*hereinafter* "LCIA Rules"]; *See* Singapore International Arbitration Centre (SIAC) Rules, 2016 [*hereinafter* "SIAC Rules"].

procedural tools have also encroached upon the ideas of party autonomy, privity, and equality, which form the foundation of the arbitration process.[3]

It begins by providing a brief on these tools, explaining their purpose, usage, advantages, and pitfalls in Part II. Part III then proceeds to elucidate upon the muddled legal position of these tools in Indian jurisprudence and brings to view the need for more clarity in the domain. The same is followed by a holistic analysis of the joinder and consolidation provisions of many renowned international arbitral institutions in a bid to identify the best-accepted international practices in Part IV. Lastly, Parts V and VI the essay, after a thorough look at the mounting criticism towards the Indian approach of the 'Group of Companies' doctrine, attempts to provide alternate solutions in line with identified best practices.

II. Joinder and Consolidation: A Brief Explanation of the Tools

'Joinder' refers to involving or 'joining' a third party which is not a signatory of the arbitration agreement in the arbitral proceedings.[4] The idea of 'joinder' is a well-settled feature of litigation, and it is usually permitted for efficient administration and conservation of resources. Even in arbitration, the main aim behind a joinder is to reduce the time, costs, and other inefficiencies pertaining to multiplicity of proceedings,[5] including the risk of inconsistent awards.[6] Consolidation, on the other hand, refers to merging or amalgamating multiple arbitrations into one single procedure.[7] Similar to the tool of joinder, consolidation's main aim is to save time and resources, and it is usually employed in multi-party and/or multi-contract arbitrations. In recent times, due to a large rise in multi-party arbitration cases,[8] these tools have quickly gained popularity in international arbitral institutions and national forums.

However, unlike litigation, in arbitration, the threshold to allow for joinder or consolidation is higher and the instances where these tools can be employed are limited.[9] The arbitral tribunal's powers are born out of the volition of the parties and therefore the usage of these tools is normally

---

3 SUNDRA RAJOO, LAW, PRACTICE AND PROCEDURE OF ARBITRATION IN INDIA 18 (2021).

4 *Arbitration: Joinder, Consolidation*, BODENHEIMER, *available at* https://www.changing-perspectives.legal/arbitration/frequently-arising-issues-in-international-arbitration/joinder-consolidation/; Kiran Gore, *Joinder*, JUS MUNDI (Sept. 27, 2022), *available at* https://jusmundi.com/en/document/publication/en-joinder#:~:text=Joinder%20(or%20%E2%80%9Cintervention%E2%80%9D),or%20by%20its%20own%20request

5 Giovanni Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Concurring Opinion of Mr. J. Christopher Thomas, QC (Decision on Jurisdiction and Admissibility), ¶ 9.

6 R. F. Hansen, *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, 73(4) MODERN L. REV. 540 (2010); GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 282 (2009) [*hereinafter* "Born Law & Practice"].

7 *Core Issues in International Arbitration: Consolidation of Proceedings – Key Considerations to be Aware of*, HOLMAN FENWICK WILLAN, *available at* https://www.hfw.com/downloads/003468-Core-issues-in-international-arbitration.pdf; *Arbitration: Joinder, Consolidation*, BODENHEIMER, *available at* https://www.changing-perspectives.legal/arbitration/frequently-arising-issues-in-international-arbitration/joinder-consolidation/.

8 Marily Paralika & Alexander G. Fessas, *Joinder, Multiple Parties, Multiple Contracts, and Consolidation under the ICC Rules,* CYPRUS CHAMBER OF COMMERCE & INDUSTRY (Apr. 29, 2014), *available at* http://www.ccci.org.cy/wp-content/uploads/2014/05/Multi-Joinder-Consolidation.pdf.

9 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 91 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "Redfern & Hunter"].

only possible when all parties consent to the same.[10] The consent could be express, implied, or by the virtue of the arbitral rules adopted by the parties.[11]

Furthermore, viewing these tools from a different angle exposes us to their pitfalls, which at times outweigh their perceived benefits. These pitfalls are enumerated as follows:

- Consolidation and joinder can at times create issues pertaining to the appointment of arbitrators. In some cases, the joined or consolidated parties are devoid of choosing arbitrators while the other parties are allowed to exercise these rights. The same issue came up in the *Dutco Construction* v. *BKMI Industrienlagen GmbH et Siemens AG* ["**Dutco**"] case,[12] wherein the arbitral award was set aside on the premise that there was a violation of the principle of equality[13] during the appointment of arbitrators. Further, as stated by Prof. Gary Born, "*Many arbitrations involve three-person tribunals, with each party nominating one member of the tribunal, and the two party-nominated arbitrators agreeing upon a third arbitrator. If there are three (or more) parties to the arbitration, who have distinct interests, this model often does not work.*"[14]

- Confidentiality is considered one of the prime advantages of arbitration[15], and steps such as joining non-signatories into an ongoing dispute between parties come with an obvious, albeit limited, loss of confidentiality.[16]

- While in general consolidated/joined arbitrations are more efficient, the reduction in cost, time, and resources used are not necessarily distributed evenly among the parties.[17]

- At times, these tools are employed without the explicit consent of parties, or the ambit of implied consent is stretched extensively[18], and this is very dangerous as consent is considered to be one of the defining characteristics[19] of arbitration.

Ultimately, in the exercise of these procedural tools of joinder and consolidation, it is to be noted that although "lack of chronological coordination, potentially conflicting findings and the possibility of diverging judgments may cast disfavour upon arbitration," it must be ensured that "the remedy is not worse than the evil."[20]

---

10 *See generally*, HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE AND CLASS ACTIONS (2005).

11 *See,* Martin Platte, *When should an arbitrator join cases?*, 18 ARB. INT'L 67 (2002); R. Chandra Mohan & Lim Wee Teck, *Some contractual approaches to the problem of inconsistent awards in multi-party, multi-contract arbitration proceedings*, 1 ASIAN INT'L ARB. J. 161, 164 (2005).

12 Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 07, 1992, No. 89-18.708, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co. (Fr.).

13 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"].

14 BORN LAW & PRACTICE, *supra* note 6, at 282-283.

15 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3 (2nd ed. 2012) [*hereinafter* "MOSES"].

16 BORN LAW & PRACTICE, *supra* note 6, at 283.

17 *Id.*

18 *See* BORN LAW & PRACTICE, *supra* note 6, at §5.01; REDFERN & HUNTER, *supra* note 9, at 85-91 (Principles of Alter Ego, Group of Companies, etc.).

19 MOSES, *supra* note 15 at 2.

20 BERNINI, OVERVIEW OF THE ISSUES, IN ICC, MULTIPARTY ARBITRATION 161, 163 (1991), *cited in* BORN LAW & PRACTICE, *supra* note 6, at 282.

III. The Muddled Legal Position of these Tools in India

Historically in our country, joining third parties in arbitrations has been held to be wrongful, impermissible, and antithetical to consent. The Supreme Court of India has held numerous times that non-signatories cannot be included as a party in the arbitration proceedings.21 However, this viewpoint is not static or inflexible in the sense that an additional party can be made a part of in arbitral proceedings by the exercise of the legal doctrine of "group of companies".

The "group of companies" doctrine first appeared in the Indian legal landscape in 2012 in the *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.* ["**Chloro Controls**"] case.[22] In the said case, the Supreme Court liberally construed the wording "*person claiming through or under*" within Section 45 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"][23] to denote that even third parties to some of the agreements could be made a part of the arbitral proceedings. The said doctrine was defined as a situation wherein an agreement for arbitration entered into by a company could be binding on its parent bodies or non-signatory affiliates, provided that the facts show that there was a "mutual intention of the parties" to bind the same.[24] The Supreme Court, however, clarified that the act of subjecting a third party to arbitration without their prior consent was an exception, and the court would examine and subject such cases to deep jural scrutiny.

However, even though *Chloro Controls* was supposed to be an exception, it has led to a number of cases following the same approach.[25] Expanding this concept further, even cases having joint/similar causes of action and commonality of parties/interest have resulted in consolidations/joint arbitrations.[26]

It becomes even more clear from the matter of *Gammon India Ltd.* v. *NHAI*[27] that the judicial position in India seems to be accepting the practice of consolidation of certain inter-related disputes by a common arbitral tribunal, even if the parties have not explicitly agreed to the same.

However, the SC, in the recent *Cox & Kings Ltd.* v. *SAP India (P) Ltd.* ["**Cox & Kings**"] case,[28] doubted the legal basis of the "group of companies" doctrine and the correctness of the law evolved in *Chloro Controls*. After due deliberation, the Supreme Court came to the conclusion that there was a need to reconsider the said doctrine as it was based more on the aspects of convenience and economics instead of law and referred the matter to a larger bench in order to settle the question of law at hand.

Hence, we have a number of contradictory positions when we consider these procedural tools. On one end, some observances make these tools seem inexecutable and impermissible, whereas others make it seem permissible, that too without the explicit consent of parties. In such conflicting

21 S.N. Prasad v. Monnet Finance Ltd., (2011) 1 SCC 320; Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531.
22 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
23 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 45 (India).
24 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
25 Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678, ¶¶ 21-25; Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413, ¶¶ 21, 23-28; MTNL v. Canara Bank, (2020) 12 SCC 767, ¶¶ 10.1-10.12.
26 P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594.
27 Gammon India Ltd. v. National Highways Authority, 2020 SCC OnLine Del 659.
28 Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1.

situations of laws, it becomes pertinent to expand our horizons and look at how various international arbitral institutions deal with such a situation so that we could take inspiration and harmonise the usage of the said tools.

IV. International Arbitral Institutions: Identifying the Best Practices

In this part of the note, the joinder and consolidation provisions of various international arbitral institutions have been analysed in order to identify the key trends, commonalities, and the widely accepted practices in these different rules. However, for the purpose of this note, the analysis has been specifically focused and limited to the rules of (i) International Chamber of Commerce ["ICC"], (ii) International Centre for Dispute Resolution ["ICDR"], (iii) London Court of International Arbitration ["LCIA"], and (iv) Singapore International Arbitration Centre ["SIAC"]. This part has been divided into two broad sub-divisions, one dealing with key trends in the joinder provisions and the other dealing with consolidation provisions.

A. Key Trends in Joinder Provisions Across International Arbitral Institutions

By holistically considering all the joinder provisions of the arbitral institutions as mentioned above, the following recurrent criteria that cut across all these institutions may be identified:

i. The third party, to be enjoined, must consent to the joinder

Among all the arbitral institution rules examined, for a joinder to take place, there is the minimum non-negotiable condition of the third party explicitly consenting to the joinder process.

This condition can be seen in the ICC Rules, wherein post the confirmation of any arbitrator, joining a third party becomes impermissible except if [a] all parties, along with the third party, consent to the same[29] or [b] the composition of the tribunal and the terms of reference are accepted by the third party and the tribunal permits the request, after taking into consideration all appropriate circumstances.[30] Likewise in the ICDR Rules, third parties can be made a part of the proceedings post the confirmation of any arbitrator, only if [a] all parties, along with the third party, consent to the same or [b] the tribunal once composed finds that the such joinder is appropriate, and the third party consents to same.[31] Similarly in the LCIA Rules, the tribunal can permit third person(s) to be enjoined into the proceedings only when both the third person and the applicant party have agreed expressly to the joinder.[32] Lastly, even when coming to the SIAC Rules, which takes a bit of bespoke approach in comparison to the other institutions, this minimum condition is still present as a joinder can take place only if either [a] the arbitration agreement *prima facie* binds the third party; or [b] all involved parties, along with the third party, consent to the same.[33]

There are two main benefits to this non-negotiable condition of the third party consenting to the joinder process. The first benefit is that needless delays associated with determining implicit consent from circumstances, as can be experienced with the "group of companies" in the Indian

29 ICC Rules, art. 7(1).
30 ICC Rules, art. 7(5).
31 ICDR Rules, art. 8(1).
32 LCIA Rules, art. 22.1(x).
33 SIAC Rules, r. 7.1; SIAC Rules, r. 7.8.

jurisprudence, are completely avoided as the consent in this case must be express. The second benefit is that by consenting to the composition of the tribunal and other terms of reference, the equal and fair treatment of all parties concerned is ensured in line with the New York Convention[34] ,and thus the probability of setting aside/non-enforcement of the arbitral award is mitigated.[35] The same also solves the problems that came up in the *Dutco* case.[36]

Hence, the most important takeaway with regards to joinder provisions is that in all situations, the minimum and uncompromisable condition is explicit consent of the third party that is to be joined.

ii. An extra condition, which is either the satisfaction of the tribunal or the consent of the remaining parties (either one or all)

As can be seen in the analysis of the rules of different international arbitral institutions in the preceding paragraphs, in addition to first condition of the consent of the third party, there is always an additional condition that must be satisfied for a joinder to take place. This additional condition is either [a] satisfaction of the tribunal/court of the circumstances of joinder, or [b] the consent of one or all the remaining parties.

The rationale behind this second condition is to make sure that there are no frivolous joinders, wherein there is no real merit or interest of the involved parties. In essence, the second condition is safeguard which prevents the procedure of joinder from being misused.

Overall, there are two primary key trends that are observed across the joinder provisions of various international institutional arbitration rules. These conditions are the non-negotiable consent of the third party and an additional safeguard provision in terms of satisfaction of the tribunal or consent of the remaining parties. Both these conditions are vital in resolving the inherent problems pertaining to the concept of arbitral joinder and will be of great use and guidance when we attempt to refine the scenario surrounding arbitral joinder in India.

B. Key Trends in Consolidation Provisions Across International Arbitral Institutions

By holistically considering all the consolidation provisions of the arbitral institutions as mentioned above, we can identify the following recurrent criteria that cut across all these institutions: -

i. The consent of all the parties is not necessarily mandatory

The process of consolidation differs from that of a joinder, as consent is not a non-negotiable condition during consolidation.

As per the ICC Rules, consolidation can take place if any one of the following disjunctive conditions of [a] all parties agreeing to consolidation; or [b] all arbitral claims falling under the same arbitration agreement(s); or [c] the Court deeming the arbitration agreements to be

34 New York Convention, art. V.

35 Smitha Menon & Charles Tian, *Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes*, KLUWER ARBITRATION BLOG (Jan. 3, 2021), *available at* http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/.

36 Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 07, 1992, No. 89-18.708, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co. (Fr.).

compatible in case of the claims falling under different agreement(s), but the same parties and dispute of same legal relationship being involved; are met.[37] Similarly, under LCIA Rules, consolidation can take place if the conditions outlined in Article 22A[38] of the said rules, which are to an extent *pari materia* to conditions outlined in the ICC Rules and also do not mandatorily require consent, are met. Likewise, the conditions for consolidation under the ICDR Rules also do not mandate consent and are almost similar to those of the ICC Rules and the LCIA Rules.[39] Finally, when we come to the conditions for consolidation enshrined under the SIAC Rules,[40] we witness the general pattern/combination of pre-requisite conditions as seen in other arbitral institutions and once again find that consent is a not mandatory requirement.

From the above, it can be surmised that the process of consolidation fundamentally differs from that of joinder as consent is not necessary for consolidated arbitrations. Although consent makes things easier and faster when granted, consolidations can still take place even if consent is not granted by all parties, given that certain other conditions are met. Evidently, procedural efficiency of the arbitration process is placed at a higher pedestal than party autonomy and consent during consolidation.

ii. Consolidation without explicit consent is possible only when certain factors are satisfied

When perusing the ICC, LCIA, ICDR, and SIAC Rules, we find that consolidation without explicit consent is possible when the same arbitration agreements are involved or when compatible agreements involving the same stakeholders and the same legal dispute are involved.[41] Furthermore, relevant circumstances also must be given due regard in each case.[42]

Hence, during non-consensual consolidation, it is ultimately upon the wisdom of the court/tribunal/consolidation arbitrator to decide whether the proceedings need to be consolidated, keeping in mind the aforementioned factors. From this, we can also infer that judicial and legal theories play a more frequent and vital role during consolidation in comparison to joinder, as the wisdom of the court/tribunal is essentially guided by these principles.

iii. Either all the parties exercise the right to appoint arbitrators for the consolidated arbitration, or no party does

Apart from the 'basic' conditions, as outlined in the preceding paragraphs, arbitral institutions have also adopted additional conditions regarding the appointment of arbitrators.

In the LCIA Rules, consolidation without explicit consent of the parties can only take place if no tribunal has been constituted for such other arbitration(s) or, if already formed, such tribunal(s) has the same composition.[43]

37 ICC Rules, art. 10.
38 LCIA Rules, art. 22A.
39 ICDR Rules, art. 9(1).
40 SIAC Rules, art. 8.
41 *See,* ICC Rules, art. 10; LCIA Rules, art. 22A; ICDR Rules, art. 9(1); SIAC Rules, art. 8.
42 *See,* ICC Rules, art. 10; LCIA Rules, art. 22A; ICDR Rules, art. 9(1); SIAC Rules, art. 8.
43 LCIA Rules, art. 22A.

Similarly, the ICDR Rules even specify the process of a consolidation arbitrator, who decides whether to consolidate proceedings based on the assessment of the basic conditions,[44] and they are to be chosen by the parties unless the parties fail to reach a common choice and the administrator chooses the same.[45] Furthermore when the consolidation takes places, all parties of such arbitrations are deemed to have renounced their rights to appoint an arbitrator and the consolidation arbitrator has the power to remove any of the appointed arbitrators and designate arbitrators from erstwhile-appointed tribunals to the consolidated arbitration.[46]

Likewise, in the SIAC Rules, the court retains the power to annul the designation of any arbitrator appointed prior to the consolidation.[47] Furthermore, a point to be noted here is that the revocation of any arbitrator is without prejudice to the validity of any act, order, or award passed by the arbitrator prior to being revoked.[48]

By perusing the above rules, we see that each party in a consolidated arbitration exercises the right to appoint an arbitrator, or in some institutional rules, each party waives the said right. By the virtue of this practice, a sort of uniformity is created in terms of appointment/non-appointment of arbitrators amongst the parties. The rationale behind practicing this uniformity is, once again, to maintain fairness and adhere to the principle of equality as mandated by the New York Convention and not fall prey to the situation that came up in the *Dutco* case.

Overall, three primary key trends are observed across the consolidation provisions of various international institutional arbitration rules. First, that consent is not mandatory in consolidation; second, that consolidation without explicit consent is possible only when certain 'basic' conditions are met; and third, that either all parties exercise or waive the right to appoint arbitrators. Once again, these trends and conditions are vital in the resolution of inherent problems pertaining to arbitral consolidation and will be of guidance and inspiration when we attempt to form holistic methods for arbitral consolidation in India.

V. Balancing the Interests in India: Arriving at a Harmonious Solution

A. Fixing the Problems Born of the Group of Companies Doctrine

From the above discussions held on joinder and consolidation, we can deduce that these tools, paired with a proper procedure, have become widely accepted by the international community. However, in India, as already discussed previously, the application of the 'group of companies' doctrine, rather than a delineated procedure, seems to have been the main driving force behind joinders and consolidation.

Ever since the beginning of its usage, the said doctrine has faced heavy criticism from the international community for its non-consensual approach. The most fundamental contention against the doctrine is delivered from Article 7 of the United Nations Commission on International

44 ICDR Rules, art. 9(3).
45 ICDR Rules, art. 9(2).
46 ICDR Rules, art. 9(6).
47 SIAC Rules, art. 8(10).
48 SIAC Rules, art. 8(11).

Trade Law Model Law on International Arbitration[49] and Article II of the New York Convention,[50] which clearly state that the intention to arbitrate must be penned down. Prof. Gary Born has termed the said doctrine as 'controversial' and says that the same principle has been subject to prevalent criticism.[51] Furthermore, the said doctrine has only been recognised in India and France,[52] and most countries have usually rejected the same. An English commercial court had opined that "*the Group of Companies doctrine ... forms no part of English law*"[53] and similarly, Swiss Courts also generally bar the recognition of the same under their *Switzerland de lege lata*.[54] In other international cases, courts have also quashed arbitral awards that placed reliance on the said doctrine while binding non signatories to an arbitration agreement.[55] Finally, as if in a response to the mounting criticism, even the Supreme Court doubted the tenability of this doctrine in the recent *Cox & Kings* case.[56]

Hence, taking a cue from the international community and the rationale delivered by the bench in the *Cox & Kings* case, the author thinks that it is high time for our judiciary to either seriously reconsider, redefine, and clarify the ambit of this heavily criticized doctrine or discard it all together in the upcoming referred matter.

B. Adopting the International Standards, Both Judicially and Legislatively

In harmonising the usage of joinders and consolidation in our country, both the judiciary and the legislature have a vital role. Both the law-making and the law-interpreting organs need to have an approach that is comprehensive, rational, and balances the advantages and pitfalls of these procedural tools. In this regard, the following steps can be taken.

i. Legislative Steps

Despite the tools of joinder and consolidation gaining wide acceptance and their incorporation into institutional arbitral rules rapidly rising[57] most, if not all, national jurisdictions have failed to codify the same into specific legislative provisions. Most of the jurisprudence surrounding these tools arises from case laws and not from codified law, resulting in conflicting and varying positions of law. This problem is particularly aggravated by the fact that most debates regarding joinder and consolidation arise due to the existence of various methods and legal theories surrounding these tools and the judicial interpretative process is perhaps not the best method when a multitude of interpretations exist. Thus, the codification of joinder and consolidation provisions has a massive

---

49 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 7, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

50 New York Convention, art. II.

51 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1558-59 (3d. ed. 2009).

52 Dow Chemical France v. ISOVER Saint Gobain, ICC Case No. 4131, Interim Award, Sept. 23, 1982.

53 Peterson Farms Inc. v. C&M Farming Ltd., [2004] 2 Lloyd's Rep. 603 (Q.B.).

54 Award in Geneva Chamber of Commerce Case of 24-3-2000, 21 ASA BULL. 781 (2003).

55 Judgment of January 20, 2006, C04/174HR (Netherlands Hoge Raad) (affirming annulment of arbitral award binding non-signatory affiliates); BORN LAW & PRACTICE, *supra* note 6 at 140.

56 Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1 (India).

57 Kirtan Prasad, *Joinder and Consolidation in Institutional Arbitration over the last 10 years: Evolution or Revolution*, 7(2) NAT'L L. SCH. BUS. L. REV. 25, 40 (2021).

unexplored advantage, as via legislative codification, these problems of conflicting interpretations and the overall lack of clarity in relation to these tools would be substantially reduced.

In light of this, the Indian legislature needs to come up with clear provisions for joinder and consolidation. The conditions drafted for these tools should conform with the key trends and commonalities of joinder and consolidation provisions as found in the analysis of various arbitral institutions, and the same should be implemented by the virtue of an amendment to the Arbitration Act.

In joinder cases, the conditions should either be the express consent of all the parties or the consent of the third party along with the satisfaction of the tribunal/court. Furthermore, there should be a balance between the rights of the signatories and the non-signatories, and none of them should be devoid of the right to select arbitrators. In the case of an already appointed tribunal prior to the joinder, if the third-party objects to the composition of the same, then the tribunal should be reconstituted post the joinder without prejudice to any decision/order delivered by the tribunal before the same. This reconstitution of the arbitral tribunal could either be undertaken with the mutual consent of all the parties, including the third-party, or, in case of lack of agreement, be undertaken by the High Court, wherein all the parties waive their right to appoint an arbitrator.

In cases relating to consolidation, the conditions should be either the express agreement of all the parties to the same or the satisfaction of the arbitral tribunal/High Court based on relevant circumstances and compatibility of agreements so involved. Similar to the joinder provisions, in case of disagreement on the composition of the arbitral tribunal, the tribunal should be reconstituted with each party's consent, or each party's right to appoint an arbitrator should be waived, and the High Court should constitute an arbitral tribunal it deems fit.

Lastly, to not encroach upon the freedom and the autonomy of the parties in selecting a procedure of their choice, a "without prejudice" clause should be added before these provisions, which would state that these provisions would only come into play only when the institutional or ad-hoc procedure chosen by the parties does not provide for any specific method of joinder or consolidation. This step will not only maintain the autonomy-friendliness of the arbitration procedure, but it will also keep in check the persistent India-specific problem of excessive judicial intervention[58] and keep delays caused to such intervention to a minimum.

ii. Judicial Steps

Till the time the legislative codification and amendments come into place, the judiciary must devise an approach that can satisfactorily deal with situations of joinder and consolidations. The first order of business would be to either fix or get rid of the 'group of companies' doctrine so that no more arbitrations fall prey to non-consensual joinders and consolidations lacking in due process. The Courts should adopt a more rational approach in consonance with commonalities as depicted by various international arbitral institutions and develop a new doctrine or test whose conditions must be met for the process of joinder/consolidation to be applicable.

[58] Justice B.N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017).

In cases of joinder, where the internationally accepted practice is for the mandatory demand of consent of the third party, the Courts should not force joinders without the explicit consent of the non-signatory. Only under very exceptional circumstances, as when the matters are concerned with the principles of natural justice[59] or public policy,[60] should there be the application of non-consensual joinders. A 'disputes-based' method, wherein the joinder is based on a case-by-case consideration of inseparably entwined rights and obligations with respect to third parties,[61] rather than a test with fixed factors, is a possible approach to such exceptional circumstances. This flexibility is vital because a straight-jacket legal theory or solution would eventually run into problems wherein sometimes even minute involvement of third-party would lead them to be impleaded,[62] whereas during other times even inextricable rights of third-party would not be enough for it to be part of the proceedings, thus violating the general basic principles of fairness and natural justice.[63]

In the cases of consolidation, where the internationally accepted practice does not always mandate consent and the process at times pertains to the wisdom of the court/tribunal, non-consensual methods should still be evoked with great care and restraint and only in the cases where there exists an adequate legal/contractual relationship between the signatories and the non-signatories.[64] In the realm of consolidations, the Supreme Court could perhaps even try to use a refurbished version of the current 'group of companies' doctrine by coming up with a stricter test of intent for determining implied consent. This stricter test could be in line with the one used in the case of *Reckitt Benckiser* v. *Reynders Label Printing*[65], wherein the Supreme Court opined that the burden of proof to prove the implied consent of the non-signatory to arbitrate lied with the signatory. Rather than relying on minor connections,[66] like common letterheads, usage of intellectual property of third-party, etc.[67], the new test should stress more upon the reasoning which forms the basis of the transaction arrangement and any possible intention of the parties to divide the transaction and liability amongst group/subsidiary entities.[68] The test could even take inspiration from international jurisprudence, wherein more concrete factors like third-party's [a] active participation

59 Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69(4) INT'L & COMP. L. Q. 991, 993 (2020).

60 FRANCO FERRARI, LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION (2016).

61 Tejas Chhura, *The Need to Re-Think the Group of Companies Doctrine in International Commercial Arbitration*, 15 NAT'L UNIV. JURIDICAL SCI. L. REV. 1, 13-14 (2022) [*hereinafter* "Tejas Chhura"].

62 Dow Chemical France v. ISOVER Saint Gobain, ICC Case No. 4131, Interim Award, 23 September 1982, 136.

63 Tejas Chhura, *supra note* 61, at 13.

64 Punit Sanwal, *Dissecting the 'Group of Companies' Doctrine under Arbitration Law Vis-À-Vis the Cox & Kings Case*, RAJIV GANDHI NAT'L UNIV. L. FIN. & MERCANTILE L. REV. (Aug. 21, 2022), *available at* https://www.rfmlr.com/post/dissecting-the-group-of-companies-doctrine-under-arbitration-law-vis-%C3%A0-vis-the-cox-kings-case.

65 Reckitt Benckiser v. Reynders Label Printing, (2019) 7 SCC 62.

66 Tejas Chhura, *supra note* 61, at 11.

67 Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories*, 8 J. INT'L DISPUTE SETTLEMENT 610, 619 (2017).

68 Charlie Caher, Dharshini Prasad & Shanelle Irani, *The Group of Companies Doctrine – Assessing the Indian Approach*, 9(2) INDIAN J. ARB. L. 33, 50 (2021).

in the conclusion of the contract,[69] [b] interest in the outcome of dispute,[70] and [c] involvement in a contract that is inextricably intertwined with the disputed contract in question,[71] are considered.[72]

Overall, with the respect to both of these procedural tools, the main aim of these steps is to minimise the intervention of the courts wherever possible and focus more on the aspect of consent of the parties. However, whenever there is a need for the intervention of the courts in light of matters such as public policy, natural justice, etc., the courts should adopt a more over-arching case-by-case approach that considers a variety of factors and consider a more holistic view of the dispute. If the above steps are implemented by both the legislature and the judiciary, it would perhaps un-muddle the current ambiguous scenario and lead to a lot more clarity with regard to these tools.

VI. Conclusion

In light of the rising number of multi-party arbitrations and the rising popularity of the tools of joinder and consolidation, this note aimed to analyse the legal position of these procedural tools in the Indian and international landscape and ultimately arrive at a holistic way forward for these tools.

The note began by briefly explaining these tools, their purpose, usage, advantages, and pitfalls. Then it proceeded to elucidate upon the muddled legal position of these tools in Indian jurisprudence, going through many landmark judgments like *Chloro Controls*, *Cox & Kings*, among others. This part was followed by a bird's eye analysis of the joinder and consolidation provisions of many arbitral institutions in order to pinpoint key trends and commonalities between the same and arrive at the best-accepted international practices. Lastly, after a thorough look at the mounting criticism towards the Indian approach of the 'group of companies' doctrine, the note attempted to provide alternate solutions in line with the holistic analysis conducted in the preceding sections.

Conclusively, it can be said that the arbitration law pertaining to joinders and consolidation is at a crucial stage in India, hinging upon the matter referred to a larger bench by the *Cox & Kings* case. It is hoped that the conclusion ultimately reached by Supreme Court with regard to the question of law at hand is in line with the analysis of this essay, resulting in a better arbitration environment in our country. Similarly, it is hoped that the legislature comes out with clear and specific provisions for these procedural tools so as to make India stand on the same pedestal as other arbitration-friendly regimes.

---

69 Sponsor AB v. Lestrade, Pau, Nov. 26, 1986 [1988] Rev. Arb. 153; ICC Case No. 5103/1988 [1988], J. DROIT INT'L 1206; Société Orthopaedic Hellas v. Société Amplitude, No 11-25.891 Cass. Civ. 1ere, Nov. 7, 2012.

70 Trelleborg do Brasil Ltda v. Anel Empreendimentos Participações e Agropecuária Ltda, Apelação Cível No. 267.450.4/6-00, 7th Private Chamber of São Paulo Court of Appeals, May 24, 2004.

71 Khatib Petroleum Services International Co. v. Care Construction Co. and Care Service Co., Case No. 4729 of the Judicial Year 72, Egypt's Court of Cassation, June 2004; Chaval v. Liebherr, Recurso Especial No 653.733, Brazilian Superior Court of Justice, 3 August 2006.

72 Eldiiar Raiymkulov, *Non-Signatory Parties in Arbitration: What can the Arbitration Institution of the Kyrgyz Republic Learn from International Practice?*, CENTRAL EUROPEAN UNIVERSITY (Apr. 01, 2016), *available at* https://www.etd.ceu.edu/2016/raiymkulov_eldiiar.pdf.