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INDIA ADR WEEK DAY 4: DELHI

Non-signatories in Contracts and the Group of Companies Doctrine

12:00 PM To 1:30 PM IST

MODERATOR

Mr. Saurabh Seth, Counsel

SPEAKERS

Hon'ble Ms. Justice (Retd.) Indu Malhotra, Former Judge of the Supreme Court of India

Mr. Rajiv Nayar, Senior Advocate

Mr. Saurav Agrawal, Counsel

Dr. Sanjeev Gemawat, Managing Director & Group General Counsel, Essar Group

Mr. Ooi Huey Miin, Partner, Raja, Darryl & Loh

HOST: The next session is hosted by Lexster Law. The topic of the session shall be, 'Non-Signatories in Contracts and the Group of Company Doctrine'. The session is moderated by Saurabh Seth. The panellists include honourable Justice Indu Malhotra, Rajiv Nayar, Saurav Agrawal, Sanjeev Gemawat and Ooi Huey Miin, I request the panellists to kindly come on stage. Thank you.

SAURABH SETH: Good afternoon, everyone, and welcome to this pre-lunch session of the India ADR Week 2025. My name is Saurabh Seth, and it is my distinct pleasure to be moderating today's session, which is on, 'Non-Signatories and Contracts and the Group of Companies Doctrine'. As you can see, to my left, we have a star studded panel. One of the stars is missing, and she will shortly join us. Just a housekeeping note to begin with. After the introductions each of the panellists will share their thoughts on the topic, then I'll pose a few tough questions to the panel to bring out different perspectives. And finally, if time permits, we'll open the floor to questions to the audience. Before I introduce the topic and the Panel, I would like to take this opportunity of thanking our wonderful hosts for today, Lexster Law LLP, a young and dynamic firm specializing in dispute resolution and arbitration. Mr. Shantanu Agrawal and his team, along with the MCIA, have worked very hard to put this event together. Can I please have a huge round of applause for our host today? We've gathered here today to discuss a subject that lies at the very heart of arbitration, Non-Signatories and the Group of Companies Doctrine. On the face of it, arbitration is very simple. Two Parties or more Parties sign a contract and refer their disputes to a neutral third-party for adjudication. But business is not as straightforward. Companies often transact through various layers and structures where you have joint ventures, affiliates, subsidiaries and often the real players of the piece stay behind the scenes. So the crucial question that we grapple with often is whether these unseen actors can be bound by the Arbitration Clause? As far as India is concerned, this doctrine has had a fascinating trajectory. The earlier simplistic view that no signature meant no arbitration has now been overhauled. In 2013, there was a watershed moment where the Supreme Court in ***Chloro Controls*** held for the first time that even a non-signatory can be bound by arbitration, provided there is a composite transaction, there is a commonality of subject matter and a clear to arbitrate. Later, in ***MTNL*** & ***Canara Bank***, thanks to Justice Malhotra more clarity was added to the concept. And most recently, the Constitution Bench in ***Cox & Kings*** has reaffirmed the doctrine. Internationally also, the picture is equally complex. Civil law jurisdictions such as France have long accepted the doctrine, whereas common law countries like England and Singapore are slightly more hesitant. But as far as India is concerned, the message is loud and clear. We are willing to look beyond the signature. And to discuss all of these nuances, we have an exciting panel which will give us perspectives from every corner of this debate.

It is my honour to first introduce Justice Indu Malhotra. Justice Malhotra is a prolific author, senior advocate, a Judge Bar Excellence, and now a renowned Arbitrator. Justice Malhotra holds a distinction of being the first woman to be directly elevated to the Bench of the Supreme Court of India. She was also a member of the Permanent Court of Arbitration in Hague. And in her latest avatar has dawned the hat of an Academician acting as Patron-in-Chief of the program run by the NLU Delhi on investment treaties and commercial arbitration. Her commentary on Arbitration Act acts as a bible and a practical guide for students, practitioners, and even judges. I can go on and on ma'am. But to conclude, I would just say that Justice Malhotra has left an indelible mark on India's arbitration landscape with various judgments which have shaped our jurisprudents. We are privileged to have you, ma'am.

JUSTICE (RETD.) INDU MALHOTRA: Thank you.

SAURABH SETH: Our next guest is Dr. Sanjeev Gemawat, Managing Director and Group General Council at the Essar group, with nearly three decades of experience across sectors including infrastructure, energy, real estate and mining he is a distinguished General Counsel and strategist. Among the many accolades, he's been honoured as India's top General Counsels and inducted into the Global Hall of Fame for his contribution to the profession. We welcome you, sir.

Our next speaker is Mr. Ooi Huey Miin, Partner at Raja, Darryl & Loh, he specially flown in from Malaysia today for this event. Mr. Miin is the former President of the Malaysian Institute of Arbitrators. And with over two and a half decades of experience, has acted as Counsel and Arbitrator in high value energy and construction disputes across the Southeast Asia region. He also serves on the faculty of the Chartered Institute of Arbitrators, training the next generation of arbitration professionals. We are delighted to have you with us.

Our next speaker is Mr. Saurav Agrawal, a rising star of the arbitration and litigation bar in India. He served as an Arbitrator in construction disputes, acted as a microcurie before the Delhi High Court and appeared in arbitrations India in all over India and overseas. He has also been part of the Expert Committee on Arbitration Law, helping shape reforms with his practical experience. We welcome you, sir. Now, without further ado, can I please request ma'am?

JUSTICE (RETD.) INDU MALHOTRA: Thank you. Good afternoon to all of you. My warm wishes to my esteemed co-panellists and members of the audience. I intend to give a perspective of the Indian evolution of this doctrine and how we have applied it. I will give the Indian perspective, and I will touch upon some of the judgments which will give you the

context in which the Group of Companies Doctrine has been invoked to join Non-Signatories to an Arbitration Agreement. We have followed the French example. And I just touch upon that fast. Now, it's like this that in modern days, there are complex corporate structures which are devised with various group and corporate entities which form a part of a common group. In such complex and layered corporate structures, it is often the case which we found that the commercial terms of the Contract are negotiated by the holding company, who is not a signatory at all, to the Commercial Contract. He stays behind the scenes, but has negotiated the Contract. And this is usually not a to protect the assets and limit the financial liability of the holding company. When disputes arise, the holding company, which has played a substantial role in the negotiations of the Contract is found not to be a signatory, and the Party which is executing the Contract has no assets in his name, in the name of that company. And eventually what happens? The Tribunal or the Court finds that the award which will be rendered, it will be not enforceable. It'll be just a paper decree. And it's to meet such challenges that the Group of Companies Doctrine has been invoked and applied in exceptional cases. Of course, I will dwell on the part of signing of the Contract a little later towards the end, but it has been applied for the first time in the ***Chloro Controls*** case, which took place in 2013.

Now what the courts, I'm going to give you an overview of what is exactly the jurisprudence which is being followed through these judgments. It is to compel those entities of the group who have played a key role either in the negotiation, execution and performance of the Contract. It's not every entity which is a part of the group of entities who can be joined in this category of cases. It's only those which have played a role in the negotiation, in the execution and performance of the Contract. And the Group of Companies Doctrine has helped in decoding the layered structure of complex commercial transactions to unravel the camouflage and to bind a non-signatory Party to the arbitration proceedings. The commercial realities have to be ascertained from the conduct of the Parties. Now, how does the Court or Tribunal ascertain that which are the entities in the group which can be joined? So one of the... I'll give you all a few examples which are normally employed. One is whether the communications, notices, payments were routed through the non-signatory company. Then the articles of incorporation of the signatory company to ascertain who is a controlling interest, who has the majority shareholding. Third is where there are common Directors and key managerial personnel who are common to the parent company and to the company which is executing the Contract. Then another instances where we found that the logo of the parent non-signatory company being used by the signatory company to establish the nexus. These factors are relevant and mat material to ascertain whether any of the non-signatory group entities have played a key role in the Commercial Contract. The evolution of this doctrine all of you know, it's a doctrine which actually emanated in France in the ***Dow Chemical's*** case, and it was for

the first time that they, in fact, came out with the concept of a veritable Party, which has now been of course, adopted by us also. A veritable Party to the Contract on the basis of their involvement in the negotiation performance and termination of the Contract. ***Chloro Controls*** was the very first judgment of 2013. And this is a case where there were multi-party agreements where performance of the ancillary agreements was substantially dependent upon the execution of the Principal Agreement. A joint venture had been entered into between the foreign entity and the Indian entity to market certain products in the Indian market. The Parties concluded several ancillary Agreements, such as even a Shareholders Agreement, which contain an Arbitration Clause. All the contracting Parties were not signatories to all the agreements, including the Shareholders Agreement. When disputes arose between the Parties, the foreign entities sought to terminate the joint venture which it had entered into with the Indian company. The issue arose in this case whether the agreements were binding on the non-signatories because of the composite nature of the transaction. The Supreme Court held that Section 45 provides that at the request of one of the Parties, any person claiming through or under him reflect reflects the intent of enlarging legislative intent of enlarging the scope beyond Parties who are signatories to the Arbitration Agreement. The Courts have held that a non-signatory can be joined only in exceptional circumstances on the basis of four determinative factors. This was in this judgment. One is direct relationship of the Party which is signatory to the Arbitration Agreement. Second is direct commonality of the subject matter of the agreement if it's a composite transaction. Third is the transaction being of a composite nature, where performance of the mother agreement may not be feasible without the aid, execution and performance of the Supplementary or Ancillary Agreements for achieving the common object of the transaction. And fourth is a competitive... I'm sorry, a composite reference of such parties was found to will serve the aids of justice. And this judgment of ***Chloro Controls*** was later followed in ***Cheran properties,*** wherein the Court said that the true properties to enforce the common intention of the Parties where circumstances indicate that both the signatories and non-signatories were intended to be bound by the agreement. So the formality of a signatory was given a go by, but it's been done only in rare and exceptional circumstances. That is the exception and not the rule. Then we had ***Ameet Lalchand Shah***, where they were interconnected agreements for interconnected agreements having individual arbitration clauses and the court said no, you will have one consolidated reference and the disputes will be arbitrated upon collectively. In ***MTNL versus Canara Bank***, we held that where one of the determinative factors is that where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit or a single economic reality you can invoke the arbitration and join a non-signatory. And the facts are interesting, and I'll just mention a couple of passages out. I won't read anything to you, but I'll just tell you what was the facts of the case where it was compelling to join a non-

signatory. Now, this was a case where an entity called Canara Bank Financial Services, that's CanFina. It was a wholly owned subsidiary of Canara Bank. It subscribed to bonds which were floated by MTNL. Subsequently CanFina transferred the bonds to Canara bank and eventually MTNL cancelled the bonds, which gave rise to disputes between the Parties. Canara Bank file a writ petition before the High Court challenging the cancellation of bonds and the High Court referred the parties to arbitration, but Canara bank opposed CanFina from being joined as a Party. So the matter when it came to Supreme Court, we said, CanFina is certainly a necessary and proper party, since it was the original purchaser of the bonds and there is no ground for keeping it out of the arbitration. So we had directed it to be joined as a necessary party. So I'll give you all some of these instances when the courts have applied the doctrine of group of companies to bind a non-signatory. In ***ONGC***, which came later, the Courts assert in addition to the four factors which were set out in the earlier judgments. They said the performance of the contract was also an additional ground as an essential factor to be considered by the Courts and Tribunals to bind a non-signatory to the Arbitration Agreement. And subsequently we have the ***Cox & King's*** judgment, Constitution Bench judgment which says that it's a modern reality of economic life and business organization created for several purposes, such as facilitating international trade, avoiding tax liabilities, limiting liability of the parent corporation, etc., which is the reason why these multilayered corporate entities are devised. The Constitution Bench then itemized, they said the following factors must be taken into consideration versus mutual intent of Parties, relationship of a non-signatory with the signatory party. This is crucial. The commonality of the subject matter, composite nature of the transaction and performance of the Contract. The test is to determine whether the non-signatory has a positive, direct and substantial involvement in the negotiation, performance or termination of the Contract. And this judgment has been followed in subsequent judgments of ***Ajay Madhusudan*** and ***ASA builders***. I won't touch upon that more. But I do want to emphasize one point which I think has been missed in several judgments but recently it has been noticed and emphasized. The first is that signing of the Agreement, Commercial Agreement is not a mandatory condition to imply a non-signatory. The first judgment which was passed was in 1955 by senior Justice Bhagwati, who was, that is Justice P.N Bhagavati's father and Justice Venkatarama Iyer and B.P Sinha, one of the most erudite benches and judgment wherein the court, for the first time said, “it is settled law that to constitute an Arbitration Agreement in writing, it is not necessary that it should be signed by the Parties. It is sufficient if the terms are reduced to writing and the Agreement between the Parties is established.” So it was 1955, when this was espoused by the Supreme Court. Subsequently came ***MR Engineers***, which referred to standard forms of terms, conditions of trade associations, etc.. They said if arbitration is provided in the terms and conditions it can be invoked. You don't necessarily have to have signed it. And then came the third judgment of

Incurable Shipping by Justice Rohinton Nariman, wherein he said, that in a Bill of Lading, if there is an Arbitration Agreement, it's sufficient to invoke it, and all Parties who have signed the Bill of Lading will be bound by it. And the most recent one is ***Glencore International versus Shree Ganesh***, which is a judgment of 25th August, 2025 where the Court has reiterated and followed this principle. So the issue is now a veritable party whether they can be impleaded, which was espoused in the ***Dow judgment*** and now is being followed in most of our judgments, but the caveat to that is it's only in rare and exceptional circumstances where you find that the non-signatory has played a role in the performance, negotiation and execution of the contract. It cannot be done otherwise. And second caveat is that if it is invoked, it doesn't mean every group, every member of the group can be joined. It's only those entities which have played a role in the negotiation, performance, execution, etc. of the Contract. This is broadly the Indian perspective. So I thought, I'll give you the Indian perspective before the other speakers start. Thank you.

SAURABH SETH: Thank you, Justice Malhotra. May I now invite Dr. Sanjeev Gemawat to lend his perspective to the issue.

SANJEEV GEMAWAT: Thank you very much for having me here. Ma'am, your speech was absolutely amazing in terms of the information and the content part, but let me give you my perspective about the whole issue. The laws are evolving, and it is the best example of how the arbitral or arbitration jurisprudence is evolving because it is addressing the needs of the society. The reason why we are discussing this today is that this jurisprudence which is getting evolved right now in the last one decade or so, essentially, it appears to me that this is an aberration from an established principles of law and the two established principles of law, which we have all learned over all these years is the Company law, which establishes. And the basic principle of Company law is the independent and separate existence, which doesn't get compromised because all this economic growth is possible because that company form of organization, corporate form of organization, because of that, we have made a separation between ownership and the company. And that is the main reason of economic growth of the last 200 years, and that is what we say that the most effective, innovative thought on the business organization standpoint was the company form of organization. But because this jurisprudence which is evolving, it is, in fact, an aberration in terms of this corporate form of organization. And the second aberration comes from the Arbitration law. Arbitration law, which we have all understood that this is a consensual process, a process whereby two Parties are binding themselves in terms of going for the Arbitral process. Now, on both these principles, it's a big aberration that Parties who have not signed the Contract. Parties who are not party to the main Contract, not signed the Contract, not part of the contract, not sign the Arbitration Clause, but they are responsible as far as the arbitration process is concerned.

Now, the interesting thing is that is also addressing the commercial realities of today. It's not the devising a corporate or complex structure. In fact, this is the needs of the society, because today organizations are diversified business groups. These organizations are operating in multiple geographies, and with that kind of diversification and geographies, it is all the more important that from an organization standpoint, Contracts get executed which are for the benefit of the multiple businesses. Let me give you some examples on that. Though ma'am has also mentioned about that in terms of the holding company and the SPVs and all that. But then, these are all commercial realities of today. For example, if I'm entering into a Shareholders' Agreement for a particular business, there would always be requirement that the shareholders would be looking for some assurance from the holding company. Holding company comes into picture. If you are a diversified business group, or, for example, if you are procuring coal and the coal is being used for your steel business, for your power business, for your cement business and so on, you might be negotiating a coal procurement Contract at the holding company level, which might be applicable to different businesses because that is the negotiation, that is a commercial sense in terms of getting the best of the prizes. Or so is the case of, say, a Contract of the service providers and say, if we are buying some software or IT related licenses and all that. And if you are buying it for the entire organization, some entity would be executing that Contract but that Contract may be for the benefit of multiple entities. Now these are the structures which are the, basically the needs of the society or needs of the business houses and they would remain in the system. The problem arises is that when these Contracts get executed, are we diligent and vigilant in terms of incorporating the requisite clauses? So that the clarity should come when the dispute happens. Now the problem is because of your drafting of the Contract at a particular point of time, at times, the aberration of that is that at times you enter into a Contract, but that in the process some other entities are also getting benefited. Now when this jurisprudence is getting evolved. Now you just see that this is basically reconciling these two conflicting principles. One principle is that there is a freedom of Contract and the other principle is substance over form. So Party who has not consented to a Contract. But then, when you go into the substance as far as the Contract or the commercial intent is concerned, the Courts or the Tribunals, they would not be shitting ideas. They will have to do justice. So basically, from a justices standpoint this jurisprudence is bound to evolve. And I think they rightly evolved in the last one decade, as ma'am mentioned in terms of various judgments.

Now, there are various facets to that. This jurisprudence is not a simple jurisprudence, in a sense that you are a part of a group entity, and that is the reason why you are bound to be a Party to a litigation or an arbitration. It's not that simple. It is, the threshold is very, very high. And the threshold is not only one factor, the threshold is multiple factors, and the threshold is

when you enter into a Contract, when you negotiate the Contract. When you keep on communicating with the Parties in terms of your communication, emails and letters and so on. When you dispute this, when the Parties who are copied on those emails, their party to all that. So the threshold is very high, and it's not one threshold. Ma'am did mention about the evolution of this principle from a French jurisprudence, and likely so. French and the Continental Europe has always been focusing in terms of this principle, and they were very liberal in terms of applying this Doctrine of Group of Companies. They were very liberal. While the common law jurisdictions like UK, US they were slightly, the threshold was high and they were having this one principle of Group of Companies Doctrine but then they were having multiple other principles also, when they were applying these kind of jurisprudence. And the principle was, again a very, very fact based. For example, if somebody is representing me, he is being, he or that entity is representing me as my agent and he has signed a Contract. Would I be sitting in the background? Somewhere, I would get involved. If I have acted in a certain manner, it's a principle of estoppel would apply or the Lifting of Corporate Vail would always happen, if I can say so. The Lifting of Corporate Vail was one principle which was used on the public policy platform and very, very discreetly, very, very discreetly. We were not having much of the judgments as far as Lifting of Corporate Vail is concerned for the first 50 years post-independence, offnet, of course, we were having because of IBC frameworks and all that. But it is also an extension of that Lifting of Corporate Vail only. If you notice as far as the Lifting of Corporate Vail is from a public policy standpoint, when you are abusing something while this is in terms of addressing the positive part of it, that if there is a commercial intent of negotiating a Contract, then you better be party to this. So I think this needs to be, you know, needs to be considered from that perspective. I think from opening finance.., it's okay. Thank you very much.

SAURABH SETH: Thank you very much can I now request Mr. Miin to share his international perspective, particularly with his experience in Malaysia and Singapore.

OOI HUEY MIIN: Good afternoon, everyone. Thank you. Now we've heard that India has, and I think we can't dispute this. India has, I think, developed the law and the jurisprudence writing on the Group of Companies Doctrine in a manner, I think that not many other jurisdictions certainly no common law jurisdiction, I think has developed. And that's a really amazing thing. But of course, one would actually wonder, well, what about the rest of the Common world? And I think that the answer to that really is that there's been great scepticism with regard to the Doctrine, certainly in jurisdictions such as the UK, such as Singapore. What I'd like to talk a little bit about is the evolution in terms of the viewpoint of the Doctrine from a Malaysian perspective. So, we start with ***Dow Chemicals*** and basically the concept that the Paris Courts basically had which is that, well, you can be a non- signatory to a Contract

that contains an Arbitration Agreement. But there are circumstances, actually where it could be inferred, or rather a mutual consent could be inferred, taking into account various factors which that's evolved, actually, into what caused the group of Companies' Doctrine. And we know that England, as 20 years ago, quite flatly rejected the application of that Doctrine in the context of considering whether Parties were parties or non-parties to an Arbitration Agreement in the ***Peterson Farms case.*** Singapore has boldly followed England in 2014 in the **Manuchar Steel H*ong Kong and* Star Pacific Line case** also flatly rejecting the application of that doctrine. Now, in 2013, Malaysia actually had the opportunity to consider the application of the Group of Companies Doctrine in a case called the ***Government of the LAO People's Democratic Republic and Thai-Lao Lignite.*** Now the Malaysian High Court, now this case was specifically an application involved in application to set aside an arbitration award that arose from an International arbitration seated in Malaysia and the complaint basically was that there was an excess of jurisdiction because the reference to arbitration was made under a particular Contract, a project development contract between Parties A and B but the dispute that were actually referred extended to disputes between in relation to a separate Contract that was entered into with, well, Party B and a subsidiary of Party A. Now, in actually determining long short, the Malaysian Court actually set aside the award for the Tribunal exceeding jurisdiction in making a determination on matters or claims that fell outside the scope of the Arbitration Agreement that was relied on. Now the Malaysian Court also considered whether this non-signatory to the Arbitration Agreement that gave rise to the reference could actually be included in the arbitration, and thus considered the group of Companies' Doctrine. Now, in 2013, this decision, the High Court flatly rejected the doctrine choosing to go down the route of ***Peterson Farms*** and that was basically that. But ultimately, I think the conclusion was that, look, it didn't really matter whether there was no need to actually look into the Group of Companies Doctrine, because the bottom line was the reference of the disputes fell outside the ambit or the scope of the Arbitration Agreement to begin with. Now fast forward a couple of years later, the decision of the High Court ends up on appeal to the Malaysian Federal Court and there the Malaysian Federal Court again does not consider the point only to say, well, even if this doctrine did apply, it wouldn't be relevant here for the same reasons. So, that was our first taste of getting into the Group of Companies' Doctrine, and it ended in, well, pretty much a firm rejection. Fast forward to 2022, we have the case of ***Padda Gurtaj Singh and Axiata Group Berhad***. Now this was an interesting case because it involved an application to court for interim relief to the Malaysian Court for interim relief in aid of an arbitration. Now, the interesting thing about the application was that the interim relief that was sought, extended to be against Parties that were not Parties of the arbitration. Now, again, long discourse by the Court. And one thing that was actually picked up or one argument, that was picked up is whether one could actually look at applying the

Group of Companies Doctrine in arguing that an injunction in aid of arbitration ought to be granted in order to preserve the integrity of the arbitration, but against effectively a non-party to the arbitration. So that's a bit of a left yield kind of thing. Now the High Court in Malaysia, and I think this was affirmed by the Court of appeal actually said, well I don't need to look at that. I don't need to look at this doctrine because if I look at the specific provision in the Malaysian Arbitration Act itself which allows me to grant interim relief in aid of arbitration. I am not restricted to just granting that relief against or in relation to the Parties to the Arbitration Agreement, so I don't need to consider extending the hat. And the High Court granted the injunctive relief to a limited extent that was sought. Now, of course, ***Padda Gurtaj Singh*** is a landmark case, even though it didn't decide the point because it is the first case in Malaysia that actually decided, or rather, they actually considered the ***MTNL and Canara Bank*** case. And it cited quite extensively the ratio that was contained there. But ultimately it made no decision. It felt there was no need for it to do so. Fast forward to this year, we have a case of ***Pte Vijaya Karia, Pesoro Debakey & Anor v EON Berhad***. Now that is an interesting case which involved setting aside of an arbitral award. Now, the contention, at least the contention that was raised, in the arbitration was that... Again the reference to arbitration came out of an agreement that had been superseded. Now, very strange arrangement here you had a Project Management Agreement between Party A and B with all the terms inside it. And then after that agreement was executed, which contained an Arbitration Clause and then after that agreement was executed, we had an identical, or rather an agreement on identical terms, that was executed between subsidiaries of the principal Parties. So we call that agreement one or the principal Parties. We got Agreement 1, principal subsidiaries, we got Agreement 2. So the reference to disputes arose, there were claims made by Party claiming fees and the reference was made under the Arbitration Agreement in the First Agreement. The agreement between the principles. The argument that came back was, well, you can't do that because basically all the rights had been assigned downwards via the Second Agreement, so your reference is bad. But the arbitration proceeded on. Basically, the Tribunal came to a finding that, well, no, the reference isn't bad. When I look at it First Agreements still sticks. Arbitration Agreement there under is valid. Effectively what's happened here is that we have a situation where the Second Agreement is just reflective of an agency that has arisen by virtue of the principles using their nominees to do the work or do the contractual arrangement that was agreed between them. So everybody's Parties, the agreement and there's no access of jurisdiction or there's no issue with jurisdiction here even though we don't have an arbitration arising out of one Arbitration Agreement, which has been agreed to by all four Parties. Went up to the High Court on the challenge, on an active challenge. And the High Court basically set aside the award. Court of Appeal, looking at it, said, hang on a second. Actually, we agree with what the Arbitrator decided in terms of

jurisdiction. What we see here is really an agency, an implied agency arrangement, point basically being that all Parties actually did consent to the arbitration, certainly by looking at the nature of the transaction as a whole and the Party's involvement. In coming to that conclusion, the Court of Appeal again extensively quoted the ***MTNL*** case and the ratio therein without going as far as to say, well, it's time for Malaysia to actually accept the Group of Companies Doctrine as part of our law. But it has progressed. In the span of just over ten years, I think that we've seen shift, and I think it's going to be very interesting to see where we go from here. All right. Sorry. I think I've run out of time. I'll pass you on to Saurabh. Thank you.

SAURABH SETH: Thank you. Mr. Agrawal.

SAURAV AGRAWAL: Good afternoon, everyone. First of all, we should thank Madam Indu because she is the one who steered the whole concept into the way we are, where we are. In fact, before we started the session, she told me about Justice Bhagawati's judgment and it's so fascinating to hear from her that even now she is very intrigued in the whole exploration of law. And it's indeed an honour to speak in front of you. Thank you. Now, when we talk about the Group of Companies Doctrine, I've always argued in favour of it outside the Court when not required. But ultimately, when we look at the word 'group of companies', we have to really understand whether it is group of companies or it is group companies or it is grouping of separate companies because all three words are very different. But when you look at all the law that has got evolved, we will realize that essentially the way the Courts are now drifting is that we are grouping different companies. Now, that's a very risky way where we are going, but it's not a bad thing that is happening because it ultimately helps us to solve the transactions. So we started with group companies under the same ownership. We moved on to group of companies along with group companies, and now we have transgressed to group of different companies coming together. The latest one in the ***Madhusudan***, that's what exactly happened. Now, before we go on to how the Indian structure is two interesting international phenomena. So, as you heard madam also say about how France has adopted the Group of Company Doctrine. We can call it GOC Doctrine but after the ***Dow Chemical's*** came the judgment of ***Dallah versus Pakistan*** where Dallah, a UAE company which had an arbitration, ICC arbitration against not really Pakistan government, but against a trust ran by the Pakistan Government for setting up of residential colonies in Mecca. They terminated the Contract. Dallah went behind the Pakistan Government in the ICC arbitration. Pakistan obviously said, listen, we have a trust. Please go and sue the trust. ICC said nothing doing. You are all one and the same. So Dallah got an award in its favour of some 200 million. Now Dallah goes to UK to enforce the arbitral award and suffers a setback. The UK court says, sorry, we will not enforce it. So you have a situation where's An award passed by ICC in applying the French law. And when it goes to UK, the UK court, Supreme Court, right up to Supreme Court

says, sorry, we'll not enforce it, Dallah comes back to Paris and enforces it in France. And it is enforced. Then recently we had another judgment of ***Kabab versus Kout***. Again, an ICC arbitration. Similar situation happening where the French law gets applied in ICC Paris, but when it goes for enforcement in UK, it gets shut out. So, UK for advance is creating an impediment in how the Group of Company Doctrines gets incorporated. Now the Group of Company Doctrine in India is actually very organic to our system. If you see analyse carefully after the 2015 Amendment, look at the number of changes that has happened. And if you examine that in that perspective, you'll realize that this Doctrine was bound to come to our country. First, we gave up the concept of the test that was happening at the Section 11 stage is diluted. So what is only required is an Arbitration Agreement. The party test goes at this level stage. The signatory test is now a dead concept. The Tribunal power to implead has been judicially recognized. The arbitrability has been widened to include everything. Now, practically fraud also gets arbitrated. There is statutory dilution to the ***Sukanya*** view, which was a big impediment, when it came to arbitration. So in the 2015 Amendment, it's very clearly written. It's notwithstanding anything to the contrary in any judgment. And then we have a great judicial support to treating arbitration as a one stop shop. The Fiona Trust Principle. So when you look at all these eight factors then you really realize, and coupled with the fact that we have given a very wide interpretation now, to the Arbitration Agreement. So Arbitration Agreement word gets expanded. The test for arbitrability gets expanded. The kind of disputes that can get decided gets expanded. The threshold for appointing an Arbitrator gets expanded. The arbitration is treated as a one stop shop we couldn't have stopped the Group of Doctrine coming into India. It is very organic to our system and when we have such changes to then stop the Group of Company Doctrine to get tickets full play will be a big problem because we can't be having a very liberal arbitration set up and then being very conservative when it comes to the GOC Doctrine. You would have heard in the Courts everybody say that, well, Arbitration Agreements have to be liberally constituted, but when we constitute liberally, a conservative approach comes in and says, oh, but not Mr. A, B, C, D. It's only the one who put their signatures on pen to paper. So Group of Companies Doctrine, as I would say, is very organic to our Indian Arbitration jurisprudence.

Now a few interesting facets. I'll just keep an eye on the time. Few interesting facets of our GOC Doctrine, firstly, it makes arbitration more transaction centric. It's moved away from party centric or agreement centric, and it is now more transaction centric. So it looks at the transaction as a whole. It looks at whether there's an Arbitration Agreement or not. And then it looks at, okay, who are the Parties who have been involved in negotiation performance and then bring everybody in. So it's moved on from making arbitration to Party and agreement centric to being a transaction centric, which is a great development. Then second, the

impediments which were there gets removed as a result of this Doctrine. It dilutes the overemphasis on the corporate structure and the insulation that companies were taking because of the corporate structure. Fourth, it's not a one way traffic. So till now we have been hearing about how Group of Company Doctrine becomes a situation where we are only going behind the people who are liable. But if you examine the Doctrine carefully. It actually also works in the reverse. Even a non-signatory can now sue. So now that's a great development which has come, although it's not got legally tested, but no doctrine can apply in a one way situation. There are some sentences here and there. In some of the ***Cox & King's*** paragraphs, which gives assemblance to the fact that it's not a one way traffic, even those who are not part of the group of companies, not signatories can sue those who are signatories. And then the difficulty arises is how far will we stretch this principle because a very famous argument comes in. Oh, you can't bring in everybody under the group as being liable. There, fortunately, we have the veritable party test, which says, no, not everybody comes under the group. Only those who have been actually involved in the transaction come in. So, that eliminates the misuse of the provision as well. So a combined impact of the Veritable Party Test and the Group of Company Doctrine actually is the way forward in the situation that we are presently in.

Now, they are benefit benefits to this Doctrine. If you look at a transaction centric approach you are avoiding multiplicity of proceeding. You're helping an enforcement of award. You are avoiding conflict of decisions. The benefits are migrate. But does this doctrine require a further exploration in terms of court? I would say yes and I would say, why? There are two problems that we still face. We don't have a statutory recognition as of now to this Doctrine in our books. Although our committee did recommend it to the higher ups. But the amendment, which has got proposed, doesn't have any statutory recognition to it. The necessity of statutory recognition is also there because the procedural matters to deal with this Doctrine is very critical. At what stage is it raised? How it is raised? What evidence is presented? What are the consequences, if it is ultimately held that the doctrine doesn't apply? How does it apply at 9? How does it apply at appointment stage? How does it apply at enforcement stage? All these procedural matters really needs to be ironed out. This is exactly presently, it's a judge made law. And for this judge made law to really evolve, we need the statutory backing without which it will be difficult to give this Doctrine the full effect. The second problem is the misuse of this doctrine, and that is, again, where we need statutory involvement, because if this Doctrine gets misused, we are actually exposing a Party to a full-fledged trial, a lot of expenses, a lot of manpower and resources being put in, and to be ultimately told, oh, all right, it was all a mistake. Thank you. So that's why we need the statutory intervention at this stage.

Now, I would just conclude by saying that this Doctrine needs to be given its full effect. The real full effect will come when a transaction has an Arbitration Agreement, and the Parties

who are connected with that agreement are all involved in the arbitration so that nobody has to keep on now, hunting around for different forums, different places, and different jurisdictions. It can all be decided as a one stop shop. It's purely a made in India concept which the world is looking at. In fact, before in the morning, I was going through some of the articles of the Columbia University. They look at the Indian concept as the guiding factor for the world to follow this Group of Company Doctrine. Thank you very much.

SAURABH SETH: Thank you, sir, for that wonderful insight. Now I'll pose a few questions to the panel. My first question is to Justice Malhotra. Ma'am, you talked about the evolution of the concept where you talked about ***Chloro Controls, MTNL*** and ***Cox and Kings.*** Do you think the Indian model is becoming more expensive than other jurisdictions?

JUSTICE (RETD.) INDU MALHOTRA: Well, my view on this is that it has been invoked only in the rarest and most exceptional cases, where it is very evident to either the arbitral Tribunal or the Court that it's a layered transaction and the Party which is a signatory, has no assets, so you end up giving a paper award. So it is to circumvent that, that these challenges came. Secondly, there is a legislative provision which says, Section 45, which says Party or any person claiming through or under them. So there is a basis in the statute on which these judgments have been passed. In fact, the Section 7 also does not require that it should be signed. They say the agreement should be in writing. The eligibility condition of signed is not at all in the statute. In fact, one of I think the best judgments on this issue, which has come recently, which is very telling, is when do the Courts join a non-signatory to an Arbitration Agreement is like in ***Glencore***. Now, here was a matter where there was an exchange of telexes and the terms were finalized. The Claimant had signed the agreement. The Respondent said, make some modifications regarding the price, which was followed. Maybe it was not signed, but the terms were worked out. The entire Commercial Contract was worked out. So eventually, when disputes arose, then to say, I have not signed the Contract is actually, you can't be circumventing the terms of the Contract. Because a Contract not only contains the commercial aspects, it also contains a dispute resolution mode. And the Court therefore looked at the conduct of Parties these surrounding circumstances and all these facts to come to the conclusion that this was a case with a non-signatory was bound to be joined in the arbitration proceedings. So it's only in very compelling circumstances that this is done. And that is why, to prevent the Claimant getting just an unenforceable award, a paper decree in his hands that the Courts have had to follow the French model, which I think meets the commercial realities. And as I said, it is invoked only in rare and exceptional cases, subject to the caveat that every member of the group cannot be joined. It's only those members, very often people are acting from behind the scenes, negotiating. They have the holding power. They have the majority of stakeholders, but they're not signatories. So that doesn't mean that you deliver an award which

is not enforceable at all. That's my view, I think that the courts have been circumspect, cautious, and they have taken the conduct of the Parties on the basis of admitted fats and then invoked it.

SAURABH SETH: Thank you, ma'am. Mr. Agarwal, do you think, I'll ask the same question to you, but do you think the Indian model is becoming more expensive your views on that?

SAURAV AGRAWAL: See it's not got tested too much. There are very few decisions on this aspect, but I don't see there is any problem in becoming expensive. So long as it's not getting misused. And misuse will depend upon the facts of every case. And it's been now 45 years since ***Dow Chemical's*** judgment was given. The way Indian concept has got developed, it's far exceeded what ***Dow*** had deployed. UK is still lagging behind. So when the Indian judgments were passed, we are looking at commercial reality test. And we therefore call it the GOC Doctrine, but when it comes to us and France, they call it the Equitable Estoppel Test, and they bring in the fairness concept to introduce it. Because we are going on commercial realities test obviously our test will be expansive. So speaking for myself, I don't see any problem in it. But yes, misuse can be there.

SAURABH SETH: Thank you, sir. Dr. Gemawat. One question to you from a General Counsel's perspective. What principles according to you should the Court or a Tribunal keep in mind when interim relief is sought against a non-signatory?

SANJEEV GEMAWAT: Well, Saurabh, I don't have an estate answer for this because I believe that this is very evidence based at that stage itself, very, very factual based. But then, surely, it appears to me, a Party who has been negotiating a Contract. A Party who is taking benefit of that. A Party who was part of all communications in terms of performance of Contract. Now, at the last stage, when the dispute arises, if it says that no, the Party was not involved, I don't think that that would be the fair assessment and I don't think that any Court would be ignoring these very facts. So I think it's largely fact based, evidence based and the Courts cannot ignore as when you bring those evidences that two at the Section 9 stage. I would say so I think that because ultimately, in the minds of the court would be the only one thing is paramount, and that is justice. And if that is compromising the justice I don't think, I think those would be the threshold which would be considered.

SAURABH SETH: Thank you, sir. Mr. Miin, the last question to you. Malaysia and India have reaffirmed the Group of Companies Doctrine, but Singapore has rejected it. So how do you see this diversion affecting cross-border arbitrations?

OOI HUEY MIIN: I actually don't think that it will impact Parties choices insofar as where their arbitration goes and what rules apply to their arbitration, for as long as Parties do not think about the problem. Now, in an ideal world, Parties are actually going to be of the same mind to look at their transaction holistically and look to agreeing on a dispute resolution mechanism that is going to work for them holistically. So, we go back to the ***Fiona Trust*** point, isn't it? Which is reasonable. You interpret the agreement, the agreement to arbitrate, the expectation that reasonable businessmen would want all their disputes determined in one arbitration. So, on the one hand if you have a Singapore type, rigid... Sorry, should I say that here? Rigid approach, right? Well, that's good for certainty, because, you know, at least where you stand if you choose Singapore as a seat of arbitration or if you're looking to do enforcement in Singapore.

Now, the flip side to that is if you look at Malaysia, you're not really quite sure where you stand because it's one feet in and one feet out. So that's bad for certainty as far as choosing your seat or looking at enforcement options are concerned. And if we look at India, which is basically, I think has been so expensive on where it stands. But I think also recognizing that there is more work to be done, that also does bring into question when choosing actually a seat, what am I getting into? Now, I think the answer to the point is really for the Parties to actually sit down and really address honestly, where they think their disputes are going to head, where they're going to come from and how best these disputes can be agreed from the outset to be determined in one forum. That'd be interesting point, actually. ***Dow Chemical's*** itself was a case where non-parties, the non-signatories of the Arbitration Agreement were Claimants. I mean, that's how it started off. Thank you.

SARABH SETH: Thank you. So my screen says time's up, but I think we have just a little bit of time for one or two audience questions. So if anybody from the audience would like to ask a question to our panel. You're welcome. Yes, ma'am. Yes, ma'am. In the first round, please.

ANANYA: Good afternoon. My name is Ananya, and this was a very insightful discussion we had. And my one question to the panellist here is that we see, we're trying to make India as a one stop shop like sir said. Now, would the expansion of this Doctrine act as a detriment factor to make India as a seat of it or would it be more companies would be more open to looking India as a seat of arbitration in that case?

SAURABH SETH: Justice Malhotra, would you like to take that all right, Mr. Agarwal

SAURAV AGRAWAL: I think Mr. Gemawat should answer it, because from the Client perspective.

SANJEEV GEMAWAT: I'm very content on this. They talk about arbitration, seat of arbitration, arbitration hub as India. It's not possible till we are having this ad hoc arbitration. Let's have the institutional arbitration then all these things are fine. So I think the effort should be the arbitration hub or these newer issues they would all be relevant and effective if we have credible institutional framework of arbitration. On *ad hoc* arbitration we would be a great subtler if we follow these principles.

JUSTICE (RETD.) INDU MALHOTRA: This will be only possible by incorporating clauses in the Arbitration Agreements to refer it to institutions. So until that doesn't happen, it's actually predominantly *ad hoc* because you leave it to the Parties and then they think, why should we get into institutional expenses. And that's why, probably, it's not really gained currency, and I think it's high time that we get a good centralized centre, like the India International Arbitration Centre, has been set up to have it up and running for it to become a hub. So it's important. That's how it will happen, because how do institutions grow? When work is referred to it. And so to have the institution, the infrastructure in place and incorporate clauses in the agreements. That's how the work will come and it will grow, and then you have an institutional system. Today, India has institutions, but we have a myriad of institutions, and I think they are necessary in India because some are for trade associations, some are like for stock exchanges. They have their own rules and regulations. So they're myriad institutions, but they are not centralized. So for international work, definitely I think a centralized institution would be more helpful than having it *ad hoc*.

SAURABH SETH: Thank you, ma'am. I think we can take one more question from the audience. Yes.

PROF. WAYNE MUTMA: I'd like to thank the panel very much. My name is Professor Wayne Mutuma, from the SIC, Kenya branch. I chair the branch I'm very curious on the extent that the GOC has been used in material aspects of a dispute. So I've had a lot about the jurisdictional establishment, but I'm thinking supply chain difficulties, transfer of risks between group of groups of companies and where that risk would lie in that sort of context. Thank you.

SAURABH SETH: Mr. Agrawal, would you like to take that?

SAURAV AGRAWAL: In fact, that's the very reason why this doctrine has to be implemented because you can't have a strait jacket formula where you only look at one Contract and one signatory. So we also have introduced the composite transaction concept in our jurisprudence, where even if there is an agreement which doesn't have an Arbitration

Clause, we can get the matter arbitrated here because the transaction overall is covered by an arbitration. So I think it's rather encouraging arbitration by ensuring that the GOC Doctrine gets implemented so that the dispute as such gets resolved. And we don't look at a dispute with the blinkers approach saying, I will not look left, I'll not look right. But to have a very wide eye perspective of the dispute, and then resolve it.

JUSTICE (RETD.) INDU MALHOTRA: And not only that, I think the most important part of arbitration is to give an enforceable award which can be enforced in binding rather than a paper decree which cannot be enforce, since the Party, the signatory, has no assets. So you have to meet the challenges, the economic realities also, or what happens in an arbitration where we find in several cases that the company which has been set up in India as a special purpose vehicle or a JV or whatever, they don't have any parent or holding company. So that's why it has actually been invoked only in exceptional cases to meet the realities and to give an enforceable binding award to the Parties.

SANJEEV GEMAWAT: I think they very talk about this particular principle is there is somewhere some failure and that failure is of drafting of a Contract. If you have a proper Contract with all Parties involved, you will not face these problems, and I think that would be the effective mechanism. The only issue comes up whereby if a Party is abusing that, as ma'am said that, if a company is avoiding its liability now, there the Court would intervene, because then the Court would be seeing the commercial intent and then deciding. But otherwise there is some failure, and that is the reason why we are talking about these very principles. So, I think that Contract drafting is too critical.

SAURABH SETH: Thank you. So, ladies and gentlemen, with that, we've come to the end of this session. One more question? All right, one more question. Okay. All right, we'll end the session. And very grateful to the entire panel for taking out the time today and enlightening us with their comments. Thank you very much.

SANJEEV GEMAWAT: Thank you, Saurabh.

SAURABH SETH: Thank you, team.

HOST: Thank you very much for the insightful session. Apologies for cutting the questions short. Maybe we can take them over for lunch. We are extremely honoured to have the presence of honourable Justice Indu Malhotra here. And thank you to the esteemed panel. We will be breaking for lunch. And we will start the next session at 02:30. Thank you.

~~~END OF SESSION 3~~~