BALANCING THE GROUP OF COMPANIES DOCTRINE: STRIKING THE EQUILIBRIUM BETWEEN ECONOMIC ASPIRATIONS AND LEGAL REALITIES IN INDIA

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The Group of Companies (‘*GOC*’) *doctrine is pivotal in arbitration jurisprudence, extending arbitration agreements to non-signatory entities under certain circumstances. Originating from the Dow Chemical Company v. Isover Saint Gobain1 this doctrine recognises implied consent within corporate groups, enhancing dispute resolution inclusivity. This paper critically examines its application in the Indian arbitration framework, employing a doctrinal research method that includes case law analysis, comparative perspectives, and evaluation of judicial reasoning in landmark cases such as Chloro Controls India (P) Ltd v. Severn Trent Water Purification2 and Cox & Kings Ltd. v SAP India (P) Ltd.3 The study highlights inconsistencies and challenges, including paradoxes of mutual intent, corporate veil conflicts, and economic implications. By exploring the interplay between the doctrine’s legal framework and its economic implications, the study provides a fresh perspective on the impact of its application on legal predictability, corporate autonomy, and the broader business environment. A comparative analysis of international practices indicates that the GOC doctrine needs refinement to suit India's aspirations in terms of its economic and legal principles. A well-balanced approach—contractual clarity and mutual intent coupled with the limitation of arbitrary liability extensions—can help nurture legal certainty and ease of business. The study concludes that adopting such reforms will enhance arbitration's efficacy without undermining foundational corporate and contract law principles.*

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[1] *Dow Chem v Isover Saint Gobain* ICC Case No. 4131, Interim Award, 23 Sept. 1982.

[2] *Chloro Controls India (P) Ltd v Severn Trent Water* Purification (2013) 1 SCC 641.

[3] *Cox & Kings Ltd v SAP India (P) Ltd* (2022) SCC OnLine SC 570.

I. INTRODUCTION

The Group of Companies doctrine ('**GOC**') has emerged as a pivotal concept in arbitration jurisprudence. The conventional boundaries of signatories to an arbitration agreement have been liberalised and extended by virtue of this doctrine. A finer delivery of justice and increased accountability are aimed at, enhancing inclusivity in the process of dispute resolution. It originates from the French arbitration jurisprudence, notably the *Dow Chemical Company v. Isover Saint Gobain*[4] case ('***Dow Chemical***'). This case, adjudicated by the International Commercial Court ('**ICC**'), pertains to contracts for the distribution of thermal insulation products, which were signed by Dow Chemical A.G. and Dow Chemical Europe; both were subsidiaries of the Dow Chemical Company. Arbitration clauses were included in the contracts, and delivery obligations were fulfilled by Dow Chemical France, but it wasn't a signatory to the agreement. Disputes arose, which led to an arbitration claim brought by Dow Chemical A.G., Dow Chemical Europe, Dow Chemical France, and the parent company against Isover. However, the tribunal's jurisdiction was challenged by Isover on the grounds that Dow Chemical France and Dow Chemical

[4] *Dow Chem* (n 1).

Company were not signatories to the agreement. However, it was opined by the ICC Court that a non-signatory can be compelled to arbitrate if the consent for the same can be implied from its conduct. Such non-signatories could include entities such as parents, subsidiaries, or facilitators involved in any form of contractual performance of the signatory.[5]

The GOC doctrine, therefore, serves as a crucial instrument in addressing the complexities surrounding modern corporate structuring. It attempts to recognise the implied underlying consent to arbitrate behind the relationships between parent companies, subsidiaries, and other associated entities/ affiliates, etc. This further broadens the scope of arbitration, which leads to the enhancement of efficacy and inclusivity of dispute resolution by ensuring that all the relevant parties are held accountable. This holistic approach not only attempts to enforce the integrity of the arbitration proceedings but also throws light on the evolving commercial realities of the world.[6]

The relevance and application of the GOC doctrine in India are critically examined in this paper, and its impact on business practices and legal implications are highlighted. The evolution of this doctrine is explored within the Indian arbitration framework via an analysis of key cases and judicial perspectives, and recommendations are proposed for its effective integration into the Indian legal system. The challenges and paradoxes inherent in the doctrine's application, particularly concerning mutual intent, issues with subsidiaries, and clashes with other principles such as the corporate veil, are further revealed and discussed by the analysis. It is argued that while the GOC holds significance in the Indian legal landscape, a nuanced evolution is required to align it with Indian economic aspirations and global best practices.

II. FROM CONCEPT TO LAW: CHARTING THE RISE OF THE GROUP OF COMPANIES DOCTRINE IN INDIA

The first instance of discussion of the doctrine in the Indian context has been in the case of *Sukanya Holdings v. Jayesh H Pandya.*[7] The idea of binding a non-signatory, upon appeal, was rejected by the Supreme Court ('**SC**') with the reasoning that no

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[5] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 94.
[6] Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue—A Comparative Study (2nd edn, Kluwer Law International, 2020) 95, 96.
[7] Sukanya Holdings (P) Ltd v Jayesh H Pandya (2003) 5 SCC 531.

provision under the Arbitration and Conciliation Act, 1996 ('**A&C Act**') existed to bind non-signatories as parties. *Chloro Controls India (P) Ltd v. Severn Trent Water Purification*[8] ('***Chloro Controls***') was the first case where the doctrine was upheld. This was done by placing reliance upon Section 8[9] and Section 45[10] of the A&C Act, which allows for parties to be referred to arbitration in the presence of an arbitration agreement. Section 8(1)[11] stipulates that parties must be referred to arbitration by the judicial authority if an application is made by a party to the arbitration agreement or any person claiming through or under that party before submitting the first statement on the substance of the dispute unless it is found that prima facie no valid arbitration agreement exists. Whereas Section 45[12] specifically addresses the judicial authority to refer matters to arbitration governed by international arbitration agreements. This section is linked to Section 44[13] of the A&C Act, which specifies that Part II of the A&C Act applies to foreign awards pursuant to certain international conventions. Therefore, Section 45,[14] being a part of Part II of the A&C Act, relates to international arbitration agreements. This section simply ensures that a wider range of arbitration scenarios are covered within the ambit of the phrase "*claiming through and under*".

The phrase "*claiming through or under [a party]*" was held to imply that a judicial authority can refer parties to arbitration at the request of not just the original parties to the agreement but also at the request of anyone who derives their rights from or under those original parties as was observed in *Chloro Controls*.[15] The three-judge bench, in this case, relied on international instances of the doctrine being upheld while listing several factors to determine mutual intent. The specific factors to ascertain mutual intent include a direct relationship between the non-signatory and signatory, a commonality of subject matter, composite performance transactions, the performance of the contract, and most importantly, if justice can be served by referring the dispute to arbitration. In *Chloro Controls*,[16] the rationale that if entities are not a party to the main agreement but are a part of interconnected agreements that ultimately form a

[8] Chloro Controls (n 2).
[9] Arbitration and Conciliation Act 1996, s 8.
[10] Arbitration and Conciliation Act 1996, s 45.
[11] Arbitration and Conciliation Act 1996, s 8(1).
[12] Arbitration and Conciliation Act 1996, s 45.
[13] Arbitration and Conciliation Act 1996, s 44.
[14] Arbitration and Conciliation Act 1996, s 45.
[15] Chloro Controls (n 2).
[16] ibid.

composite transaction, were held to be bound by the arbitration agreement based on mutual intention. This judgment was followed by multiple other decisions that led to additional factors for the determination of mutual intent, while others broadened the application of the doctrine in the Indian arbitration jurisprudence. In *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited*,[17] wherein an application was made to implead an international affiliate of one of the signatories to an arbitration agreement. The SC held that the onus to prove the non-signatory's intent to consent to the arbitration agreement is on the party wanting to implead them. It further held that the involvement of the non-signatory party in the negotiation and performance of the underlying contract is a key determinant of intent to be a party to the arbitration agreement. Moreover, the SC also opined that merely agreeing to indemnify a party does not automatically make the indemnifier a party to the arbitration agreement of a different contract altogether. The SC also took a stern view of post-contractual negotiations to indicate an intention to be bound by the arbitration agreement. In *MTNL v. Canara Bank*,[18] the dispute was over the sale, purchase, and transfer of bonds. MTNL had issued secured bonds and kept a sizeable share with Can Bank Financial Services Ltd., which is a wholly owned subsidiary of Canara Bank. Due to a financial crunch, CANFINA (subsidiary) could not pay for the bonds. Canara Bank purchased some of the bonds. However, MTNL refused to directly transfer them in Canara Bank's name and later cancelled some of the bonds, leading to the dispute. Subsequently, two primary issues arose: firstly, whether there is a valid arbitration agreement existing among the three entities, and secondly, if CANFINA can be roped in as a party to the arbitration proceedings. The SC, while opining in the affirmative for both issues, relied on the concept of a "*single economic unit*," amongst other factors. The doctrine was held validly invoked on the basis of a tight organisation structure, forming a "*single economic unit*".

The GOC doctrine has not been restricted to binding non-signatories; rather, in *Cheran Properties Ltd v. Kasturi and Sons Ltd.*[19] ('***Cheran Properties***'), it was expanded even to impose arbitral awards on non-signatories. In this case, three parties had an arbitration agreement with another fourth party. As per the arbitral award, two parties were required to return certain documents of share and some title documents,

[17] Reckitt Benckiser (India) Pvt Ltd v Reynders Label Printing India Pvt Ltd (2019) 7 SCC 6.
[18] *MTNL v Canara Bank* (2020) 12 SCC 76.
[19] Cheran Properties Ltd v Kasturi and Sons Ltd (2018) 16 SCC 413.

whereas one party was required to pay a certain amount. The award was challenged by the party, which was required to pay the amount by claiming itself as a non-signatory. However, the ruling by the court stated that even non-signatories are bound by the terms of an arbitration agreement based on intent, relationship, and conduct; therefore, the award was enforced by reliance upon the doctrine.

The doctrine, broadly based on the *Chloro Controls*,[20] has also been relied upon in adjudicating the recent case of *ONGC Ltd v. Discovery Enterprises Pvt Ltd*.[21] A contractual default occurred on the part of Discovery Enterprises, and arbitration proceedings were initiated against it along with Jindal Drilling. Jindal Drillings was excluded from the arbitration proceedings by the arbitration tribunal and the Bombay HC. However, the case was sent back by the SC for reconsideration of evidence for including Jindal Drilling based on economic unity between the two entities. The performance of the contract and the idea of a "*single economic unit*" were thus, emphasised as essential factors in binding a non-signatory to an arbitration agreement.

III. SHIFTING JUDICIAL PERSPECTIVE: EMPHASIS ON THE IDEA OF CONSENT

A significant shift was observed shortly after the decision in *ONGC Ltd v Discovery Enterprises Pvt Ltd.*[22] Although the doctrine remains accepted in India, its application has been significantly altered by the SC in its *Cox & Kings Ltd. v. SAP India (P) Ltd.*[23] ('***Cox & Kings***') ruling. In this case, the dispute originated from software licensing agreements entered into by Cox & Kings with SAP India Pvt. Ltd., with a General Terms and Conditions Agreement containing an arbitration clause to be bound by the A&C Act. Assistance was provided by SAP SE, the parent company of SAP India from Germany, with regard to issues concerning the software project. When fresh arbitration was initiated by Cox & Kings Ltd., SAP SE was included as a party despite not being a signatory to the agreement. The entire line of reasoning with regard to the doctrine's application was subsequently subjected to scrutiny. Before referring the question of the doctrine's applicability to a larger bench, the court identified that the doctrine is predominantly oriented toward economics and convenience rather than

[20] Chloro Controls (n 2).
[21] ONGC Ltd v Discovery Enterprises Pvt Ltd (2022) 8 SCC 42.
[22] ibid.
[23] Cox & Kings (n 3).

legal principles. This approach was subsequently characterised as a "*modern approach to consent*".[24]

Furthermore, the ambit of the phrase "*claiming through and under*" of Section 8[25] and the scope of Section 45[26] of the A&C Act, which allows for parties to be referred to arbitration in the presence of an arbitration agreement, was questioned in this case by Justice Ramana.[27] Justice Ramana opined that these provisions based on the phrase "*claiming through and under*" cannot be used to read the doctrine into the Indian arbitration jurisprudence. The commercial reality of subsidiaries being separate legal entities is jeopardised if the doctrine is read into Indian law with reference to Section 8[28] and Section 45[29] of the A&C Act. The basis of the application and not the doctrine itself was questioned. Even the jurisprudential precedent given in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* established that for a judicial authority to refer a case to arbitration, firstly, the entire dispute must be something the parties agreed to arbitrate, and secondly, it should involve only the people bound by the agreement and not otherwise.

Despite scrutinising the reasoning behind upholding the doctrine, it was upheld independently by Justice Surya Kant in an opinion concurring with Justice Ramana. The doctrine was upheld by reliance upon fundamental principles of contract law. These principles include implied agency, implied consent, guarantors, and third-party beneficiaries, rather than a strict interpretation of Section 8[30] of the A&C Act. These principles were implemented to ensure that the true intent behind entering into complex commercial transactions can be highlighted. It was emphasised by Justice Surya Kant that the doctrine's application is justified based on the conduct of the non-signatory. Their involvement in contractual performance and negotiation was relied upon to understand intent. Reliance on other principles like "*single economic unit*" were avoided as their establishment in law is challenging. However, for better

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[24] M. Saunders et al, 'Group of Companies Doctrine and Arbitration: The "Modern Approach" to Consent' (*Ashurst* 15 Dec 2024) <https://www.ashurst.com/en/insights/group-of-companies-doctrine-and-arbitration-the-modern-approach-to-consent/>.
[25] Arbitration and Conciliation Act 1996, s 8.
[26] Arbitration and Conciliation Act 1996, s 45.
[27] Cox & Kings (n 3).
[28] Arbitration and Conciliation Act 1996, s 8.
[29] Arbitration and Conciliation Act 1996, s 45.
[30] Arbitration and Conciliation Act 1996, s 8.

deliberation and defining the contours of the GOC doctrine, the decision was referred to a larger five-judge bench led by Justice Chandrachud.

It was elucidated by the five-judge bench that consent and mutual intention are imperative for entering into arbitration, and the need to retain the GOC doctrine was affirmed. Furthermore, the instrumentality of the doctrine in the determination of the intent of parties involved in complex transactions was reaffirmed. The GOC doctrine in the Indian context was defined by Justice Chandrachud, who authored the majority opinion, as "*an agglomeration of privately held and publicly traded firms operating in different lines of business, each incorporated as a separate legal entity, but collectively under the entrepreneurial, financial, and strategic control of a common authority, typically a family, and linked by trust-based relationships forged around a similar persona, ethnicity, or community*".[31]

The doctrine was also identified as a "*factual element*" that should be reconsidered by the tribunal while analysing the consent between parties.[32] It also reiterated that basic contract law principles should not be violated in the application of the doctrine. The judgment also distinguishes between piercing the corporate veil and the doctrine, stating that while the former disregards the concept of separate legal entities, the doctrine respects it while recognising the mutual intention of separate legal entities to arbitrate jointly. The insights provided by Justice Ramana were reaffirmed, and the existence of the doctrine was held to be independent of the A&C Act provisions and rather based on the mutual intention of parties to an agreement. Justice Narsimha, in his concurring opinion, agreed with the majority on most of the aspects. However, he further opined that the GOC doctrine would be subsumed under Section 7(4)[33] of the A&C Act, which stipulates when an arbitration agreement can be claimed to be in writing, including exchanged communications or unchallenged statements of claim as indicators of a written arbitration agreement.

To summarise, the SC upheld the doctrine on its merits independently and emphasised implied consent as the fundamental for binding non-signatories to an arbitration agreement. The Indian position on the doctrine comes to light in this decision. Justice Surya Kant highlighted the prominence of family-run business entities in India, which

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[31] *Cox & Kings* (n 3) para 62.
[32] *Cox & Kings* (n 3) para 69.
[33] Arbitration and Conciliation Act 1996, s 8.

involves family members occupying multiple roles within the same larger group, thus, sharing the dictate that runs the business, justifying the relevance of the doctrine in Indian jurisprudence apart from the reasons considered internationally. The evolution of the GOC doctrine in India has been intricate, with *Cox & Kings* significantly altering its application.[34] However, various challenges and legal paradoxes associated with the doctrine persist unaddressed in India.

IV. THE PARADOX OF MUTUAL INTENT IN INDIA: UNCERTAINTY IN DOCTRINE APPLICATION

The GOC doctrine, as outlined originally in the *Dow Chemical*[35] relies on three primary prongs: a tight group structure, contractual involvement, and mutual intent. Mutual intent is a foundational element for the determination of an arbitration agreement's enforceability, and it requires a nuanced evaluation on a case-to-case basis. This complexity is highlighted by *Cox & Kings*, wherein mutual intent has been examined as a key factor.[36] In this case, the mere involvement in a contract is seen as a determinant of mutual intent, leading to the first paradox.

When contractual involvement is considered an indicator of mutual intent, the need for the intricate establishment of mutual intent on a case-to-case basis is eliminated. This tends to overshadow the requirement to assess the aspect of mutual intent as an independent prong thoroughly. This issue is well illustrated in cases like *Cheran Properties*,[37] wherein the first two prongs, tight group structure, and contractual involvement, seem to imply mutual intent. In this case, Sporting Pastime India Ltd. ('**SPIL**'), a subsidiary of Kasturi & Sons Ltd. ('**KSL**'), agreed with K.C. Palanisamy ('**KCL**') to sell shares amounting to 90% of SPIL's capital to the nominees of KCP, including Cheran Properties Ltd. KCL, however, failed to fulfil its obligations as required under the agreement, which led to the invocation of the arbitration clause of the same agreement. Ruling in KSL's favour, the arbitral tribunal directed the return of shares to KSL. Furthermore, KSL sought to enforce the same via the National Company Law Tribunal ('**NCLT**'). Cheran Properties, claiming that the arbitration agreement is not binding on them, objected to the same.

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[34] Cox & Kings (n 3).
[35] Dow Chemical (n 1).
[36] Cox & Kings (n 3).
[37] Cheran Properties (n 19).

The paradox of determining mutual intent can be observed in how the court concluded the presence of mutual intent in this case. While the court did rely on the *Chloro Controls*[38] while stipulating that circumstances are to be relied upon for demonstration of mutual intent,[39] however, the court considered the contractual performance and involvement of the appellant as an indicator of mutual intent. The awareness about the share purchase agreement and participation in the transaction by Cheran Properties was relied upon by the court.[40] Reliance was also placed upon a letter where the Share Purchase Agreement was referred to.[41] Moreover, even the authorities referred to by the court in its judgment were used to interpret the negotiation and performance as an indication of intent directly for binding the non-signatory to the contract terms.[42]

The doctrine can thus, be said to have been erroneously applied due to this paradox, and this has thereby resulted in a significant deviation from the original intention of the judges in the *Dow Chemical*[43] which is caused by this oversimplification, wherein, mutual intent required a more intricate assessment. The complex nature of mutual intent and its instrumentality in joining the ends of justice requires such an intricate assessment and the mere involvement in the performance or negotiation of a contract does not necessarily indicate its full presence.

The second paradox relating to another angle of mutual intent is with regard to the separability of an arbitration clause. An arbitration clause, despite being a part of a contract, functions as an independent contract.[44] This clause remains valid even if the main contract is found to be void or its performance is terminated.[45] This is clearly stipulated in Section 16 of the A&C Act,[46] based on the "*kompetenz-kompetenz*" principle as enshrined in the United Nations Commission on International Trade Law ('**UNCITRAL**') Model Law.[47] The paradox that arises here is that even if a non-

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[38] Chloro Controls (n 2).
[39] *Cheran Properties* (n 19) para 22.
[40] ibid, para 24.
[41] ibid, para 23.
[42] ibid, para 28.
[43] Dow Chemical (n 1).
[44] National Agricultural Coop Marketing Federation India Ltd v Gains Trading Ltd (2007) SCC OnLine SC 800
[45] Today Homes & Infrastructure (P) Ltd v Ludhiana Improvement Trust (2023) SCC Online SC 495.
[46] Arbitration and Conciliation Act 1996, s 8.
[47] Clyde Croft et al., *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 249 https://assets.cambridge.org/97805211/95720/frontmatter/9780521195720_frontmatter.pdf last accessed 8 Aug 2024.

signatory agrees to assist or perform the contract, the mutual consent implied cannot be considered to be consent for a separate agreement altogether; that is, the arbitration agreement. There have been instances, such as in the *Duro Felguera v. Gangavaram Port Limited* case,[48] wherein a two-judge bench of the Hon'ble SC refused to direct five different contracts for joint arbitration despite the sister concerns of one party to the original arbitration agreement. This case involved awarding contracts for bulk material handling systems. The initial contract was divided into five separate contracts with separate arbitration clauses for each of them. Four of these five contracts were given to the Indian subsidiary of Duro Felguera, whereas one was given to the parent company itself. The other party, Gangavaram Port, sought to consolidate the arbitration with regard to all five contracts under a single tribunal. However, the court held that contracts, having separate clauses, must be arbitrated separately on the basis of several factors.

Firstly, the court considered the explicitly splitting of the original tender into five separate contracts by the parties, each with its own arbitration clause as intent to arbitrate separately.[49] While analysing mutual consent, this interpretation by the Court becomes directly relevant. While the GOC Doctrine allows the extension of the arbitration clause to non-signatories, in this case, the presence of separate arbitration agreements clearly rules out the very possibility of a mutual intent for a joint arbitration. The contracts were split to clearly delineate liabilities, obligations, etc., underscoring the intent to arbitrate separately.[50]A parent company, for instance, assisting its subsidiary in contractual performance or negotiation that is bound by a contract with an arbitration clause also resembles a situation wherein the liabilities arising out of the contract are delineated. Therefore, allowing the extension of the arbitration clause over the subsidiary would give rise to similar concerns as raised in *Duro Felguera v. Gangavaram Port Limited.*[51] The distinct nature of the corporate guarantee and the arbitration mechanism behind it further led to the court ruling against the merging of this arbitration clause with the rest of the four for a joint proceeding.[52] Lastly, the Court relied on Section 7(5) of the A&C Act,[53] which talks

[48] Duro Felguera v Gangavaram Port Limited (2017) 9 SCC 729.
[49] ibid, para 24.
[50] ibid.
[51] ibid.
[52] ibid, para 25.
[53] Arbitration and Conciliation Act 1996, s 7(5).

about binding parties to arbitration agreements referenced in external documents if intended by the parties. The court underscored the lack of any intent of the parties to be bound by external arbitration agreements, ruling against a joint arbitration proceeding.[54]

Hence, the decision made by the parties to arbitrate separate arbitration agreements separately under their individual contracts was respected. The overall analysis in this case by the court also highlights the value of express consent in arbitration, Therefore, the paradox gets furthered; if separate arbitration agreements are construed as intent to arbitrate separately then the complete absence of an arbitration agreement cannot be construed as mutual intent to arbitrate either. This paradox can also be observed in the *Cheran Properties* , wherein the Court did not view the arbitration agreement as a severable agreement altogether while stipulating that contractual involvement with acceptance of general agreement terms implies the acceptance of the arbitration clause as well.[55] These paradoxes lead to the misapplication of the doctrine, thus, creating a conundrum, further affecting business prospects in India by adversely impacting the commercial actions and liabilities of businesses in India.[56]

V. THE PARADOX OF SUBSIDIARIES: CORPORATE VEIL V. GROUP OF COMPANIES DOCTRINE

The legal paradox is furthered by the corporate veil and alter ego principles. These doctrines are recognised in India in cases such as *Iridium India Telecom v. Motorola Inc.*[57] where criminal intent/wrongdoings of a company were attributed to the group managing and controlling its affairs. This is also known as the doctrine of attribution and imputation. Alter ego has been further applied in cases such as *Sunil Bharti Mittal v. CBI*,[58] wherein allegations in the 2G spectrum scandal involved the approval of additional spectrum by the Ministry of Telecommunications, which resulted in the loss of government revenues. A special judge, adjudicating upon the matter, issued court summons to three telecom executives by application of the "*alter ego*" doctrine, holding them vicariously liable for the actions of their companies. This principle

[54] *Duro Felguera* (n 48) para 33.
[55] *Cheran Properties* (n 19) para 24.
[56] Cheran Properties (n 19); Magic Eye Developers Pvt Ltd v Green Edge Infra Private Limited (2020) SCC OnLine Del 597.
[57] Iridium India Telecom Limited v Motorola Inc (2003) SCC OnLine Bom 760.
[58] Sunil Bharti Mittal v CBI (2015) 4 SCC 609.

evolved in England to plug the loophole of vicarious liability in principal-agent relationships, which solely covers civil wrongs.[59] In international jurisprudence, the group of companies' doctrine has also been differentiated from that of the alter ego on the grounds of fraud. The parent companies have been held liable for fraud perpetrated via subsidiaries.[60]

The difference between the alter ego/corporate veil and the GOC doctrine has been established in *Cheran Properties*.[61] The former ignores company separation and party intentions for fairness. Whereas the latter helps navigate the true parties to an arbitration agreement without changing a company's legal status. Therefore, alter ego and corporate veil cannot be the grounds for enforcing this doctrine, which is well recognised.

Having subsidiaries is a standard industry practice. They are created for various needs, including corporate structuring, developing new products and services, regulatory compliance, taxing, expanding into new markets, etc.[62] It is also a common practice to limit liability in light of the involved in creating a new venture.[63] The corporate veil principle exists to address these concerns in malpractice and fraud cases and its application is done with proper assessment of standards. The GOC doctrine somewhat lowers this standard to make a parent company liable in less severe cases, particularly wherein the parent company attempts to limit its liability. The *Cox & Kings* decision has certainly upheld the validity of the doctrine from a contract law lens and has also differentiated between the doctrine and the uplifting of the corporate veil.[64]

The difference between the parent and the subsidiary as two separate entities was clearly made by the SC in the *Vodafone International Holdings BV v. Union of India* case.[65] It has further been identified that subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham, which can be evaluated by lifting the corporate veil.[66] It also gave an instance of one-

[59] Babu Eedi D, 'Doctrine of Attribution in Corporate Criminal Liability' (*Lakshmikumaran & Sridharan*, 17 Sept 2013) https://www.lakshmisri.com/insights/articles/doctrine-of-attribution-in-corporate-criminal-liability/ accessed June 9, 2024.
[60] Bridas S.A.P.I.C. v Government of Turkmenistan 447 F.3d 411 (5th Cir. 2006) (US).
[61] Cheran Properties (n 19).
[62] Cox & Kings (n 3).
[63] Cathy S Krendt & James R Krendl, 'Piercing the Corporate Veil: Focusing the Inquiry' (1978) 55 DLJ 1.
[64] Cox & Kings (n 3).
[65] Vodafone International Holdings BV v Union of India (2012) 6 SCC 613.
[66] ibid.

man companies where the man holds 99% of shares and the wife holds 1%; in such cases, the company is considered the man's alter ego.[67] This addresses the family-run enterprises concern raised by Justice Surya Kant in *Cox & Kings*.[68] Furthermore, the US SC reiterated the general corporate law principle that a parent company was not liable in general cases for the acts of its subsidiaries in *United States v. Bestfoods*.[69] The concerns of malpractice, as discussed, are already taken care of by lifting the corporate veil. Therefore, this creates a paradox, which is the utter disregard for separate legal entities, and the standard industry practice of creating subsidiaries to limit liability by compelling non-signatories to arbitrate, despite the on-paper view taken in the *Cox & Kings* decision, which calls for upholding basic contract law principles, including separate legal identities.

This decision also highlights the manner in which the GOC doctrine respects different legal identities, that is, by allowing signatories and non-signatories to arbitrate jointly on the basis of the mutual intent of parties to an agreement. However, as previously highlighted, the application of this doctrine becomes erroneous in the Indian context as a paradox with regard to proper analysis of mutual intent as a determinant of the arbitration agreement's ambit. This paradox not only creates legal uncertainty for enterprises with subsidiaries as predicting which action of their subsidiaries will drag them into arbitration. Furthermore, this also disregards the choice that one might have to litigate over arbitrate as this choice is usually determined within the contractual terms itself. The imposition of an arbitration agreement upon a non-signatory by virtue of the GOC doctrine overrides this very choice.

VI. INDIA'S ECONOMIC ASPIRATIONS: RECONSIDERING THE GROUP OF COMPANIES DOCTRINE

India strives to attract foreign direct investment ('**FDI**') by raising foreign equity caps for insurance and defence and has also jumped up 14 places to be 63rd on the World Bank's Doing Business Study 2020. Moreover, India has also undertaken simplification of multiple taxes into a unified Goods and Service Tax.[70] It has further

[67] ibid.
[68] Cox & Kings (n 3).
[69] United States v Bestfoods 524 U.S. 51 (1998).
[70] Invest India, 'Business-Friendly Reforms: India's Path to Prosperity' (*Invest India*, 16 March 2024) <https://www.investindia.gov.in/team-india-blogs/business-friendly-reforms-indias-path-prosperity> accessed 10 June 2024.

streamlined the business registration process by introducing the SPICe form, including simplified registration for Employee State Insurance Corporation (‘**ESIC**’) and Employee Provident Fund Organisation (‘**EPFO**’).[71] Digitalisation is also underway by way of online interfaces, decriminalisation of minor defaults, and the use of a single PAN for all regulatory clearances.[72] Furthermore, India also aspires to self-reliance, as highlighted in the government's Atmanirbhar Bharat Campaign, which ultimately requires ease of doing business on Indian soil.[73]

Several cases and instances can be observed wherein the application and interpretation of the GOC doctrine in its present form in India is likely to dampen economic prospects. Often, the courts have relied upon vague considerations and realities to bind non-signatories such as a single economic group, common email IDs, centralised controls, offices, etc.[74] Furthermore, oversimplification and overuse of this doctrine have also led to HCs indulging in inadequate analysis of the parties' mutual intent before applying this doctrine.[75] Such instances lead to legal unpredictability for companies with direct economic consequences of the same. This can further lead to hesitation amongst multinationals as well with regard to joint ventures with Indian companies. Corporate structuring and financial transactions can also be impacted if subjected to unreasonable scrutiny, as discussed previously. Thus, it can be said that the GOC doctrine in its present form is antithetical to India’s aspirations. The SC in *Cox & Kings* considered the economic realities and convenience as stronger ideas backing the doctrine than the law by itself.[76] However, it is imperative that the reality of India’s economic aspirations and global best practices are also taken into account. Perhaps the doctrine requires some further evolution to suit Indian economic interests.

VII. STRIKING THE BALANCE: THE PATH BETWEEN OUTRIGHT REJECTION & ERRONEOUS APPLICATION

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[71] ibid.
[72] ibid.
[73] Press Information Bureau, Ministry of Commerce & Industry, Government of India, ‘Collaboration with Foreign Companies under Atmanirbhar Bharat’ (*Press Information Bureau* Ministry of Commerce & Industry, Government of India, 8 Dec 2021) https://pib.gov.in/Pressreleaseshare.aspx?PRID=1779401 accessed 8 Dec 2021
[74] SEI Adhavan Power Private Ltd v Jinneng Clean Energy Tech Ltd (2018) SCC OnLine Mad 13299.
[75] *Magic Eye* (n 56).
[76] Cox & Kings (n 3).

Different jurisdictions across the globe have taken different stances on the applicability of the doctrine. For reasons previously discussed, the doctrine is relevant to the Indian context if it evolves to suit contemporary requirements. And while the United Kingdom has completely rejected the application of this doctrine, the United States has taken a more balanced approach.[77]

While it allows a non-signatory to invoke an arbitration clause only in accordance with the standard contractual agency.[78] It binds the non-signatory 'agent' when it is involved in any wrongdoing with the contract itself.[79] It allows the binding of signatories by reference; however, it is subject to the establishment of a two-pronged test. Firstly, the agreement requires such terms which explicitly allow the binding of non-signatories.[80] Secondly, the terms of the arbitration clause also need to be broad enough to encompass the dispute at hand.[81] When two parties negotiate an agreement, including an arbitration clause, both parties can have absolute clarity on the ambit of the arbitration agreement. In cases of high-risk transactions, parties can choose to negotiate the exclusion or inclusion of non-signatories, like subsidiaries or parents, if the situation arises. To illustrate the same in the context of a parent-subsidiary relation, a newly established independent subsidiary of a large international conglomerate in a certain country that enters into a contract with a local company of the specific country can have the inclusion of non-signatories, such as the parent company, within the scope of an arbitration agreement during negotiation. Such terms can be typically agreed upon in high-risk collaborations, ensuring that disputes, like those involving financial liability, fall under the arbitration agreement's ambit. This is a more balanced approach to the GOC doctrine as it does not do away with the doctrine in practicality by allowing the impleading of non-signatories while continuing to offer a company some certainty and control to limit its liability. A company can work with its subsidiary to prepare such terms that do not allow binding non-signatories or selectively keep certain types of disputes out of its purview to limit liability. This ensures that the mere involvement of the non-signatory in the negotiations leading up to the drafting and finalisation of the underlying contract does not make it binding on

[77] Peterson Farms Inc v C & M Farming Ltd [2004] APP LR 02/04.
[78] Paracor Finance Inc v General Electric Capital Corp 96 F.3d 1151 (9th Cir. 1996).
[79] ibid.
[80] ibid.
[81] ibid.

the non-signatory. Companies can take this opportunity to negotiate the contracts entered into by their signatories wherever they require limiting liability, such as high-risk ventures, as previously illustrated. This also ensures greater autonomy to subsidiaries, almost making their existence at par with an independent entity. Such an approach further resolves the problem of erroneous application. A non-signatory company can assist with the performance of the very contract where it has negotiated such terms that do not allow it to be binding on a non-signatory. However, this approach also holds the non-signatory liable in case of wrongdoing with the contract.[82] Such an approach upholds the standard industry practice, allowing companies to limit liability by creating subsidiaries while also upholding equity considerations and good faith in cases of wrongdoings. In more grave cases pertaining to fraud and malpractice, India can always resort to uplifting the corporate veil and determining the alter ego. This practice has been followed by India[83] and US[84] alike. While Motorola was prosecuted under the alter ego doctrine, where the corporate veil was pierced, and it was held liable for cheating and conspiracy,[85] The government of Turkmenistan was held liable for wrongful termination of an agreement despite not being a direct signatory of the concerned joint venture agreement.[86]

Thus, India should also adopt a similar approach in furtherance of the contract law principle of privity and the principle of the arbitration clause being separable. This will go a long way in aligning with India's economic goals and realities and create a more conducive atmosphere for ease of business. Adopting such a nuanced approach ensures that the GOC doctrine is upheld, and it does not hinder the business environment needed to fulfil India’s economic aspirations by placing undue liabilities on companies for the actions of their subsidiaries. It also helps avoid being at a crossroads with basic corporate and contract law principles and ensures greater certainty in India’s business and legal atmosphere.

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[82] ibid.
[83] Iridium India Telecom (n 57).
[84] *Bridas* (n 60).
[85] Iridium India Telecom (n 57).
[86] *Bridas* (n 60).