

THE NEED TO RE-THINK THE GROUP OF COMPANIES DOCTRINE IN INTERNATIONAL COMMERCIAL ARBITRATION

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Based largely on party autonomy and consent, over the past two decades, arbitration has emerged as the top pick for corporations to resolve their disputes. Unlike other forms of adjudication, an arbitral tribunal derives its power from the consent the parties themselves provide. Hence, the question of impleading non-signatories in arbitral proceedings has continued to be a matter of great controversy with tribunals generating several ‘creative’ solutions to implead non-signatories. One such solution created is the Group of Companies doctrine, a theory that allows the impleading of parent companies supposedly on the basis of implicit consent. However, the response to this doctrine has been lukewarm, with some jurisdictions choosing to adopt it while others vehemently opposing it, resulting in challenges with cross-border enforcement of arbitral awards. This paper aims to critically analyse this doctrine and attempts to show that it is irreconcilable with a fundamental principle of arbitration, namely consent. It begins by showing the inconsistent application of this doctrine across jurisdictions and then aims to dispute the claim that the doctrine is merely an extension of the principle of consent. Finally, the paper suggests an alternative route that could replace the Group of Companies Doctrine and act as a means to extend the arbitral tribunal’s jurisdiction without necessarily diluting the essence and need for consent by instead focusing on the rights and liabilities of the non-signatory with respect to the dispute before the tribunal.

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I. INTRODUCTION

As a voluntary form of dispute resolution, one of the cornerstone principles of arbitration is consent.¹ Unlike other forms of adjudication which tend to have some form of statutory backing or legitimacy conferred by the State,² arbitral tribunals instead draw their jurisdiction and power to adjudicate from the principle of consent itself.³

In a commercial climate that seems to encourage corporations to diversify their investments and limit their liabilities through the creation of entities like subsidiaries, there have been growing concerns regarding the status of such subsidiaries with respect to arbitration law.⁴ One particular concern that has arisen is whether a subsidiary company can be bound by consent to arbitration provided by a parent company and vice versa. A party may agree to a contract containing an arbitration clause through a subsidiary. However, the question of liability arises – which entity is bound by the same, the parent company or the subsidiary alone? In an attempt to reconcile this, arbitral tribunals have occasionally developed theories to extend their jurisdiction to include non-signatories into the proceedings and hold them liable for the actions of their subsidiaries,⁵ but these theories have been met with varying responses from various jurisdictions.⁶ One such theory developed is that of the Group of Companies Doctrine which was laid out in *Dow Chemicals v. Isover Saint Gobain* ('Dow Chemicals') wherein the court prescribed for a three-level test to allow the tribunal to extend its authority to non-signatories.⁷ Given the recent concerns raised surrounding the doctrine in the

¹ SUNDRA RAJOO, *LAW, PRACTICE AND PROCEDURE OF ARBITRATION IN INDIA*, 18 (Thomson Reuters, 2021).

² Christoph Schreuer, *Consent to Arbitration* in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW*, 831 (2008).

³ *Id.*, at 832.

⁴ Hilary Ingham & Steve Thompson, *Wholly-Owned vs. Collaborative Ventures for Diversifying Financial Services*, Vol. 15(4), *STRATEGIC MANAGEMENT JOURNAL*, 333 (1994).

⁵ Juan Marcos Otazu, *The Law Applicable to Veil Piercing in International Arbitration*, Vol. 5(2), *MCGILL JOURNAL OF DISPUTE RESOLUTION*, 35 (2018-2019).

⁶ *Peterson Farms Inc. v. C & M Farming Ltd.*, (2004) App LR 02/04 (Commercial Court of the United Kingdom); *Thomson-CSF, S.A. v. Am. Arbitration Assn.*, 64 F 3d 773 (2d Cir., 1995) (United States Court of Appeals for the Second Circuit); *Dow Chemical France v. Isover Saint Gobain*, ICC Case No. 4131, Interim Award of September 23, 1982.

⁷ *Dow Chemical, Id.* at 136.

Indian jurisdiction,⁸ and the difficulties the doctrine presents in the cross-border enforcement of arbitral awards,⁹ it becomes essential to revisit the same to check its compatibility with the nature of arbitration.

This paper aims to critically analyse this doctrine and attempts to show that it is irreconcilable with one of the fundamental principles of arbitration, namely consent.¹⁰ Part II of the paper analyses the adoption of the doctrine by several prominent jurisdictions and attempts to highlight the cause of resistance in adoption to the same. Part III aims to analyse the belief that the Group of Companies Doctrine is located in consent and attempts to highlight that the same has merely expanded the scope of consent to an unreasonable level. Additionally, it also aims to flag some important shortcomings of the doctrine both in application and enforcement. Part IV suggests an alternative route that could recalibrate the scope of the Group of Companies Doctrine and act as a means to extend the arbitral tribunal's jurisdiction without necessarily diluting the essence and need for consent. It does so by focusing on the nature of the dispute before the tribunal and which parties would have rights and liabilities surrounding the dispute. In doing so, it balances public policy considerations and broader considerations of equality to circumvent the requirement of consent in the impleading of non-signatories, thereby narrowing the scope of the applicability.

II. THE GROUP OF COMPANIES DOCTRINE

Theories regarding the involvement of non-signatories in arbitral proceedings are broadly classified into two categories – non-consensual theories and consensual theories.¹¹ While non-consensual theories tend to involve contractual and company law doctrines such as that of alter ego,¹² or estoppel,¹³ the development of consensual theories have been in the context of arbitration and are hence rooted in concepts like implied consent.¹⁴

The origins of the Group of Companies Doctrine can be traced back to an International Chamber of Commerce ('ICC') case, *Dow Chemicals*.¹⁵ In the said case, the matter of dispute before the tribunal was as follows; Dow Chemical Group was an American Corporation that had entered into a several contracts with *Isover Saint Gobains* for the distribution of certain thermal insulation products.

⁸ *Cox and Kings Ltd. v. SAP India (P) Ltd.*, (2022) 8 SCC 1, ¶47.

⁹ Clint A Corrie, *Challenges in International Arbitration for Non-Signatories* in *COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS*, Vol. 45, 1-2 (Kluwer Law International, 2007).

¹⁰ RAJOO, *supra* note 1, at 18.

¹¹ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, 1414 (Wolters Kluwer, 2014); Otazu, *supra* note 5, at 35.

¹² Yaroslau Kryvoi, *Piercing the Corporate Veil in International Arbitration*, Vol. 1, *GLOBAL BUS. L. REV.*, 176 (2010-2011).

¹³ Otazu, *supra* note 5, at 35.

¹⁴ BORN, *supra* note 11, at 1415.

¹⁵ *Dow Chemical*, *supra* note 6, at 132.

However, in order to limit its liability regarding this transaction, the parent company entered into an arrangement with Isover through two of its subsidiaries. When a dispute arose, the parent company and another subsidiary of the Dow Chemical Group sought to be impleaded into the arbitral proceedings against Isover Saint Gobain. This was met with contentions from the latter, who submitted that since the parent company and the additional subsidiary were not signatories to the contract which contained the arbitration agreement, they would be unable to invoke the same to become part of the proceedings. However, the ICC tribunal rejected this submission stating that all of the parties that wished to join, constituted a single economic entity with the parties of the suit, and hence, would be permitted. In doing so it had laid down a three-fold test. This includes the presence of a Tight Group Structure, active participation of the Non-Signatory in the Contract and mutual intent of the parties to bind the Non-Signatory.¹⁶

Ordinarily, corporate law jurisprudence contains the doctrine of a separate legal personality.¹⁷ Under the doctrine, a company is a separate legal entity which is distinct from its shareholders. This in turn creates a “veil” wherein the shareholders cannot be liable for the actions of the company, commonly known as the corporate veil.¹⁸ Therefore, extending this to the concept of parent companies and subsidiaries, it should mean that parent companies are not bound to or liable for the actions of their subsidiaries.¹⁹ However, the model introduced by Dow Chemicals negates the legal fiction of having separate legal entities, thereby leaving parent companies liable for the actions of their subsidiaries. This idea is further explored in Part III of this paper.

A. ADOPTION OF THE GROUP OF COMPANIES DOCTRINE

Since its conceptualisation, this doctrine has been met with both resistance and acceptance across jurisdictions, predominately rooted in their respective principles and approaches to contract law. This inconsistent approach across jurisdictions results in the introduction of an element of unpredictability in the enforcement of awards granted in other jurisdictions. Therefore, there is a need to understand the underlying reasons behind the hesitation to universally adopt such a doctrine. A comprehensive understanding of these reasons will prove vital while assessing the practical feasibility of the alternative test that is laid out in Part IV of the paper.

¹⁶ *Id.*, at 136.

¹⁷ Mohammad Razil Salim, *Corporate Insolvency: Separate Legal Personality and Director's Duties to Creditors*, Vol. 2, UITM LAW REVIEW, 90 (2004).

¹⁸ *Id.*, at 91.

¹⁹ Cathy S. Krendt & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, Vol. 55 DENVER L.J., 2 (1978).

1. France

French jurisprudence seems to wholeheartedly acknowledge and accept this doctrine, with one tribunal going so far as to call it a legal rule.²⁰ In a number of cases, both tribunals, and courts,²¹ have taken a fairly liberal view and allowed for the joinder of non-signatories. This is likely a result of France's approach to contract law in general, as French contract law allows for the inferring of consent to contract from the behaviour of the party.²² It can also be linked to the general approach of the country towards arbitration as a field of law (French law applies the same rules to arbitration that are applied to contract law, which requires a minimal form for proving contractual validity).²³ Hence, a doctrine such as the Group of Companies doctrine was easily assimilated into its jurisprudence.

2. United Kingdom

However, other jurisdictions have taken a stricter approach to contractual matters and have the explicit requirement for clear contractual intention. As a result, the Group of Companies doctrine has been met with resistance.²⁴ For instance, courts and tribunals in the United Kingdom do not acknowledge the validity of this doctrine.²⁵ In adopting a highly conservative view to contracts, and thereby arbitration agreements, English law exhibits a high level of scepticism in adopting a position that would endanger the privity of the contract at both the stage of adjudication and that of appeal/enforcement.²⁶ For instance, in *Peterson Farms Inc v. C&M Farming Ltd.*, despite the tribunal finding that the non-signatory and the responding party were part of a single entity and thereby mutual intention can be inferred, upon an appeal to the UK Courts, it was held that such a doctrine has no place in English law and thereby refused to compel the enforcement of the award.²⁷ As is the case with French law, this appears to stem from the larger approach of English Law to contracts. In case of English law, intent to contract must be clear and apparent as opposed to being inferred by other means such as performance or pre-contract signing negotiations, and the same appears to have been extended to governing the arbitration clause and proceedings.²⁸ This also appears to be the case in some other common law jurisdictions, such as the United States, where Courts have recognised and granted legitimacy to only five theories which

²⁰ Sponsor AB v. Lestrade, November 26, 1986, (1988) Rev. Arb. 153 (Court of Appeal of Paul).

²¹ Kis France v. Societe Generale, October 31, 1989, (1992) Rev. Arb. 90 (Court of Appeal of Paris).

²² Civil Code, Art. 1113(2), 2018 (France).

²³ Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of US Courts with Respect to the Group of Companies Doctrine*, Vol. 3(1), THE ARBITRATION BRIEF, 29 (2013).

²⁴ Adyasha Samal, *Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine*, Vol. 11, KING'S STUDENT L. REV. 73, 16 (2020).

²⁵ Caparo Group Ltd v. Fagor Arrasate Sociedad Cooperativa, 1998 EWHC J0807-1, Q.B. Div. (1998) (Administrative Court of England & Wales).

²⁶ Samal, *supra* note 24, at 19.

²⁷ Peterson Farms, *supra* note 6.

²⁸ Kryvoi, *supra* note 12, at 176.

could allow for the impleading of non-signatories into the arbitration agreement. These include incorporation, agency, assumption, estoppel and veil piercing.²⁹ This approach is a reflection of the general jurisprudence in the United States wherein arbitration agreements are seen more as an extension of contracts,³⁰ and hence, there is a tendency to import traditional contractual doctrines to settle such disputes as opposed to adopting doctrines specific to arbitration, like the Group of Companies doctrine.³¹

While the approach adopted by France and that of the UK appear to be on diametrically opposite ends of the scale, several other jurisdictions have adopted a sort of mixed approach, falling within the two on the spectrum. Three countries of importance that fall within this category are Switzerland, Germany, and India.

3. Switzerland

Addressing these in order, parallels can be drawn between the Swiss approach and French approach to contract law. Like French law, Swiss law does not harp on a strict formalistic representation of consent in arbitration agreements.³² However, unlike French courts and tribunals, Swiss courts and tribunals appear to exercise a higher degree of restraint in using this power,³³ with the Supreme Court, despite acknowledging the doctrine, advising for caution in its usage.³⁴ In *X v. Y Engg. SpA*, the Supreme Court inferred consent by looking at the involvement of a third party to determine if it was a common intention that they are bound by the agreement by virtue of their actions of signing a guarantee bond (even though the guarantee bond did not contain an arbitration clause).³⁵ Hence, it appears that Swiss Courts while exercising some restraint, seem to agree in principle with the ability to infer consent from the actions of the third party in the absence of written consent by looking at the actions of the non-signatory.

²⁹ Thompson-CSF, *supra* note 6.

³⁰ *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F 3d 580, 584 (3d Cir. 2007) (United States Court of Appeals for the Third Circuit).

³¹ *Fisser v. International Bank*, 282 F 2d 231 (2d Cir 1960) (United States Court of Appeals for the Second Circuit).

³² *Samal*, *supra* note 24, at 19.

³³ Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories*, Vol. 8, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, 619 (2017).

³⁴ *X Ltd. v. Y and Z SpA* Bundesgericht [BGer] August 19, 2008, No. 4A 128/2008 134 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 565 (Federal Supreme Court of Switzerland).

³⁵ *X v. Y Engg. SpA* Tribunal Federal [TF] April 7, 2014, ATF 4A_450/2014 7, at 16 (First Civil Law Court of Switzerland).

4. Germany

Germany is another interesting case in the adoption of the doctrine. Although like the UK, Germany's approach to arbitration clauses and contracts has largely been conservative,³⁶ by having a strict requirement for the terms of a contract to be in writing.³⁷ However, there appears to be a shift in this approach when it comes to the application of this doctrine. Recently, the German Federal Supreme Court, when tasked with examining the interaction of the principles of law, stated that the Group of Companies doctrine was not barred by German public policy.³⁸ Therefore, despite having a strict written requirement, there appears to be an approach of adjudicating on matters which have a conflict of laws, on a case-to-case basis. Unlike the UK, a more hybrid approach is being adopted in Germany.

5. India

While most common law jurisdictions such as the U.K. and the U.S.A. appear to exercise a great deal of scepticism to the adoption of the Group of Companies doctrine, India decided to adopt the same in *Chloro Control India v. Severn Trent Water Purification*.³⁹ In the said case, the Indian Supreme Court held that even though there were multiple agreements between the parties, the agreements formed part of one overall larger transaction as the performance and the nature of each agreement was inexplicably interlinked with the performance of the other agreements. Hence, the Indian Courts allowed the importation of the doctrine and emphasised on the presence of mutual intent between all the parties to be bound by the arbitration clause. The Court viewed the establishment of this 'mutual intent' as a preliminary issue in the determination of jurisdiction. The Court opined that once established, the non-signatory impliedly consented to the arbitration agreement, thereby reconciling the two matters – the impleading of the non-signatory and the principle of consent. Additionally, like the Courts in Germany, the Indian Courts were aware of the potential implications of a blanket acceptance of this doctrine, and hence, laid emphasis on the idea that in situations where the doctrine is to be applied, would vary from a case-to-case basis. In fact, Indian Courts have at times rejected the applications for joinder of parties into the suit.⁴⁰ However, recently, the Indian Supreme Court appears to be reconsidering the role and the usage of the Group of Companies Doctrine in Indian jurisprudence.⁴¹

Therefore, as depicted above, the adoption of this doctrine has been varied worldwide. This varied adoption has, in turn, caused issues pertaining to

³⁶ Otto S. Sandrock, *Extending the Scope of the Arbitration Agreement to Non-Signatories*, Vol. 8, ARB AGREEMENT ASA SPL SERIES, 643, 644 (1994).

³⁷ German Civil Code 1887, §1031 (Germany).

³⁸ *Bundesgerichtshof* [BGH] [Federal Court of Justice] Case No. III ZR 371/12 (May 8, 2014).

³⁹ *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641, ¶102.

⁴⁰ *Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing India (P) Ltd.*, (2019) 7 SCC 62, ¶9.

⁴¹ *Cox and Kings*, *supra* note 8, at ¶47.

the enforcement of arbitral awards,⁴² with the more conservative jurisdictions refusing to enforce awards against non-signatories, a proposition explored in subsequent parts of the paper. Given the international nature of arbitration, it is entirely possible that an award passed by a tribunal in one jurisdiction may need to be enforced in any another jurisdiction(s). Consequently, challenges to enforcement in any jurisdiction pose a serious concern. If any court refuses to uphold the arbitral award, then it would render the award futile and result in a wastage of resources for the parties. These concerns pertaining to cross border enforcement of arbitral awards, is considered in depth in the following segment of the paper.

Hence, in order to resolve this issue, it becomes important to understand the underlying rationale and the point of contention raised. From the above, it becomes clear that the fundamental paradigm shift between the approaches of different jurisdictions arises from the question of whether or not the Group of Companies doctrine violates the principles of consent and party autonomy, or alternatively if it merely reasonably expands the scope of the term 'consent' to give effect to the true intentions of the parties involved. This question of whether or not consent should be inferred in this manner is discussed in Part III of the paper which aims to weigh to benefits and the concerns of the same.

III. ANALYSIS OF THE GROUP OF COMPANIES DOCTRINE

Part III of the paper will begin by analysing the test laid down in Dow Chemicals in order to appreciate the arguments in favour of the doctrine. It then proceeds to draw a distinction between the Group of Companies doctrine and other principles such as alter ego to further emphasise the consent-based approach that the doctrine provides for.⁴³ It concludes, however, by arguing against the doctrine by stating that Courts and academicians have wrongly rooted the doctrine in consent as the manner in which the doctrine relies on consent is improper. It is proposed that the doctrine has simply expanded the definition of consent to an unreasonable level. Finally, the paper aims to shed light on the different challenges that the application of the doctrine poses, both at the stage of application, and at the stage of enforcement.

A. *THE JUSTIFICATION GIVEN FOR THE GROUP OF COMPANIES DOCTRINE*

As mentioned above, the Group of Companies doctrine *prima facie* appears to be rooted in the principle of implied consent (which involves inferring the consent of a non-signatory party by looking at other factors such as the conduct of the non-signatory and the relationship between the subsidiary and the

⁴² Corrie, *supra* note 9.

⁴³ BORN, *supra* note 11, at 1414; Otazu, *supra* note 5, at 35; Kryvoi, *supra* note 12.

non-signatory as shown in Part II of this paper).⁴⁴ Consent is one of the cornerstones of arbitration and one of the key reasons for why arbitration has become as successful of a manner of dispute resolution as it is today.⁴⁵ Given the finality of arbitral awards, it would be against the principle of natural justice of fairness, which requires that parties be heard in matters which would affect their rights,⁴⁶ to bind a party to such an award in situations where they have not consented to the same.⁴⁷

To this effect, the decision in Dow Chemicals appears to take this into account in laying down its three-fold test.⁴⁸ The first requirement of the test is to prove that there is a tight group structure.⁴⁹ While it is a well-established principle that the mere carrying out of business through the corporate structure i.e., through subsidiaries (highlighted above) does not amount to arbitral consent as the standard under the doctrine is higher. In analysing the ‘tight group structure’ the court did not look for a faint link between the parent company and its subsidiaries.⁵⁰ Instead, it supplemented this with the requirement for one of the group members to have significant control over another.⁵¹ Hence, in order to establish that there is this level of control, arbitrators have been seen to look for organisational or financial links between the companies.⁵² One such case would be that of ICC Case Number 2375 wherein the tribunal held that the ability of the parent company to appoint directors and vice-presidents to the board of the subsidiary, amounted to the level of control needed to apply the doctrine.⁵³ Courts have also considered the overall level of control and involvement of the non-signatory in maintaining the operations of the subsidiary,⁵⁴ as an extension of the test of ‘strong organizational and financial links’ to be relevant in this regard.⁵⁵ Hence, the underlying assumption is that since the parent company would be ‘pulling the strings’ of the subsidiary to such a large extent, the consent that the subsidiary company provides is merely an extension of the consent of the parent corporation.⁵⁶

The second requirement needed for the application of this doctrine is the involvement of the non-signatory in the performance, termination, or

⁴⁴ Alona Kiriak, *Arbitral Jurisdiction over Non-Signatories: The Group of Companies’ Doctrine*, CENTRAL EUROPEAN UNIVERSITY, March 27, 2015, available at https://www.etd.ceu.edu/2015/kiriak_alona.pdf (Last visited on July 13, 2022).

⁴⁵ RAJOO, *supra* note 1.

⁴⁶ Justice Brijesh Kumar, *Principles of Natural Justice*, Vol. 1(1), J.T.R.I JOURNAL, 2 (1995).

⁴⁷ Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, Vol. 26(5), J. INT’L ARB., 648 (2009).

⁴⁸ Dow Chemical, *supra* note 6, at 136.

⁴⁹ *Id.*, at 136.

⁵⁰ STAVROS BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* (Oxford University Press, 2010).

⁵¹ Samal, *supra* note 24, at 6.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678, ¶13.

⁵⁵ Mahanagar Telephone Nigam Ltd. v. Canara Bank, (2020) 12 SCC 767, ¶9.

⁵⁶ *Id.*, 975.

conclusion of the contract.⁵⁷ By reading this requirement, the court further raised the standard from that of a simple establishment of control and a tight group structure to that of an active role in the contract.⁵⁸ In order to assess this level of involvement in the process, tribunals have looked at the conduct of the non-signatory to establish such an involvement and implied consent to the arbitration agreement. In doing so, matters such as a potential impression that the parties (the party and the non-signatory) are interchangeable in the contract,⁵⁹ the usage of the intellectual property belonging to the non-signatory in the contract,⁶⁰ or even the usage of a common letterhead, have proved to be matters of importance to determine active involvement.⁶¹ However, in doing so, Courts and tribunals appear to view consent as a question of degree rather than kind. It creates this 'threshold' *per se* beyond which the consent that the non-signatory to the contract would be taken to mean consent to arbitration. However, this therefore, raises further questions as to how one is to define this threshold and if consent, which is ordinarily thought of as a binary concept, could be considered as a spectrum. These questions are explored in the subsequent parts of the paper.

The final criterion that was laid down is that of mutual intent of the parties to be bound to the arbitration agreement at the time of the conclusion of the contract.⁶² The presence of this criterion appears to be the basis for the importation of the doctrine of implied consent which in turn founds the basis of the Group of Companies doctrine. If one can ascertain with certainty, that at the stage of the execution of the contract, there was an intent between both parties as well as the non-signatory to bind the latter to the arbitration agreement, then it can be construed that while not direct, the non-signatory did indeed give specific consent to the arbitration agreement. Therefore, in situations where this specific consent is present and ascertainable, it can be said that the Group of Companies doctrine does fit within the meaning of consent within the arbitration paradigm. However, there have been concerns regarding how the adjudicating body is to determine for certainty,⁶³ whether there was mutual intent at the stage of execution, a proposition that has been analysed in subsequent sections of the paper. However, Tribunals have in the past looked at evidence such as the exchange of emails, letters and invoices to ascertain this mutual intent.⁶⁴

Hence, the justification given for the usage of this doctrine is by stating that it is indeed rooted in consent and thereby does not violate any principle of

⁵⁷ Dow Chemical, *supra* note 6, at 136.

⁵⁸ Charlie Caher et al., *The Group of Companies Doctrine - Assessing the Indian Approach*, Vol. 9(2), INDIAN J. ARB L., 49 (2021).

⁵⁹ Dow Chemical, *supra* note 6, at 136.

⁶⁰ BREKOULAKIS, *supra* note 50.

⁶¹ *Id.*

⁶² Dow Chemical, *supra* note 6, at 136.

⁶³ Caher, *supra* note 58, at 43.

⁶⁴ GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, 69 (Oxford University Press, 2012).

arbitration law.⁶⁵ This seems to find some support in the UNCITRAL Model law, which several countries have relied on in the development of their own national arbitration laws,⁶⁶ including India. While Article 7(3) of the said model law states that arbitration agreements are to be made in writing, the actual contents of the agreement can be done in any form including oral or through conduct.⁶⁷ The presence of this Article appears to contain an exception to the general rule that every aspect of the arbitration clause needs to be present in writing and specifically consented to by the parties. Therefore, a more liberal construction regarding what the content of the arbitration agreement is, appears to be taken. This in turn leaves the door open to allow for the conduct of non-signatories to become relevant, thereby, providing some support to the justification given to the doctrine.

B. DIFFERENCE FROM THE PRINCIPLE OF VEIL PIERCING/ ALTER EGO

While *prima facie* the Group of Companies doctrine may appear to be merely a substitute for the alter ego doctrine, the reliance on this supposed implied consent by the former has been justified as a more appropriate tool for arbitration solely because it is based on the concept of implied consent.⁶⁸ While there may be some merit to the differences between the two doctrines a key difference between them is the role that consent plays. Analysing the two doctrines on this touchstone will illustrate how one cannot simply disregard the Group of Companies Doctrine owing to the flaws in the non-consensual doctrines such as the alter ego doctrine.

In today's economic climate and the growing globalisation of markets, companies have ceased to be confined by geographical limits and therefore, are free to pursue opportunities in newer markets or centre their operations across jurisdictions for business or tax reasons. However, acknowledging the risks that can arise out of entering a new venture, one common practise of companies is to limit their liabilities through the creation of subsidiaries.⁶⁹ In doing so, the subsidiary functions as an entirely separate legal entity from the parent company which in turn lowers the exposure of the latter. This form of reducing liability is a legitimate practise and encouraged by State's in order to promote commercial investments.⁷⁰ However, this separation is not an absolute and irreversible one. In situations that have grave implications such as abusive conduct or fraud, most jurisdictions are allowed to 'lift the veil' separating the two entities and hold the parent company

⁶⁵ Brekoulakis, *supra* note 33, at 622.

⁶⁶ Michael F. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, Vol. 20(1), THE INTERNATIONAL LAWYER, 327 (1986).

⁶⁷ UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 7(3).

⁶⁸ BORN, *supra* note 11, at 1415.

⁶⁹ Cathy S. Krendt & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, Vol. 55, DENVER L. J., 2 (1978).

⁷⁰ King Fung Tsang, *Applicable Law in Piercing the Corporate Veil in the United States: A Choice with no Choice*, Vol. 10(2), J. PRIV INT L., 228 (2014).

liable for the actions of the subsidiary.⁷¹ The underlying rationale for the same stems from the general principles of fairness and equality,⁷² but are used by the Courts only in exceptional circumstance and when absolutely necessary.⁷³ While the test for the same varies from jurisdiction to jurisdiction, one criterion that is often looked at is the presence of an extremely high level of control between the signatory and non-signatory.⁷⁴

However, there are differences between the Group of Companies Doctrine and the concept of piercing the corporate veil, and hence, it becomes important to highlight the same. The primary and most important difference between the two is the underlying principle. As per the third criteria laid down in the Dow Chemicals case, the Group of Companies Doctrine rests on the grounds of having implied consent.⁷⁵ The requirement for having a mutual intent to be present between all the parties, including the non-signatory, is a stark contrast from the non-consensual nature of the alter ego doctrine. Additionally, the effects that the two have are vastly different. While under the Group of Companies Doctrine, a non-signatory could become party to a proceeding, they still retain their own individual legal personality. However, in situations where the corporate veil is pierced, the legal fiction created of two distinct legal entities collapses,⁷⁶ and hence, the purpose of having the same fades. Hence, the Group of Companies Doctrine does not pierce the veil per se by disregarding the fiction created but rather merely impleads a party.

C. CRITICAL ANALYSIS OF THE DOCTRINE

This segment aims to critique the Group of Companies Doctrine on three grounds. Firstly, on the grounds that the implied consent that the doctrine aims to expand of the scope of consent is incorrect. Secondly, it has resulted in enforcement challenges that have adversely impacted the predictability and reputation of the finality of arbitration awards. Lastly, tribunals and courts have been inconsistent and have incorrectly understood the test laid down in Dow Chemicals.

1. Unreasonable Expansion of the Term “Consent”

While it is conceded that consent may be inferred through the actions of the parties, this consent is not to the arbitration agreement itself, but rather consent to the underlying substantive matters of the contract. An analysis of the application of the Group of Companies Doctrine reveals that despite the supposed

⁷¹ Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, Vol. 76, CORNELL L. REV, 1036 (1990).

⁷² GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (Wolters Kluwer, 2014).

⁷³ Kryvoi, *supra* note 12.

⁷⁴ Otazu, *supra* note 5, at 37.

⁷⁵ Dow Chemical France v. Isover Saint Gobain, ICC Case No 4131, Interim Award of 23 September 1982, at 136.

⁷⁶ BORN, *supra* note 9, at 1415.

requirement of looking at the mutual intent of all the parties at the time of the execution of the contract, courts and tribunals often struggle to draw the line between when there is truly the presence of mutual intent. For instance, Courts in India had, in some instances, viewed the third criterion of mutual intent as being satisfied automatically by the presence of the first two criteria.⁷⁷ This is also seen in other jurisdictions where tribunals and courts have looking at relatively minor connections, such as the usage of a common letterhead,⁷⁸ to hold that the test of mutual intention had been met. However, in doing so, it lowers the threshold for determining consent from that of an explicit agreement within the parties to that merely of consent to the substantive terms of the contract or mere presence of the non-signatory. This results in a situation wherein once an agreement between two parties is proved, then the standard of consent required for an arbitration agreement appears to be lowered.

This lowering of the threshold of consent has been acknowledged and even advocated for in the French jurisdiction. In *Korsnas Marma v. Durand-Auzias* the French Court of Appeals adopted an extremely liberal interpretation of the doctrine to hold that even the mere presumption of knowledge of the existence of an arbitration agreement,⁷⁹ would be grounds to implead a party through this doctrine despite them not signing the arbitration agreement. Arbitration proceedings aiming to implead non-signatories, being part of a contract, are obligated to be in consonance with the principles of contract law.⁸⁰ However, this lowering of the threshold needed to prove consent is fundamentally opposed to the general principles of contract law,⁸¹ which mandates that the same level of consent be present to bind a signatory and a non-signatory to the contract (consent is viewed in the form of a binary).⁸² Categorising consent like this makes it a matter of degree rather than kind. It appears to create this “threshold” beyond which it is concluded that a non-signatory was to be bound by the arbitration agreement. However, such classification finds no support in international arbitration treaties or national legislatures concerning arbitration.⁸³ Additionally, non-compliance with these principles sets a dangerous precedent as it allows parties to simply point to the participation of the party at any stage of the contract to implead them, thereby escaping the standard procedure of law.⁸⁴ It is argued that in creating this legal fiction, the Group of Companies Doctrine has resorted to the usage of proxies to demonstrate consent thereby increasing its scope to an unreasonable level.

⁷⁷ *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*, (2018) 16 CC 413.

⁷⁸ BREKOULAKIS, *supra* note 50.

⁷⁹ *Korsnas Marma v. Durand-Auzias*, 30 November 1988 (1989) Rev Arb 691, at 694 (Paris Court of Appeal).

⁸⁰ Brekoulakis, *supra* note 33, at 621.

⁸¹ WILLISTON, ON CONTRACTS, ¶57 (Thomson Reuters, 2001).

⁸² D Cohen, note in Cour de Cassation, S January 1999; Cour de Cassation, 19 October 1999 (2000) Rev Arb 92 (Paris Court of Appeal).

⁸³ Brekoulakis, *supra* note 33, at 621.

⁸⁴ Dow Chemicals uses the language of “conclusion, performance or termination of the contract” (Emphasis added). *See*, Dow Chemical, *supra* note 6, at 136.

Allowing for such an interpretation of the scope of consent, is therefore, completely irreconcilable with the jurisprudence of both contract law and arbitration law, thereby resulting in a situation which could have serious implications on the faith parties in arbitration have in the process.

2. Enforcement Issues

In the context of the enforcement of arbitral awards, perhaps the most relevant statute would be the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').⁸⁵ The New York Convention was introduced with the intent of providing recognition and enforcement of arbitral awards passed in other contracting states and is an essential tool in ensure cross-border enforcement of arbitral awards.⁸⁶ While the UNCITRAL model law does allow for the content of the arbitration agreement to be through the verbal medium or through the conduct of the parties, the New York Convention, which has 168 signatories and has been adopted into a number of national laws *verbatim*,⁸⁷ does not provide for any such exception.⁸⁸ As per the New York Convention, there is an explicit requirement for a written agreement between the parties. This provides for a gap between the theory of the doctrine and the actual application of the same, particularly when it is applied across jurisdictions in enforcement. This gap dilutes the certainty regarding the enforcement of cross-border arbitral awards which the New York Convention was attempting to bring about.

The best example to illustrate this point is through looking at the case of *Dallah v. Govt. of Pakistan*.⁸⁹ The plaintiffs, who were a construction company based in Saudi Arabia, entered into an agreement (through a memorandum of understanding) with the Pakistan government to provide housing to pilgrims from Pakistan travelling to visit Mecca. To achieve this, the Pakistani government set up a trust and utilised the same to enter into an agreement with Dallah. However, upon the dispute occurring, the Trust used by the government ceased to exist, and hence, Dallah sought to commence proceedings against the Pakistani government despite them not being a signatory to the agreement themselves. While the tribunal tasked with adjudicating the matter was seated in Paris, the enforcement was to happen in the United Kingdom. As highlighted in the previous section of the paper, the approaches adopted by these jurisdictions lie at opposite ends of the spectrum, and hence, unsurprisingly, the tribunal accepted the joinder stating that the government was inextricably linked with both the negotiation and the

⁸⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3, [1975] ATS 25, 4 ILM 532 (1965), UKTS 26 (1976).

⁸⁶ EMMANUEL GAILLARD, *THE URGENCY OF NOT REVISING THE NEW YORK CONVENTION*, 689 (Kluwer Law International, 2009).

⁸⁷ HERBERT KRONKE ET AL., *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION*, 2 (2010).

⁸⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3, [1975] ATS 25, 4 ILM 532 (1965), UKTS 26 (1976), Art. II (1).

⁸⁹ *Dallah v. Govt. of Pakistan*, 2010 UKSC 46, at 107 (Supreme Court of the United Kingdom).

performance of the contract and could be validly impleaded in the case. However, at the time of enforcement, the UK Supreme Court refused the same by adopting a conservative approach to hold that since the Pakistani Government was not a signatory, they could not be impleaded in the present case.⁹⁰ Hence, the issue highlighted above reflects a fundamental issue with the doctrine. The increased scope of consent that this doctrine provides causes uncertainty and issues regarding enforcement in the arbitration sphere, which in turn adversely affects the reputation of arbitration as a whole.

3. Incorrect Application of the Doctrine

Another issue that crops up with respect to the application of this doctrine is that tribunals and courts often compromise on the third leg of the test laid down in *Dow Chemicals* and instead focus entirely on the presence of a tight group structure and an involvement in the contract.⁹¹ For instance, in India (one such jurisdiction that has adopted the Group of Companies Doctrine), High Courts have impleaded non-signatories even when there was no mutual intent and merely the first two prongs were satisfied.⁹² Doing so has grave implications as it binds a party to an agreement that it did not intend itself to be bound by, and hence, results in eroding the fundamental tenants of arbitration. The application of the doctrine faces severe issues and occasionally transforms it into a non-consensual theory of impleading non-signatories as opposed to the supposed consensual nature of the doctrine.⁹³

In reading in the three-level criteria, the Court in *Dow Chemicals* has essentially widened the scope of consent to include actions of the non-signatories. In doing so, it has compromised the fundamental nature of consent in arbitration agreements and adversely affects the finality of the arbitration awards. The following section aims to propose an alternative approach to aid in adjudicating on the matter of extension of the jurisdiction of the tribunal to non-signatories.

IV. ALTERNATIVES TO THE GROUP OF COMPANIES DOCTRINE

While the Group of Companies Doctrine does have its disadvantages, the function that it provides is essential. It allows claims to be brought by and against non-signatories. Doing so allows the tribunal to attain a greater understanding of the dispute before it.⁹⁴ In situations where a non-signatory has a claim against them or wish to be impleaded in the arbitral proceedings, the actions of the non-signatory to the performance of the contract would be a relevant

⁹⁰ *Id.*, at 160.

⁹¹ Caher, *supra* note 58, at 44.

⁹² *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*, (2018) 16 SCC 413, at 24.

⁹³ *Mahanagar Telephone Nigam Ltd v. Canara Bank*, (2020) 12 SCC 767.

⁹⁴ *Brekoulakis*, *supra* note 33, at 629.

discussion and factor for consideration. Not allowing for the claims to be brought could lead to a conflict of laws wherein the judgement of the court and the award of the tribunal may have different decisions on the same matter. By not allowing for the impleading of non-signatories, arbitral tribunals will not only be unable to gain a holistic understanding of the dispute before it, but also risk the award passed being overturned on the ground that it impacts the right of a third party without providing them with an opportunity to be heard, thereby violating the principles of natural justice and the general principles of fairness and access to justice.

This was acknowledged by the Singapore High Court in the case of *Yee Hong Pte Ltd v. Tan Chye Hee Andrew & Ho Bee Development*, wherein the court explicitly mentioned that it would be unsatisfactory for two issues that arose out of the same project to be referred to two different forms of adjudication. Doing so would raise a question as to whom the ultimate power of adjudication over the matter would rest upon.⁹⁵ For an arbitral tribunal to come into existence, it is essential that there is a dispute that is to be adjudicated upon,⁹⁶ and it is suggested that an approach focused on the dispute would result in an approach that respects the principles of arbitration law that have been developed.

A. DISPUTE BASED APPROACH

Under the dispute based approach, tribunals would have the jurisdiction to make non-signatories' part of the proceedings in situations where the rights, claims and liabilities of/against the non-signatories are greatly intertwined with the matter of the dispute. Hence, unlike the group of companies doctrine that merely requires an active role of the non-signatory in either of the three stages of the contract,⁹⁷ this theory would be specifically focused on the dispute and termination of the contract alone. It is at this point that the relevant rights and liability of the non-signatories in connection with the contract, if any, would arise.

Additionally, the underlying principle of this approach would be rooted in the principles of equity and fairness as opposed to the principle of implied consent.⁹⁸ For instance, consider the situation in the judgement of the Singapore High Court highlighted above, *Yee Hong Pte Ltd v. Tan Chye Hee Andrew & Ho Bee Development*.⁹⁹ In this case, there are three relevant parties; the developer, the contractor and the architect. The developer had entered into separate contracts with both the contractor and the architect pertaining to the construction of a suit

⁹⁵ *Yee Hong Pte Ltd v. Tan Chye Hee Andrew & Ho Bee Development Pte Ltd.*, [2005] 4 SLR 398 (The High Court of Singapore).

⁹⁶ Frank D. Emerson, *History of Arbitration Practice and Law*, Vol. 19(1), CLEV. ST. L. REV., 155 (1970).

⁹⁷ Dow Chemical, *supra* note 6, at 136.

⁹⁸ SI Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, Vol. 31(4), VANDERBILT L. REV., 920 (1998).

⁹⁹ *Yee Hong Pte Ltd.*, *supra* note 95, at 13.

property. However, owing to certain issues, which the architect found to be attributable to the contractor, the project was delayed and therefore, the developer was entitled to claim damages from the contractor as per the agreement and initiated proceedings regarding the same. The contractor then proceeded to initiate legal proceedings against the architect in Singapore on the grounds that they had failed to act in an impartial manner. However, despite being non-signatory to the contract between the developer and the contractor, the architect sought to rely on the arbitration clause within this contract. The Group of Companies Doctrine would clearly fail to apply in the present case as there is an evident absence of a tight group structure as the architect is a different entity from the contractor, as well as no mutual intent that can be ascertained to submit the dispute to arbitration. However, this example does raise an interesting question regarding whether it would be fair to prevent the architect from joining the proceedings on a matter which would have a direct and clear impact on their rights and liabilities.

While being a fundamental principle in arbitration law, party autonomy and consent is not absolute.¹⁰⁰ While it is conceded that the emphasis given to the same is considerably higher than other forms of adjudication, there are still some implicit limits on the same such as the principle of equality, fairness and the principles of natural justice.¹⁰¹ While arbitration is meant to be a form of resolution that parties may adjust and adapt to their needs, they cannot go against the fundamental tenants of public policy, which mandates the same to be in line with such principles.¹⁰² Denying a party the opportunity to be heard in a matter which would severely affect their rights and liabilities would be irreconcilable with these principles. Therefore, a tribunal could implead a party even if it does not meet the threshold of the consent requirement as laid down in *Dow Chemicals* if it is in accordance with such principles. In fact, these principles have in the past been used to justify the application and usage of several non-consensual theories such as that of alter ego and veil piercing.¹⁰³

As mentioned above, a key test for adopting such an approach would be that the liabilities and claims made by/against the non-signatory are intertwined with the dispute before the tribunal. The decision of the tribunal would necessarily have an impact on the non-signatory, regardless of whether or not they were allowed to participate in the proceedings. Barring the non-signatory on a matter that directly involved their own rights and liability without giving an adequate opportunity to be heard and present their views would be in conflict with the principle of fairness and equality.¹⁰⁴ Additionally, it secures the non-signatory's right to justice

¹⁰⁰ Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, Vol. 24(3), J. INT'L ARB, 327 (2007).

¹⁰¹ Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, Vol. 69(4), INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 993 (2020).

¹⁰² FRANCO FERRARI, LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION (JurisNet, LLC, 2016).

¹⁰³ OTAZU, *supra* note 5, at 37.

¹⁰⁴ Strong, *supra* note 98, at 920.

as, in the absence of such an approach, they may find themselves bound or severely affected by an award in which they had no representation.

Tribunals have previously affirmed this approach, such as in ICC case Number 9762 of 2001.¹⁰⁵ In this case, the tribunal noted that the right to act against all the necessary parties in the case could not be denied to the claimant. The tribunal then proceeded to view the relationship between the respondents and noted that there was a substantial overlap of liability between a signatory and a non-signatory, and hence, allowed the joinder of the same.¹⁰⁶ However, this can and should only be done in cases where the arbitration agreement is in itself broad enough to cover the same. A narrow arbitration agreement, which explicitly demarcates specific claims, would not be able to accommodate such an approach.¹⁰⁷ However, in cases where the arbitration clause is sufficiently broad, the tribunal would have the competency to extend its jurisdiction to include all collateral matters.¹⁰⁸ This was done not only in *JLM v. Stolt Nielsen*,¹⁰⁹ but several other cases as well.¹¹⁰ This has also been the case in France, wherein the legal construct of *tierce opposition* was introduced. Under this construct, a non-signatory would have the right to contest a domestic award that has adverse effects to it.¹¹¹ However, this construct has also been extended to some international awards,¹¹² with the underlying rationale being a need to ensure access to justice and compliance with due process. However, such a construct only exists in France and mainly pertains to domestic awards alone, as mentioned above. Hence, non-signatories belonging to other jurisdictions cannot seek remedy under such an approach, despite the French courts holding it to be a fundamental principle.

Additionally, this approach seems to agree with the jurisprudence of a majority of jurisdictions with respect to litigation. Most jurisdictions provide recourse to a third party whose rights and liabilities would be severely affected by the decision,¹¹³ by allowing them to intervene in proceedings as a matter of right. This is true even for the most conservative of jurisdictions such as the UK,¹¹⁴ and the US,¹¹⁵ wherein the joinder of a third party whose rights and liabilities are inextricably linked with the matter before the court is considered a matter of necessity. Given that recent developments in arbitration seem to draw emphasis to its

¹⁰⁵ Defense Ministry of State X v European Co., ICC Case No. 9762, Interim Award of 15 August 1991.

¹⁰⁶ *Id.*

¹⁰⁷ Brekoulakis, *supra* note 33, at 633.

¹⁰⁸ *JLM Indus, Inc v. Stolt-Nielsen SA*, 387 F 3d 163 (2d Cir 2004) (United States Court of Appeals for the Second Circuit).

¹⁰⁹ *Louis Dreyfus Negoce SA v. Blystad Shipping & Trading Inc*, 252 F 3d 218, 224 (2d Cir 2001) (United States Court of Appeals for the Second Circuit).

¹¹⁰ *Meyer v. WMCO-GP*, 211 SW3d 302, 305 (Tex 2006) (Supreme Court of Texas).

¹¹¹ French Code de Civil Procedure, Art. 583-85 (France).

¹¹² Brekoulakis, *supra* note 33, at 635.

¹¹³ French Code de Civil Procedure, Art. 583-85 (France).

¹¹⁴ English Civil Procedural Rules, 1998, Art. 19(3)(1) (United Kingdom).

¹¹⁵ US Federal Rules of Civil Procedure, Rule 24(a) (United States of America).

adjudicatory nature as opposed to it merely being an extension of contract law,¹¹⁶ adopting such an approach may meet less resistance in adjudication and enforcement than that under the Group of Companies Doctrine.

Admittedly this approach would require some radical steps to be taken in the context of international arbitration law. It is important to note that although a similar approach might have been taken by the jurisdictions in the arena of litigation, a similar undertaking would have to be done in the context of arbitration.¹¹⁷ The legislature of the country would have to allow the tribunals to deal not only with the dispute before them but also with matters that are inextricably linked with the same. This would additionally help in the issues of enforcement that the usage of the group of company's doctrine raises, as once established into the jurisprudence of the nation, the enforcement of the award could no longer be denied on the lack of consent, but rather would succeed as a matter of public policy.

While some may argue that if legislative reforms are required regardless, then the same can be done to legitimise the Group of Companies Doctrine itself. However, this argument does not take into account that, as highlighted in Part II of this paper, countries that reject the application of the Group of Companies Doctrine, do so primarily because of their concerns regarding the manner in which consent is being inferred. However, the alternative framework suggested rests this concern by rooting the impleading of the non-signatory in matters which these countries have already recognised as valid exceptions to the privity of contracts, namely, the principles of equity and natural justice.

While this approach can be criticised for doing away with the requirement of consent, it does provide a better alternative to the existing structure. As highlighted in the previous section, the Group of Companies Doctrine, although appearing to find its root in the concept of implicit consent, is in actuality an unreasonable abstraction of the term consent. This abstraction of what the term consent means not only has potential adverse policy implications but also poses dangerous implications on the predictability of arbitration proceedings as well as the enforcement of foreign awards and the potential for arbitration to become an independent field of law as opposed to merely being seen as an extension of contract law. While it is conceded that arbitration law does regard principles like consent as important, other principles like equity and fairness also form part of the foundations of arbitration. Therefore, this new alternative approach, is not only more academically honest but also avoids eroding at the basic principles of arbitration law.

¹¹⁶ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, 284 (Kluwer Law International, 2014).

¹¹⁷ French Code de Civil Procedure, Art. 583-85 (France); English Civil Procedural Rules, Art. 19(3) (1) (United Kingdom); US Federal Rules of Civil Procedure, R. 24(a) (United States of America).

On the other hand, the suggested approach focuses on a different aspect to extend the tribunal's jurisdiction to non-signatories, namely the nature of the dispute before it and the relationship of the parties to said dispute. By focusing on the dispute element and the nature of the rights and liabilities between the signatory and the non-signatory, emphasis is placed on the principles of equality and fairness and hence can be used to implead non-signatories without diluting the essence of the term consent. Hence, this approach seems to lend more academic integrity to the principles of arbitration by preserving, and in fact strengthening, the meaning and role of consent in the process.

V. CONCLUSION

This paper aimed to critically analyse the Group of Companies Doctrine to understand if it is a viable method to extend the tribunal's jurisdiction to non-signatories of the agreement. It began by briefly looking at the Dow Chemicals case to understand the three-level test it laid out, which is the presence of a Tight Group Structure, the active participation of the non-signatory in the conclusion, termination, or performance of the contract and the presence of a mutual intent to bind the non-signatory. Following this, owing to the international nature of arbitration, the paper then looked at the adoption of this doctrine across jurisdictions and the reasons for the same. While jurisdictions like France, which take a fairly liberal view of the subject matter, seemed to favour such a doctrine, other more conservative jurisdictions such as the United Kingdom found the same to be irreconcilable with their jurisprudence. However, some countries like Switzerland, India, and Germany, seemed to adopt a hybrid model in which the doctrine was permitted but was to be exercised with caution.

The following part attempted to shed light on the justification given for the doctrine, namely implied consent. Some academicians believe that the doctrine is rooted in the concept of implied consent and the three-prong test that was laid out in Dow Chemicals. This emphasises that point by ensuring a degree of control, high enough to reasonably conclude that the consent given was that of the non-signatory as well. However, this paper disputes this presumption and instead argues that the manner of implying consent as done under this doctrine, increases the scope of the term itself to an unreasonable level. Additionally, it sheds light on the fact that tribunals and courts alike have often misapplied this test and wrongfully impleaded parties even when there was no consent to the same while also highlighting the enforcement issues that arise out of the application of this doctrine.

The final part suggests an alternative to the current approach. While the existing model attempts to draw a link between the non-signatory and consent, the paper suggests an alternative route that would focus on the dispute before the tribunal. The principles of equality and fairness can be used to support this approach. Giving a third party the right to be involved in the proceedings in the

event that the award is likely to seriously affect them, is just, fair and reasonable. It was observed that such an approach was taken in a number of different jurisdictions wherein a third party whose rights are likely to be seriously affected by the decision of the court, could be impleaded as a matter of right. However, the said approach could only be applied in cases where the arbitration agreement was not narrow and specific to an exhaustive list of subject matter and would require the liabilities and claims or/against the non- signatory to be involved in a substantial way. Additionally, to adopt such an approach, legislatures across the globe would have to consent to provide the tribunals with the ability to extend their jurisdiction to matters that are inextricably linked with the dispute before it. Doing so would allow the joinder of non-signatories, when necessary, while also ensuring that the nature of consent is not violated.