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Composite Transactions and Impleadment of Non-Signatories

Part I – Evolution of the Law

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Chapter I – Introduction

1. The Supreme Court in an effort to consolidate or to have a relook at the law on a particular aspect refers cases to larger benches. In an effort to discuss principles of impleadment of non-signatories and to test the principles of Group Companies doctrine applied by the Supreme Court in ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*** ("***Chloro Controls***"), in 2022 a reference was made by a three-judge bench of the Hon'ble Supreme Court in ***Cox & Kings Ltd. v. SAP India (P) Ltd.***,[3] ("***Cox & Kings I***") to a 5 judge bench in ***Cox & Kings Ltd. v. SAP India (P) Ltd.***, ("***Cox & Kings II***")[4].

2. The restatement in ***Cox & Kings II*** was detailed to and lengthy and also required further discussion as to how to apply the principles crystallised by the Supreme Court in ***Cox & Kings II***. This exercise was carried out by the Supreme Court itself in ***Ajay Madhusudan Patel v. Jyotrindra S. Patel*** [5] ('***Ajay Madhusudan'***) and ***ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd.***,[6] ("***ASF Buildtech***").

3. In an attempt to further distil and clarify the status of the law, the authors have attempted to trace its evolution and the application of the principles laid down in ***Cox & Kings II***. While attempting to simplify the principles, the Authors also were drawn into the lesser principles of impleadment i.e the Composite Transaction doctrine which were in play in several cases around the country in single project multiple contract cases. The authors have therefore split the entire discussion into two parts.

4. In Part I they have discussed the evolution of the principles of impleadment of non-signatories while focussing the on composite transaction doctrine. Thereafter in part II, the authors have analysed as to whether the principles, as consolidated by the Hon'ble Supreme Court, were correctly applied in certain cases relating to construction of campuses of Central Universities such as IIT Mandi and IIM Jammu.

Chapter II – Impleadment in cases of Composite Transactions as envisaged in *Chloro Controls*

Interlinked Agreements with interdependent performance as the basis for composite reference

5. The first major instance where the Hon'ble Supreme Court ("**SC**") dealt with the issue of a non-signatory being impleaded as a party to the arbitration, was in 2012, while discussing the concept of composite transaction in the case of ***Chloro Controls***.[7] It dealt with a structure of

[3] Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1.
[4] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1
[5] Ajay Madhusudan Patel v. Jyotrindra S. Patel, (2025) 2 SCC 147.
[6] ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd., 2025 SCC OnLine SC 1016.
[7] *Id.*

agreements where there existed a primary / mother agreement and other ancillary agreements. The question before the court was whether a reference of dispute in whole or in part could be made to the arbitral tribunal under Section 45, in case multiple agreements were signed between different parties and where some agreements contained an arbitration clause and the others did not.

6. The Court observed that these ancillary agreements were intrinsically connected to the parent agreement. They were so interdependent on each other that they could not separate or perform without reliance on the other. On this basis, the Court held that such linkage reflected the intention of the parties to refer disputes arising from both the parent agreement and the ancillary agreements to arbitration. In ***Cox & Kings II***, the Hon'ble Supreme Court re-affirmed the fact that ***Chloro Controls*** itself laid the test for impleadment of non-signatories in case of composite transactions.[8] A transaction is treated to be composite in nature when the performance of the mother agreement might not be feasible without the execution and performance of the supplementary or ancillary agreements.[9] It was also held that the courts will have to examine "*whether a composite reference of such parties would serve the ends of justice*."[10] Lastly, if the courts think that composite reference would better facilitate the arbitration, then even non-signatories can be referred to arbitration.[11]

7. In ***Chloro Controls***, the Hon'ble Supreme Court while determining the legal foundation for such impleadment, was persuaded to draw the conclusion by way of a comparison of the language of Section 45 from Part II and Section 8 from Part I of the Arbitration and Conciliation Act. They noted that Section 8 (as it then stood) only allowed the parties to be referred to arbitration, whereas Section 45 allowed any person *claiming through or under* to be referred to arbitration. This further fortified the dicta of the Court. The more well-known principle of Group Companies doctrine for impleadment of non-signatories was formulated thereafter. The guide being the written text of Section 45, wherein a person had the opportunity to claim through or under.

Chloro Controls view of the power to Implead non-signatories

8. As far as the power to implead is concerned, the Supreme Court in ***Chloro Controls*** was compelled to hold that the same belongs only with the Courts.[12] The reason being that in 2012 when the Judgment was pronounced, the jurisprudence of Section 11 entailed all preliminary issues to be dealt with by the Referral Court, including impleadment.[13] It is relevant to point out

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[8] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶122 .

[9] Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, ¶73.

[10] *Id.*

[11] *Id.*

[12] *Id.* ¶165.2.

[13] ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd., 2025 SCC OnLine SC 1016, ¶44 .

that in ***Chloro Controls***, the Court was dealing with Section 45 which forms part of Part II of the Arbitration and Conciliation Act. Since Part II did not have a Section 16 equivalent provision, the Court held that prior to referring the parties to an arbitration, all preliminary issues, including impleadment, will have to be dealt with by the Court itself.

Chapter III – Development and evolution of the law of composite reference post *Chloro Controls*

9. ***Chloro Controls*** in para 73 observed that a non-signatory could be subject to arbitration without the consent of the non-signatory. To implead them into arbitration the court will have to examine the facts of the case and determine whether there existed a valid arbitration agreement or not. Additionally direct commonality of subject matter and whether the agreement between the parties is a part of a composite transaction or not was to be ascertained. However, a different trend can be observed in the cases post ***Chloro Controls***, wherein courts increasingly stressed on the intention of the parties.

Cheran Properties v. Kasturi and Sons

10. ***Cheran Properties Ltd. v. Kasturi and Sons Ltd***. ***(“Cheran Properties”)*** specifically dealt with group companies doctrine wherein the Supreme Court analysed whether the absence of an arbitration agreement in writing excludes the possibility of binding third parties. The court after considering global trends held that written agreement to arbitrate may, in certain circumstances, extend to bind non-signatories, particularly where the intention was to hold the creditworthy member of the corporate group accountable. However, the Court also held that the separate legal identity of each company must be respected. The lifting of the corporate veil to bind a non-signatory can be done based on the terms of the arbitration agreement, the parties’ intention at the time of the contract, and how the contract was performed.[14]

11. The court also took into account that business transactions often had multiple layers. It was held, that while determining whether a non-signatory is bound by the arbitration agreement or not, the Court must uncover the true essence of the business arrangement and attribute to the transaction a meaning consistent with commercial sense. Even a person who did not formally sign the agreement, can be bound, if they accepted being bound by the actions of the signatory. In determining so, the relationship between the non-signatory and the signatory, the commonality of subject-matter, and the composite nature of the transaction were held to be relevant considerations.[15]

MTNL v. Canara Bank

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[14] Cheran Properties Ltd. v. Kasturi and Sons Ltd., (2018) 16 SCC 413, ¶25 ¶28.
[15] *Id*. ¶23.

12. In *Mahanagar Telephone Nigam Ltd.* v. *Canara Bank*,[16] the Hon'ble Supreme Court applied the Group of Companies doctrine based on the principle of a "single economic unit." CANFINA, a wholly owned subsidiary of Canara Bank, was the original purchaser of the bonds issued by MTNL. It later transferred shares back to Canara Bank. The Supreme Court held that CANFINA was a necessary and proper party and upheld its impleadment in arbitration.

13. The Supreme Court interpreted Section 7(4)(b) & 7(3) of the Arbitration and Conciliation Act, 1996, and observed that the arbitration agreement does not have to be in a particular form. The intention of the parties is to be enquired into to settle their disputes. Intention can also be implied from the conduct of the parties and documents/correspondence exchanged between them.[17] Further, the Supreme Court reiterated the stance in ***Chloro Controls*** that group companies' doctrine can be invoked in cases of composite transactions.[18]

Ameet Lalchand Shah v. Rishabh Enterprises

14. In the context of multi-party arrangements arising out of a single commercial transaction, the most significant precedent is the 2018 Judgment in ***Ameet Lalchand Shah v. Rishabh Enterprises*** ("***Ameet Lalchand***").[19] The matter dealt with four interconnected contracts involving different sets of parties. The first two agreements entered between Rishabh and Juwi India had an arbitration clause. The third agreement between Rishabh and Dante Energy also had an arbitration clause. However, in the fourth agreement between Rishabh and Aston Field, there was no arbitration clause.[20] The principal issue before the Court was whether the disputes arising out of four interlinked agreements between Rishabh Enterprises and three other parties could be referred to arbitration, notwithstanding the absence of an arbitration clause in one of the agreements.[21]

15. It was categorically held that, although there were four distinct agreements, involving several parties, they were for a singular purpose and hence it was a single commercial project. The agreements were commercial in nature and integrally connected in purpose and performance.[22] All parties were referred to arbitration, while noting that all these parties can be covered by the arbitration clause in the main agreement as all the parties were involved in a single commercial project executed through several agreements and contracts.[23] Even in the

[16] MTNL v. Canara Bank, (2020) 12 SCC 767
[17] MTNL v. Canara Bank, (2020) 12 SCC 767, ¶9.2; ¶9.3; ¶9.4.
[18] *Id.* ¶10.6.
[19] Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678.
[20] Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678, ¶13.
[21] *Id.* ¶12.
[22] *Id.* ¶24.
[23] *Id.* ¶25.

absence of a formally signed arbitration agreement by Astonfield, the Court inferred its intention to be bound on account of its participation in a single commercial project.

ONGC v. Discovery Enterprises

16. The discourse was further consolidated in the 2022 Judgment of the Hon'ble Supreme Court in ***ONGC v. Discovery Enterprises***,[24] ONGC awarded a contract to DEPL for operating vessel. The contract provided for settlement of disputes through arbitration. Thereafter, ONGC instituted an arbitration against DEPL and Jindal Drilling and Industries Limited ("**JDIL**"), a group entity, to recover its outstanding dues on ground that they were a single economic entity. The tribunal held it lacked jurisdiction over JDIL and struck it off. ONGC then withheld payments under other contracts with JDIL, leading to further arbitration.

17. The Hon'ble Supreme Court took the view that, there was a fundamental failure on the part of the arbitral tribunal by not allowing evidence that might have had a bearing on impleadment of JDIL.[25] The Supreme court categorically held that non-signatories can be bound based on consensual theories such as agency and assignment and on non-consensual theories like estoppel.[26] Certain factors for assessing the intention of the non-signatories were also laid down in this case. The relevant paragraph is extracted hereunder:

> *"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
>
> *(i) The mutual intent of the parties;*
>
> *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
>
> *(iii) The commonality of the subject-matter;*
>
> *(iv) The composite nature of the transaction; and*
>
> *(v) The performance of the contract."*[27]

<u>Chapter IV – Cox & Kings: reasserting the importance of consent in Arbitration</u>

[24] ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42.
[25] ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42, ¶75.
[26] *Id.* ¶41.
[27] *Id.* ¶40.

18. For about a decade, the law as settled by ***Chloro Controls*** was the norm and was followed by several subsequent judgments by the Supreme Court[28] and various other High Courts. In 2022 however, a three-judge bench of the Hon'ble Supreme Court in *Cox & Kings Ltd. v. SAP India (P) Ltd.*,[29] ("***Cox & Kings I***"), doubted the correctness of the applicability of the principle of Group Companies in the manner as propounded by ***Chloro Controls*** and the subsequent judgments.

19. In ***Chloro Controls*** the conditions for impleadment of non-signatories was summarized in para 72. The Hon'ble Supreme Court in ***Cox & Kings II*** clarified that ***Chloro Controls*** itself laid down that consent was the foundation for impleadment of non-signatories to arbitration and re-affirmed the said foundation to further consolidate the law. Para 27-29 of the judgment in ***Cox & Kings II*** is relevant and is extracted hereunder:

> ***27.*** *The next issue before this Court was to determine whether there was any legal relationship between the signatory and the non-signatory for the latter to "claim through or under" the former. The Court noted that the Group of Companies doctrine has been developed by courts and tribunals in the international context to bind a non-signatory affiliate or sister concern within the same corporate group as the signatory party, to an arbitration agreement provided there was a mutual intention of all the parties. This Court emphasised that the "intention of the parties" is the underlying principle for the application of the Group of Companies doctrine. It observed : (Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , SCC p. 683, para 72)*
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>> *"72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties."*
>>
>> *(emphasis supplied)*
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> *28. The Court held that a non-signatory could be subjected to arbitration "without their prior consent" in "exceptional cases" on the basis of four determinative factors:*

[28] Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413; Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678, MTNL v. Canara Bank, (2020) 12 SCC 767; ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42.

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

28.1. A direct relationship to the party which is a signatory to the arbitration agreement;

28.2. A direct commonality of the subject-matter and the agreement between the parties being a composite transaction;

28.3. The transaction being of a composite nature where performance of the mother agreement may not be feasible without the aid, execution, and performance of supplementary or ancillary agreements for achieving the common object and collectively have a bearing on the dispute; and

28.4. A composite reference of such parties will serve the ends of justice.

29. In Chloro Controls, this Court acknowledged that cases of composite transactions involving multi-party agreement give rise to peculiar challenges where non-signatories may be implicated in the dispute because of their legal relationship and involvement in the performance of contractual obligations. To remedy such situations, it was held that the Group of Companies doctrine could be applied to systematically evaluate the facts and circumstances to determine "a clear intention of the parties to bind both, the signatory as well as the non-signatory parties" to the arbitration agreement.[30]

20. The Supreme Court in ***Cox & Kings II*** acknowledged that even in ***Chloro Controls,*** mutual intention of the parties was key even if the intention was derived from other actions and not by being a direct signatory to the arbitration agreement. Further, it is equally important to note that mutual intention of parties as a yardstick to implead parties was developed in ***Chloro Controls*** itself and only re-iterated in the future judgments including ***Cox & Kings II***.

21. The Supreme Court in ***Cox & Kings II*** fortified the entire foundation of arbitration by re-iterating that consent is its cornerstone.[31] They clarified that a signature of a party is the most profound expression of consent but not the only manner in which consent can be asserted. It referred to all such entities who signify their intent through conduct, rather than by signature, as non-signatories rather than third parties.[32] The Supreme Court further stated that a contract may also be implied and a party who is a non-signatory can be bound by the terms of the contract if it has consented to the same by means other than a signature.[33] Section 7 of the Arbitration Act clearly refers to a legal relationship and not specifically contracts where the parties can be referred to arbitration. Therefore, even in case of implied contracts parties could be sent to arbitration if there exists a legal relationship based on consent.[34]

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[30] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶27-29.
[31] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶70.
[32] *Id.* ¶70.
[33] *Id.* ¶73 ¶79.
[34] *Id.* ¶74 – 79.

22. The Supreme Court in ***Cox & Kings II*** also clarified the apparent confusion created in Para 72 & 73 of ***Chloro Controls***, wherein readers assumed that parties who had no intention of being bound by the agreement were being dragged into arbitration. In ***Cox & Kings II***, the Court held that, if read harmoniously, the criteria provided for impleadment of non-signatories to arbitration, as provided in para 73 of ***Chloro Controls*** refers to impleadment of parties 'without prior consent' should rather be read as impleadment of parties 'without prior formal consent' to the arbitration agreement. The test therefore being applied by the Supreme Court in Chloro Controls was to understand whether the consent was given in some other form, such as by way of conduct.[35]

23. ***Cox & Kings II*** only overruled ***Chloro Controls*** specifically on manner of application of Group Companies doctrine for impleadment of parties in arbitration, while fortifying arbitration as a consent-based dispute resolution mechanism. It held that third parties cannot be compelled to arbitrate based on an agreement they never consented to. Sections 2(1)(h) or Section 7 are based on the concept of party autonomy and party independence, which require the party to provide consent to submit their disputes to arbitration.[36]

24. In summation therefore, it is relevant to point out that ***Cox & Kings I*** disagreed with Chloro Controls on a very specific issue regarding the manner of applicability of the Group Companies Doctrine. Meanwhile, the Hon'ble Supreme Court in the larger bench reference in ***Cox & Kings II*** overwhelmingly re-iterated several aspects of the law as laid down in ***Chloro Control*** in 2012. Sweeping statements, therefore, that ***Chloro Control***, on all aspects has been overruled, would therefore be incorrect.

25. The above gains greater significance because the principles regarding composite transaction as postulated in Chloro Controls still survive today. Even post ***Chloro Controls,*** in ***Ameet Lalchand*** as well the Supreme Court clarified that impleadment is not confined to the Group Companies Doctrine alone and may also rest on the existence of a composite transaction forming a single commercial project.

26. Whenever the issue of impleadment of non-signatories arises, the most prominently invoked principle is the group of companies doctrine. It has been discussed in a plethora of judicial pronouncements as well. However, this often causes a mental block as though it were the sole mode of impleadment. ***Chloro Controls*** had articulated the doctrine of composite transaction as a distinct basis for binding non-signatories. Later, ***Cox & Kings II*** has also clarified that impleadment is legal as long as it is undertaken on consideration of established legal principles including, but not limited to, the doctrines of "group of companies", "alter ego", "composite transaction". The focus on composite transactions in this Part I is to setup the

[35] *Id.* ¶112 – 113.
[36] *Id.* ¶152.

discussion in Part II regarding impleadment of non-signatories in a multi-party single project cases.

Chapter V – Reference to Arbitration and determination of who is a "Veritable Party"

Section 11 Principles and reference to Arbitration

27. Before, ***Cox & Kings II*** the jurisprudence on scope of judicial intervention had undergone a significant shift due to the insertion of Section 11(6A). The courts have thereafter consistently held the scope of examination, at the referral stage, is limited to existence of arbitration agreement.[37] Section 5 of the Act enshrines the principle of minimal judicial interference and limited scope of enquiry under Section 11 application.[38] Any issue, other than the issue of existence of the arbitration agreement, is to be adjudicated upon and dealt with by the Arbitral Tribunal under Section 16 of the Act which confers the tribunal power to rule on its own jurisdiction. The arbitral tribunal can make a determination on any objection with respect to arbitration agreement and therefore, any further determination on the preliminary issues should be dealt by the Tribunal itself. This is the doctrine of Kompetenz-Kompetenz.[39]

28. In ***Cox & Kings II,*** the Supreme Court held that where joinder of non-signatory into arbitration takes place, the Court is required to prima facie rule on the existence of arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. At the same time, the Court categorically held that given that there is complexity in determining the issue of who is a veritable party given and that in case of a non-signatory the determination boils down to an analysis of the manner in which consent has been given by the non-signatories to the arbitration agreement, the referral court must refrain from entering into such an exercise and leave it to the Arbitral Tribunal to make that decision by exercising its powers under Section 16.

29. In ***Ajay Madhusudan Patel v. Jyotrindra S. Patel*** [40] (***'Ajay Madhusudan')***, the Hon'ble Supreme Court laid down factors through which the court can draw legitimate inference as to who is a veritable party. The court emphasized that the courts shouldn't adopt a conservative approach which may leave out parties, who by conduct or relationship with signatories, intended to be bound by the agreement.[41] Para 83 of the Judgment in Ajay Madhusudan is relevant and is extracted hereunder:

> *"83. It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the*

[37] Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455, ¶7.8; Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729, ¶48.
[38] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶159.
[39] *Id.* ¶163.
[40] Ajay Madhusudan Patel v. Jyotrindra S. Patel, (2025) 2 SCC 147.
[41] *Id.* ¶81.

> *participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement."*

30. ***Cox & Kings II*** and ***Ajay Madhusudan*** converged on the principle that the conduct and participation of the non-signatory in the underlying arbitration arrangement must be examined in light of the surrounding facts to determine its connection with the arbitration agreement. Again the principles were further distilled by the Supreme Court in ***ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd.***,[42] ("***ASF Buildtech***") wherein the Supreme Court held that the intention to bind a non-signatory to an arbitration agreement must be gathered from the surrounding circumstances. The court examines the non-signatory's role in the negotiation, performance, and termination of the contract.[43] If the non-signatory acted in a manner similar to the signatories, it may lead them to reasonably believe that the non-signatory was a real party to the contract. To infer consent, the non-signatory's involvement must be positive, direct, and substantial. It must not be merely incidental. The burden of proving this lies on the party seeking to implead the non-signatory to the arbitration proceedings.[44]

31. In ***ASF Buildtech***, the Supreme Court summarised the position in ***Ajay Madhusudan*** and also consolidated the law on this issue. Paragraphs 107 – 110 & 114 – 115 of the Judgment in ***ASF Buildtech*** is relevant is extracted hereunder:

> *"107. Thus, what has been conveyed in so many words by Ajay Madhusudan Patel [Ajay Madhusudan Patel v. Jyotrindra S. Patel, (2025) 2 SCC 147 : (2025) 1 SCC (Civ) 154] is that the inquiry into whether a non-signatory is bound by an arbitration agreement is not, in its essence, an inquiry into the formal or juridical existence of the arbitration agreement itself. It is an exercise of determining the functional concept of consent within the existing arbitration agreement rather than the existence of the arbitration agreement itself. It is to cull out and discern the intention of various parties—whether signatories or*

[42] ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd., (2025) 9 SCC 76.
[43] ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd., (2025) 9 SCC 76, ¶99.
[44] KKH Finvest (P) Ltd. v. Jonas Haggard, 2024 SCC OnLine Del 7254, ¶81.

otherwise—in relation to their willingness to be bound by the arbitration mechanism embedded in the contract.

108. Put differently, although notionally the exercise of determining "existence of the arbitration agreement qua the non-signatory", may, on the surface appear to be concerned with the arbitration agreement or clause in question, yet one must be mindful that the actual focus of such exercise lies in determining the existence of consent of the parties through fact patterns to such arbitration agreement or clause and not vice-versa. It is the existence of mutual consent to arbitrate—not the formal existence of the arbitration agreement—that is the heart of this inquiry.

109. There runs no umbilical cord between the exercise of determining the "existence of the arbitration agreement" and determining its "existence qua the non-signatory". The latter is an independent and substantive determination that falls outside the narrow and circumscribed domain of the Referral Court's singular obligation under Section 11 sub-section (6-A) of the 1996 Act and as such cannot be conflated to be one pertaining to or attacking the "existence" of an arbitration.

110. Even if it is assumed for a moment that the Referral Court in its jurisdiction under Section 11 of the 1996 Act has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of Cox & Kings (1) [Cox & Kings Ltd. v. SAP (India) (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680], the Referral Court should only refrain but rather loathe the exercise of such discretion. Any discretion which is conferred upon any authority, be it Referral Courts must be exercised reasonably and in a fair manner. Fairness in this context does not just extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided ***. Any determination even if prima facie by a Referral Court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the Referral Courts opine that a non-signatory in question is not a veritable party****. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the Arbitral Tribunal to decide, as such party can always take recourse to Section 16 of the 1996 Act and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the Tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non-signatory is concerned be borne by the party who vexatiously impleaded it, but the Arbitral Tribunal would be well within its powers to also impose costs.*

…

114. ***<u>Thus, even if it is assumed for a moment, that the question whether a non-signatory is a veritable party to the arbitration agreement is intrinsically connected with the issue of "existence" of arbitration agreement, the Referral Courts should still nevertheless, leave such questions for the determination of the Arbitral Tribunal to decide, as such an interpretation gives true effect to the doctrine of competence-competence enshrined under Section 16 of the 1996 Act.</u>***

115. This hands-off approach of Referral Courts in relation to the question of whether a non-signatory is a veritable party to the arbitration agreement or not was reiterated in Cox & Kings (2) [Cox & Kings Ltd. v. SAP (India) (P) Ltd., (2025) 1 SCC 611 : (2025) 1 SCC (Civ) 314 : (2024) 251 Comp Cas 802] , wherein one of us, (J.B. Pardiwala, J.), observed that ***<u>once an Arbitral Tribunal stands constituted, it becomes automatically open to all parties to raise any preliminary objections, including preliminary objections touching upon the jurisdiction of such tribunal, and to seek an early determination thereof. Consequently, the issue of impleadment of a non-signatory was deliberately left for the Arbitral Tribunal to decide, after taking into consideration the evidence adduced before it by the parties and the principles enunciated under Cox & Kings</u>*** *<u>(1)</u> [Cox & Kings Ltd. v. SAP (India) (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680] ."*

<u>(Emphasis Supplied)</u>

32. It is therefore clear that the referral court under Section 11 is not supposed to dive into the question of whether the non-signatory is veritable party. It is however unfortunate that certain referral Courts, have misinterpreted the clear dictum of the ***Cox & Kings II***, ***Ajay Madhusudan*** and ***ASF Buildtech*** and have started taking upon themselves the burden of determining the status of the non-signatories as a veritable party at the Section 11 stage as a referral court. The same will be discussed in Part II of this article.

Arbitral Tribunal's power of Impleadment and determination of who is a veritable party

33. The decision in ***ASF Buildtech*** is particularly notable for recognizing the power of an arbitral tribunal to implead non-signatories on its own accord.[45] It was held that the impleadment of non-signatories by the Court as veritable parties, does not preclude the possibility of joinder of a non-signatory which was never brought before the referral court. It doesn't imply that for a

[45] ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd., (2025) 9 SCC 76, ¶125.

non-signatory to be impleaded, it has to be brought before the referral court. The arbitral tribunal is fully empowered to summon a non-signatory to participate in the arbitration, as long as such impleadment is undertaken by consideration of applicable legal principles.[46]

34. Even the Delhi High Court followed the above guidance in ***Saroj v. Axis E Corpn. Solutions (P) Ltd.***, and held that once the referral court comes to the conclusion that there exists a valid arbitration agreement, the matter can be referred to arbitration, even though the binding nature of the same might still be unclear or not established at this stage.[47] The court distinguished between the enquiry into the 'existence of Arbitration Agreement' and 'veritable party to the Arbitration Agreement.' The court further explained the nature of enquiry into binding of non-signatory is complex and demands high threshold of satisfaction and therefore is to be left to the arbitral tribunal.[48] It is to be based on a 'holistic evaluation of the factual matrix, evidence and contractual stipulations and relationships*'*

35. A veritable party is a party in the real sense. A non-signatory which is demonstrated to be a party to the arrangement in a real sense by examining facts, circumstances and documents would be a veritable party.[49] A person or an entity, both can be veritable parties. The referral court is only required to prima facie rule on the existence of an arbitration agreement and whether the non-signatory is a veritable party. The rest shall be left to the arbitral tribunal to decide whether the non-signatory can indeed be impleaded in the arbitration. The Tribunal may decide the same on the basis of factual, circumstantial, and legal aspects of the matter to the non-signatories.[50]

36. ***Cox & Kings II*** discussed in detail how to determine whether a non-signatory, to a contract containing an arbitration clause, can be treated as a veritable party to the arbitration agreement. Although, the case arose in the context of the Group of Companies, the judgement elaborated on the factors and principles that must guide such an assessment.[51] It categorically held consent can be determined by way of conduct.[52] The courts or tribunals must closely evaluate the overall conduct and involvement of the non-signatory. The standard of the same should be such that the non-signatory has actively assumed obligations or performance upon itself.[53]

37. It further clarified that, there may be situations where a non-signatory may give the appearance of a veritable party to such arbitration agreement due to legal relation which a

[46] *Id.* ¶122.
[47] Saroj v. Axis E Corpn. Solutions (P) Ltd., 2025 SCC OnLine Del 6568, ¶10.
[48] *Id.*
[49] Hindustan Petroleum Corpn. Ltd. v. BCL Secure Premises (P) Ltd., 2025 SCC OnLine SC 2746, ¶25 ¶26.
[50] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶169.
[51] Rajasthan State Coop. Oil Seed Growers Federation Ltd. (Tilam Sangh) v. B.G. Shirke Construction Technology (P) Ltd., 2025 SCC OnLine Bom 4177, ¶18.
[52] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶73.
[53] *Id.* ¶127.

signatory or involvement or performance in the contract.[54] They relied on the UNIDROIT Principles of International Commercial Contract for such assessment and listed the following as a guide for ascertaining the subjective intention of the parties:

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned; and

(f) usages.[55]

38. The High Court of Delhi in ***KKH Finvest (P) Ltd. v. Jonas Haggard (‘KKH Finvest’)***, re-iterated the same. KKH Finvest entered into a Memorandum of Settlement (MoS) with Sensorise Digital Services Pvt. Ltd. and its promoters for acquisition of the company, pursuant to which separate Share Purchase Agreements (SPAs) were executed with the respondents. As the arbitration agreement was contained only in the MoS and not in the SPAs, the question before the Court was whether the respondents, despite being non-signatories to the MoS, could be bound by its arbitration clause. It held that the prima facie observations of the court should be an assessment, primarily of conduct, role, and involvement of the non-signatory in the underlying contract. In order to assess whether the party is a veritable party or not, the Court is required to consider factors such as mutual intent, relationship between the signatories and non-signatories, commonality of subject matter, composite nature of transactions and performance of the contract.[56]

39. The Court held that the non-signatories’ obligations under the MoS, read with their corresponding obligations under the SPAs, demonstrated the interconnected nature of the agreements and made it difficult to sever the two agreements.[57] However, in the case of Ashiesh Shukla, the High Court distinguished and ruled that he was not bound by the MoS due to Clause 16 of his SPA, which stated that the transfer of shares was conclusive, independent and mutually exclusive from the remaining clauses of the SPA and the MoS.[58] In appeal however, the Supreme Court set aside this distinction and stated that “*the performance of his obligations by Ashiesh*

[54] *Id.* ¶96.
[55] Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ¶123.
[56] KKH Finvest (P) Ltd. v. Jonas Haggard, 2024 SCC OnLine Del 7254, ¶80.
[57] KKH Finvest (P) Ltd. v. Jonas Haggard, 2024 SCC OnLine Del 7254, ¶90.
[58] KKH Finvest (P) Ltd. v. Jonas Haggard, 2024 SCC OnLine Del 7254, ¶104.

Shukla under his Share Purchase Agreement was fundamental to the completion of the obligations spelt out in the MoS."[59] The court held that a factor to decide whether a non-signatory is a veritable party or not is the involvement of the non-signatory in the performance of an underlying contract. The Supreme Court while relying on *ONGC v. Discovery Enterprises* also acknowledged that other factors, such as the composite nature of the transaction and commonality of subject matter, were also relevant to suggest that claims against a non-signatory are interlinked with the issues under arbitration. The Supreme Court perused the contract and held the Ashiesh Shukla's was involved in the underlying performance of the Contract through the MoS and therefore referred the matter to the same arbitrator who was already in seisin of disputes under the SPA.

40. Having understood that consent is the cornerstone of arbitration and that non-signatories who are veritable parties can be impleaded in arbitration, it is relevant to understand how the same applied in case of multi-party projects involving multiple contracts. The same is discussed in Part II of this Article.

<u>Conclusion of Part I</u>

41. In this Part, the authors have attempted to trace and simplify the evolution of the law relating to the impleadment of non-signatories in arbitral proceedings. Beginning with ***Chloro Controls***, the discussion follows the development of the jurisprudence through subsequent landmark decisions like ***Ameet Lalchand, ONGC v. Discovery Enterprises, Cox & Kings II, ASF Buildtech and KKH Finvest***. A central objective of the authors has been to demonstrate the continued relevance of the foundational principles laid down in *Chloro Controls*, despite subsequent judicial developments. In this context, the article clarifies that the often-repeated statement that ***Chloro Controls*** has been overruled is inaccurate. ***Cox & Kings II*** overruled ***Chloro Controls*** only to the limited extent of its formulation and application of the Group of Companies doctrine, while reaffirming its principles on composite transactions and the centrality of consent.

42. Another objective of the authors has been to demonstrate that impleadment of non-signatories is not confined to the Group of Companies doctrine alone, despite the common perception to the contrary. The discussion highlights several other recognised bases of impleadment, including composite transactions, the single commercial project doctrine as recognised in ***Ameet Lalchand*** etc. Lastly, the authors sought to answer the question of who possesses the power to implead non-signatories. While ***Chloro Controls*** placed this power primarily with the referral courts, the jurisprudence culminating in ***Cox & Kings II*** and ***ASF***

[59] KKH Finvest Pvt. Ltd. and Anr. v. Ashiesh Shukla and Ors., Special Leave Petition (C) No. 4222 of 2025, Judgement dated 05.08.2026, ¶20

Buildtech has shifted the substantive determination of impleadment to the arbitral tribunal under Section 16, leaving the referral court with only a limited prima facie examination.

43. The article also examined the clarification in ***Cox & Kings II*** that the observations in ***Chloro Controls*** regarding impleadment "without prior consent" must be understood as referring to the absence of prior formal consent, and not as dispensing with consent altogether. The article further examines the relevant indicators of consent, as crystallised in ***Cox & Kings II*** and ***Discovery Enterprises***, including the conduct, participation, relationship, and surrounding circumstances of the non-signatory. Through our analysis we conclude that throughout this evolution, the common thread running across every test for impleadment has remained the existence of consent, whether express, implied, or inferred from the conduct and surrounding circumstances of the parties and other factors, such as the composite nature of the transaction and commonality of subject matter.