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COX AND KINGS JUDGMENT

ITS IMPACT ON ARBITRATIONS, IN RELATION TO THE GROUP OF COMPANIES THEORY, IN INDIA

The 'Group of companies' doctrine has evolved significantly in India and other countries, over the years. In India, the doctrine can be segregated into the Pre-Chloro Controls and the Post-Chloro Controls era. During the Pre-Chloro-Controls era, in many cases decided by the Supreme Court of India, a narrow or restricted interpretation was given to the word "parties" as provided in the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), as in the case of Indowind Energy Ltd v. Wescare (I) Ltd, (2010) 5 SCC 306 ("Indowind case"). Further it was restricted to signatories with emphasis on formal consent to add non-signatories, as held in the case of Sukanya Holdings (P) Ltd v. Jayesh H Pandya, (2003) 5 SCC 531, In the Indowind case, the Court refused to join a party to the arbitration proceeding on the ground that it was not a signatory to the sale agreement, they were two independent companies with a separate and distinct legal existence and the fact that the party did not sign the sale agreement indicating

THOUGHT for the MONTH

Success is not final, failure is not fatal: It is the courage to continue that counts

WINSTON S. CHURCHILL

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that it was the mutual intention of all the parties to not make it a party to the arbitration agreement.

The Supreme Court of India in 2013, in the case of Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc, (2013) 1 SCC 641 ("Chloro-Controls Case"), held that the expression "any person" in the act reflects the legislative intent to include non-signatories within its purview provided that the non-signatory claims through or under the signatory party. However, while deciding the present case of Cox and Kings Case (Cox and Kings Limited v. SAP India Private Limited and Another (2024) 4 SCC 1), this has been, held to be incorrect by the court, with the reasoning that the phrase was taken out of context. The "intention of the parties" was considered a significant aspect, which must be established, before the scope of arbitration can be said to include, the signatory, as well as the non-signatory parties.

In the Chloro-Controls Case, the court further held that non-signatories may be bound by an arbitration agreement "without their prior consent" in "exceptional cases" based on four determinative factors: (i) A direct relationship to the signatory; (ii) A direct commonality of the subject matter and the agreement between the parties being a composite transaction; (iii) The transaction being of a composite nature where the 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 having a bearing on the dispute; (iv) A composite reference of such parties will serve the ends of justice.

To remedy the situation, wherein, non-signatories may be implicated in the dispute, because of their legal relationship and involvement, in the performance of contractual obligations, the Supreme Court while deciding the Cox and Kings Case, held that the 'Group of Companies' doctrine should be applied after evaluating 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. For e.g., a situation arose where all the ancillary agreements were relatable to the parent agreement and the ancillary agreements, were inter-twined, with each other, to the extent that they could not be severed. This in the view of the court, indicated the intention of the parties, to refer all disputes arising out of the parent agreement and ancillary agreements to the arbitral tribunal.

In the Post Chloro-Controls era, the Law Commission in its reports of 2014 recommended many changes in the Arbitration Act, amongst which, it suggested to include in section 8 (as was already existing in section 45), the expression "claiming through or under" and thus, the act was amended accordingly in 2016. After this amendment and the Chloro-Controls case, subsequent case laws have referred to the group of companies doctrine.

In the case of Cheran Properties Ltd v. Kasturi and Sons Ltd, (2018) 16 SCC 413, it was held that the expression "persons claiming under them" refers to every person whose capacity or position is derived from and is same as a party to the proceedings. In the case of Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678, it was held that a non-signatory, who is a party to an inter-connected agreement, would be bound by the arbitration clause in the principal agreement. The participation of the non-signatory party in the negotiation and performance of the underlying contract was also held to be the key determinant of the intention of the parties to be bound by an arbitration agreement, as in the case of Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited, (2019) 7 SCC 62. The Group of Companies doctrine was also invoked, in cases like Mahanagar Telephone Nigam Ltd. v. Canara Bank, (2020) 12 SCC 767, where there is a "tight group structure with strong organizational and financial links, to constitute a single economic unit, or a single economic reality." The performance of the contract, in addition to other factors earlier laid out, was also an essential factor to be considered by the courts and tribunals to bind a non-signatory to the arbitration agreement, as was laid down in the case of Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd, (2022) 8 SCC 42 ("Discovery Enterprises case)

In arriving at its decision in the Cox & Kings case, the Supreme Court was also enlightened on the global perspective of the doctrine, in relation to Arbitration with international rulings, on the subject in France, Switzerland, England, Singapore and the USA.

To conclude, in India, the question of binding a non-signatory revolves around the determination of the consent of the parties to be bound by the terms of the contract. Such determination is manifested through the acts or conduct. The theory of implied contract by conduct has also been accepted by Indian Courts, in the case of Haji Mohammed Ishaq v. Mohamad Iqbal, (1978) 2 SCC 493. The legislative intent underlying Section 7 of the Arbitration Act, suggests that any legal relationship, including relationships where there is no contract between the persons or entities, but whose actions or conduct has given rise to a relationship, could form a subject matter of an arbitration agreement under Section 7, as held in the case of Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1. To determine whether a non-signatory is bound by an arbitration agreement, the courts and tribunals apply typical principles of contract law and corporate law. The Group of Companies doctrine is one among many non-consensual theories like piercing the corporate veil, binding the alter ego, estoppel etc which have been applied, albeit controversially, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement. In the case of Bank of Tokyo v. Karoon, (1986) 3 All ER 468, the view was held that entities within a corporate group have separate legal personalities, which cannot be ignored save in exceptional circumstances such as fraud. The distinction between a parent company and its subsidiary is fundamental and cannot be easily

abridged by taking recourse to economic convenience. It was further held in D H N Food Distributors Ltd v. Tower Hamlets London Borough Council, [1976] 1 WLR 852 (2), that a group of three companies should be treated as a single economic entity on the basis of two factors: first, the parent company owned all the shares of the subsidiary companies, to the extent that it controlled every movement of the given subsidiary companies; and second, all the three companies in the group virtually acted as partners and could not be treated separately. The courts or tribunals should rigorously evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer consent. The burden is on the party seeking a joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.

The Supreme Court finally held that all the cumulative factors laid down in the Discovery Enterprises case which are: (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 transactions; and (v) The performance of the contract; must be considered holistically while determining the applicability of the Group of Companies doctrine. However, the application of the above factors must be fact-specific, and the Supreme Court cannot tie the hands of the courts or tribunals, by laying down how much weightage they ought to give to the above factors. It was also held that a person "claiming through or under" cannot be a "party" to an arbitration agreement on its terms because it only stands in the shoes of the original signatory party and is claiming in a derivative capacity. Further the 'group of companies' doctrine is based on the principles of mutual intention and not "claiming through or under the party." The group of companies' doctrine probes the mutual intention to join the non-signatory as a "veritable" party to the arbitration agreement. Such a non-signatory party can apply for interim measures under Section 9 of the Arbitration Act. Thus, the 'group of companies' doctrine ought to be applied, in the definition of "party" under Section 2(1)(h) read with Section 7 of the Arbitration Act ■

RISK MANAGEMENT IN SWITCH BILL OF LADING

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INTRODUCTION

The practice of Switch Bill of Lading even though prevalently used internationally, has not gained notable attention in the legal literature. Although most of the time Switch Bills are used for legitimate purposes and to facilitate trade, issuance is done without knowing about the risks involved in the process. Even though the legal nature and character of Switching have not been discussed in depth, it is very important to be informed about the consequences, nature and character of the process of switching Bill of Lading. In this article, we discuss in detail the meaning, reasons, consequences and risk management of Switch Bill of Lading.

WHAT IS A SWITCH BILL OF LADING?

A Switch Bill of Lading is utilized usually in a "triangle trade". In other words, when an importer buys goods from a middleman or distributor rather than the actual manufacturer. Switching is also often used when the middleman or distributor is located in a different country of origin. Switching is said to be done when the original Bill of Lading is replaced with another Bill of Lading. However, the contents in the shipment itself do not change.

REASONS FOR SWITCH BILL OF LADING

The reasons for requesting a switch Bill of Lading can be various, although many are quite legitimate. A circular from the International Transport Intermediaries Club (ITIC) lists some of the most common ones as follows: -

- The discharge port named in the original bill is changed (because the goods are resold and a new discharge port is required.
- The seller in a chain of contracts does not want the name of the original shipper to appear

in the Bill. Therefore, the name of the original shipper is changed to the seller's name.

- The goods originally being packed in small parcels, and the seller requires a Bill of lading for the bulk shipment. Afterwards, one bill may be issued for bulk shipment which is then split into multiple smaller bills.

In BNP Paribas v. Bandung Shipping, the court observed that altering the details of the original bill of lading could be for several reasons such as to conceal the origin of goods, the identity of the original shipper, date of shipment.

RISKS RELATED TO SWITCH BILL OF LADING

The issue of switch bills is fraught with numerous risks for the carrier who might nevertheless agree to it for commercial reasons. Understanding these risks is crucial to taking preventive and mitigative action. The risks pertaining to switch bills is as follows:-

a. The risk of fraud against buyer and seller

As mentioned in cases such as Samsung v Devon, IRISL v. Phiniqia etc, the issue of switch bills may be be illegitimately requested by a buyer to enable it to obtain payment from a sub-buyer which has not yet paid the seller. In these cases, the bill is switched while the original bill is still in circulation. However, for the original bill issuer, the outcome was different. In IRISL v Phiniqia, the switch of bills was not authorized by the original bill issuers. In Samsung v Devon, the switch bill was issued in collusion with the shipping agents. The above-mentioned cases demonstrate that it is upon the issuer of the switch bills to ensure that it is given on restrictive terms and those authorized to waive those restrictive terms by reason of their position as shipping agents are properly monitored.

b. Risk of misdelivery claims

The risk of misdelivery of the cargo is one of the most popular reasons why the owners are warned against agreeing on a switch bill of lading. When new bills are issued without the original bills being cancelled and returned, there will be a multiplicity of bills circulating over the same cargo. This situation gets worse if the shipper has sold the goods twice; the same cargo will be claimed by two parties and the carrier will face a shortage of goods to be delivered.

This risk of having multiple bills in circulation can be rectified by having an electronic bill of lading system, as e-bills can be altered while goods are in transit without the need for issuance of a new bill.

c. Risk of potential illegality

There may be legitimate reasons for requesting a switch bill. Other requests, however, should cause concerns for the owner. For example, a request to switch bills alters the place of loading of the goods more than what it is a clear attempt to evade import duty on the cargo. In IRISL v Phiniqia, it was noted that 'GEG is an Iranian company subject to sanctions imposed by the United Nations Security Council; and therefore Tradeline would have difficulty negotiating the shipping documents through banks if the Original B/L were not switched'. In Sea Glory Maritime Co and Swedish Management Co SA v Al Sagr National Insurance Co, defendant insurers made a late application to amend their points of defence as evidence had come to light that the claimants, assureds under a marine policy, had agreed to issue false switch bills of lading in order to circumvent regulations governing trade with Iran.

The owner should also be aware of the requests to issue ante or post-dated bills which maybe used by the requester to draw on a Letter of Credit with a framework set for when a cargo is shipped, an act which the court deems as fraud. By agreeing to the request to switch bills the owner might be forced to be complicit in the requester's crime.

d. Risk of loss of P&I Cover

P&I clubs advices its members the appropriate procedure to follow when issuing switch bills. They emphasize to ascertain the following things before issuing switch bills: -

- That the person making the request is entitled to do so.
- That the consent of all the necessary parties are obtained.
- That the wording in the substitute bill is not such that it will mislead.
- That there is a clear and valid reason for the switch of the bill
- That the original bills are held by the requester and that they are ready to be surrendered or cancelled and that any indemnity given in exchange for the switch is enforceable.

It is due to the reason of risk of loss of the cover that the issuer will demand an indemnity from the person requesting the switch as a condition to accept the request. In such cases the issuer must make sure that the acts in issuing the switch bills are within the purview of what is requested in the indemnity.

Even when this is done, the issuer shouldn't rely too much on the indemnity. This is because if the switch is done for some unlawful purposes the indemnity will become unenforceable depending on the knowledge of the issuer. In Brown Jenkinson v Percy Dalton it was held that an indemnity given in exchange for an agreement by shipowners' agents to issue a clean bill of lading in respect of cargo known to be defective and knowing that the description in the bill would be relied on, was unenforceable as it was an agreement to make a fraudulent misrepresentation.

MITIGATING THE RISKS

Most of the risks stems from the fact that where information is recorded on a piece of paper, the multiple parties involved in the international trade transactions do not have adequate access to ensure reliable and consistent details about the goods themselves and about the rights over the goods.

The use of electronic alternatives for ta transfer documents has been gaining ground in recent years. In 2013, the International Group of P&I Clubs agreed to cover the liability risks arising from the use of certain systems.124 In 2014, BIMCO drafted and adopted a model clause on Electronic Bills of Lading (EBL clause) for use in its charterparties.125 Subsequently, in 2016 upon the update of the BP VOY form of charterparty, provisions contemplating the use of electronic bills of lading were introduced in BP VOY 5.These provisions were introduced due to the increased use of these systems in international trade and is promoted by chartering multinationals.

These systems can be programmed so as to make it impossible to substitute the bill with another without the express permission of the original issuer and without the cancellation of the original bill, which only the current holder would be able to request. The surrender of the original bill and the issue of the switch bill would be instantaneous and the carrier of the goods would have real time information so as to the contractual terms so that there would be no ambiguity as to whom the delivery is to be made. The system would create an audit trail which would give the issuer clarity with respect to obligations on particular goods.

CONCLUSION

Depending on the nature of the request, the issuer of a switch bill may become liable for fraud or misrepresentation, or for colluding to evade duties, or may lose P&I cover. If the Letter of Indemnity(LOI) given to the issuer in exchange for switching the bills is deemed unenforceable, the issuer could be exposed to very serious losses. These risks can be mitigated by giving careful preconditions for requesting a switch. The Clause should be added in charter parties that: -

- switch bill will only be issued in exchange of original bill.
- that the request to switch must come from the holder of the bill of lading.
- that the request must be accepted by designated persons on behalf of the original issuer. These clauses would also specify circumstances where the requests cannot be accepted.
- That the LOI must be provided by the person requesting the switch with countersignature by a financial institution where that person's credit standing is in any doubt.

The bills of lading can also be replaced with electronic alternatives with will allow the holders and issuers alike to be aware of the contractual terms and entitlements. This replacement would mitigate many of the risks related to switch bill of lading.

REFERENCE

- Managing the Risks of Switch Bill of Lading – Dr. Miriam Goldby
- https://www.skuld.com/topics/legal/pi-and-defence/switch-bills-of-lading/

MARITIME INDUSTRY ON THE BRINK OF MAJOR DISRUPTION

STRIKE AND COMPLIANCE ISSUES LOOM

The maritime sector is facing significant challenges as both labor unrest and regulatory compliance issues converge, threatening global shipping operations. Here's the latest:

Potential Labor Strike on U.S. East Coast

The International Longshoremen's Association (ILA) has warned of a coast-wide strike across the U.S. East Coast, starting on October 1, 2024. Contract negotiations between the ILA and the United States Maritime Alliance (USMA)

have stalled, and with the current Master Contract expiring, the union is preparing to strike if their demands are not met. This could disrupt shipping activities in major U.S. ports, affecting global supply chains and causing delays across industries.

Carbon Credit Compliance Disputes

As the European Union Emissions Trading System (ETS) takes effect, requiring ship operators to purchase carbon credits, the maritime industry faces new legal battles. The financial burden of buying these credits is already sparking disputes between shipowners and charterers, raising questions about who will bear the cost of compliance. This regulatory change is expected to reshape shipping contracts, with legal ramifications affecting emissions accountability.

These developments mark a critical moment for the maritime legal industry, as labor negotiations and environmental regulations bring unprecedented pressure on both operations and compliance ■

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ADV. JOY THATTIL SPEAKS AT WORLD COLD CHAIN EXPO 2024, DUBAI

We are proud to announce that Adv. Joy Thattil, Managing Partner of Callidus Legal, was a distinguished speaker at the **World Cold Chain Expo 2024**, held from 24th to 25th September in Dubai. The event brought together leading experts, innovators, and key players in the cold chain industry to discuss advancements in logistics, technology, and legal frameworks shaping the sector.

Adv. Joy's insightful session highlighted the legal challenges and opportunities within the international cold chain logistics space, addressing key issues related to maritime law, supply chain management, and regulatory compliance. His participation underscored Callidus Legal's commitment to staying at the forefront of legal developments in the ever-evolving logistics and supply chain industry

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