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GROUP OF COMPANIES DOCTRINE IN INDIAN JURISDICTION

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Introduction

Amid a business environment promoting corporate diversification and risk mitigation through entities like subsidiaries, there's an increased focus on how arbitration law applies to these subsidiaries. An emerging concern involves whether a subsidiary can be obligated to arbitration agreements made by its parent company, and conversely, if a parent company can be bound by arbitration agreements made by its subsidiary. This concern led to the development of the group of companies doctrine through judicial wisdom. The group of companies doctrine permits the extension of the arbitration agreement signed only by one or some of the companies of a group to

THOUGHT for the MONTH

You can always edit a bad page. You can't edit a blank page

JODI PICOULT

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the non-signatories of the same group when certain conditions are met. The origins of the Group of Companies Doctrine can be traced back to the case of Dow Chemicals v. Isover-Saint-Gobain in the International Chamber of Commerce. The existence and the stance of the group of companies doctrine has been pronounced by the 5-judge bench of the Supreme Court recently through the case of Cox v. King.

In Cox v. King, the 5-judge bench of the Supreme Court said that in the case of Dow Chemicals the tribunal emphasised on the mutual intent of the parties which was implicit as Dow Chemical group entered into the agreement in the place of its subsidiaries in order to limit their liabilities. The subsidiaries performed the obligations under the contract. It's evident from the observation of the case that merely being part of the same corporate group or sharing "same economic reality" wasn't the exclusive reason for involving non-signatories in this instance.

Erroneous part of the judgment in Chloro Controls

In the case of Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. & Anr., the bench determined the existence of the Group of Companies Doctrine in Indian Jurisdiction by invoking ' claiming through and under' under Section 45 of Arbitration and Conciliation Act, 1996 and Section 8 of the Arbitration and Conciliation Act. The court in Cox v. King declared that the doctrine find its existence in the Indian jurisdiction under Section 2(1)(h) in conjunction with Section 7(4)(b) of the Arbitration Act as it encompasses both those who signed the agreement and those who didn't, indicating that the term 'party' differs from 'persons claiming through or under a party' in the arbitration agreement. It has thus been observed that the persons claiming through or under can only assert a right in a derivative capacity.

Piercing of the corporate veil or the doctrine of alter ego

The Court clarified that the Group of Companies Doctrine hinges on preserving the separate identities of corporate entities while establishing the mutual agreement of parties to include a non-signatory in an arbitration agreement. It mentioned that this Doctrine is similar to other consent-based principles like agency, assignment, assumption, and guarantee, as they help discern the mutual intent to involve non-signatories in arbitration. Specifically referencing Chloro Control, the Court supported the notion that a non-signatory could enter arbitration if transactions were within a group and there was a clear intention to bind both signatories and non-signatories. Additionally, in Cheran Properties Limited v Kasturi and Sons Limited and Ors, the Court distinguished the Doctrine from the 'principle of veil piercing' or 'alter ego,' emphasizing that the latter disregards corporate separateness and party intent, prioritizing fairness and good faith. In contrast, the Doctrine identifies parties' intentions without disturbing the legal personality of the entity. Consequently, the Court concluded that the principle of alter ego or corporate veil piercing cannot be the foundation for applying the Doctrine. The Supreme Court, in the case of Cox v. King, introduced the concept of the "veritable party," suggesting that if a corporate entity deliberately avoids being bound by a contract with an arbitration agreement but actively participates in negotiating, executing, and terminating the contract, the Group of Companies doctrine can apply to uncover the parties' intentions. In its ruling, the Supreme Court clearly differentiated between the Group of Companies doctrine, based on consent, and the principle of piercing the veil or alter ego, which isn't consent-based. The latter disregards corporate boundaries and party intent, while the former aids in identifying party intentions to determine the true parties involved in the arbitration agreement without negating the legal status of the entity in question.

Impleadment of non-signatories to arbitration

In the case of ONGC v. Discovery Enterprises Pvt Ltd, while the decision about whether a non-signatory was considered a party was deferred to the arbitral tribunal, the Court conducted an extensive examination of academic literature and legal precedents on the matter. The Court ultimately summarized the key considerations as follows:

"When determining whether a company within a group of companies, not originally a signatory to an arbitration agreement, could still be bound by it, the law takes into account several 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.

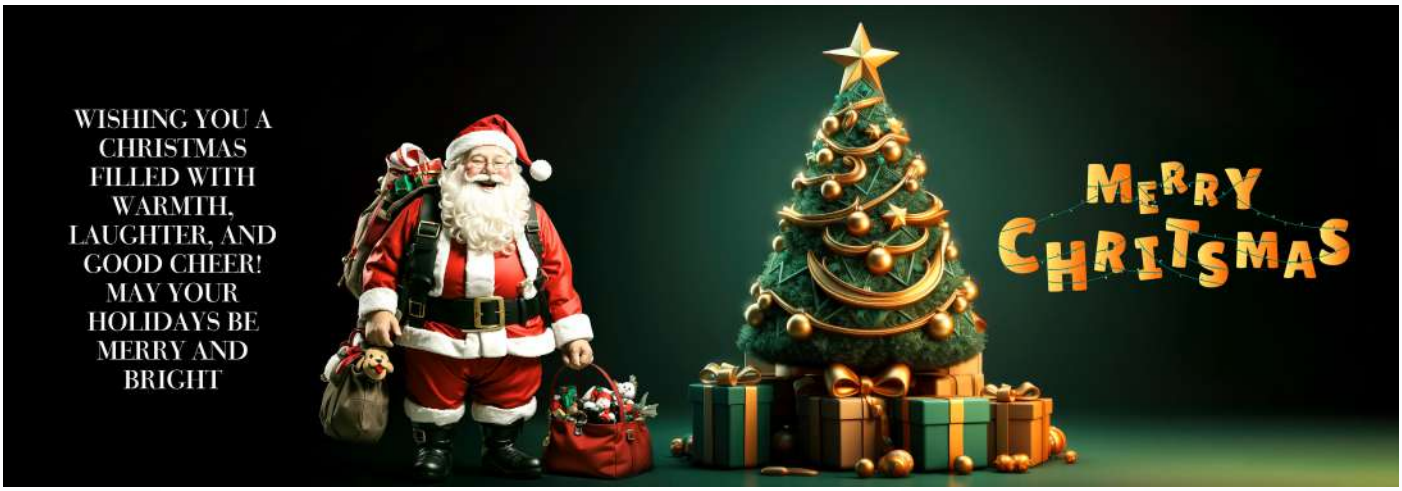
Court reiterated these 5 principles in the case of Cox v. King. Mutual intent of the parties can be determined by the role they played in negotiation, performance and termination of the agreement.

An agreement for arbitration typically requires written documentation, although it doesn't necessarily need the parties' signatures. According to Section 7(4)(b), whether a non-signatory is considered a party to the arbitration agreement is determined by examining the explicit language used in the agreement, along with the context of how the contract was formed, carried out, and concluded. When interpreting the contract, courts or tribunals may apply established principles to ensure accurate resolution. The Group of Companies doctrine serves as one such principle aiding in this determination.

Conclusion

The SC, in Cox v. King, explained that the Group of Companies doctrine ought to

be preserved within Indian arbitration law and legal practices due to its usefulness in discerning the intentions of parties amid intricate transactions involving numerous entities and agreements. The Supreme Court's ruling in Cox and Kings marks a pivotal moment in Indian arbitration law. This judgment not only aligns India with global arbitration norms but also bolsters its reputation as a jurisdiction favoring arbitration. The decision's positive impact encompasses validating the group of companies doctrine, recognizing its relevance in intricate multi-party deals, and unifying Indian arbitration practices with international benchmarks. It offers clear guidance to courts and tribunals, benefiting all stakeholders involved in arbitration disputes. However, challenges may surface, including potential ambiguity in applying the group of companies doctrine due to its case-specific nature, along with concerns about safeguarding the rights of non-signatory parties ■



HOT NEWS

SHIPPING INDUSTRY URGES CAUTION ON USE OF ARMED GUARDS ON RED SEA VESSELS

Shipping companies should use caution when deploying private armed guards onboard vessels sailing through the Red Sea and Gulf of Aden because of the risk of escalation amid growing attacks on ships, an industry advisory said on Friday.

Yemen's Houthis have been attacking vessels in Red Sea shipping lanes in recent weeks and firing drones and missiles at Israel, saying they aim to support Palestinians as Islamist group Hamas and Israel wage war in Gaza.

In an advisory issued on Friday by the shipping industry's leading associations, companies were urged to "complete a thorough risk assessment when considering the use of armed guards".

"Caution should be taken when managing their employment and rules of engagement should consider the risk of escalation," the advisory said.

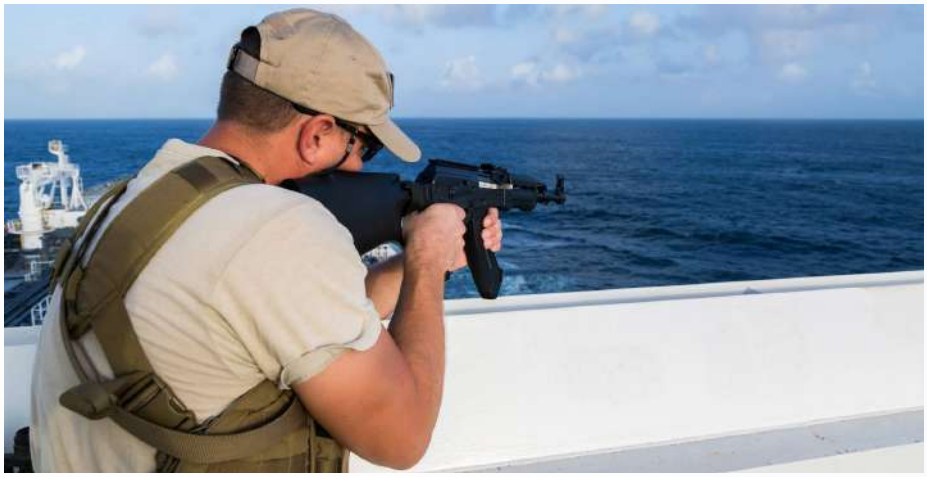
The wave of attacks on commercial ships has prompted some shipping companies to pause sailings through the Red Sea in recent days.

British maritime security company Ambrey said this week that there had been an "exchange of fire" between armed guards onboard a vessel and armed assailants who that was attacked

by a speedboat with armed assailants.

Private armed guards have been deployed for years onboard commercial ships sailing through those waters and helped curb Somali piracy attacks over a decade ago, shipping sources said.

The Marshall Islands shipping registry - one of the world's top flags - said in a separate note on Thursday that vessels were advised "reassess rules for the use of force with their private maritime security company".



"A clear distinction should be made between suspected attackers with small arms and military forces with more advanced weaponry," the advisory said, adding that engagement with military forces was not advised as "it may result in significant escalation".

The industry advisory said ships that switched off their AIS tracking transponders to avoid detection could also complicate rescue efforts if they ran into trouble ■

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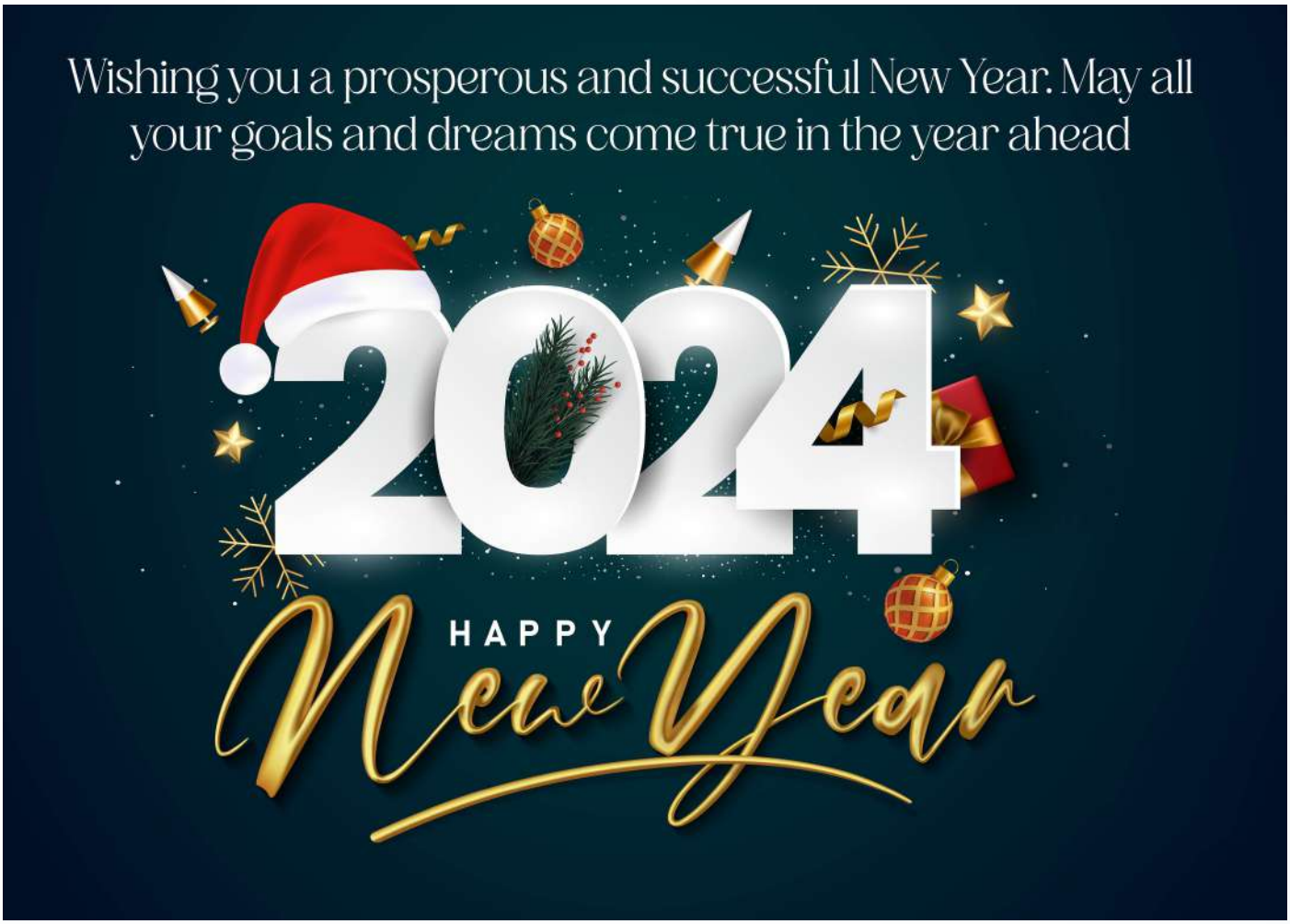

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