THE SHIPPING LAW REVIEW

SIXTH EDITION

Editors
George Eddings, Andrew Chamberlain
and Holly Colaço

THE LAWREVIEWS

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PREFACE

The sixth edition of this book aims to continue to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance and environmental issues. A new chapter on decommissioning is also included, which seeks to demystify this interesting and fast-developing area of law.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around US$380 billion in terms of global freight rates, amounting to about 5 per cent of global trade overall. More than 90 per cent of the world's trade is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

The maritime sector continues to take stock after experiencing a bumpy ride during the past few years and, while the industry is looking forward to continued recovery, there is still uncertainty about the effects of trade tariffs and additional regulation. Under the current US administration, the sanctions picture has become ever more complex and uncertain.

With a heightened public focus on the importance of environmental issues, a key issue within the shipping industry remains environmental regulation, which is becoming ever more stringent. At the IMO's MEPC 72 in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by the year 2050. This agreement may lead to some of the most significant regulatory changes in the industry in recent years and is likely to lead to greater investment in the development of zero carbon dioxide fuels, possibly paving the way for phasing out carbon emissions from the sector entirely. This new IMO Strategy, together with the stricter sulphur limit of 0.5 per cent m/m coming in from 2020, is generating increased interest in alternative fuels, alternative propulsion and green vessel technologies.

Brexit continues to pull focus, with the withdrawal agreement reached between the EU and UK having been rejected three times and an extension of the Article 50 process granted until 31 October 2019. Much has been printed about the effects of Brexit on the enforcement of maritime contracts. However, the majority of shipping contracts globally will almost certainly continue to be governed by English law, as Brexit will not significantly effect enforceability. Arbitration awards will continue to be enforceable under the New York Convention and it seems likely reciprocal EU and UK enforcement of court judgments will be agreed.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

George Eddings, Andrew Chamberlain and Holly Colaço
HFW
London
May 2019

Chapter 22

INDIA

Amitava Majumdar, Aditya Krishnamurthy, Jyotika Jain and Damayanti Sen[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

India has an untapped potential to leverage its 7,500 kilometres of coastline spanning nine states and four union territories albeit India's merchandise trade has grown at more than twice the growth rate of the world merchandise exports over the past decade. Over the past five years Indian policymakers have sought to emulate the Chinese export-led development miracle and the same has been satisfactory. Despite a near doubling in India's share in world exports from 0.9 per cent in 2005 to 1.7 per cent in 2016, the same is dwarfed by China, which in 2005 was 7.3 per cent and rose to 13 per cent in 2016. More than 90 per cent of India's merchandise trade by volume and around 70 per cent by value is moved through maritime transport. At present there is a commonly held view that to achieve the ambitious target of having a 5 per cent share in world exports and climb up the ranks in ease of doing business, India needs to recalibrate the current legal and regulatory regime governing its shipping ecosystem.

Recently the Indian government has made a concerted effort to switch to clean fuel and citizens below a certain income range have been granted a greater subsidy to encourage the consumption of liquefied natural gas. This has led to an increasing number of gas carriers calling at Indian ports. India exports bulk raw commodities such as bauxite and iron ore to countries such as China. India is dependent on importing coal from countries such as Indonesia, Australia and South Africa for its thermal power plants, which account for the bulk of the energy produced in India. While there had been an effort to shore up domestic production of coal, the increasing demand for steel is likely to increase demand of coking coal from countries such as Australia. A majority of Indian petrochemical companies that import crude oil from Africa and the Middle East are government-owned.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Shipping in India is centrally regulated and exclusively controlled by the government of India. The government regulates shipping through the Ministry of Shipping (MoS). The MoS has set up a semi-autonomous statutory body – the Directorate General of Shipping (DG Shipping) – whose powers are circumscribed by the Indian Merchant Shipping Act, 1958 (MSA) to deal with all matters relating to shipping policy and legislation, implementation of various international conventions and other mandatory regulations of the International

1 Amitava Majumdar (Raja) is the managing partner, Aditya Krishnamurthy is a partner, and Jyotika Jain and Damayanti Sen are senior associates at Bose & Mitra & Co.

Maritime Organization. The MSA is a general umbrella legislation to deal with merchant shipping. The MSA empowers the DG Shipping to promulgate delegated legislation such as circulars and notifications to deal with all issues relating to shipping. The Mercantile Maritime Department is a body under the control of the DG Shipping dealing with the registration of Indian-flagged vessels, survey of ships and enforcement of international regulations such as the SOLAS and Load Line Conventions.

The MoS has a chartering wing (Transchart) to broker transportation of government-owned and government-controlled cargoes. Transchart makes shipping arrangements at internationally competitive freight rates while giving preference and support to Indian-flagged vessels without any difference in freight rate, at a service charge of 1 per cent. Transchart regularly finalises long-term time charter parties, contracts of affreightment for various Indian government-owned entities, such as the Steel Authority of India, Rashtriya Ispat Nigam Ltd and the Department of Fertilizers.

With the exception of 12 designated 'major ports', all ports are owned and controlled by state and union governments. The governments of Gujarat, Maharashtra and Tamil Nadu have enacted legislation to set up autonomous maritime boards that own and operate ports and formulate parameters for the collection of tariffs in their respective states. Recently in a number of cases, port authorities have entered into concession agreements with private terminal operators under the Build, Own, Operate and Transfer (BOOT) Policy designed for private sector participation in the development of Indian ports. In these circumstances, a private terminal operator levies a port tariff on ships calling at the port. The Tariff Authority for the Major Ports (TAMP) is a regulatory body, or quasi-judicial authority, that deals with the levy of port tariffs such as berthing charges and anchorage charges on ships calling at the 12 major ports. Unfortunately there is no regulatory authority along these lines for ports other than the 12 major ports and this has resulted in a number of litigations relating to the arbitrary and capricious conduct of private terminal operators levying tariffs on ships calling at these ports.

While India allows 100 per cent foreign direct investment under the automatic route in the shipping sector, there have been very few global players who have sought to invest and flag their vessels in India. As a general rule, foreign investors set up special purpose vehicles that in turn own an Indian flagged vessel only to take advantage of the cabotage policy in India.

Generally, an Indian shipping company would have to pay corporate tax at the rate of 33.3 per cent, unless it opted for the tonnage tax system, which is between 1 per cent and 2 per cent of its income. An Indian shipping company could opt for the tonnage tax system by fulfilling certain guidelines laid down by the government, such as the training of Indian seafarers and making financial provisions for new vessel ownership. The Indian indirect tax regime has undergone a radical overhaul with the implementation of the goods and services tax regime (the new taxation structure is a destination-based tax on consumption as compared to the principle of origin-based taxation under the erstwhile regime). The Indian government has issued an amendment through its latest notifications[2] stating that the export

2 Notification No. 9/2017 – IGST (Rate) (as amended from time to time); Section 12(8) of the IGST Act 2017 has been amended to provide that the point of service for transportation of goods to a place outside India will be the place of destination of such goods. While the amended IGST Act 2017 has received presidential assent, the amendment will be applicable from a date, to be notified later.

of ocean freight will be exempted from goods and services tax, effective from 25 January 2018 with a 'sunset clause' up to 30 September 2019 (i.e., the exemption will automatically be terminated after this fixed period, unless further extended).

i Satellite devices and ammunition banned in Indian waters

There have been incidents in which foreign crew members were arrested for using satellite devices, such as Thuraya or Iridium phones, within Indian territorial waters. The use of such satellite devices is banned in India by the DG Shipping.[3] Even if a foreign-flagged vessel possesses all the valid documents permitting her to carry satellite phones, the Indian authorities have the right to deny permission to use them. These satellite phones can be used only after a 'no objection certificate' is obtained from the Department of Telecommunications. There have been instances where crew members accused of using such banned devices in Indian territorial waters have been arrested and detained in India pending a full-fledged trial of the offence. There have been instances where vessels have been detained for their failure to provide proper declarations. The carriage of arms and ammunition has posed added complications for vessels calling into an Indian port following the incident with the MV *Seaman Guard Ohio*. The Madurai Bench of the Madras High Court[4] exonerated 35 foreign seafarers on the MV *Seaman Guard Ohio*, a foreign-flagged floating armoury, which had been arrested in India for entering Indian waters.

ii Cabotage

Unlike the Jones Act regime of the United States or the domestic cabotage legislation of China, India does not have a regime that bars foreign players from operating in the Indian market. On the contrary, India has a right of first refusal regime wherein an Indian shipowner is given an opportunity to match the price quoted by a foreign shipowner to the Indian charterer. In these circumstances, it would be open for an Indian charterer to charter a foreign-flagged vessel in the event no Indian shipowner is able to match the bid quoted by the foreign shipowner. Under the present regime, the DG Shipping would first circulate an enquiry with the Indian National Shipowners Association (INSA) – a private body of Indian shipowners – on whether an Indian shipowner could provide a vessel having similar characteristics at the same or a lower freight rate quoted by the foreign shipowner. It is only when INSA issues a 'no objection certificate' that a licence is issued to the Indian party to charter a foreign-flagged vessel. Insofar as coastal trade goes, a no objection certificate would have to be provided by the Indian Coastal Conference (ICC). There are proposals to develop a system wherein the DG Shipping would set up an online platform bypassing INSA and ICC whereby Indian shipowners would be given an opportunity to match the rates quoted by foreign shipowners for Indian charterers seeking to charter foreign-flagged vessels.

On 21 May 2018 the MoS issued General Order No. 1 of 2018, whereby restrictions on foreign-flagged vessels undertaking a coastal voyage from one Indian port to another Indian port have been relaxed for the carriage of empty containers. Additionally, if EXIM containers intended for transhipment are loaded onboard a vessel, no licence will be required under Section 407 of the MSA for such vessel to undertake the coastal voyage from one

3 Vide Order No. 2 of 2012 (48-NT(1)/2012).

4 *Dudnik Valentyn and Ors. v. The Inspector of Police*, 'Q' Branch CID, Crl. A. (MD) Nos. 41, 43, 44 of 2016.

Indian port to another. This regime remains in force at the time of writing and seeks to reduce India's dependence on foreign transhipment terminals in ports such as Colombo, Singapore, Port Klang and Jebel Ali, which currently account for about one-third of India's transshipment cargo.

In an attempt to bolster the 'Make in India' policy of the government of India and add stimulus to the shipbuilding industry in India, the government recently issued a notification dated 13 February 2019 and a consequent circular dated 22 March 2019 (the Proposed RoFR Regime) wherein, for the first time, an Indian-built foreign-flagged vessel would have preference over a foreign-built Indian-flagged vessel. Prior to the promulgation of the Proposed RoFR Regime, the order of priority among various categories of shipowners was as follows:

a First priority: Indian-flagged vessel.
b Second priority: Indian-owned foreign-flagged vessel (Indian-controlled tonnage).
c Third priority: foreign-flagged vessel.

Under the Proposed RoFR Regime the order of priority would be as follows:

a First priority: Indian-built vessel irrespective of whether she flies the Indian flag or a foreign flag.
b Second priority:
- Foreign built, Indian owned, Indian flag.
- Foreign built, foreign flag but Indian chartered.

At the time of writing, the Delhi High Court, vide an interim order dated 28 March 2019 in the case of *The Great Eastern Shipping Company Limited v. Union of India*, has passed an *ad interim* order staying the operation of the Proposed RoFR Regime. Subject to the outcome of these proceedings and any further appellate proceedings, there is likely to be a cataclysmic shift in the Indian cabotage regime, which is bound to have far-reaching ramifications for all stakeholders.

III FORUM AND JURISDICTION

i Courts

Commercial disputes in India are litigated primarily in civil courts having territorial jurisdiction (over the cause of action or the defendant in the action) or pecuniary jurisdiction. For general suits, the High Courts of Bombay, Calcutta, Delhi, Madras and Himachal Pradesh exercise original jurisdiction for claims that have arisen within their territorial and pecuniary jurisdiction, while all other civil suits have to be instituted in the courts of first instance, which are generally the relevant district courts. However, admiralty suits are to be brought before the high court of a coastal state, which are the only courts vested with admiralty jurisdiction. Under the newly enacted admiralty regime, each high court of a given state can only exercise admiralty jurisdiction over vessels calling at its own coastal state.

The enactment of the Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (now renamed

the Commercial Courts Act 2015[5]) radically upgraded the existing judicial procedural framework. The government has established special commercial courts modelled on the lines of the English High Court to deal exclusively with 'commercial disputes' involving specialised subject matters (i.e., relating to export or admiralty and maritime law, carriage of goods, import of merchandise, sale of goods, insurance, etc.) and for claims of a specified value.[6] The Act makes pre-institution mediation compulsory, unless an urgent interim relief is sought, in which case the Commercial Court can be approached directly without having to go through the mediation process.[7] The Commercial Courts Act imposes fixed and strict deadlines to complete procedural formalities. Notably, the Commercial Courts Act provides for a strict timeline of presenting the statement of defence within a 120 days of the date of service of the writ of summons, failing which the right to file the statement of defence is forfeited.[8] This position has been recently confirmed by the Apex Court,[9] which has also held that an interim application for rejection of the plaint or statement of claim will by itself not stop the clock of 120 days from running. The Commercial Courts Act also seeks to impose a duty of full and frank disclosure of facts and documents at the time of filing the claim statement and defence and gives the court greater power to compel parties to disclose documents. In keeping with the latest developments in technology, the Commercial Courts Act has introduced the system of e-discovery of electronic records, such as metadata and logs relating to the creation and modification of documents.

The Commercial Courts Act also introduces a regime that now makes legal costs recoverable. Under the new regime, it is incumbent on the court to award legal costs after disposal of the suit and the judge must set out reasons why legal costs have not been awarded. Even though the regime now allows recovery of costs, the courts have, to date, largely not been inclined to issue orders awarding costs, if at all, at figures that equate to the total costs actually incurred by a party.

Some important points to bear in mind in the context of issues arising in India on the choice of law and civil jurisdiction are as follows:

a Words such as 'alone', 'only' or 'exclusive' are not required for a clause to be interpreted as an exclusive jurisdiction clause under Indian law.[10] If a contract provides for parties to submit to the jurisdiction of a particular court, there is a general presumption that the intention of the parties would be to exclude the jurisdiction of all other courts.

b As a general rule, in the absence of a cause of action arising in India, it may be difficult for two foreign parties to litigate before an Indian court, save for admiralty disputes in which the court acquires jurisdiction by virtue of the vessel having been arrested in India, by an order of an Indian littoral high court.[11]

5 Vide the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.

6 The specified value is currently fixed at 10 million rupees but can start from 300,000 rupees – to be notified by the state governments.

7 Section 12A of the Commercial Courts Act.

8 Section 16 read with Clause 4(A) of the Schedule to the Commercial Courts Act.

9 *M/s SCG Contracts India Pvt. Ltd v. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.*, C.A. No. 1638 of 2019.

10 *Swastik Gases P Ltd. v. Indian Oil Corporation Ltd.* (2013) 9 SCC 32.

11 Section 20 of the Code of Civil Procedure 1908 (CPC).

c If, in any case, more than one Indian civil court has jurisdiction over the subject matter, it is open for the parties to contractually agree to choose one court and oust the jurisdiction of the other courts that would, under normal circumstances, also have had jurisdiction.[12]

d An Indian entity and a foreign entity can agree to litigate in a foreign court, which is enforceable as a matter of Indian law.[13]

e Two Indian parties cannot exclude, by contract, the applicability of Indian substantive law if the place of performance of the contract is in India.[14]

f Indian courts can apply foreign law in deciding disputes. The question of what constitutes foreign law is a question of fact.[15] If no evidence is adduced regarding foreign law, normally the presumption is that it is the same as the Indian law on the point under consideration.[16]

g Limitation being an issue of the *lex fori*, the Indian Limitation Act, 1963 will mandatorily apply to disputes litigated in India. For most types of cause of action, the limitation period under Indian law is three years.

h Parties cannot extend or reduce the limitation period by contract.[17]

i The Indian courts have recently re-affirmed the grounds for appeal under the Commercial Courts Act,[18] which leaves some ambiguity as to the jurisdiction of the Commercial Courts to hear appeals arising under the Admiralty Act.

ii Arbitration and ADR

Maritime arbitrations in India may be *ad hoc* or institutional arbitration with bodies such as the Indian Council of Arbitration (ICA). It is common for shipping contracts involving Indian government-owned companies to provide for arbitration in India to be administered by the ICA under its Maritime Arbitration Rules.

India has given effect to the UNCITRAL Model Law on International Commercial Arbitration through the Arbitration and Conciliation Act, 1996 (the Arbitration Act). The Arbitration Act was last amended in 2015, ushering in what is essentially a new arbitration regime following the amendment. The default court to move any application with respect to an international commercial arbitration (where one of the parties is a foreign party irrespective of whether the arbitration is taking place in India or not) would be a High Court. Indian High Courts are better equipped to deal with complex commercial disputes relating to international transactions, and the official language of High Courts in India is English. This brings an end to a rather notorious dilatory tactic adopted by certain litigants to initiate proceedings in courts in interior parts of India where the proceedings may be in a language other than English and the judge is ill-equipped to handle complex issues generally raised in international commercial disputes.

12 *ABC Laminart Pvt Ltd v. AP Agencies Salem* (1989) 2 SCC 163.

13 *Modi Entertainment Network and Anr v. WSG Cricket Pte Ltd*, AIR 2003 SC 1177.

14 Section 23 of the Indian Contract Act, 1862.

15 *Hari Shanker Jain v. Sonia Gandhi*, AIR 2001 SC 3689.

16 *Malaysian International Trading Corpn v. Mega Safe Deposit Vaults (P) Ltd.*, 2006 (3) Bom C R 109.

17 Section 28 of the Indian Contract Act, 1872.

18 *Shailendra Bhadauria v. Matrix Partners India Investment Holdings LLC*, Commercial Appeal No. 327 of 2018 (Bom).

The Arbitration Act also empowers Indian courts to pass interim orders for security and other ancillary relief in support of arbitration taking place outside India. Another notable feature is allowing 'any person claiming through or under' a party who was a signatory of the original arbitration agreement to be party to the arbitration agreement. This has the effect of binding even an assignee or subrogatee within the ambit of the arbitration agreement contained in the underlying contract. The High Court of Gujarat has held that an endorsee of a bill of lading, which incorporates the terms of the charter party, including the law and arbitration clause, would be bound by such arbitration agreement.[19] The Supreme Court of India has held that a generic incorporation of a standard form contract in a particular industry (e.g., the GENCON, NYPE, Norwegian Sale Form, SUPPLYTIME in the shipping industry) is sufficient to incorporate the arbitration agreement contained in those forms into the underlying contract.[20] Recently, the Supreme Court has taken this proposition a step further by holding that a generic incorporation of a contract into another contract is sufficient to incorporate the arbitration clause (even if the contract that has been sought to be incorporated into the underlying contract is a bespoke contract, which is not common in the industry).[21]

The Arbitration Act requires an arbitrator to disclose in writing any circumstances relating to his or her impartiality and independence, and contains an exhaustive list[22] of grounds, including direct, indirect, past and present relationship with the subject matter or parties or counsel to the dispute, be it financial, business, professional, personal, and so on. Furthermore, there is a mandate imposed upon an arbitrator to dispose the reference within one year and in certain limited circumstances extend the reference by a further period of six months.

The Arbitration Act, following the amendment, has introduced fast-track arbitration, or document-only arbitration (with the consent of both parties), which, *inter alia*, entails that the tribunal would consist only of a sole arbitrator, the award being passed by the tribunal merely by reviewing documents without an oral hearing and the arbitrator being under obligation to pass and publish its award within six months of its reference.

Under the Arbitration Act, the fact that the award debtor has filed an application to challenge or set aside the award does not in itself amount to a stay on the execution of the award by the award holder.[23] In the event the arbitration proceeding seated in India is an 'international commercial arbitration' seated in India (i.e., when one of the parties to the arbitration is a foreign party), the scope of interference by Indian courts would be limited and similar to the context of deciding the award debtor's application to resist the enforcement of a foreign arbitral award in India whereby the Indian court is precluded from setting aside the Indian-seated arbitral award on the ground of 'patent illegality'.

To obtain a stay on execution, the award debtor would need to file a separate application for such a stay under Section 36(3) of the Arbitration Act. The Supreme Court of India has further clarified this position by holding that the amended Section 36 of the Arbitration Act has retrospective effect, and thereby the automatic stay as envisaged under the old Section 36 no longer applies to any pending application challenging the award under Section 34 of the

19 *MV Nicoloas A v. Indian Farmers Fertilizers Cooperative*, 2017 SCCOnLine Guj 2149.

20 *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.* (2009) 7 SCC 696.

21 *Inox Wind Ltd. v. Thermocables Ltd.*, (2018) 2 SCC 519.

22 The Fifth and Seventh Schedules of the Arbitration Act.

23 Section 36(2) of the Arbitration Act.

Arbitration Act.[24] As a general rule, a court would pass an order staying the execution of the award, conditional on the party seeking the stay furnishing security for 50 per cent of the value of the award.

Indian courts would be bound to decline to exercise jurisdiction and to refer the parties to arbitration unless the Indian courts 'find that the said agreement is null and void, inoperative or incapable of being performed'.[25] The Supreme Court, in the case of *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc.*,[26] held that the court could have a fully fledged trial (which includes leading oral or documentary evidence) to make a determination on whether an arbitration agreement exists before referring the parties to arbitration. The finding of the Indian courts on whether an arbitration agreement exists or not is final and cannot be revisited by the arbitral tribunal. In other judgments, the Supreme Court has taken the view that the question of fraud leading to the conclusion of the underlying contract and arbitration agreement is an arbitral issue that ought to be decided by the tribunal.[27]

In an interesting judgment in 2017,[28] the Delhi High Court, in its interpretation of the *Chloro* judgment, followed the proposition of law laid down by the Singapore High Court in the case of *Aloe Vera of America, Inc. v. Asianic Food (S) Pte. Ltd.*[29] and held that the arbitral tribunal would, in principle, have jurisdiction to decide on issues regarding whether it should disregard the corporate and juridical personality of a company to hold a non-signatory to an arbitration agreement bound by the arbitration agreement. The Division Bench of the Delhi High Court, in its judgment of *Shakti Nath v. Alpha Tiger Cyprus Investment No. 3 Ltd.*,[30] upheld the findings of the court of first instance, which upheld the legal costs awarded by the arbitral tribunal in excess of US$1 million.

Under the Indian Stamp Act 1899 and legislation in every state of India regulating the payment of stamp duty such as the Maharashtra Stamp Act 1958 etc., legal instruments and contracts require the payment of stamp duty levied by the local state government for these documents to be enforceable in a court of law. Stamp duty is required to be paid, *inter alia*, on shipping contracts such as charter parties, bills of lading, indemnity bonds, delivery orders, protest of the master of ship, agreements creating a hypothecation or pledge over the goods, etc. In the case of an arbitration seated in India between two Indian parties a very recent judgment of the Supreme Court of India in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*[31] has created uncertainty over whether an Indian court can entertain an application for interim measures or security in aid of arbitration seated in India, between two Indian parties when the underlying contract had not been affixed with appropriate revenue stamps.

In an effort to promote institutional arbitration in India, the Indian government has, on 2 March 2019, promulgated the New Delhi International Arbitration Centre Ordinance, under which the New Delhi International Arbitration Centre (NDIAC) was established. The Ordinance seeks to establish an independent and autonomous regime for institutionalised arbitration in India through the NDIAC. The NDIAC has been declared to be an institute

24 *Board of Control for Cricket in India v. Kochi Cricket Private Limited & Ors.*, (2018) 6 SCC 287.

25 Section 45 of the Arbitration and Conciliation Act 1996.

26 (2013) 1 SCC 641.

27 *MSM Satellite v. World Sport Group*, (2014) 1 SCC 58.

28 *GMR Energy Limited v. Doosan Power Systems India Pvt. Ltd*, 2017 SCC OnLine Del 11625.

29 2006 SGHC 78.

30 2017 (5) ArbLR 112 (Delhi).

31 Civil Appeal No. 3631 of 2019 (Arising out of Special Leave Petition (Civil) No. 9213 of 2018).

of national importance. India is rapidly moving towards a pro-alternative dispute resolution regime, and courts are not shying away from looking to institutions for assistance, including for appointment of arbitrators. In the first case of its kind, the Supreme Court of India has sought the assistance of the Mumbai Centre for International Arbitration to appoint an arbitrator for an arbitration between an Indian and a foreign company.[32]

iii Enforcement of foreign arbitral awards and foreign judgments

Enforcement of arbitral awards under New York Convention or Geneva Convention

Although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) has also been incorporated into the Arbitration Act, a foreign arbitral award can be enforced in India only if the government declares the country in which the award was passed to be a 'reciprocating territory' under Sections 44 or 53 of the Arbitration Act. A foreign award holder seeking to enforce an award in India would have to apply to the court, within whose jurisdiction the award debtor has its assets, to enforce the foreign award.[33] Presently, there is no requirement to convert the foreign award into a judgment of the Indian court by way of separate proceedings and the party seeking to enforce a foreign award can directly initiate execution proceedings to liquidate the assets of the award debtor.[34] Enforcement and execution proceedings can be initiated in India by placing on record the following documents before the Indian court:

a the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b the original agreement for arbitration or a duly certified thereof; and

c such evidence as may be necessary to prove that the award is a foreign award. In this regard, generally an affidavit from a lawyer from the country in which the foreign award was passed stating that the foreign award is final and binding as a matter of the laws in that jurisdiction and confirming that there is no appeal against the award pending in that jurisdiction suffices.

The award debtor can resist the enforcement of the foreign award on the grounds of objections enumerated in the New York Convention, which are reproduced under Section 48 of the Arbitration Act. One such commonly used ground was on the issue of public policy, where the award debtor would seek to reargue the underlying issues of the arbitration proceedings on merits, and there were a plethora of cases in which the courts considered the merits. However, there were two landmark judgments of the Supreme Court in 2015,[35] in which the scope of public policy was clarified. Subsequently, this was included as an amendment to Section 48 of the Arbitration Act to include an explanation that clarified that 'for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute'. Hence, the courts have been more restrictive in allowing the reopening of any issues on merits.

32 *Sun Pharmaceutical Industries Ltd. v. M/s Falma Organics Limited, Nigeria*, Arbitration Case No. 33 of 2014 (SC).

33 *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* (2012) 9 SCC 552.

34 *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (2001) 6 SCC 356.

35 *Oil and Natural Gas Corporation v. Western Geco International Ltd.* (2014) 9 SCC 263 and *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49.

Indian courts are now prone to adopting a commercial approach in refusing to allow an Indian party to take advantage of its own wrong and avoid a contract, for example, in circumstances such as issuing guarantees for overseas companies that do not comply with Indian foreign exchange regulations.[36] The Bombay and Calcutta High Courts, in their judgments involving shipping disputes, held that a party is estopped from raising challenges to the foreign arbitral award at the time of its enforcement in India on the grounds of the existence of a valid and enforceable arbitration agreement, when they have chosen not to appeal against the award before the appropriate court in the country where the arbitration had been seated.[37]

Enforcement of foreign judgments in India

A foreign judgment can only be enforced in India as if it were a decree of an Indian court if it has been passed in a reciprocating territory declared by the Indian government. Foreign jurisdictions such as the United Arab Emirates and Australia are not 'reciprocating territories' and a party seeking enforcement of a judgment passed in a court in these territories would have to file a substantial lawsuit in India on the cause of action stemming out of the judgment passed by the foreign court in the non-reciprocating territory. Furthermore, only a foreign 'decree' (i.e., a final judgment on the underlying merits of the case) can be enforced in India and not an interim order. Courts in India have the right to examine whether a foreign judgment has been given on the merits.[38] In these circumstances, it would appear that interim or interlocutory orders of freezing or *Mareva* injunctions passed by foreign courts are not enforceable in India.

While the Gujarat High Court in the case of *MV Cape Climber v. Glory Wealth Shipping Pvt Ltd.*[39] has allowed the enforcement of a London arbitral award that has subsequently been converted into a judgment of an English High Court (as a decree of the English High Court), the Delhi High Court, in the case of *Marina World Shipping Corporation Ltd. v. Jindal Exports & Imports Private Ltd.*,[40] rejected this approach and held that a London arbitral award can only be enforced in India under the Arbitration Act and not as an English judgment under the Code of Civil Procedure, 1908 (CPC), even though the London arbitral award had been converted into a judgment of the English High Court. The Bombay High Court in the case of *Marine Geotechnic LLC v. Coastal Marine Construction & Engineering Ltd.*[41] held that a foreign judgment could in principle be directly enforced in India by way of bankruptcy or winding-up proceedings strictly subject to the decree holder establishing that the foreign decree satisfies the requirements of Section 13 of the CPC.

36 *Intesa Sanpaolo SPA v. Videocon Industries Ltd.*, 2014 SCC Online Bom. 1276.

37 *Mitsui OSK Lines Ltd. (Japan) v. Orient Ship Agency Pvt. Ltd. (India)*, Arbitration Petition No. 842 of 2009 and *Aurelia Reederei Eugen Friederich GmbH v. POL India Projects Limited*, Arbitration Petition 12 of 2012; *Sifandros Carrier Ltd. v. LMJ International Ltd.*, 2018 SCC OnLine Cal 7146.

38 *International Woollen Mills v. Standard Wool, (UK) Ltd*, AIR 2001 SC 2134.

39 Civil Application (OJ) No. 250 of 2015.

40 2007 (3) ARBLR 46 Delhi.

41 Company Petition No. 67 of 2013.

IV SHIPPING CONTRACTS

Under Indian law, as a general rule of contractual construction, an attempt must be made to reconcile the relevant terms of a contract if possible and not treat any term as idle surplusage.[42] Indian courts have held that if a party seeks to invoke a termination clause in the contract, it is incumbent upon the party to strictly follow the procedural requirements stipulated in the contract to effect a valid termination.[43]

i Shipbuilding

India allows 100 per cent foreign direct investment into shipbuilding in India. A shipbuilding contract providing for Indian law would be governed by the Indian Sale of Goods Act, 1930. This Act is based on and largely a reproduction of the English Sale of Goods Act, 1893 and the principles of the law of sale of goods in both the countries are the same.[44]

The shipbuilding industry is subject to goods and service tax (GST), which subsumes the earlier levy of VAT, central sales tax (CST), excise duty, octroi, service tax, etc. Customs duty, customs bonds, cost clearing and forwarding excise, foreign income tax, and taxes by ancillary units and subcontractors are charged separately. GST at 5 per cent is applicable on all design and engineering services procured by the shipyards during the course of ship construction. It is important to ensure that any shipbuilding contract with an Indian counterparty to be governed by Indian law and jurisdiction has clear demarcations of the liability on each party, for the payment of taxes imposed by the Indian authorities.

ii Specific Relief Act, 1963

India recently recast the law relating to specific performance of contracts from an equitable and discretionary remedy to be exercised in limited circumstances to a statutory remedy. Under the old regime, courts had discretion in granting the remedy of specific relief and could refuse to order such relief even if the party seeking specific relief satisfied all the criteria for it. This discretionary power of the court has now been done away with. Under the old regime, it was impossible to obtain an order directing specific performance of a contract, for the non-performance of which, compensation was an adequate relief. This is no longer the case under the present regime. Indian courts would not be able to pass an order of injunction if such an injunction would be likely to impede the completion of specific infrastructure projects, which, *inter alia*, include capital dredging of ports and other operations in ports, Shipyards (including a floating or land-based facility with the essential features of waterfront, turning basin, berthing and docking facility, slipways or ship lifts, and which is self-sufficient for carrying on shipbuilding, repair or breaking activities), inland waterways, oil pipelines, oil, gas or liquefied natural gas storage facilities (including strategic storage of crude oil), etc. Under the new regime, a court, even after granting specific performance, can additionally grant a certain amount of compensation.

iii Contracts of carriage

The following are the legislation and principles of law applicable to contracts of carriage.

42 *Tiruvenibai v. Lilabai*, AIR 1959 S.C. 620.

43 *Base International Holdings NV Hockenrode 6 v. Pallava Hotels Corporation Ltd.*, 1999 PTC (19) 252.

44 *Consolidated Coffee Ltd. v. Coffee Board, Bangalore* (1980) 3 SCC 358.

The Indian Carriage of Goods by Sea Act, 1925

The Indian Carriage of Goods by Sea Act, 1925 (the Indian COGSA), in its Schedule, incorporates the Hague Rules. In 1993, India amended the COGSA and included certain provisions of the Hague-Visby Rules. Significantly, the legislation increased the limits as prescribed in the Hague-Visby Rules. However, the Hague-Visby Rules do not, in themselves, have the force of law in India.

The Indian COGSA is applicable to outward cargo (i.e., ships carrying goods from Indian ports to foreign ports or between ports in India) and does not apply to inward cargo (i.e., ships carrying goods from foreign ports to Indian ports). In the case of *Shipping Corporation of India Ltd v. Bharat Earth Movers Ltd.*,[45] the Supreme Court of India had to determine whether the Indian COGSA or the Japanese Carriage of Goods by Sea Act, 1992 (the Japanese COGSA) applied in a case involving goods carried from Japan to India. The Court held that the Indian COGSA did not apply to inward shipments and chose to apply the Japanese COGSA. Indian courts have allowed carriers to take defences enumerated under Article IV of the Hague Rules (e.g., fire).[46] The limitation period under the Indian COGSA is one year, unlike the general limitation period of three years provided under the Limitation Act 1963. The Multimodal Transport Act, 1993 applies to multimodal transportation of cargo from any place in India to a place outside India using two or more modes of transport.

The Indian Contract Act, 1872

Charter party contracts are governed by the Indian Contract Act, 1872 and common law principles derived from various jurisdictions. This is the position in the absence of any provision in the contract whereby a different substantive law applies to the contract.

Sections 73 to 75 of the Indian Contract Act, 1872 deal with the measure of damages to which the claimant may be entitled, arising out of the counterparty's breach of contract. In the case of liquidated damages, there appears to be a slight divergence between Indian and English law. Indian courts have held that in the absence of loss, a claimant is unlikely to be awarded liquidated damages. In their interpretation of Section 74 of the Indian Contract Act, 1872, Indian courts have taken the view that clauses in a contract providing for liquidated damages are enforceable only if it is impossible to compute the loss resulting from the breach of a contract, subject to the same not being a penalty clause.[47]

Liens

Liens can be exercised under Indian law in the following circumstances.

If cargo is to be discharged at a port designated as a major port, a shipowner may be able to exercise a statutory lien over the cargo shipped on board the vessel for claims of outstanding freight and other charges payable to the shipowner.[48] Certain ports in the ownership of the state government, such as Gujarat, have similar provisions enabling a shipowner to exercise a statutory lien over the cargo.[49] Notice of such a lien must be served upon the consignee and the concerned port authority prior to the discharge of the cargo from the vessel.

45 (2008) 2 SCC 79.

46 *Collis Line Private Ltd. v. New India Assurance Co. Ltd.*, AIR 1982 Ker 127.

47 *Fateh Chand v. Balkishan Dass*, AIR 1963 S.C. 1405; *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, 2003(5) SCC 705.

48 Section 60 of the Major Port Trust Act, 1963.

49 Section 48 of the Gujarat Maritime Board Act, 1981.

Other than the right of lien under the Major Port Trust Act, 1963, as above, the question of whether an owner has the right of lien against the charterers and the cargo interests will depend upon the lien clauses in the charter party, in the bill of lading and the incorporation clause in the bill of lading.

A shipowner can also, in principle, exercise a possessory lien over the cargo by refusing to discharge the same in the event that the party liable to pay the shipowner's dues is the owner of the cargo. The exercise of a possessory lien over cargo owned by third-party cargo interests may potentially expose the vessel to claims under the bills of lading contract.

iv Cargo claims

India does not have an equivalent of the English Carriage of Goods by Sea Act, 1992, but rather follows a colonial legislation – the Indian Bills of Lading Act, 1856. The Madras High Court in the case of *MT Titan Vision v. 3F Industries Ltd.*[50] and the Gujarat High Court in the case of *MG Forest Pte Ltd. v. MV Project Workship*,[51] in their interpretation of Section 1 of the Indian Bills of Lading Act 1856, held that only a named 'consignee' or 'endorsee' would have the right in India to initiate a cargo claim against the carrier under the bill of lading contract. In these circumstances, it can be argued that the consignee 'assumes only those rights and liabilities created by the contract of carriage that concern the carriage and delivery of the goods, and the payment therefor' so that, for example, the consignee would not be liable for the consequences of the shipment of dangerous cargo. To incorporate an arbitration or dispute resolution clause, the bill of lading will be required to specify that the arbitration or dispute resolution clause is incorporated.[52]

In the case of *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries*,[53] the Supreme Court of India expressed the opinion that a consignee or an endorsee may be bound by the terms of the charter party terms incorporated into the bill of lading contract even in circumstances when the consignee or endorsee is unaware of those terms. The Bombay High Court, in its recent judgment in the case of *M/s. Assobhai Bhanji and Sons v. Great Circle Shipping Pvt. Ltd.*,[54] allowed a shipper's claim against a carrier for delivering cargo without production of the bill of lading even in circumstances when the bill of lading has been made out 'to the order of a named consignee'.

v Interest

Indian courts have the power to pass judgments in foreign currency.[55] As a general rule, for commercial transactions, courts award interest at the rate at which monies are lent or advanced by nationalised banks.[56] Indian arbitrators generally award interest at the rate of 18 per cent per annum.[57] The Appeal Court of the Bombay High Court has held that an Indian arbitral tribunal can award interest at the rate of 9 per cent per annum on a claim in

50 (2014) 2 MLJ 154.

51 Misc. Civil Application No. 187 of 2003 in Admiralty Suit No. 14 of 2003.

52 *MV 'Baltic Confidence' v. The State Trading Corporation of India Ltd.* (2001) 7 SCC 473.

53 (1990) 3 SCC 48.

54 (2018) 2 AIR Bom R 252. However, this judgment is pending appeal.

55 *Forasol v. Oil & Natural Gas Commission*, 1984 SCR (1) 526; and *Forysthe Trading Services Ltd. v. MV 'Niizuru'*, 2004 (5) Bom CR 806.

56 Section 34 of the Code of Civil Procedure, 1908.

57 Section 31(7)(b) of the Indian Arbitration and Conciliation Act, 1996.

US dollars.[58] However, a recent decision of the Supreme Court in *Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Co. Ltd.*[59] has held that a high rate of interest on foreign currencies would be punitive in nature, and reduced the rate of interest awarded by the arbitrator to LIBOR plus 3 per cent.

In the case of *Forysthe Trading Services Ltd. v. MV Niizuru*,[60] the contract between the bunker supplier and the shipowner provided for interest of 20 per cent per annum for late payment. The Bombay High Court disregarded the interest rate stipulated in the bunker supply contract and awarded interest of only 8 per cent per annum. The Supreme Court held that a tribunal's award may be inclusive of interest and the sum of the principal amount plus interest may be directed to be paid by the tribunal for the pre-award period.[61]

vi Limitation of liability

Carriers can limit their liability for cargo claims by way of 'package limitation' and 'kilo limitation' pursuant to the Indian COGSA and the Multimodal Transportation Act, 1993. A party seeking to limit liability under the LLMC Convention, 1976 can initiate limitation proceedings by filing an admiralty suit in the High Court.

Section 352(b) contained in Part XA of the MSA provides that 'the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time' has the force of law in India. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2015, which came into force on 16 February 2015, gives effect to the 1996 Protocol of the 1976 LLMC. Under the 2015 Rules, a different unit of account applies to 'Indian ships intended for navigation in or around the coast of India' than to foreign-going vessels. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2017, which came into force on 21 February 2017, gave effect to the 2012 amendments to the 1976 LLMC. However, the 2017 Rules do not apply to coastal trade. This would imply Indian-flagged vessels having a licence only to trade along the coast of India would follow the 1996 Protocol to the 1976 LLMC, whereas seagoing vessels would follow the 2012 Amendments to the 1976 LLMC. The amended rates are applicable to incidents that take place subsequent to the amendment coming into force.

The High Court of Bombay held that a shipowner's right to limit liability under Part XA of the MSA is absolute and without reference to any proof of loss resulting from a personal act or omission of the shipowner.[62] This decision is therefore likely to make India a favourable jurisdiction for constituting a single worldwide limitation fund, without any prior claim being initiated. Interim limitation funds are not permissible under Indian law.

The CLC Convention, as amended from time to time, has been incorporated under Part XB of the MSA. A party seeking to limit liability can file an action in the admiralty court.[63] Security in the form of cash or bank guarantee is permissible.

58 *Steel Authority of India Ltd. v. Pacific Gulf Shipping Co. Ltd.*, Appeal No. 391 of 2013.

59 (2018) SCCOnLine 1922.

60 2004 (5) Bom CR 806. See footnote 55.

61 *Hyder Consulting Ltd. v. State of Orissa* (2015) 2 SCC 189.

62 *Murmansk Shipping Company v. Adanin Power Rajasthan Ltd. & Ors.*, Admiralty Suit No. 43 of 2012 (decided on 8 January 2016).

63 For an Indian-registered ship, in the high court of the state in whose port the vessel is registered, or where the incident occurs. For foreign ships, at the port or place within the territorial waters of which the vessel is present.

V REMEDIES

i Arrest and sale of ships

Admiralty law in Indian has finally been codified as of 1 April 2018 with the coming into force of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (the Admiralty Act). The brief ramifications of the Admiralty Act are:

a the Bombay and Calcutta High Courts would no longer exercise pan-India jurisdiction and each high court of a coastal state in India would only have jurisdiction over vessels within its own territorial waters;

b Indian ships are amenable to orders of arrest, except vessels owned or operated by the government of India and vessels registered under the Inland Vessels Act, 1917;

c a claimant can arrest a vessel to enforce a judgment or order;

d an express stipulation of the limited cluster of claims that are classified as 'maritime liens' bring much-needed clarity to the rather nebulous notion of whether claims for supply of necessities to a vessel would give rise to a maritime lien;

e express stipulations on the priority of claims or the hierarchy of various cluster of creditors over a vessel seeking to assert an *in rem* action against a vessel that includes an express stipulation of priorities of various creditors seeking to assert a maritime lien;

f an expansive definition of a 'vessel' that can be subject to an order of arrest;

g a plaintiff may arrest a vessel for any defined 'maritime claim' as listed in the 1999 Arrest Convention;

h the right of a plaintiff to arrest a vessel other than a vessel against which a maritime claim has arisen, is subject to the fulfilment of certain conditions;

i there is an express right of a plaintiff to initiate a pure action *in personam* for a 'maritime claim' beyond the scope of an action *in rem*;

j the appointment of nautical assessors to assist the admiralty court to deal with technical or nautical matters;

k an express provision authorising the admiralty court to sell the vessel by way of a judicial auction free of all encumbrances, liens, attachments, registered mortgages and charges;

l a defined time period of one year after which maritime liens would expire, except for seafarers' wages, which expire after two years.

m the courts have been empowered to impose on a claimant, either as a condition to obtain an arrest or to maintain the order of arrest, an obligation to provide an undertaking to pay damages or furnish security for damages, for any loss or damage to the shipowner as a result of a wrongful arrest or excessive security having been demanded;

n express power to the Indian Central Government to publish rules under the Admiralty Act;

o all pending applications in any admiralty court will be decided in accordance with the Admiralty Act; and

p the Admiralty Act is silent on whether property other than ships, such as bunkers, cargo, freight, is amenable to an order of arrest without an underlying cause of action being made out against a vessel.

The Bombay High Court in the case of *Flag Mersinidi*[64] rejected the notion that a bunker supply contract could be given the recognition of a maritime lien, if the governing law of

64 Notice of Motion No. 763 of 2013 in Admiralty Suit No. 8 of 2013.

the bunker supply contract recognises a maritime lien for bunkers supplied to a vessel. The Court had refused to apply American law, which was the governing law of the bunker supply contract and applied Indian law as the *lex fori*.

The Supreme Court of India held that a claim for necessaries supplied to a vessel would constitute a maritime claim against a vessel and not a maritime lien.[65] The judgment further stated that 'arrest of a foreign ship for a maritime claim is permissible only if there is no change of ownership between the date of claim and date of arrest'.

Arrests can be moved *ex parte*, unless there is a caveat against arrest filed up to a reasonable contemplation of the claim with an undertaking to furnish security for the claim amount. India follows the English case of *The Moschanthy*,[66] on the basis of which a claimant can sustain an order of arrest over a vessel merely by making out a reasonably 'best arguable' case.[67] The Division Bench of the Kerala High Court has clarified that even though an admiralty suit for damages can be filed for any amount the plaintiff desires, the owner of the ship cannot be asked to furnish excessive security for an unrealistic amount, having no proximity with the actual loss.[68]

A party seeking release of the vessel is required to furnish security either by way of a cash deposit or a bank guarantee.[69] Indian courts do not accept club letters of undertaking (LOUs) as security as a right, unless consented to by the plaintiff.[70]

In India, every company is a separate and independent legal entity; ownership of the assets vests with the company and not in its shareholders.[71] *Prima facie*, the registered owner of the vessel is deemed the beneficial owner, save in very exceptional cases.[72] Only in exceptional circumstances where questions of public policy, fraud or malice are involved, will the courts consider piercing the corporate veil. It must be noted that the party seeking to lift the corporate veil will be required to plead and particularise fraud or malice or public policy.[73]

The Admiralty Act does not expressly contain any provision allowing a party to arrest a vessel for simpliciter security in aid of judicial and arbitral proceedings taking place outside India. That said, a single judge of the Bombay High Court has recently held that it was permissible for a party to obtain security pending arbitration by way of an arrest in India, since the Admiralty Act is silent on this issue and does not expressly prohibit it. According to the Court, a party has a statutory right to initiate *in rem* proceedings under the Admiralty Act, which could not be denied if a party otherwise had a valid maritime claim.[74]

The Supreme Court of India has recognised that although a demise charterer may have absolute dominion and control over the vessel, this fact in itself would not allow a claimant to obtain an order of arrest against the vessel for an *in personam* claim against the demise charter

65 *Chrisomar Corporation v. MJR Steels Private Ltd.*, 2017 SCC OnLine SC 1104.

66 [1971] 1 Lloyd's Rep 37.

67 *Videsh Sanchar Nigam Limited v. MV 'Kapitan Kud'* (1996) 7 SCC 127.

68 *Sangita Das & Ors. v. MV Amber L and Ors.* (2018) 1 KLT 836.

69 Security can be deposited in US dollars in the Bombay High Court and Gujarat High Court.

70 *Stephen Commerce Pvt. Ltd. v. Owners and Parties in Vessel MT 'Zaima Navard'*, AIR 1999 Cal 64. However, the parties can agree to an LOU as security, which could be accepted by the courts.

71 *Lufeng Shipping Company Ltd. v. MV 'Rainbow Ace'*, 2013 (4) ABR1412.

72 *Universal Marine & Anr. v. MT 'Hartati'*, MANU/MH/0131/2014.

73 Order VI Rule 4, Civil Procedure Code 1906.

74 *Siem Offshore Redri AS v. MV Altus Uber*, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court.

relating to another vessel.[75] However, a single judge of the Bombay High Court on a bare reading of Section 5 of the Admiralty Act (which departs slightly in wording from Article 3 of the Arrest Convention 1999), came to a conclusion that even a vessel on bareboat charter could be arrested for an unrelated third-party claim against the bareboat charterer.[76] Recent notable judgments in India involving ship arrest and sale have clarified the following matters:

a In the event that bunkers are ordered by the owner (irrespective of whether the vessel is on time charter or not), the bunker supplier will be entitled to arrest a vessel at the *prima facie* evaluation stage.[77] By a recent judgment, the Appeal Court of the Bombay High Court has held[78] that an arrest granted at the *prima facie* stage cannot be vacated in the absence of a trial, on a rebuttable presumption of privity of contract between the actual physical supplier of bunkers and the shipowner, especially when supplies of necessities to a vessel such as bunkers have been made on faith and credit of the vessel. At the time of writing, a special leave petition (application for leave to appeal) against the *Amoy Fortune* judgment is pending before the Supreme Court of India.

b While the earlier position was that a vessel could not be arrested for security pending arbitration in the admiralty jurisdiction of the court,[79] per the judgment of the single judge of the Bombay High Court this is now permissible if the suit is filed praying for a decree and determination on the merits of the underlying maritime claim.[80]

c A claim for damages for wrongful arrest of a vessel is not a special law. Principles of mitigation will apply and the claim is subject to mitigation of losses arising from wrongful arrest of the vessel.[81]

d The arrest of bunkers onboard a vessel is not subject to the admiralty jurisdiction of the courts in India.[82]

e Freight alone cannot be arrested.[83]

f The arrest of cargo without an underlying cause of action being made out against a vessel is not permitted by the Bombay High Court,[84] albeit certain other High Courts have allowed the same on occasions.

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75 *Sunil B. Naik v. Geowave Commander*, 2018 SCC OnLine SC 203 (*Geowave Commander*).

76 *Siem Offshore Redri AS v. MV Altus Uber*, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court on, *inter alia*, the ground that it is contrary to the findings of the Supreme Court in *Geowave Commander*.

77 *Gulf Petrochem Energy Pvt. Ltd. v. MT 'Valor'* in Notice of Motion (L) No. 581 of 2015 in Admiralty Suit (L) No. 94 of 2015 and *Drop Energy Services Ltd. v. MT 'Tradewind'* in Notice of Motion No. 805 of 2015 in Admiralty Suit No. 240 of 2015. The former judgment is under appeal to a higher bench of the Bombay High Court.

78 *Socar Turkey Petrol Enerji v. M.V. Amoy Fortune*, 2018 SCC Online Bom 1999. A petition for leave to appeal against this judgment has been filed before the Supreme Court of India and is currently pending.

79 *Rushab Ship International LLC v. The Bunkers on board MV African Eagle*, 2014(4) Bom CR 269.

80 *Siem Offshore Redri AS v. Altus Uber*, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court. See footnote 74.

81 *Lufeng Shipping Co Ltd v. MV 'Rainbow Ace' and Ors.*, Notice of Motion No. 1646 of 2013 in Admiralty Suit No. 29 of 2013.

82 *Peninsula Petroleum Ltd. v. Bunkers on board the vessel MV 'Geowave Commander'*, Notice of Motion No. 385 of 2014 in Admiralty Suit No. 85 of 2014.

83 *Bulk Shipping Management SEA & Anr. v. The Bunkers on board MV 'African Eagle'*, 2013 (3) BomCR 380.

84 *Global Integrated Bulkers Pte Ltd. v. Cargo of 14,072.337 MTS of Limestone* (Judge's Order No. 253 of 2017 in Comm. Admiralty Suit (L) No. 665 of 2017.

g Institution of a prior legal proceeding against the concerned vessel or its owner cannot be said to be a precondition for maintainability of a suit for constitution of fund to limit the shipowner's liability under the LLMC Convention 1976 and the LLMC Protocol 1996.[85]

h Proceedings for the sale of a vessel under arrest can be taken out on expiry of three days from the date of arrest if no security or bail has been furnished.[86]

i 'Owner' means registered owner. The corporate veil can be lifted only in exceptional cases, such as fraud or public policy. The party seeking arrest on the basis of fraud must plead and *prima facie* establish that fraud is committed.[87]

j In the Bombay High Court, once the order of arrest is vacated, the party that has suffered 'prejudice' can invoke the undertaking issued by the plaintiff to pay damages arising out of a wrongful arrest, and the test of malice or *crassa neglentia* does not apply.[88]

k There is no right vested in a shipowner against a receiver or consignee, or the shipper or charterer (unless a vessel is a party) *in personam* in the admiralty jurisdiction of the court.[89]

l The Bombay High Court in its interpretation of Section 5 of the Admiralty Act has held that multiple arrests of a number of vessels in the fleet of a shipowner is not permissible for a single claim even in circumstances wherein the sale proceeds of the vessel are sufficient to meet the claim of the plaintiff though these sale proceeds of the vessel may be insufficient to meet the claims of all creditors asserting a claim against the vessel (i.e., that even if the *pari passu* distribution of the sale proceeds of the vessel would be insufficient to fully satisfy the claim of the plaintiff, arrest of multiple vessels to satisfy the plaintiff's claim is impermissible).[90]

m The Bombay High Court has clarified that only a claimant who has executed a warrant of arrest prior to the date of admission of winding-up petition (liquidation application) would have a charge over the vessel and once the winding-up petition has been admitted, the claimant, in any case, would not be able to obtain decree against sister vessels or other assets of the company in liquidation.[91]

n The Bombay High Court in its interpretation of Section 4(1)(n) and Section 9(1)(d) of the Admiralty Act held that port dues are in the nature of a maritime lien as well as a maritime claim against the vessel.[92]

o A claim for interest on a principal amount towards supply of bunkers by a bunker supplier to a charterer would not be a 'maritime claim'.[93]

85 See footnote 62.

86 *Coromandel International Limited v. MV 'Glory I' and Andromeda Ship Holdings Ltd.*, 2014 (3) ABR 365.

87 See footnote 71.

88 *Navbharat International Ltd v. Cargo on board MV 'Amtees'*, MANU/MH/0192/2014.

89 *M/s. Greenwich Meridian Logistics (India) Pvt. Ltd. v. M/s. Sapphire Kitchenware Pvt. Ltd.*, Admiralty Suit 31 of 2008 of Bombay High Court and *MUR Shipping BV Amsterdam v. Al Gyas Exports Private Ltd*.

90 *Praxis Energy Agents SA v. M.T. Prathibha Neera*, 2018 (4) ABR 148.

91 *Praxis Energy Agents SA v. M.T. Prathibha Neera*, 2018 (4) ABR 148. See footnote 90.

92 *State of Goa v. Sale Proceeds of vessel M.T. Pratibha Bheema and Ors.*, A.S. No. 72 of 2014 (decided on 7 June 2018).

93 *M.V. Kiveli v. Monjasa DMCC and Ors.*, 2018 (5) ALT 73.

p Arrest of a vessel is akin to the seizure of property and thus attracts Article 80 of the Indian Limitation Act 1963, which provides for a limitation period of one year from the date of seizure (the arrest of the vessel) to lodge a claim for damages or to lodge a counterclaim.[94]

q The Court of Appeal of the Bombay High Court held that a claim involving a vessel operated by the Central Government will be outside the purview of the Admiralty Act in light of the proviso to Section 1(2) therein.[95]

VI REGULATION

India is a party to the Indian Ocean MOU, which lays down basic standards for vessels calling at ports. In order to prevent wreckage of older foreign ships in Indian waters, as well as to prevent oil spills, the MoS has notified the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities) Rules 2012, which, *inter alia*, provide that foreign-flagged vessels can only enter Indian territorial waters on being in possession of a Blue Card (i.e., valid insurance cover) from the International Group of P&I Clubs or from insurance companies that are specially authorised by the DG Shipping upon fulfilling certain criteria. Foreign-flagged vessels entering India must be registered with a classification society that is a member of the International Association of Classification Societies

i Registration and classification

Indian-flagged vessels will be registered under the MSA, the Inland Vessels Act, 1917 or the Coasting Vessels Act, 1838, depending on the nature and type of vessel. The Supreme Court of India, in interpreting the provisions of the MSA, has held that a provisional certificate of registry for Indian-flagged vessels can be granted only to a constructed vessel and not to an 'under construction' vessel and such provisional certificate of registry will be valid for a period of six months, within which the shipowner must obtain a permanent certificate by ensuring that all the obligations of the Indian flag state are met.[96]

The Customs Act, 1962 imposes various obligations upon owners of vessels calling at ports in India, such as the Import General Manifest. A central register is maintained by the DG Shipping, which contains all the entries recorded in the registers kept by the registrar at the port of registry in India. Any vessel that is registered requires a licence to trade. Vessels that are more than 25 years old require a special licence to trade.

ii Environmental regulation

India has ratified the CLC Convention and its 1976 and 1992 Protocols. Part XB of the MSA deals with civil liability for oil pollution damage, and Part XC was introduced to incorporate

94 *M.V. Tongli Yantai and Ors. v. Great Pacific Navigation (Holdings) Corporation Ltd.*, NoM No. 2202 of 2015 in CC 19 of 2012 in AS. No. 3 of 2011 & NoM No. 1770 of 2015 in AS. No. 66 of 2015 (decided on 17.09.2018). This judgment is under appeal to a higher bench of the Bombay High Court.

95 *Joao Martin Fernandes v. The Union of India and Ors.*, Appeal No. 65 of 2017 (decided on 24 October 2018).

96 *Halliburton Offshore Services Inc. v. Principal Officer of Mercantile Marine Department*, Civil Appeal No. 5428 of 2017.

the requirements of the International Oil Pollution Compensation Fund (the IOPC Fund). Where an oil spill occurs from two or more ships as a result of an accident, the owners of all ships are jointly and severally liable for all damage that is not reasonably separable.[97]

India is the second-highest contributor to the IOPC Fund in the world, with 13.12 per cent of the total composition of the fund. The IOPC Fund is under an obligation to pay compensation to states and persons who suffer pollution damage, if those persons are unable to obtain compensation from the owner of the ship from which the oil escaped or if the compensation due from the shipowner and P&I club is not sufficient to cover the damage suffered.

iii Collisions, salvage and wrecks

The COLREGs have been incorporated into Indian law under the Merchant Shipping (Prevention of Collisions at Sea) Regulations 1975. While, in principle, Indian courts have the power to apportion liability between two vessels in accordance with the degree of fault, there have been very few instances when they have proceeded to do so. There is no precise formula to measure the degree of negligence of a party under Indian law and the courts have a considerable amount of discretion based on abstract notions of justice and equity.[98] Section 345(1)(a) of the MSA provides that in an event where it is not possible to establish different degrees of fault, the liability shall be apportioned equally. In these circumstances, liability between two vessels in a collision would be apportioned equally unless it is *ex facie* evident that the degree of fault of one vessel was palpably higher than the other.

The law in India with respect to shipwrecks is laid down in Part XIII of the MSA and in the Indian Ports Act 1908. The term 'wreck' includes 'a vessel abandoned without hope or intention of recovery'. India is in the process of giving effect to the Nairobi WRC 2007 into domestic law, but at present there is no legal regime to deal with the removal of wrecks in the exclusive economic zone of India. In the case of *Oil & Natural Gas Corporation Ltd v. Osprey Underwriting Agencies Ltd.*,[99] the Bombay High Court, in interpreting Section 14 of the Indian Ports Act, directed a foreign P&I club and its Indian agents to deposit the cost of removing and raising the wreck in the Indian court. However, it should be noted that the Bombay High Court, *inter alia*, dealt with a dispute between the assured and the P&I club.

Sections 402 to 404 of the MSA provide the salvor with the right to claim salvage services. The Kerala High Court, in the case of *Commander KP Shashidharan v. Union of India*,[100] allowed an officer of the Indian Coast Guard to claim salvage services even though he had a pre-existing duty to protect life and property at sea.

iv Seafarers' rights

India has ratified the Maritime Labour Convention 2006 (MLC) and made amendments to the MSA to give effect to the provisions of the MLC. In the exercise of the powers conferred by Section 218A read with Section 457 of the MSA, the Indian government promulgated the Merchant Shipping (Maritime Labour) Rules, 2016 (MLC Rules), which, *inter alia*, cast an obligation on a vessel's financial security provider for unpaid wages for up to a maximum period of 120 days and repatriation expenses in the case of abandonment by the shipowner.

97 Section 352I(4) of the MSA.

98 *Municipal Corporation of Greater Bombay v. Laxman Iyer*, 2003(8) SCC 731.

99 1998 (2) BOMLR 179.

100 AIR 2002 Ker 388.

The Merchant Shipping (Recruitment and Placement of Seafarers) Rules 2016[101] has overhauled the earlier regime set up under the 2005 Rules, and has placed greater responsibility, liability and obligations on the recruitment and placement service providers (RPSL agents). Under these Rules, an RPSL agent has to provide a bank guarantee to the DG Shipping, to ensure that the rights of seafarers are protected and that seafarers would be compensated for any monetary loss arising out of the breach of the obligations of the RPSL agent or the shipowners under the seafarer's employment agreement.

The Supreme Court of India held that a foreign seafarer's right to wages falls within the ambit of a fundamental right to life and liberty under Article 21 of the Constitution of India.[102] Indian courts are likely to be guided by the general standard agreement between the National Union of Seafarers of India and the Indian National Shipowners' Association, as an overwhelming majority of contracts of employment on board a vessel incorporate these terms.

Indian law recognises the rights of an injured seafarer or the family members of a deceased seafarer to claim compensation for injury or death of the seafarer. The Employees' Compensation Act, 1923 (ECA) is a general legislation that allows workmen or employees to claim compensation for death and personal injury of seafarers. However, the ECA would not apply to Indian seafarers working aboard foreign-flagged vessels. Under Indian law, foreign seafarers cannot be employed on Indian-flagged vessels unless they obtain prior permission from the DG Shipping.

v New insolvency regime

The law relating to corporate insolvencies in India has undergone a paradigm shift with the enactment of the Insolvency and Bankruptcy Code, 2016 (the Insolvency Code), which repeals the Sick Industrial Companies (Special Provisions) Act, 1985 and various provisions of the Companies Act, 2013. The Insolvency Code recognises the 'creditor in possession' model and differs from jurisdictions that follow the 'debtor in possession' model, such as Singapore and the United States. The Insolvency Code stipulates definitive time periods within which various stages of the insolvency, corporate rescue and liquidation proceedings have to be completed. The moment the National Company Law Tribunal admits an insolvency petition, a resolution professional is appointed to take over the management of the company. A committee of creditors is formed, comprising the financial creditors of the company, who then have a period of 180 days (extendable by up to 270 days) to finalise a corporate rescue strategy, known as an 'insolvency resolution plan', failing which the company would automatically be put into liquidation. During this period when the committee of creditors is attempting to rehabilitate the company, there is a moratorium on institution of new or continuation of pending legal proceedings against the company.[103] In order to commence the corporate insolvency resolution process, the creditor would have to show that there is no pending dispute between the creditor and the debtor. Such dispute should not be merely illusory in nature.[104] One issue that parties to the insolvency proceedings were facing was with regard to reaching an amicable settlement pursuant to the commencement of the corporate insolvency resolution process. The Insolvency Code only envisages two situations

101 G.S.R. 169(E) dated 15 February 2016.

102 *O Konavalov v. Commander, Coast Guard Region* (2006) 4 SCC 620.

103 Section 14 of the Insolvency Code.

104 *Mobilox Innovations (P) Ltd v. Kirusa Software (P) Ltd.*, (2018) 1 SCC 353.

after the commencement of the corporate insolvency resolution process; first formulation of a plan in order to continue the existence of the corporate debtor as a going concern and second, to commence the liquidation proceedings. There was no third alternative available for parties who were willing to settle the claims. In order to fill this lacuna, the Insolvency Code was amended.[105] Pursuant to the amendment parties can now withdraw the application, provided that 90 per cent of the committee of creditors approves such a withdrawal. However, the decision of the committee of creditors in rejecting a proposal for withdrawal should not be arbitrary in nature, and as such the adjudicating authority and appellate adjudicating authority under the Insolvency Code have the power to set aside such a decision.[106]

VII OUTLOOK

Indian maritime and commercial laws have undergone substantial changes with the enactment of a plethora of legislation and amendments in areas such as arbitration, admiralty, insolvency and tax. Moreover, the Merchant Shipping Bill, 2016 is currently pending before Parliament, which would also update the regime under the MSA. This legislation comes as a welcome development in bringing the Indian legal and regulatory environment up to speed with legislative developments in other countries. It is also heartening to note that India jumped 30 places from its ranking last year in the 'ease of doing business' rankings published by the World Bank in *Doing Business 2018*, to 100. Notwithstanding the foregoing, it remains to be seen how stakeholders react to the entire gamut of legislation affecting the shipping industry.

105 Section 12A, Insolvency and Bankruptcy Code, 2016.

106 *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India*, 2019 SCCOnLine SC 73.

Appendix 1

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Amitava Majumdar (Raja) is the managing partner at Bose & Mitra & Co. Mr Majumdar regularly advises the government of India on the incorporation of international conventions into Indian law and has been part of the Indian delegation representing the legal committee meetings at the IMO. He has also recently been appointed trustee of the Maritime Training Trust, chaired by DG Shipping.

He has been involved in a number of international commercial arbitrations in London, Singapore and India. Mr Majumdar regularly appears in shipping and international trade-related litigations before the Supreme Court of India and various High Courts and district courts of coastal states in India. He is a fellow of the Indian Council of Arbitration and has been appointed as a committee member of the maritime committee of the Indian Council of Arbitration and a member of the governing counsel of the Singapore Chamber of Maritime Arbitration.

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Mr Aditya Krishnamurthy has recently been made a partner at Bose & Mitra & Co after having been associated with the firm for more than eight years. He has more than a decade's experience in the industry and previously worked with two English law firms in Singapore. He has been extensively involved in admiralty matters concerning the arrest and release of ships before various Indian High Courts. He has also been involved in a number of wet matters for investigation on maritime casualties. Aditya is a commercial litigator and heads the firm's fraud, asset-tracing and insolvency department. He specialises in complex, high-value cross-border fraud and insolvency matters, including those that involve enforcing foreign arbitral awards and judgments in India. Aditya holds an LLM degree in maritime law from the University of Southampton (England) and has been mentioned in *The Legal 500 Asia Pacific 2018* as a 'next generation lawyer'.

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