

THE SHIPPING LAW
REVIEW

TENTH EDITION

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

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PREFACE

The aim of the tenth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple 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, including international trade sanctions, ocean logistics, offshore, piracy, shipbuilding, ports and terminals, marine insurance, environmental and regulatory issues, decommissioning and ship finance.

We have 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.

Each of these jurisdictional chapters 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, as are the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims.

In addition, the authors 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 also examined. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction in the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development estimating that the operation of merchant ships contributes about US\$380 billion in freight rates to the global economy, amounting to about 5 per cent of global trade overall. The significance of maritime logistics in facilitating trade and development has become increasingly apparent in the past year. Heightened and unstable freight rates, port closures, congestion and evolving shipping requirements as a result of covid-19 and the Ukraine conflict have all had far reaching effects beyond the shipping sector itself. As the international shipping industry is responsible for the carriage of over 80 per cent of world trade, with over 50,000 merchant ships trading internationally, the elevated shipping expenses and challenges to global logistics we have experienced this year have exacerbated inflation and supply chain disruptions, adding to the ongoing global crisis and hampering the maritime industry's covid-19 recovery. We have seen

global maritime trade, which plunged by approximately 4 per cent in 2020, recover at an estimated rate of 3.2 per cent. In 2021, shipments reached 11 billion tonnes, a value slightly below pre-pandemic levels.

The disruption caused by the pandemic and the war in Ukraine have brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself, and the contributions to this book continue to reflect that.

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.

Andrew Chamberlain, Holly Colaço and Richard Neylon

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INDIA

Amitava Majumdar, Pabitra Dutta, Rishabh Saxena and Ruchir Goenka¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

India has untapped potential to leverage its 7,517 kilometres of coastline spanning nine states and four union territories and has sought to utilise this with a thrust towards an export-led development model. India's merchandise trade has grown at more than twice the growth rate of global merchandise exports over the past decade. With 12 major ports and 205 notified non-major ports facilitating seaborne trade, more than 95 per cent of India's merchandise trade by volume and around 70 per cent by value is moved through maritime transport. In recent years, the Indian government has made a concerted effort to switch to clean fuel with subsidies being provided to encourage the consumption of liquefied natural gas, leading 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, while it is dependent on importing coal from countries such as Indonesia, Australia and South Africa for its thermal power plants, which account for most 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 the 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.

In keeping with its goal of encouraging private participation and foreign investment in the shipping sector, in its 2023 Budget speech,² the government focused on its aim to capitalise on India's advantageous geographical location and has emphasised the importance of developing coastal shipping. This is in line with the government's previous announcements that seven projects worth about 20 billion rupees will be offered by the Major Ports on Public Private Partnership mode thereby allowing major ports across the country to outsource management of their operational services to private players. Furthermore, a scheme for promoting flagging of merchant ships in India by providing subsidy support to Indian shipping companies in global tenders floated by ministries and CPSEs was announced. The speech also highlighted that pursuant to India having enacted the Recycling of Ships Act, 2019 and acceded to the Hong Kong International Convention, around 90 ship recycling yards at Alang in Gujarat have been granted the HKC compliant certificate with the government working to bring more ships to India from Europe and Japan and aiming to double the recycling capacity of around 4.5 million Light Displacement Tonne (LDT) by 2024. Furthermore, with an aim to provide a better framework for the development, maintenance, and management of aids

1 Amitava Majumdar is a managing partner and Pabitra Dutta, Rishabh Saxena and Ruchir Goenka are principal associates at Bose & Mitra & Co.

2 Budget 2023-2024: Speech of Nirmala Sitharaman Minister of Finance, available at: https://www.indiabudget.gov.in/doc/Budget_Speech.pdf (last accessed on 19 April 2023).

to navigation in India, the Marine Aids to Navigation Act, 2021 was brought into force on 31 March 2022. This Act inter alia repeals the 90-year-old Lighthouse Act, 1927. The Marine Aids to Navigation Act, 2021 seeks to promote ease of doing business by incorporating the global best practices, technological developments and India's International obligations in the field of marine aids to navigation. Pursuant to the Navigation Act 2021, marine aids to navigation dues will be levied and collected for every ship arriving at or departing from any port in India, at the rate specified by the central government from time to time. The central government of India may wholly or partially exempt certain vessels from these dues. These vessels include:

- a* any government ship that is not carrying cargo or passengers for freight or fares; or
- b* any other ship, classes of ships or ships performing specified voyages.

There is, however, 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. While the paradigm shift in policy in the recent years reflects this need to strengthen shipping regulations to tie into India's overarching aim to become a viable investment destination, much progress is still required to achieve this objective.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Shipping in India is centrally regulated and exclusively controlled by the Indian government 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 Maritime Organization. The MSA is a general umbrella legislation that deals with merchant shipping and empowers the DG Shipping to promulgate delegated legislation, such as circulars and notifications, to regulate 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 the Load Line Conventions.

The MoS has a chartering wing (Transchart) to broker transportation of government-owned and government-controlled cargoes, and regularly finalises long-term time charter parties and 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. 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.

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 India-flagged vessels merely to take advantage of the cabotage policy in India.

Generally, an Indian shipping company will 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 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 notifications³ stating that the export of services by way of transportation of goods by vessel will be exempted from goods and services tax, effective from 25 January 2018 with a ‘sunset clause’ up to 30 September 2021 (i.e., the exemption will automatically be terminated after this fixed period, unless further extended).

i Maritime India Vision 2030

The MoS has undertaken an aggressive development of the maritime landscape in India including introducing the Maritime India Vision-2030, a 10-year blueprint with the aim of overhauling the Indian maritime sector.⁴ The following key themes outlined in the policy have been identified:

- a* developing best-in-class port infrastructure;
- b* driving end-to-end logistics efficiency and cost competitiveness;
- c* enhancing logistics efficiency through technology and innovation;
- d* strengthening policy and institutional framework to support all stakeholders;
- e* enhancing global share in shipbuilding, repair and recycling;
- f* enhancing cargo and passenger movement through inland waterways;
- g* promoting ocean, coastal and river cruise sector;
- h* enhancing India’s global stature and maritime co-operation;
- i* leading the world in safe, sustainable and green maritime sector; and
- j* becoming a top seafaring nation with world-class education, research and training.

The Indian government has also launched a dedicated portal for inviting and facilitating investments in the maritime sector in India which sets out in detail all the investment opportunities as part of the initiative.⁵

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

3 Notification No. 04/2020 – Integrated Tax (Rate) dated 30 September 2020; 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.

4 The Maritime India Vision 2030 document is accessible at <https://static.investindia.gov.in/s3fs-public/2021-03/MIV%202030%20Report.pdf> (last accessed on 8 April 2021).

5 The dedicated portal launched by the Ministry of Shipping of the Indian government can be accessed at <https://maritimeinvest.in/investment-opportunities> (last accessed on 8 April 2021).

before the high court of a coastal state, which are the only courts vested with admiralty jurisdiction. Under the present admiralty regime, each high court of a given state can only exercise admiralty jurisdiction over vessels calling at its own coastal waters.

The Commercial Courts Act 2015 radically upgraded the existing judicial procedural framework. The government has established special commercial courts to deal exclusively with ‘commercial disputes’ involving specialised subject matters (i.e., those relating to export or admiralty and maritime law, carriage of goods, import of merchandise, sale of goods and insurance) and for claims of a specified value.⁶ The Act makes pre-institution mediation compulsory, unless urgent interim relief is sought, in which case the Commercial Court can be approached directly without having to go through the mediation process.⁷ However, the Bombay High Court in *Ganga Taro Vazirani v. Deepak Raheja*,⁸ held that the requirement of pre-institutional mediation under Section 12A of the Act was procedural in nature and could be deemed to be waived by a party through its conduct. The Court observed that in a situation where the parties attempted to resolve the disputes but failed, driving them to mandatory mediation would run contrary to the aims and objectives of the Commercial Courts Act, that is, quick and speedy redressal of disputes. This was overturned by the Court of Appeal, which held that pre-institution mediation is mandatory⁹. This issue, however, has now been laid to rest by the Supreme Court of India, wherein the Apex Court has held that pre-institution mediation is mandatory for all commercial suits that are not accompanied by urgent relief in accordance with the provisions of the Commercial Courts Act.¹⁰

The Commercial Courts Act imposes fixed and strict deadlines to complete procedural formalities. Notably, the Act provides for a strict timeline of presenting the statement of defence within 120 days of the date of service of the writ of summons, failing which the right to file the statement of defence is forfeited.¹¹ This position has been confirmed by the Apex Court,¹² 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 running¹³. The Bombay High Court has clarified that the strict timelines are applicable to commercial suits instituted after the enactment of the Act, and would not apply to older suits transferred to the Commercial Courts after the Act came into force.¹⁴ The Apex Court has also clarified that the strict timelines would only be applicable to commercial disputes of a specified value and insofar as non-commercial disputes are concerned, the Court still retains the discretion

6 The specified value is currently fixed at 300,000 rupees.

7 Section 12A of the Commercial Courts Act, 2015.

8 2021 SCC Online Bom 195.

9 *Deepak Raheja v. Ganga Taro Vazirani*, Commercial Appeal (L) No. 11950 of 2021.

10 *Patil Automotive Private Limited and Others v. Rakheja Engineers Private Limited*, 2022 SCC Online SC 1028.

11 Section 16 read with Clause 4(A) of the Schedule to the Commercial Courts Act, 2015.

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

13 A warrant of arrest served on a vessel would not be sufficient for the time bar for the filing of the written statement (defence) to start counting and the service of writ of summons is mandatory unless the order of arrest specifies that the written statement is required to be filed within the time specified as required in law. *CMOG Fuel DMCC v. OSS Altus Uber* (IMO No. 9385300) (Interim Application No. 169 of 2019, judgment dated 16 June 2022).

14 *Reliance General Insurance Co. Ltd v. Colonial Life Insurance Company (Trinidad) Ltd. & Anr* (Commercial Appeal No. 543 of 2019).

to condone delays upon sufficient cause being shown.¹⁵ 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.

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. The Bombay High Court has recently awarded costs to the successful party in an application filed by a judgment debtor challenging a domestic award after considering circumstances such as conduct of the parties and frivolity of the action carried out.¹⁶ Subsequently, it has also passed an order in favour of a claimant, directing the errant shipowner to pay costs for its dilatory tactics.¹⁷

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.¹⁸ 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.¹⁹
- 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.²⁰
- 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.²¹
- 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.²²

15 *Desh Raj v. Balkishan (D) Through Proposed LR Ms Rohini*, Civil Appeal No.433 of 2020.

16 *Reliable Spaces Pvt Ltd v. Evonik India Pvt Ltd* (Commercial Arbitration Petition No. 1019 of 2019, judgment dated 19 October 2020); *Sanjay Soya Private Limited v. Narayani Trading Company* (Interim Application (L) No. 5011 of 2020, judgment dated 9 March 2021).

17 *Rajnish Steels and Ors v. MV Golden Pride and Anr* (Interim Application (L) No. 7724 of 2021, judgment dated 24 March 2021).

18 *Swastik Gases P Ltd v. Indian Oil Corporation Ltd* (2013) 9 SCC 32, *Jagdish Chander v. Ramesh Chander and Ors* (2007) 5 SCC 719.

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

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

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

22 Section 23 of the Indian Contract Act, 1862.

- f* Indian courts can apply foreign law in deciding disputes. The question of what constitutes foreign law is a question of fact.²³ 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.²⁴
- 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.²⁵

Owing to the onset of covid-19, the Supreme Court of India took *suo motu* note of the various hardships being faced by litigants in approaching judicial forums and, accordingly, passed several orders clarifying the computation of limitation periods as follows:

- a* in computation limitation for suits, appeals or applications, the time period from 15 March 2020 to 28 February 2022 shall stay excluded and the balance period as on 15 March 2020 shall become available from 1 March 2022;
- b* where limitation had expired in the time between 15 March 2020 and 28 February 2022, irrespective of the actual balance period of limitation, a period of 90 days would be available from 15 March 2021 unless the actual balance period is more than 90 days, in which case, the period available would be the longer balance period; and
- c* the period between 15 March 2020 and 28 February 2022 would be excluded in computing various time limits prescribed under Sections 23(4) and 29 A of the Arbitration Act, 1996 (in relation to domestic arbitrations), Section 12A of the Commercial Courts Act and periods mentioned under any other laws where periods of limitation for instituting proceedings or outer limits (within which the court or tribunal can condone delay) and termination of proceedings are prescribed.²⁶

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 significantly 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 seated in India or not) would be the relevant high court, which is better equipped to deal with complex commercial disputes relating to international transactions. The Arbitration Act was also amended in 2019 as well as in 2020. The 2019 amendment sought to undo the progressive regime promulgated by the 2015 amendment especially with respect to the default court being the concerned high court for

23 *Hari Shanker Jain v. Sonia Gandbi*, AIR 2001 SC 3689.

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

25 Section 28 of the Indian Contract Act, 1872.

26 Orders dated 23 March 2020, 8 March 2021, 27 April 2021, 23 September 2021 and 10 January 2022 in *In Re: Cognizance of Limitation, Suo-Motu Writ Petition* (Civil) No. 3 of 2020.

the conduct of matters related to international commercial arbitrations. However, the Apex Court declared certain portions of the 2019 amendment to be unconstitutional, thereby restoring the position as set out in the 2015 amendment.²⁷ For the sake of completion, the Arbitration Act also came to be amended in 2021 by the Arbitration and Conciliation (Amendment) Act, 2021 wherein grounds for the unconditional stay on the enforcement of a domestic arbitral award were inserted.

The Arbitration Act empowers Indian courts to pass interim orders for security and other ancillary relief in support of arbitration taking place both within and outside India.²⁸ The Supreme Court in *Essar House Pvt Ltd v. Arcellor Nippon*²⁹ held that while passing these interim orders, they are not bound by the strict prerequisites applicable when obtaining an attachment before judgment as prescribed under Order 38, Rule 5 of the Code of Civil Procedure, 1908 (CPC); that is, these requirements under the CPC act merely as guidelines, and technicalities cannot prevent the court from securing justice. However, immediately after this pronouncement, the Supreme Court, in the case of *Sanghi Industries Limited v. Ravin Cables & Anr*,³⁰ held that the rigours of Order 38, Rule 5 of the CPC must be satisfied to grant interim orders. Another pronouncement from the Supreme Court on this issue³¹ seems to suggest that wide powers are available to courts passing orders for interim relief in aid of arbitral proceedings and only factors such as a good prima facie case, balance of convenience and approaching the court with reasonable expedition are to be considered. In appropriate cases where the defence is prima facie untenable, an order of deposit of security can be made at the interim stage.³² However, courts have clarified that they would not have subject-matter jurisdiction to grant relief in a dispute involving foreign parties with no nexus to India.³³ Courts have also observed that applications seeking interim relief for a foreign seated arbitration may be filed where assets of a party are located.³⁴

The Supreme Court in the landmark judgment of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited*³⁵ held that foreign emergency arbitration are orders under Section 17(1) of the Arbitration Act and are enforceable in India. It has been clarified that an ‘emergency arbitrator’ would be included within the ambit of an ‘arbitral tribunal’ as defined under the Arbitration Act.³⁶ Therefore, an emergency order will be exactly the same as an order of any other arbitral tribunal. The Apex Court further held that the no appeal lies from enforcement of such emergency award made under Section 17(2) of the Arbitration Act.

27 *Hindustan Construction Company Limited v. Union of India & Ors* (2020) 17 SCC 324.

28 Section 9 of the Arbitration Act, 1996.

29 2022 SCC Online SC 1219.

30 2022 SCC Online SC 1329.

31 *Sepeco Electric Power Construction v. Power Mech Projects Limited*, 2022 SCC Online SC 1243.

32 *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Ltd*, 2021 SCC OnLine Bom 149; *Valentine Maritime Ltd v. Kreuz Subsea Pte Ltd & Anr*, 2021 SCC OnLine Bom 75.

33 *Cyrstal Sea Shipping Company Ltd v. Bostomar Shipping Pte Ltd & Ors* (I.COM.A.O.A. No. 1 of 2021; order dated 5 March 2021 passed by Andhra Pradesh High Court) and *Cyrstal Sea Shipping Company Ltd v. Bostomar Shipping Pte Ltd & Ors* (AP No. 136 of 2021, order dated 11 March 2021 passed by Calcutta High Court).

34 *Shanghai Electric Group v. Reliance Infrastructure Ltd*, OMP (I) (Comm) 433 of 2020, judgment dated 19 July 2022.

35 (2022) 1 SCC 209.

36 Section 2(1)(d) of the Arbitration Act, 1996.

The 2019 amendment to the Arbitration Act amended Section 45 of the Act³⁷ by permitting reference to foreign-seated arbitrations if a prima facie case is made out 'that the said agreement is null and void, inoperative or incapable of being performed'. The Supreme Court, in *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc.*,³⁸ (*Chloro Controls* judgment) had held that the court could have a full-fledged trial (which includes leading oral or documentary evidence) to determine whether an arbitration agreement exists before referring the parties to arbitration. However, this position appears to have been diluted in light of the 2019 amendment to the Arbitration Act.

Pertinently, the Supreme Court in the *Chloro Controls* judgment also held that 'group of companies doctrine' shall bind a non-signatory party to arbitration where there is a clear intention of the parties to bind both the signatory and the non-signatory parties who are part of a group of companies. The intention of the parties is a very significant feature that must be established before the scope of arbitration and can be said to include the signatory as well as the non-signatory parties. In an interesting judgment in 2017,³⁹ the Delhi High Court, in its interpretation of the *Chloro Controls* judgment, followed the proposition of law laid down by the Singapore High Court in *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd.*⁴⁰ The Delhi High Court 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. However, the Supreme Court in *Cox and Kings v. SAP India (P) Ltd.*,⁴¹ after analysing the group of companies doctrine and after taking note of the *Chloro Controls* judgment, doubted its applicability and referred it to a larger bench. This reference was reserved for judgment at the time of writing this article.

Another notable feature of the Act 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.⁴² This has the effect of binding even an assignee or subrogated party 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.⁴³ 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 and SUPPLYTIME in the shipping industry) is sufficient to incorporate the arbitration agreement contained in those forms into the underlying contract.⁴⁴ The Supreme Court took 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).⁴⁵

37 Section 45 of the Arbitration Act, 1996 applies to foreign seated arbitrations and deals with the power of a judicial authority to refer parties to arbitration.

38 (2013) 1 SCC 641.

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

40 2006 SGHC 78.

41 2022 SCC Online SC 570.

42 Section 8 of the Arbitration Act, 1996.

43 *MV Nicolaas A v. Indian Farmers Fertilizers Cooperative*, 2017 SCCOnLine Guj 2149.

44 *MR Engineers & Contractors (P) Ltd v. Som Datt Builders Ltd* (2009) 7 SCC 696.

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

Following the doctrine in the *Chloro Controls* judgment, the Apex Court further held an arbitral award to be enforceable against a non-signatory after examination of factors such as the circumstances and intention in entering into the agreement, relationship and commonality of the parties, the composite nature of the transaction and endeavour to find out the true essence of the business arrangement.⁴⁶ Furthermore, invoking the same principles, the Supreme Court decided to implead a non-signatory to the arbitration proceedings.⁴⁷ The principle has further been applied in a recent case⁴⁸ by the Delhi High Court, wherein it has been held that the ‘group of companies’ doctrine can be invoked to bind the non-signatory affiliate of a parent company if there was the following:

- a a direct relationship with the signatory to the arbitration agreement;
- b commonality of the subject matter; and
- c a composite transaction between the parties at dispute.

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.⁴⁹

In the context of the classic ‘seat versus venue’ debate, the Supreme Court of India held that the designation of ‘venue’ of the arbitration, would not confer exclusive jurisdiction on the High Court having jurisdiction over that ‘venue’ to supervise the arbitration.⁵⁰ This view now stands approved and underlined by a three-judge bench of the Apex Court, who held that in the absence of a designated seat and only a designated venue, the cause of action may vest with different courts.⁵¹ The Supreme Court has further clarified that the parties in dispute are empowered to mutually decide upon the change in seat of the arbitration, the courts of which seat shall then have exclusive jurisdiction to deal with matters related to the arbitration.⁵²

The Supreme Court in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*⁵³ has authoritatively ruled that there is no bar on two Indian parties agreeing to a foreign-seated arbitration and this would not bar the parties from seeking interim reliefs under Section 9 of the Arbitration Act. The Court in this ruling also seems to have opened the gates for Indian parties to even agree to the substantive law of the contract being foreign law. However, the Court has also clarified that merely by agreeing to foreign substantive law, parties cannot dodge Indian law and issues arising in this regard may be adjudicated by the arbitrator in accordance with applicable conflict of law principles. The Court further clarified that should the provisions of Indian law be violated, the foreign award can also be challenged under the ground of public policy as provided under Section 48(2) (a) of the Arbitration Act.

The Arbitration Act requires an arbitrator to disclose in writing any circumstances relating to his or her impartiality and independence, and contains an exhaustive list⁵⁴ of

46 *Cheran Properties Limited v. Kasturi and Sons Limited* (2018) 16 SCC 413.

47 *Mahanagar Telephone Nigam Limited v. Canara Bank* (2020) 12 SCC 767.

48 *Shapoorji Pallonji and Co Pvt Ltd. v. Rattan India Power Ltd & Anr*, 2021 SCC OnLine Del 2875.

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

50 *Brahmani River Pellets Ltd v. Kamachi Industries Ltd* AIR, 2019 SC 3658.

51 *BGS SGS SOMA JV v. NHPC Ltd*, 2019 (17) SCALE 369.

52 *Inox Renewables Ltd v. Jayesh Electricals Ltd*, 2021 SCC OnLine SC 448.

53 2021 SCC Online SC 331.

54 The Fifth and Seventh Schedules of the Arbitration Act, 1996.

grounds, including direct, indirect, past and present relationship with the subject matter or parties or counsel to the dispute, be it financial, business, professional or personal, among other types of relationships. Significantly, the Apex Court has held that a party having a financial interest in an arbitration is barred from unilaterally appointing an arbitrator.⁵⁵ The Supreme Court has also recently held that Section 12(5) read with the Seventh Schedule of the Arbitration Act is a mandatory and non-derogable provision of the Act.⁵⁶ However, the Bombay High Court has recognised:

*Under Explanation 3 to the Fifth Schedule, maritime or commodities arbitration may draw arbitrators from a small, specialised pool, in which case it is the custom and practice for parties to appoint the same Arbitrator in different cases.*⁵⁷

As per the 2019 amendment to the Act, pleadings are required to be completed within six months from the date on which written notice of appointment is served on the arbitrators.⁵⁸ An arbitrator is mandatorily required to dispose of the reference within one year from the period of completion of pleadings in domestic arbitrations, while this period is merely a direction for international commercial arbitrations.⁵⁹

Following the 2015 amendment, the Arbitration Act, 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.

In the event that the arbitration proceeding 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 threshold 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’. However, the 2019 amendment to the Arbitration Act in the context of domestic arbitrations has provided that should an arbitration agreement or the making of the award be induced by fraud or corruption and the concerned court is prima facie satisfied of the same, then the court shall unconditionally stay the execution of the award.⁶⁰

Insofar as domestic arbitrations are concerned, 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.⁶¹ 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

55 *Perkins Eastman Architect DPC v. HSSC (India) Ltd*, 2019 SCC OnLine SC 1517.

56 *Haryana Space Application Centre (HARSAC) and Another v. M/s Pan India Consultants Pvt Ltd* (2021) 3 SCC 103.

57 *Sawarmal Gadodia v. Tata Capital Financial Services Limited and Ors*, Arbitration Petition No. 560 of 2019.

58 Section 23 of the Arbitration Act, 1996.

59 Section 29A of the Arbitration Act, 1996.

60 Section 36(3) of the Arbitration Act, 1996.

61 Section 36(2) of the Arbitration Act, 1996.

to any pending application challenging the award under Section 34 of the Arbitration Act.⁶² 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. That said, should a party make out a strong, exceptional and overwhelmingly compelling case for not furnishing a security, the court may not order security to be furnished.⁶³

The Division Bench of the Delhi High Court, in its judgment of *Shakti Nath v. Alpha Tiger Cyprus Investment No. 3 Ltd*,⁶⁴ 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. On the issue of fees of the arbitral tribunal, the Supreme Court in the case of *ONGC v. Afcons Gunanusa JV*⁶⁵ has observed that arbitrators cannot unilaterally issue binding orders determining its fees.

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, 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 and agreements that create a hypothecation or pledge over the goods. In this regard, in a recent 3:2 opinion the Constitution Bench of the Supreme Court, in the case of *NN Global Mercantile Private Limited v. Indo Unique Flame Ltd & Ors* (Civil Appeal Nos 3802-3803 of 2020, judgment dated 25 April 2023) (*NN Global*), conclusively held that an arbitration agreement contained in an instrument that is liable to stamp duty is non-existent in law unless the agreement is validated under the Stamp Act and this would make it unenforceable. The Court has, however, clarified that this observation was not pronounced in relation to Section 9 of the Arbitration Act, which provides for interim relief in aid of arbitral proceedings. This decision was passed in the context of an application seeking appointment of an arbitrator. The decision may arm erring litigants in creating more roadblocks in arbitral proceedings. In the context of a foreign seated arbitration, the Andhra Pradesh High Court has granted interim relief on an unstamped agreement.⁶⁶

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 Section 44 or 53 of the Arbitration Act. However, should a notified country be subsequently divided or disintegrated, the award from the new territory (even though the same is not notified) can be enforced as per the Arbitration Act.⁶⁷ 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

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

63 *Kishore Shah and Ors v. Urban Infrastructure Trustees Ltd*, Commercial Arbitration Petition No. 1435 of 2019, judgment dated 14 December 2020.

64 2017 (5) ArbLR 112 (Delhi).

65 2022 SCC Online SC 1122.

66 *VR Commodities Private Limited v. Norvic Shipping Asia Pte Ltd* (ICOMAA No. 1 of 2022, judgment dated 5 May 2022).

67 *Transocean Shipping Agency Pvt Ltd v. Black Sea Shipping & Ors* (1998) 2 SCC 281.

its assets, to enforce the foreign award.⁶⁸ 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 consolidated proceedings for enforcement and execution to liquidate the assets of the award debtor.⁶⁹ Proceedings for enforcement of foreign awards may be filed in more than one court.⁷⁰ 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 this 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 is sufficient.

The Supreme Court in *PEC Limited v. Austbulk Shipping SDN BHD*⁷¹ held that the word ‘shall’ appearing in Section 47 of the Arbitration Act has to be read as ‘may’, and thus the need for producing the original award or the original arbitration agreement or its certified copy is not mandatory at the time of filing proceedings for enforcement of an arbitral award. Furthermore, the Apex Court in its latest judgment of *Gemini Bay Transcription P Ltd v. Integrated Sales Service Ltd*⁷² has settled that all the requirements of Section 47 of the Arbitration Act are procedural in nature and aimed at satisfying the enforcing court that the award is a Foreign Award, as defined and enforceable against the persons bound by it.

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. The Supreme Court in *Government of India v. Vedanta Limited and Ors*⁷³ (the *Vedanta* judgment) restated the scenarios under which the enforcement of an award may be refused being, inter alia:

- a the award being passed in ‘violation of procedural due process in the conduct of the arbitral proceedings’ in observing procedural fairness that ‘constitutes a fundamental basis for the integrity of the arbitral process’ since ‘fair and equal treatment of the parties is a non-derogable and mandatory provision’; and
- b the award is ‘in conflict with the basis notion of justice, or in violation of the substantive public policy of India’, that is, the award is tainted by ‘corruption or fraud, or undue means’.

The burden is on the person resisting enforcement to show that the case comes within Section 48(1) or (2) of the Arbitration Act, failing which the award must be enforced.⁷⁴ The Supreme

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

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

70 *NCC Infrastructure Holdings Ltd and Anr v. TAQA India Power Ventures Pvt Ltd* (Arb OP Nos. 410 and 412 of 2021, judgment dated 11 January 2023).

71 2018 SCC Online SC 2549.

72 (2022) 1 SCC 753.

73 2020 SCC Online SC 749.

74 *Supra* 66.

Court in the *Vedanta* judgment clarified that in light of the usage of the phrase ‘may be refused’ in Section 48 of the Arbitration Act, a court would, where a party against whom the award is being enforced is able to establish one or more grounds or objections under Section 48 to refuse enforcement, retain a residual jurisdiction to overrule such objections where such ‘grounds for refusal concerns a minor violation of the procedural rules applicable to the arbitration, or if the ground for refusal was not raised in the arbitration’ or where the violation is not grave in nature to prevent enforcement in international relations.

One commonly used ground under Section 48 of the Arbitration Act was on the issue of public policy, where the award debtor would seek to argue against the underlying issues of the arbitration proceedings on merits, and there was a plethora of cases in which the courts reconsidered their merits. However, there were two landmark judgments of the Supreme Court in 2015,⁷⁵ in which the scope of public policy was clarified. Subsequently, the 2015 amendment to Section 48 of the Arbitration Act included 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’.

The 2015 amendment to Section 48 further clarified that a foreign award would fall foul of the India’s public policy only if:

- a there was fraud or corruption involved in the making of the award;
- b it was in contravention of the fundamental policy of Indian law; or
- c it was in conflict with the most basic notions of morality and justice.

Therefore, the courts have been more restrictive in allowing the reopening of any issues on merits. The Supreme Court in *Vijay Karia and Ors v. Prysmian Cavi E Sistei SRL*⁷⁶ endeavoured to settle this position of law by observing that the grounds mentioned under Section 48 can be segregated into three groups being those affecting the jurisdiction of the arbitration proceedings, grounds affecting the party interest alone and grounds that go to the public policy of India. Furthermore, the Supreme Court in *Centrotrade Minerals v. Hindustan Copper*⁷⁷ has held that a party is ‘otherwise unable to present his case’ under Section 48(1)(b) only if it has not been given an opportunity to present its case through circumstances outside the party’s control. However, the Supreme Court may have slightly undone the good with its subsequent pronouncement in the case of *NAFED v. Alimenta SA*⁷⁸ wherein it held a foreign award to be unenforceable, based on the finding that the transactions contemplated under the underlying agreement were in violation of Indian law and therefore fell foul of the public policy of India.

The Supreme Court in the *Vedanta* judgment⁷⁹ has now clarified that the period of limitation for filing enforcement or execution of a foreign award Section 47 of the Arbitration Act would be covered under the residuary provision being Article 137 of the Limitation Act, 1963, which prescribes a period of three years from when the right to apply accrues.

Indian courts are 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

75 *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.

76 2020 SCC OnLine SC 177.

77 2020 SCC OnLine SC 479.

78 *NAFED v. Alimenta SA*, 2020 SCC Online SC 381.

79 *Supra* 67.

circumstances such as issuing guarantees for overseas companies that do not comply with Indian foreign exchange regulations.⁸⁰ In their judgments involving shipping disputes, the Bombay and Calcutta High Courts 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 it has chosen not to appeal against the award before the appropriate court in the country where the arbitration had been seated.⁸¹

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 government⁸² subject to the decree holder establishing that the foreign decree satisfies the requirements of Section 13 of the CPC. 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.⁸³ 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. However, an *ex parte* judgment may be executed provided the defendant was served and the foreign court duly tried the claim.⁸⁴

The Supreme Court of India in *Bank of Baroda v. Kotak Mahindra Bank Limited*⁸⁵ has clarified that the period of limitation for executing a foreign decree, under Section 44A of the CPC, passed by a superior court of a reciprocating territory (cause country) will be the limitation prescribed under the laws of the cause country. Once the period of limitation prescribed in the cause country is over, no execution proceedings can be filed in India. Where the execution proceedings are initiated in India pursuant to the decree passed in the cause country, the limitation period for such proceedings shall be governed by Article 137 of the Limitation Act, 1963 (three years from the date of finalisation of execution proceedings in the cause country).

While the Gujarat High Court in *MV Cape Climber v. Glory Wealth Shipping Pvt Ltd*⁸⁶ has allowed the enforcement of a London arbitral award that has subsequently been converted into a judgment of the English High Court (as a decree of that court), the Delhi High Court, in *Marina World Shipping Corporation Ltd v. Jindal Exports & Imports Private Ltd*⁸⁷ 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 CPC. The Bombay High Court

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

81 *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.

82 Section 44A of the Code of Civil Procedure, 1908.

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

84 *TransAsia Private Capital Limited v. Gaurav Dhawan* (Exp Mo. 37 of 2021, judgment dated 6 April 2023).

85 Civil Appeal No. 2175 of 2020 (judgment rendered on 17 March 2020).

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

87 2007 (3) ARBLR 46 Delhi.

in *Marine Geotechnic LLC v. Coastal Marine Construction & Engineering Ltd*⁸⁸ 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. It has been recently clarified by the National Company Law Tribunal, Cuttack Bench in the matter of *Jaldhi Overseas Pte Limited v. Steer Overseas Private Limited*⁸⁹ that a foreign award in itself is not sufficient to initiate insolvency proceedings against the coprorate debtor under the Insolvency and Bankruptcy Code, 2016.

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.⁹⁰ 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.⁹¹

i Shipbuilding

As of 2021, there are about 28 shipyards in India⁹² and about 33 dry docks for ship repairs. Presently, the Indian shipbuilding industry can be broadly divided into the following three categories:

- a large ocean-going vessels catering to overseas as well as coastal trade;
- b medium-sized specialised vessels, such as port crafts, fishing trawlers, offshore vessels, inland and other smaller crafts; and
- c defence or naval crafts and coast guard vessels.

India extensively overhauled its Foreign Direct Investment policy in 2018, thereby allowing 100 per cent foreign direct investment into ports and shipping in India through the automatic route. In order to provide a boost to the Indian government's 'Make in India' campaign, various state maritime boards offer building parks and plots adjacent to coasts on concessional terms for the purposes of shipbuilding in India. The Indian government has also launched a 'Shipbuilding Financial Assistance Policy' with an aim to provide financial assistance to Indian shipyards for shipbuilding contracts signed between 1 April 2016 and 31 March 2026. The financial assistance will be 20 per cent of the 'contract price' or 'fair price', whichever is lower, as determined by international valuers,⁹³ for any vessel constructed and delivered in India within a period of three years from the date of contract. However, an

88 Company Petition No. 67 of 2013.

89 2021 SCC OnLine NCLT 490.

90 *Tiruvembai v. Lilabai*, AIR, 1959 S.C. 620.

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

92 Annual Report 2020–21, Government of India Ministry of Ports, Shipping & Waterways, at the link https://shipmin.gov.in/sites/default/files/AnnualReport2021_0.pdf (last accessed on 8 April 2022).

93 Schedule III to the Guidelines for implementation of Shipbuilding Financial Assistance Policy (SBFAP), 2016.

exception has been provided for specialised vessels⁹⁴ wherein the time period of construction and delivery can be increased to a maximum of six years by the DG Shipping. A dedicated online platform has also been launched for this purpose.⁹⁵

A shipbuilding contract providing for Indian law would be governed by the Indian Contract Act, 1872⁹⁶ and the Indian Sale of Goods Act, 1930.⁹⁷ The Indian Sale of Goods Act, 1930 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 similar.⁹⁸

The shipbuilding industry is subject to goods and service tax (GST), which subsumes the earlier levy of value added tax (VAT), central sales tax (CST), excise duty, octroi and service tax, among other taxes. 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 is 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 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. The new regime provides for only four exceptions wherein the specific performance of a particular contract would not be directed by the courts, namely:

- a a case of 'substituted performance';
performance of a continuous duty that the courts cannot supervise;
- b a contract heavily dependent on the personal qualifications of the contracting parties; and
- c contract of a determinable nature.⁹⁹

Unlike under the old regime, it is now no longer impossible to obtain an order directing specific performance of a contract, for the non-performance of which compensation is an adequate relief. In fact, under the new regime, a court, even after granting specific performance, can additionally grant a certain amount of compensation.

Indian courts would not be able to pass an order of injunction if it would likely 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

94 Schedule II to the Guidelines for implementation of Shipbuilding Financial Assistance Policy (SBFAP), 2016.

95 The online platform in respect of shipbuilding is accessible at <https://www.shipbuilding.nic.in/> (last accessed on 8 April 2022).

96 The text of the Act can be accessed by clicking on the link <https://www.indiacode.nic.in/bitstream/123456789/2187/1/A1872-9.pdf> (last accessed on 8 April 2022).

97 The text of the Act can be accessed by clicking on the link <https://www.indiacode.nic.in/bitstream/123456789/2390/1/193003.pdf> (last accessed on 8 April 2022).

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

99 Section 14 of the Specific Relief Act, 1963 (as amended).

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).

iii Contracts of carriage

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

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 *Shipping Corporation of India Ltd v. Bharat Earth Movers Ltd*,¹⁰⁰ 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. In another case concerning the Indian COGSA, the Supreme Court clarified that for the Indian COGSA to become applicable, the port of loading has to be in India.¹⁰¹ The courts have also allowed carriers to take defences enumerated under Article IV of the Hague Rules (e.g., fire).¹⁰²

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,

100 (2008) 2 SCC 79.

101 *British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries and Ors* (1990) 3 SCC 481.

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

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.¹⁰³

Liens

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.¹⁰⁴ 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.¹⁰⁵ Notice of such a lien must be served upon the consignee and the concerned port authority before the discharge of the cargo from the vessel.

Other than the right of lien under the Major Port Trust Act, 1963 – now the Major Port Authorities Act, 2021 (addressed in detail below) – 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, 1924, but rather follows a colonial legislation – the Indian Bills of Lading Act, 1856. The Madras High Court in *MT Titan Vision v. 3F Industries Ltd*¹⁰⁶ and the Gujarat High Court in *MG Forest Pte Ltd v. MV Project Workship*,¹⁰⁷ 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.¹⁰⁸

In *British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries*,¹⁰⁹ 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 when the consignee or endorsee is unaware of those terms. The Bombay High Court, in

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

104 Section 29 of the Major Port Authorities Act, 2021.

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

106 (2014) 2 MLJ 154.

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

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

109 (1990) 3 SCC 48.

its judgment in *M/s Assobhai Bhanji and Sons v. Great Circle Shipping Pvt Ltd*,¹¹⁰ allowed a shipper's claim against a carrier for delivering cargo without production of the bill of lading even though the bill of lading had been made out 'to the order of a named consignee'.

v Interest

Indian courts have the power to pass judgments in foreign currency.¹¹¹ As a general rule, for commercial transactions, courts award interest at the rate at which monies are lent or advanced by nationalised banks.¹¹² 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 US dollars.¹¹³ However, the Supreme Court in *Vedanta Ltd v. Shenzhen Shandong Nuclear Power Construction Co Ltd*¹¹⁴ 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. Additionally, the Supreme Court in *Delhi Airport Metro Express v. Delhi Metro Rail Corporation*¹¹⁵ clarified that the discretion to grant interest is available to the arbitral tribunal only in the absence of any agreement to the contrary. However, the Calcutta High Court has ruled that the award of future or post-award interest is mandatory.¹¹⁶

In *Forysthe Trading Services Ltd v. MV Niizuru*,¹¹⁷ 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 has 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.¹¹⁸

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 (the 2015 Rules), 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

110 (2018) 2 AIR Bom R 252. However, this judgment is pending appeal.

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

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

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

114 (2018) SCCOnline 1922.

115 2022 SCC Online SC 549.

116 *Future Market Networks Limited v. Laxmi Pat Surana & Anr* (IA GA 1 of 2022, judgment dated 28 April 2022).

117 2004 (5) Bom CR 806. See footnote 59.

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

India' than to foreign-going vessels. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2017 (the 2017 Rules), 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.¹¹⁹ The Bombay High Court in another recent case has supported its previous decision and held that the inquiry would be restricted to the question as to whether the application satisfies the conditions set out in the Merchant Shipping Act, 1958 (Section 352 A).¹²⁰ These decisions are, therefore, likely to make India a favourable jurisdiction for constituting a single worldwide limitation fund, without any prior claim being initiated. However, Section 352 E of the MSA sets out the scope of application of Part XA of the Act, and states that if the vessel in relation to which the limitation of liability is sought to be invoked is flagged in a country that is not party to the LLMC Convention, the provisions of Part XA of the MSA will not apply and the LLMC Convention provisions will stand excluded. 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.¹²¹ Security in the form of cash or bank guarantee is permissible.

V REMEDIES

i Admiralty actions in India

Admiralty law in India has 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 as follows:

- a* the Bombay and Calcutta High Courts no longer exercise pan-India jurisdiction and each high court of a coastal state in India only has 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. However, the Court of Appeal of the High Court at Calcutta has upheld the observation of the

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

120 *Ms MV Nordlake GmbH v. Union of India and Ors*, Notice of Motion No. 41 of 2017 in Comm Admiralty Suit No.14 of 2014.

121 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.

Court of First Instance that if the vessel has dual registration- under the Inland Vessels Act, 1917 as well as the Merchant Shipping Act, 1958, the vessel would be amenable to arrest;¹²²

- c the Bombay High Court, while dealing with the application to vacate an order of arrest on the ground that the vessel was an inland vessel, clarified that even if the vessel is registered under the Inland Vessels Act, 1917, the applicability of the Admiralty Act cannot be discounted unless it can be shown that the vessel ordinarily plied only inland waters. The court also further held that matters of proving or disproving the nature of voyages conducted by the vessel would be a matter of trial and cannot be decided at the interim stage;¹²³
- d a claimant can arrest a vessel to enforce a judgment or order;
- e 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 give rise to a maritime lien;
- f express stipulations on the priority of claims or the hierarchy of various clusters 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;
- g an expansive definition of a ‘vessel’ that can be subject to an order of arrest;
- h a plaintiff may arrest a vessel for any defined ‘maritime claim’ as listed in the 1999 Arrest Convention;
- i 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;
- j 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*;
- k the appointment of nautical assessors to assist the admiralty court to deal with technical or nautical matters;
- l 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. However, this does not mean that the rates applicable to the dues after the sale to the new buyer may not attract rates prior to the sale;¹²⁴
- m a defined time period of one year after which maritime liens would expire, except for seafarers’ wages, which expire after two years;
- n 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;
- o express power to the Indian central government to publish rules under the Admiralty Act;
- p all pending applications in any admiralty court will be decided in accordance with the Admiralty Act;

122 *Jindal ITF Limited & Anr v. I-Marine Inftratech (India) Pvt Ltd* (APO 160 of 2020, GA 1 of 2020, AS 5 of 2020 before the Calcutta High Court.

123 *MV Lima V and Ors v. Coastal Marine Construction and Engineering Ltd*, Interim Application No. 105 of 2022 in Comm Admiralty Suit No. 82 of 2021.

124 *NKD Maritime Limited v. Board of Trustees of the Port of Mumbai and Ors*, 2022 SCC Online 1272.

- q the Admiralty Act is silent on whether property other than ships, such as bunkers, cargo and freight, is amenable to an order of arrest without an underlying cause of action being made out against a vessel;
- r the Bombay High Court in a recent judgment held that the vessel sought to be arrested needs to be a party to the suit as the jurisdiction arises by virtue of the vessel being in the jurisdiction of the court, and the court will not entertain the arrest of a vessel in an *in personam* proceeding, nor can the vessel be detained by way of an injunction to circumvent the provisions of the Admiralty Act;¹²⁵ and
- s the Bombay High Court, while dealing with an argument on whether the interest and costs associated with crew wages would have the same priority as the crew wages themselves, held that if a decree is for crew wages, it cannot be dismembered into distinct parts and, therefore, holds the same priority as that of the crew wages.¹²⁶

The high courts of Kerala, Madras (Tamil Nadu), Calcutta and Bombay have notified new Admiralty Rules through the respective state governments, governing admiralty actions in those courts. The Bombay High Court Admiralty Rules¹²⁷ permit the arrest of cargo in place of a ship, in a suit for salvage, if there is a claim against the cargo onboard the ship or onshore.

The Bombay High Court in the case of *Flag Mersinidi*¹²⁸ rejected the notion that a bunker supply contract could be given the recognition of a maritime lien, if the governing law of 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 necessities supplied to a vessel would constitute a maritime claim against a vessel and not a maritime lien.¹²⁹ 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 Moschanty*¹³⁰, based on which a claimant can sustain an order of arrest over a vessel merely by making out a reasonably ‘best arguable’ case.¹³¹ 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.¹³²

125 *Angsley Investments Limited v. Jupiter Denizcilik Tasimacilik Mumessillik*, San Appeal No. 902 of 2006 in Admiralty Suit No. 15 of 2001.

126 *Slovesnou Vadym & Ors v. OSV Beas Dolphin Interim Application*, (L) No. 9499 of 2020 in Comm Admiralty Suit 30 of 2022.

127 Chapter LX of the Bombay High Court Original Side Rules, 1980, Rules for Regulating the Procedure and Practice in Cases Brought Before the High Court Under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

128 *MV Flag Mersinidi v. Southport Spirit SA*, Notice of Motion No. 763 of 2013 in Admiralty Suit No. 8 of 2013.

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

130 [1971] 1 Lloyd’s Rep 37.

131 *Videsh Sanchar Nigam Limited v. MV ‘Kapitan Kud’* (1996) 7 SCC 127.

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

A party seeking release of the vessel is required to furnish security by way of either a cash deposit or a bank guarantee.¹³³ Indian courts do not accept club letters of undertaking (LOUs) as security as a right, unless consented to by the plaintiff.¹³⁴

In India, every company is a separate and independent legal entity; ownership of the assets vests with the company and not in its shareholders.¹³⁵ Prima facie, the registered owner of the vessel is deemed the beneficial owner, save in very exceptional cases.¹³⁶ Only in exceptional circumstances in which 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, malice or public policy.¹³⁷

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 relating to another vessel.¹³⁸ 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.¹³⁹

Various 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 on a prima facie basis.¹⁴⁰ The Appeal Court of the Bombay High Court has held¹⁴¹ 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.
- b Although the earlier position was that a vessel could not be arrested for security pending arbitration in the admiralty jurisdiction of the court,¹⁴² and the Admiralty Act does not expressly contain any provisions allowing a party to arrest a vessel for simpliciter security in aid of judicial and arbitral proceedings taking place outside India, a single judge of the Bombay High Court has held that it was permissible for a party to obtain

133 Security can be deposited in US dollars in the Bombay High Court, Gujarat High Court and the High Court of Andhra Pradesh at Amravati.

134 *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.

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

136 *Universal Marine & Anr v. MT 'Hartati'*, Notice of Motion No. 1080 of 2013 in Admiralty Suit No. 77 of 2012 dated 11 February 2014.

137 Order VI Rule 4 of the Code of Civil Procedure, 1908.

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

139 *Siem Offshore Redri AS v. Altus Uber*, 2018 (6) ABR 361. This judgment was upheld by the Court of Appeal in *Altus Uber v. Siem Offshore Redri AS* (2019) 5 Bom CR 256. This is now under appeal before the Supreme Court of India on, inter alia, the ground that it is contrary to the findings of the Supreme Court in *Geowave Commander*.

140 *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.

141 *Socar Turkey Petrol Enerji v. MV Amoy Fortune*, 2018 SCC Online Bom 1999.

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

- 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, provided that the suit is filed for a decree and determination on the merits of the underlying maritime claim. According to the Bombay High Court, a party has a statutory right to initiate *in rem* proceedings under the Admiralty Act, which cannot be denied if a party otherwise had a valid maritime claim.¹⁴³
- 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.¹⁴⁴
- d* The arrest of bunkers onboard a vessel is not subject to the admiralty jurisdiction of the courts in India.¹⁴⁵
- e* Freight alone cannot be arrested.¹⁴⁶
- 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,¹⁴⁷ albeit certain other high courts have allowed the same on occasions prior to the enactment of the Admiralty Act. The Bombay High Court in its admiralty rules, however, provides for the arrest of cargo for suits for salvage or claims for salvage of cargo.¹⁴⁸
- 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 1996.¹⁴⁹
- 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.¹⁵⁰
- 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 based on fraud must plead and *prima facie* establish that fraud has been committed.¹⁵¹
- 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 negligentia* does not apply.¹⁵²

143 Supra 116.

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

145 *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.

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

147 *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.

148 Bombay High Court: Rules for Regulating the Procedure and Practice in Cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, Rule 1103, it shall be open to the claimant to institute a suit *in rem* against the cargo and the provisions of the rules shall apply *mutatis mutandis* to such a suit as if the property to be arrested is the cargo in place of the ship.

149 Supra 101.

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

151 Supra 112.

152 *Navbharat International Ltd v. Cargo on board MV 'Amitees'*, 2014 (5) BomCR 312.

- 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.¹⁵³
- 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 are not permissible for a single claim even when the sale proceeds are sufficient to meet the claim of the plaintiff though these sale proceeds may be insufficient to meet the claims of all creditors asserting a claim against the vessel (i.e., even if the *pari passu* distribution of the sale proceeds would be insufficient to fully satisfy the claim of the plaintiff, arrest of multiple vessels to satisfy the plaintiff's claim is impermissible).¹⁵⁴
- m* 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.¹⁵⁵
- n* 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'.¹⁵⁶
- o* 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.¹⁵⁷
- p* 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.¹⁵⁸

The Bombay High Court in a recent judgment has given precedence to the construction and nature of the charterparty as opposed to its nomenclature whilst deciding whether the vessel can be arrested for a claim against a demise charterer.¹⁵⁹

The Court of Appeal of the Bombay High Court¹⁶⁰ has held that the crew wages arising after the arrest of a vessel are to be treated as sheriff expenses and hence to be paid out of the sale proceeds in priority. The judgment came to be passed in appeals preferred by crew members engaged on board the vessel, MT GP Asphalt I and by The Swedish Club (i.e., the P&I Club for that vessel). The P&I Club had approached the Single Judge of the Bombay High Court seeking permission to pay the pending wages of the crew of that vessel and that

153 *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*.

154 *Praxis Energy Agents SA v. MT Prathibha Neera*, 2018 (4) ABR 148.

155 *State of Goa v. Sale Proceeds of vessel MT Pratibha Bheema and Ors*, AS No. 72 of 2014 (decided on 7 June 2018).

156 *MV Kiveli v. Monjasa DMCC and Ors*, 2018 (5) ALT 73.

157 *MV 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 & No. 1770 of 2015 in AS No. 66 of 2015 (decided on 17 September 2018). This judgment was under appeal to a higher bench of the Bombay High Court, but the Appeal has now been withdrawn pursuant to a settlement between parties.

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

159 *Continental Radiance Offshore Pvt Ltd v. MV Lewek Altair*, Review Petition (L) No. 9091 of 2022.

160 *The Swedish Club v. V8 Pool Inc and Other*, Commercial Appeal No. 108 of 2021 (decided on 23 March 2022).

these were to be treated as sheriff expenses. The Single Judge declined the request of the P&I Club and held that it was a duty of the P&I Club to reimburse the pending wages of the crew and hence no permission of court was required to be sought.

This order of the Single Judge was on appeal and the Court of Appeal overturned the order and, *inter alia*, held:

- a* crew wages accrued post arrest shall be treated as sheriff expenses or marshall expenses, without the trouble of filing a suit, proving their claims, getting a decree, determining priorities and seeking payment out. Any doubt or objection on the quantum or validity of the claims can be verified by the sheriff or commissioner for taking accounts;
- b* payments made by the P&I Club towards crew wages accrued post arrest shall also be treated as sheriff expenses; and
- c* payments made by the P&I Club towards crew wages accrued before arrest can be claimed as maritime lien upon assignment by the crew, subject to prior leave of the court. The Bombay High Court in a more recent judgment has clarified that in the absence of leave of the court and expenses being mentioned in the sheriff's report, it would be at the discretion of the court to consider the sheriff's expenses.¹⁶¹

The Supreme Court of India, while dealing with an appeal arising out of an order passed in a commercial admiralty suit, harmoniously interpreted the provisions of the Admiralty Act and the Commercial Courts Act and held that only orders passed by a court under the Admiralty Act while exercising an *in rem* jurisdiction would be appealable under the provisions of the Admiralty Act. The appeal provision in the Admiralty Act cannot be taken as a blanket appeal provision from every order passed by a court while exercising admiralty jurisdiction, and the provisions of the Commercial Courts Act would continue to apply to the general conduct of the proceedings, including orders that can be appealed.¹⁶²

ii The 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). The Insolvency Code is dynamic in nature and has undergone a number of amendments in order to cater to the needs arising out of different situations. 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 330 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.

161 *Irwin Edmund Sequeira & Ors v. MV Karnika Interim Application* (L) No. 2893 of 2021 in Comm Admiralty Suit (L) No. 5166 of 2020.

162 *Owners and Parties Interested in the Vessel MV Polaris Galaxy v. Banque Cantonale De Geneve*, 2022 SCC OnLine SC 1293.

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 disputes should not be merely illusory in nature. However, the Supreme Court has clarified that requirement is that of a ‘pre-existing’ dispute (i.e., a dispute that existed before the date of receipt of the demand notice or invoice as the case may be).¹⁶³ 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 was amended to allow the admitted applications for the institution of insolvency resolution process with the approval of a 90 per cent vote of the committee consisting of financial creditors of the debtor.¹⁶⁴

The Insolvency Code only envisages two situations after the commencement of the corporate insolvency resolution process:

- a to formulate a plan in order to continue the existence of the corporate debtor as a going concern; or
- b to commence the liquidation proceedings.

Owing to the situation arising out of the covid-19 pandemic, the Insolvency Code was amended to forever exclude actions for initiation of insolvency process for defaults arising after 25 March 2020 for a period of six months or any such time that the central government prescribed,¹⁶⁵ the last of these extensions expired on 31 March 2021. This amendment was also upheld by the Supreme Court,¹⁶⁶ although the Court clarified that the embargo would not in any manner extinguish the debt owed or the right of the creditor to recover the same.

Furthermore, the threshold for default was increased from 1 million rupees to 10 million rupees for initiating an insolvency action. The Supreme Court in *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) & Ors*¹⁶⁷ has held that a dispute would not remain arbitrable after an application for insolvency resolution has been admitted as *in rem* proceedings are not arbitrable under Indian law. In addition, the National Company Law Tribunal, Mumbai has admitted an application for initiation of insolvency process based on a foreign award from a reciprocating country,¹⁶⁸ although the position in the erstwhile regime was that such an action was not permissible.¹⁶⁹ The Delhi High Court has also observed that mere pendency of a petition for invocation of insolvency proceedings would not per se make a dispute non-arbitrable.¹⁷⁰

163 *Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited*, (2019) 12 SCC 697.

164 Section 12A of the Insolvency and Bankruptcy Code, 2016.

165 Ins by Act No. 17 of 2020, Section 2 (w.e.f. 5 June 2020).

166 *Ramesh Kymal v. Siemens Gamesa Renewable Power (P) Ltd* (2021) 3 SCC 224.

167 2021 SCC Online SC 268.

168 *Agrocorp International Pvt Ltd v. National Steel and Agro Industries Ltd*, CP (IB) No. 798/MB/C-IV/2019 dated 9 June 2020.

169 *Marina World Shipping Corporation Ltd v. Jindal Exports & Imports Private Ltd*, 2007 (3) ARBLR 46 Delhi).

170 *Brilltech Engineers Pvt Ltd v. Shapoorji Pallonji and Co Pvt Ltd* (Arbitration Petition No. 790 of 2022, judgment dated 15 December 2022).

iii Insolvency versus Admiralty regime

In a recent case,¹⁷¹ the Bombay High Court considered the interplay and overlap of the provisions of the Admiralty Act with those of the Insolvency Code and the Companies Act. The Court, *inter alia*, held:

- a as regards the Insolvency Code, an action *in rem* may be filed and the ship arrested (1) before the moratorium under Section 14 of the Insolvency Code comes into force; (2) during the moratorium period; or (3) even after the corporate debtor is ordered into liquidation. However, the Court clarified that while an action *in rem* may proceed even after declaration of the moratorium, the suit would thereafter not be allowed to proceed after such an arrest so as to not impede the insolvency resolution process. In the event that an order for liquidation is passed against a corporate debtor under the Insolvency Code, the same would not be a bar to continue with an action *in rem*. The liquidator may then defend the proceedings. Thus, the Court held that the provisions of the Insolvency Code have to be read harmoniously with the provisions of the Admiralty Act;
- b the Admiralty Act (being a special act) would prevail over the provisions of the Companies Act, 1956 (Companies Act) (being a general legislation), and no leave would be required under Section 446 (1) of the Companies Act for (1) commencing a suit under the Admiralty Act; or (2) proceeding with a pending suit against the company under the Admiralty Act, when a winding-up order has been passed or the official liquidator has been appointed as provisional liquidator. However, a notice would have to be given to the official liquidator prior to the sale of the vessel in an action *in rem* under the Admiralty Act, unless the official liquidator has already entered appearance. The Court of Appeal of the Madras High Court has held a similar view¹⁷² and further expanded on this proposition by holding that admiralty claims deserve to be adjudicated without any intervention by the Official Liquidator;
- c an action *in rem* against a vessel will proceed in accordance with the Admiralty Act (being the applicable law), and the priorities for payment out of the sale proceeds of the vessel will also be determined in accordance with the Admiralty Act and not as per the priorities set out in the Insolvency Code. Similarly, in the matter of priorities for payment out, the Admiralty Act would prevail over the priority provisions of the Companies Act; and
- d the moment a ship is arrested, the plaintiff becomes a secured creditor qua the vessel and not against its owner or the assets of the owners. However, on the deposit of the security for the release of the vessel by the owners (i.e., when the action turns into an *in personam* action against the owners), the provisions of the Insolvency Code would apply in relation as to how the matter proceeds against the owners.

171 *Raj Shipping Agencies v. Barge Madhwa and Anr*, 2020 SCC OnLine Bom 651. This judgment of the Bombay High Court is presently under appeal to the Supreme Court of India where the Court issued Notice on 14 September 2020 (See: *Sudip Bhattacharya and Anr v. Barge Madhwa*, SLP (C) No. 9384/2020 and SLP (C) No. 9388/2020).

172 *Pratibha Shipping Company Ltd v. Praxis Energy Agents SA* (Unreported) Dt. 9.8.2019 in OSA Nos. 20, 317 to 349, 363 & 264 of 2018 & W.A. Nos. 738 to 751 of 2013.

The above has been recently relied upon by the Bombay High Court in the case of *Angre Port Private Ltd v. TAG 15 (IMO 9705550) & Anr.*¹⁷³

VI REGULATION

India is a party to the Indian Ocean Memorandum of Understanding (MOU) on Port State Control, 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

India-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 India-flagged vessels can be granted only to a constructed vessel and not to an 'under construction' vessel and the 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.¹⁷⁴ 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.

The Customs Act, 1962 imposes various obligations upon owners of vessels calling at ports in India, such as the Import General Manifest. The Central Board of Indirect Taxes and Customs has notified the Sea Cargo Manifest and Transshipment Regulations, 2018 (the SCMT Regulations).¹⁷⁵ The SCMT Regulations¹⁷⁶ make it compulsory for shipping lines, exporters and importers to follow set timelines for submitting cargo manifests and vessel documentation and declarations for imports arriving in India and for exports out of India, and for transshipment via Indian ports. The SCMT Regulations are aimed at implementing entirely new procedures to which vessels either arriving into or departing from India must adhere, and is a push towards a consolidated, efficient and more transparent platform to ease the procedural formalities of the entire end-to-end logistic chain. Under these regulations,

173 Commercial Admiralty Suit(L) No. of 2020 (decided on 3 January 2022).

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

175 Notification No. 38 /2018-Customs (NT) dated 11 May 2018.

176 The SCMT Regulations have been enacted in supersession of the Import Manifest (Vessels) Regulations, 1971, Export Manifest (Vessels) Regulations, 1976 and Transportation of Goods (Through Foreign Territory) Regulations, 1965.

advance intimation must be given of vessel and cargo arrivals and departures, all commodities and cargo will be identified by unique identifiers, and standard format of declarations are provided.¹⁷⁷

ii Age norms for Indian tonnage and foreign flag vessels requiring a Section 406/407 licence

The DG Shipping issued Order No. 6 of 2023 setting out the age norms and other qualitative parameters for the registration and operation of vessels under the Indian flag and that foreign flag vessels are required to apply for a licence under Sections 406 and 407 of the Merchant Shipping Act, 1958. The DG Shipping has, as part of its plan to improve tonnage safety and to reduce the age of Indian tonnage, has issued this Order and made it applicable to all Indian and foreign flag vessels required to be licensed under Sections 406 and 407 of the Merchant Shipping Act, 1958 (and it is also applicable to vessels exempt from applying for these licences under the law). While the order sets out the specifics of the requirements in the annexure thereto, broadly, the Order effectively bans the acquisition of vessels (as specified) older than 20 years and withdraws the general trading licence for plying vessels (as specified) older than 25 years. This Order, however, has not been made applicable to passenger vessels, floating storage regasification units, floating production storage and offloading units, and drilling and production units certified under the Mobile Offshore Drilling Unit or Special Purpose Ships Code.

iii 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 the requirements of the International Oil Pollution Compensation Fund, 1992 (the IOPC Fund). When 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.¹⁷⁸

India is the 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.

Although India is a party to the aforementioned conventions, in a first of its kind case, the National Green Tribunal, under the powers given to it by the Environment (Protection) Act 1986, directed the cargo interests to deposit 1 billion rupees following the oil spill caused by the MV Rak Carrier.¹⁷⁹

177 Notification No. 44/2021-Customs (NT), dated 15 April 2021, has deferred the date of implementation of the SCMT Regulations to 31 May 2021.

178 Section 352I(4) of the MSA.

179 *Samir Mehta v. Union of India & Ors*, 2017 SCC OnLine NGT 1314) This is presently under appeal before the Supreme Court of India.

iv Collisions, salvage and wrecks

The COLREGs have been incorporated into Indian law under the Merchant Shipping (Prevention of Collisions at Sea) Regulations 1975. Although, 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 justice and equity.¹⁸⁰ 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 International Convention on the Removal of Wrecks 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 *Oil & Natural Gas Corporation Ltd v. Osprey Underwriting Agencies Ltd*,¹⁸¹ 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 *Commander KP Shashidharan v. Union of India*,¹⁸² allowed an officer of the Indian Coast Guard to claim salvage services even though he had a preexisting duty to protect life and property at sea.

v 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. The DG Shipping has further issued a notice to ensure that Indian seafarers on India-flagged vessels have clear and unambiguous terms in their employment contract in terms of the provisions of the MLC as amended.¹⁸³

The Merchant Shipping (Recruitment and Placement of Seafarers) Rules 2016¹⁸⁴ have overhauled the earlier regime set up under the 2005 Rules, and have 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

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

181 1998 (2) BOMLR 179.

182 AIR 2002 Ker 388.

183 Merchant Shipping Notice, 7 of 2020 dated 24 April 2020.

184 GSR 169(E) dated 15 February 2016.

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.¹⁸⁵ 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 workers or employees to claim compensation for death and personal injury of seafarers. However, the ECA does not apply to Indian seafarers working aboard foreign-flagged vessels. Under Indian law, foreign seafarers cannot be employed on India-flagged vessels unless they obtain prior permission from the DG Shipping.

vi The Major Port Authorities Act

With the exception of 12 designated 'major ports', all ports in India 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. In a number of recent 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 Major Port Authorities Act, 2021 (the Ports Act) repeals The Major Port Trusts Act, 1963. The Ports Act brings about a sea change in the functioning of the 12 major ports in India by setting up the Board of Major Port Authority and giving it autonomy to conduct its business and promote the development of the major ports, enter into public-private partnership (PPP) and lease out port property and terminals for third parties to develop and run. Pursuant to the Ports Act, the government shall constitute an adjudicatory board to exercise jurisdiction, power and authority as conferred under the Ports Act, which, inter alia, include the functions envisaged to be carried out by the Tariff Authority for the Major Ports (TAMP), adjudicate disputes relating to rights and obligations of major ports and PPP, look into complaints received from port users against services rendered by the major ports and review such PPP projects referred by the government. However, the adjudicatory board is yet to be constituted and, until then, the TAMP shall continue to discharge the functions of the adjudicatory board under the Ports Act. The Ports Act also retains the right of the master or the shipowner to exercise statutory lien on the cargo for freight and other charges payable to the shipowner. With the notification of the Major Port Adjudicatory Board Rules, 2023 one would have expected some clarity on the jurisdiction of the Board to adjudicate disputes against major ports. However, a reading of the Major Port Authorities Act and the rules thereto seems to suggest the ouster of the jurisdiction of a civil court for any proceeding to be moved against major ports.

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

The Supreme Court of India in a recent judgment held¹⁸⁶ that major ports cannot fasten the liability for payment of port storage or demurrage charges for uncleared cargo or containers lying in port premises upon the shipowners, vessel agents or steamer agents after the port has taken charge of the goods and given a receipt for the same. Unfortunately, there is no regulatory authority for ports other than the 12 major ports and this has resulted in a number of litigations relating to the arbitrary conduct of private terminal operators levying tariffs on ships calling at these ports.

vii The Recycling of Ships Act

India as a party to the International Maritime Organization has adopted the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (the Hong Kong Convention) and, in an effort to bring the Indian regulations in line with the Hong Kong Convention, has enacted the Recycling of Ships Act, 2019 (the Ship Recycling Act).¹⁸⁷ The Ship Recycling Act seeks to establish an authority that will maintain and record the business of ship recycling conducted in India, including the registration of new ships built in India (for their hazardous material), surveys conducted prior to the breaking of the ship or vessel and the registration of ship recycling facilities. The Ship Recycling Act also prescribes the penalty for offences as imprisonment or fine, or both.

viii The Cabotage Regime

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 and instead 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 that 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 with 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).

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 export-import containers intended for transshipment are loaded onboard a vessel, no licence will be required under Section 407 of the MSA for that vessel to undertake the coastal voyage from one Indian port to another. This regime remains in force at the time of writing and seeks to reduce India’s dependence on foreign transshipment terminals in ports such as Colombo, Singapore, Port Klang and Jebel Ali, which currently account for about one-third of India’s transshipment cargo.

186 *The Chairman, Board of Trustees, Cochin v. M/s Arebee Star Maritime Agencies Private Ltd & Ors*, 2020 SCC OnLine SC 622.

187 Recycling of Ships Act, 2019 gazetted on 16 December 2019.

In an attempt to bolster the 'Make in India' policy of the Indian government and add stimulus to the shipbuilding industry in India, the government issued a circular published on 14 January 2021 (effective from 16 January 2021) and a further clarificatory circular dated 11 February 2021, which has completely revamped the cabotage regime in India (the New Right of First Refusal (RoFR) Regime).¹⁸⁸

Under the New RoFR Regime, the exercise of the RoFR will be available in the following hierarchy:

- a first priority: India-built, India-flagged and India-owned;
- b second priority: foreign-built, India-flagged and India-owned; and
- c third priority: India-built, foreign-flagged but foreign-owned.

All India-flagged vessels registered in India up until midnight of 15 January 2021 (irrespective of whether they are India- or foreign-built) shall be deemed to be India-built vessels and will fall within first priority. Further foreign-flagged vessels permitted to be chartered by an Indian entity by the DG Shipping under Section 406 of the MSA, as a temporary substitute for a vessel being built in an Indian shipyard for registration under the India flag, shall be deemed to be an India-built vessel and will fall within first priority, provided:

- a 25 per cent of the contract money has been paid to an Indian shipyard; and
- b 50 per cent of the hull fabrication has been completed, as may be certified by a recognised organisation.

However, the duration of the licence provided by the DG Shipping to such chartered vessels will be limited to the period of building the ship as per the shipbuilding contract.

ix Satellite devices, ammunition and drones 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.¹⁸⁹ 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 in which 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 and instances in which vessels have been detained for their failure to provide proper declarations.

188 The New RoFR Regime supersedes a notification dated 13 February 2019 and a consequent circular dated 22 March 2019 (together the Proposed RoFR Regime) where an India-built foreign-flagged vessel was given preference over a foreign-built India-flagged vessel. The Delhi High Court stayed the operation of the Proposed RoFR Regime by an interim order dated 28 March 2019 in *The Great Eastern Shipping Company Limited v. Union of India and the Proposed RoFR Regime* was thereafter withdrawn *suo moto* by the government vide the notification dated 20 July 2020 issued by the Ministry of Shipping and Vide DGS Circular 31 of 2020 dated 7 August 2020.

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

The carriage of arms and ammunition has posed additional complications for vessels calling into an Indian port following the incident with the MV Seaman Guard Ohio, a foreign-flagged floating armoury, which had been arrested in India for entering Indian waters. The Madurai Bench of the Madras High Court¹⁹⁰ exonerated 35 foreign seafarers on board.

A foreign crew member was arrested for the use of a drone in a restricted area within port limits of India and was charged under Section 10 (2) of the Aircraft Act, 1934 which provides for a maximum punishment of two years imprisonment and fine up to 1 million rupees. Subsequently, the Indian Ministry of Civil Aviation has introduced the new Unmanned Aircraft System Rules, 2021¹⁹¹ and has designated areas prohibiting the use of drones, including notified port limits identified by the central government beyond the territorial waters of India. The punishment under the new Rules for contravention has been reduced to a fine of 50,000 rupees.

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, India has recently taken proactive steps to improve its maritime presence in the world with a focus on updating legislation such as the Major Port Authorities Act, the Recycling of Ships Act, the Merchant Shipping Bill, 2016, the Code on Social Security, 2020 and the Marine Aids to Navigation Act, 2021. The thrust towards bringing the Indian legal and regulatory environment up to speed with legislative developments in other countries is a welcome development. It is also heartening to note that India has jumped 14 places, from its ranking last year in the 'Ease of Doing Business' rankings published by the World Bank in Doing Business 2020, to 63 and has improved its rank by 79 positions in the past five years. Notwithstanding the foregoing, it remains to be seen how stakeholders react to the entire gamut of legislation affecting the shipping industry.

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

191 Unmanned Aircraft System Rules, 2021, Ministry of Civil Aviation Notification dated 12 March 2021, GSR 174(E).