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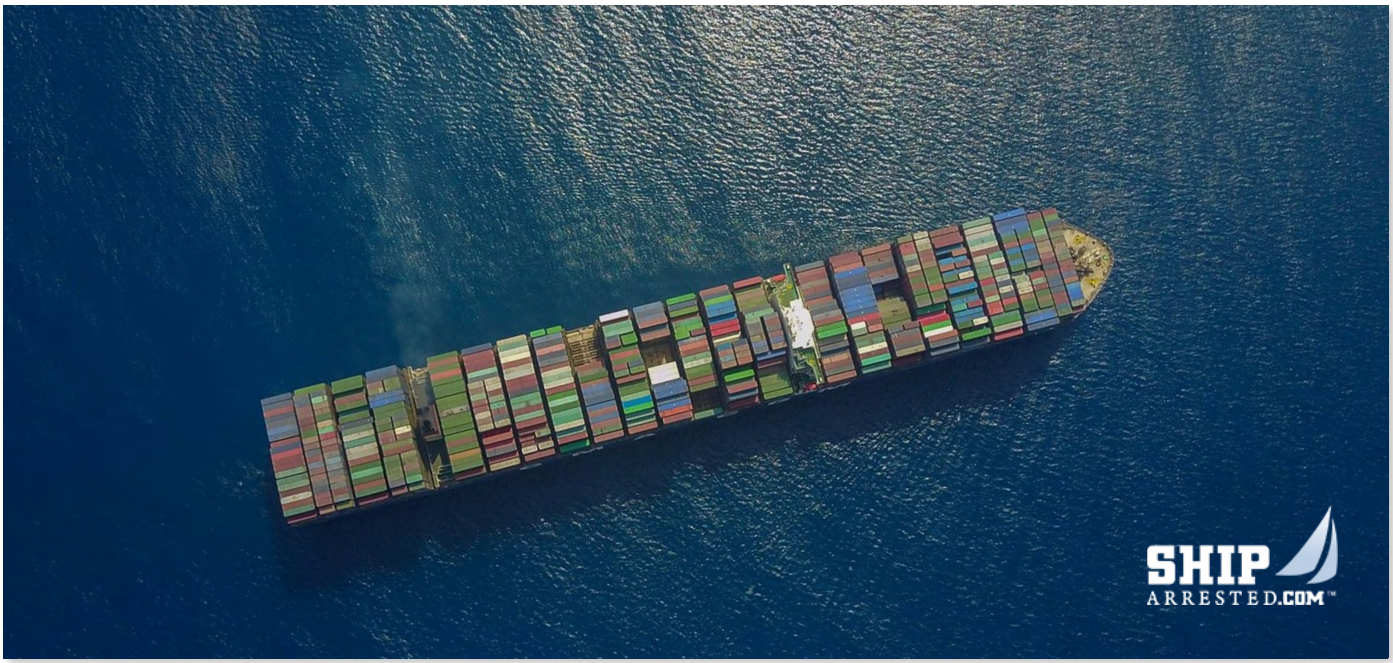

In this issue of *The Arrest News,* members examine the Indian Admiralty Act of 2017 and its varied interpretations; compliance issues faced by the maritime industry; and the imminent impact of the IMO 2020 sulphur cap regulations

Invoking Admiralty Jurisdiciton for Security for Claim in Arbitration by Gautam Bhatikar, Legasis Partners Advocates & Solicitors (India)

Independent India saw its first codified legislation dealing with Admiralty law on 1st April 2018 with the enforcement of Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("Act"). The said Act was enacted in an attempt to modernize Indian admiralty law and align it with the Arrest Conventions. The Act is well intentioned but suffers from errors and omissions. Indian law makers also set out certain provisions in the Act that were apart from the provisions that were set out in the Arrest Conventions. The deviation from the conventions have given light to host of different interpretations given by the different High Courts in India that exercise Admiralty Jurisdiction. One such recent Judgment that has re-shaped the Admiralty law in India is discussed hereunder.

A Single Judge of the Bombay High Court in a recent judgement viz, *Siem Offshore Redri v. Altus Uber* (decided on 25th October 2018) held that a claimant could arrest a ship in India as security for its claim in arbitration without having to submit to a merit hearing in India. The court upheld the arrest of a demise-chartered ship for a claim against another ship that was bare boat chartered by the demise charterer.

The Dispute:

The Claimant i.e. *Siem Offshore Redri* entered into a bareboat charter party with Marine Engineering Diving Services ("MEDS/ Defendant") for a vessel called *Siem Marlin*. MEDS allegedly breached the demise charter. The Claimant commenced arbitration in London for recovery of its claim against MEDS with respect to the bareboat charter party. The Claimant's claim arose out of *inter alia* unpaid charter hire under the charter party. Pending determination of the arbitral proceedings in

London, the claimant sought and obtained an *ex-parte* arrest of a vessel *Altus Uber* in India on the ground that MEDS (Defendant) was either the owner or demise charterer of both vessels.

The Defendant entered appearance under protest in the Bombay High Court and contended that the Act was very clear from its provisions that the arrest of a vessel in aid of obtaining security for an arbitration was impermissible i.e. that security pending arbitration was by itself not a maritime claim under the Act. The Defendant also contended that Claimant cannot secure its claim in Arbitration by filing an Admiralty Suit and obtaining an order of arrest as the Arbitration proceedings have already commenced in London and therefore the Claimant must take necessary steps for securing the claim under the English Arbitration Act and therefore filed a vacating application before the Ld. Single Judge of the Bombay High Court.

Contentions of Parties:

The primary argument of the Defendant was that the claimant filed the suit only for obtaining security until the enforcement of the arbitral award and the defendant relied upon the full bench judgment of the Apex Court in Bharat Aluminium Co v Kaiser Technical Services Inc (BALCO) and upon Rushab Ship International LLC v Bunkers on board Ship MV Eagle and Freight.it was the defendants contention that the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 (the Admiralty Act) does not provide for security in foreign arbitrations. Although Art 7 of the Arrest Convention 1999 permits such a claim, the Admiralty Act does not include a provision similar to Art 7.

The Claimant argued that, as the arbitration was an action *in personam* against the Defendants and the admiralty suit was an action in rem, both actions were maintainable and that art 7 of the Arrest Convention 1999 provides for a situation where arbitration proceedings have commenced and an action in rem is permitted to obtain security pending arbitration. Although the Admiralty Act does not have a similar provision, it nevertheless does not bar the provisions of the Arrest Convention 1999 being applied. The Claimant placed reliance upon JS Ocean Liner LLC v MV Golden Progress (Golden Progress) the full bench of the High Court held that, where there is no explicit legislation providing that an action in rem may be used to obtain and retain security, even though the merits of the dispute are to be determined in arbitration proceedings, art 7 of the Arrest Convention 1999 may be applied to advance the cause of justice.

Courts' decision:

The question before the Ld. Single Judge of the Bombay High Court was whether the court can order arrest of a vessel to secure a maritime claim where the disputes have been referred to arbitration. The Ld. Single Judge held that such an *in rem* action for a claimant to obtain a security arrest in India is permissible in law and would not amount to abuse of process. And that whilst the Act was silent and did not expressly make provision for this, it did not prohibit an order for security pending arbitration.

The Court held that, *in personam* and *in rem* proceedings, can be pursued parallelly and not alternatively. An *in personam* proceeding does not bar initiation of an action *in rem*. The Court ruled that a claimant had a statutory right to initiate *in rem* proceedings under the Act that could not be denied to a claimant who otherwise had a valid maritime claim.

The court relying on the full bench in Golden Progress, devised a procedure in consistence with Article VII of the 1999 Arrest Convention and stated that,

> "*Following the arrest of a vessel in an action in rem, in the event the disputes are to be arbitrated (whether the arbitration has commenced or is yet to be commenced), once the retention of security method as devised by the Full Bench is adopted, the suit is required to be stayed and the security retained for the benefit of the arbitration and the final award that may be passed. The successful Claimant who obtains an award would then have to satisfy the High Court that the award is enforceable under the provisions of the Arbitration Act, 1996. Once the award is declared enforceable then the security retained by the High Court pursuant to the action in rem will be made*

available to the Claimant in satisfaction of the judgment of the High Court declaring the award enforceable as a decree of the High Court."

Under Article 3 (2) of the Arrest Convention, a ship (other than the demise-chartered ship) that is owned by a demise charterer can be arrested for claims against the demise charterer. But any other ship that is demise chartered by the demise charterer, is immune from arrest. The philosophy of this provision is to ensure that only the asset of the debtor can be seized and not that of a third party.

With regards to the arrest of a non-offending vessel on demise charter. The Ld. Single Judge while construing section 5 of the Act (which departs slightly in wording from Article 3 of the Arrest Convention), gave a very wide ambit to its interpretation and upheld the arrest of Altus Uber which was another vessel demise chartered by MEDS. It is relevant to note that the interpretation of section 5 of the Act proceeds on a demurrer that the Vessel Altus Uber was not owned by MEDS but was bareboat chartered to it.

The said Judgment of the Ld. Single Judge of the Bombay High Court exposes vessel owner to arrests of their vessels for claims against their bareboat charters irrespective of whether their vessel was the offending vessel or not.

The order of the Ld. Single Judge was challenged before the Division bench of the Bombay High Court and the Division bench has recently upheld the order passed by the Ld. Single Judge.

Conclusion:

To summarise, the Bombay High Court ruling presents interesting opportunities for the claimant to secure its claim whilst opting for Arbitration in a foreign land.

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Compliance Issues Faced by the Maritime Industry by Nicola Loh, Joseph Tan Jude Benny

This article is for general information only and is it not intended to constitute legal advice. JTJB has made all reasonable efforts to ensure the information provided is accurate at the time of publication.

Shipping companies operate in a business environment where deals are frequently conducted with foreign counterparties. More often than not, companies also have little information on their business counterparts, not to mention who the beneficial owners of their counterparties are. Further, the customary practice is such that local agents are engaged to handle aspects of the business and these local agents may not have adequate knowledge of the applicable regulatory obligations. All these externalities make companies in the maritime industry extremely vulnerable and exposed to regulatory risks.

The identity of the ultimate beneficial owner ("UBO") of the ship-owning entity is often shielded behind multiple layers of corporate structures. It is also common for one-ship shell companies to be incorporated for the purposes of masking the individual behind the entity who may be involved in money laundering or terrorist financing. It is crucial that one carries out the requisite due diligence not only on the UBO of the ship-owning company but the key individuals and companies involved in the transaction. Based on the information, one will be able to ascertain whether there are any red flags on trade-based money laundering and whether the vessel had been or is listed on a sanctions list.

Some of the prevalent types of corruption risks in the maritime industry include those that occur during port of calls (e.g. where bribes are given to enable a vessel with high-risk defects to enter), customs clearance (e.g. request for facilitation payments by customs officials in order to obtain clearance) and procurement of goods and services (e.g. bribery to secure contracts).

Each time a ship calls at a different port, a different set of regulations and local practice applies. The vessel has to go through customs clearance, immigration and inspections. The Master and crew is faced with potential

requests for bribes at each hurdle. A refusal to accede to the requests for bribes would usually result in losses and delays as the vessel is made to incur demurrage or is unable to arrive in time at the designated port for her next fixture. Apart from financial losses, there may even be potential threats to the safety of the Master and the crew. In this regard, the main international anti-bribery laws generally prohibit giving a bribe unless there is an imminent threat of physical harm to the persons involved. When weighing the costs of offering or accepting a bribe, the company should bear in mind the irreparable reputational damage that the company may suffer and the prosecutorial risks that they are choosing to undertake by participating in the corrupt act.

As counterparties are often from different jurisdictions and deal with each other through third party agents, there could be differences in the interpretation of the applicable laws and local practices. For instance, what constitutes a 'bribe' in one country may be an accepted form of payment in another. Many may also not be aware that legislations such as the UK Bribery Act and the Foreign Corrupt Practices Act have extra-territorial application.

At the industry level, there are several initiatives to eliminate corruption by the industry in recent years. One example is the Maritime Anti-Corruption Network which aims to eliminate all forms of maritime corruption and to create a culture of integrity within the maritime community. BIMCO has also come up with an anti-corruption clause which provides companies with options to react to demands for bribes, entitling the parties to terminate the contact should the other insists on the unlawful conduct.

With the regulators stepping up enforcement measures in recent years, it is crucial that all companies adopt a robust compliance programme with standardised controls. Whilst the policies and procedures are essential features of a compliance programme, they are only as effective as how the members of the company choose to implement them and whether there is tone from the top by the management that compliance is regarded seriously in the company. Apart from having effective policies and internal controls in place, it is also important that the employees receive training. Everyone in the company ought to know what to do when faced with a bribe, what red flags to look out for when a lucrative business opportunity surfaces, how to escalate a matter when the situation arises and what to do when a business counterparty refuses to agree to abide by the company's anti-bribery and corruption policy for third parties, etc. The consequences of non-compliance are not an option and the individuals directly involved in the corrupt act, the company and their senior officers can be held liable.

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The IMO 2020 Sulphur Cap: What Does This Mean for the Bunkering World?

By Dr. Jean-Pie Gauci-Maistre & Ms. Despoina Xynou, Gauci-Maistre Xynou (Legal | Assurance)

Through the implementation of Regulation 14.1.3 of Annex VI of the MARPOL Convention, the International Maritime Organisation (IMO) announced on the 27 October 2016 that it would implement a global sulphur cap of 0.5% on marine fuels starting from 1 January, 2020, for ships operating outside Emission Control Areas (ECA's)[1] ; a decision which will inevitably impact refiners, crude producers and bunker suppliers. The current cap stands at 3.5% outside the four internationally designated ECA's where the sulphur limit has been capped at 0.1% since January 2015.

[1]These are the Baltic Sea area, the North Sea area, the North American area (covering designated coastal areas off the United States and Canada) and the United States Caribbean Sea area (around Puerto Rico and the United States Virgin Islands)

Regarding applicability, the 2020 cap will apply to all ships flying the flag of a state that has ratified MARPOL Annex VI and/or calling at a port or passing through the waters of a state that has ratified the Convention. This will effectively include a great number of the world's fleet. Regarding the level of enforcement and the imposition of fines, this would vary from jurisdiction to jurisdiction. Additionally, the IMO's Marine Environment Protection Committee (MEPC) has adopted a further amendment to MARPOL Annex VI which will furthermore prohibit the carriage of non-compliant fuel oil for combustion purposes for propulsion or operation on board a ship – unless the ship has an equivalent compliance method such as scrubbers. This amendment is expected to enter into force on 1 March 2020.

When trying to assess the effective implementation of the cap in practice, the fact that this projected shift demands drastic adjustments, produces a risk of severe product shortages and inflated prices. It is also estimated that the refining capacity should not meet the demand for low sulphur fuels in 2020 and that approximately 60-75% additional sulphur plant capacity would require to be built by the deadline when compared with already planned projects.

No silver bullet solution can be provided in the sense that each respective party will have to decide on the most appropriate approach to take to suit their operations and remain commercially sustainable in the long run all within the context of the intended amendments. Refiners, although not regulated by the IMO, have a commercial interest in catering to market needs. Shipowners, on the other hand, who are at the receiving end of the IMO regulation have various options; namely the installation of scrubbers on their ships which would involve a hefty investment and would obviously be limited generally speaking by access to finance, manufacturing capacity and technological uncertainty; purchasing compliant fuel (such as marine gas oil (MGO)) at higher costs which would require close to zero upfront investment but will inevitably mean higher bunker bills or running their vessels on the clean gas LNG as fuel. The latter option is however dependant on the availability of a worldwide network of LNG bunkering infrastructure which is currently still severely underdeveloped.

In view of the above, what is certain is that shipowners and refiners should have to work hand in hand and adopt a parallel approach to finding the solution which works best for both industries. There is currently little idea what the true demand for MGO will be in 2020. Undoubtedly, any response to the lack of demand will be slow since any investment to convert fuel oil into distillates is not only expensive but time consuming.

From an environmental perspective some may opine that through the adoption of some of the specific solutions provided, the pollution problem is not being solved but is merely being transferred from the air to the sea. More specifically, the main concern is regarding the installation of scrubbers on vessels which would automatically necessitate the wastewater produced, contaminated by a toxic cocktail of chemicals, to enter the ocean and thus cause this status quo.

The shipping industry should be ready to meet the deadline and adopt the new regulations and the refining industry should be ready to meet the upcoming demand. IMO on the other hand maintains its position that there can be no change in the 1 January 2020 implementation date, as it is too late now to amend the date and for any revised date to enter into force before 1 January 2020.

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Just Around the Corner: IMO 2020 — Global Sulphur Cap by Murali Pany & Marcus Sim, Joseph Tan Jude Benny

"IMO 2020, the regulation to cut marine fuel sulphur emissions from 3.5% to 0.5% will set off a tsunami." – Tradewinds, 20 May 2019, IMO 2020.

"The operational challenges will be manifold, and the costs astronomical. S&P Global Platts Analytics estimates the total global impact of this rule on various sectors in the energy space, as well as other industries, will be in excess of $1 trillion over five years." – S&P Global Platts Analytics

THE REGULATIONS

Under the International Convention for the Prevention of Pollution from Ships ("MARPOL") Annex VI, from 1 January 2020, the sulphur content of any fuel oil used on board ships shall not exceed 0.50% m/m. MARPOL Annex VI also prohibits the carriage of fuel oil with sulphur content exceeding 0.50% m/m from 1 March 2020 onwards.

By way of the Section 3 of the Prevention of Pollution of the Sea (Air) Regulations, the MARPOL Annex VI has been adopted in its entirety in Singapore.

THE UNCERTAINTIES

The Regulations have not yet been tested in Court so there is no judicial guidance. However, on a reading of the Regulations, no grace period appears to be provided. Thus, if there is a carriage or use of non-compliant fuel, it is an immediate breach under MARPOL Annex VI.

The International Maritime Organization's philosophy is for equal and strict application of the Regulations to avoid market distortion. However, some Port Authorities or Flag States may not take such a strict approach.

Issues will arise if:

a ship is unable to obtain low sulphur fuel.
the fuel is not or becomes non-compliant because of inherent defects/properties. the scrubbers break down.
the breach is due to residual non-compliant fuel in the tanks or pipes.

This leads to two common questions:

(1) Are there any available defences to a compliance breach?

The "Proper Chain" of Documents

Regulation 3 of MARPOL Annex VI states that there will not be any penalties if the (a) emission resulted from damage to the vessel or its equipment, (b) all reasonable precautions were taken after the occurrence of the damage or discovery of emission and (c) the owner/master did not act with intent or recklessly to cause damage. However, it remains to be seen whether said Regulation would cover inherent vice – for instance, if scrubbers fail due to a manufacturing defect or poor maintenance.

Nonetheless, in order to have any chance of availing themselves of the defences and exceptions, Owners must be able to show that they practiced due diligence, e.g.:

(a) When they took on fuel;
(b) In relation to scrubbers; and (c) If fuel is unavailable.

This involves what we call the "Proper Chain" – proper planning, proper purchase, proper contracts, proper training, proper maintenance, proper operation, proper responses and proper records. A full set of records and documents is going to be the key to any defence.

(2) What approach is the Regulator in Singapore going to take in the case of breach?

Comply or Be Detained

The Regulator in Singapore is the Maritime Port Authority.

Section 9 of the Prevention of Pollution of the Sea (Air) Regulations provides that the owner and master may be liable on conviction to a fine not exceeding $10,000 or to an imprisonment not exceeding 2 years or both.

However, the relatively low level of the fine is unlikely to encourage compliance. Imprisoning a host of owners and masters is also not going to be practical. Rather, we believe that the Regulator's approach towards

enforcement is going to be to require compliance and detain the vessel until then.

The vessel would have to offload non-compliant fuel, clean its tanks and lines and then load compliant fuel. This would inevitably cause significant delays to the vessel's voyage.

The costs and financial impact to Owners/Charterers by this approach would be considerable and is thus seen as a far better mechanism to deter breach and encourage compliance.

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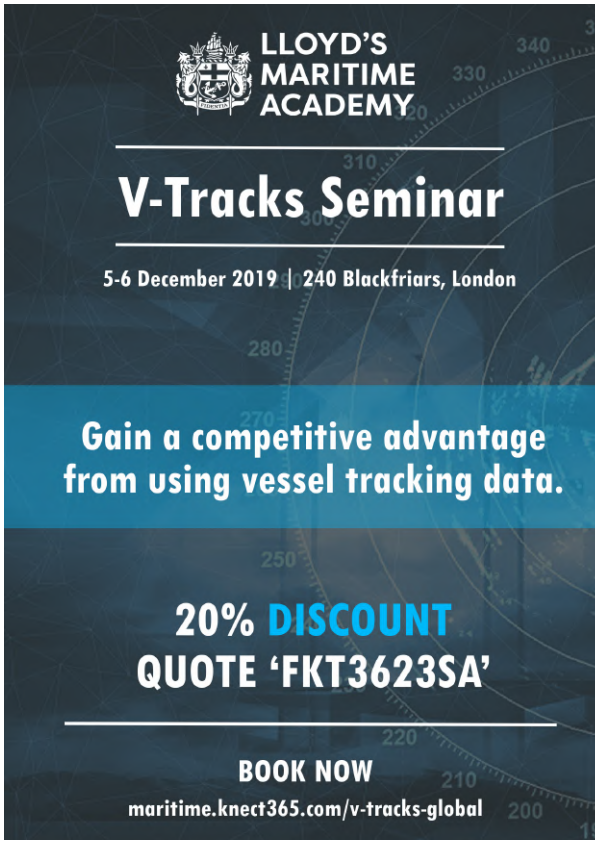
Upcoming Events



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Arresting a ship is always a last resource to collect a maritime claim, a debt, or defend your interest, but when forced to do it, bunker suppliers, agents, banks, charterers, ship yards, even owners all want to be aware of their rights and have first hand and accurate information regarding arrest law. You want to arrest or release fast and cost effectively. This is part of what the Shiparrested.com network industry membership can do for you; your claims department is fully involved in what is needed to defend your interest across more than 1.000 ports in over 100 jurisdictions.

Above are members of the network at the closing dinner of the annual members' conference in Malta this past June.