THE ARREST news

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In this issue of *The Arrest News,* multiple members share their perspective on the virtual "Zoom" auction of the MV Evolution as well as the the Indian High Court's clarifications on issues regarding actions in rem under the Admiralty Act, 2017. Members also cover Covid-19 measures in India, recent amendments in Maltese law impacting the maritime industry, and new approaches to ship arrest in Ukraine.

Virtual Courthouse Auction for the Interlocutory Sale of the M/V EVOLUTION Held in South Carolina by George Chalos, Chalos & Co. (USA)

Since mid-March individuals, businesses, and the Court system have turned to virtual meetings and video conferencing in response to the need to practice safe social distancing in the wake of the COVID-19 pandemic. A byproduct of the need to shelter-in-place has been the opportunity to increase efficiency and connectivity around the world through technology. This intersection of traditional Court business with the assistance of virtual video conference capabilities was recently on full display in Charleston, South Carolina.

U.S. District Judge Richard Gergel of the United States District Court for the District of South Carolina issued an order authorizing the interlocutory sale of the M/V EVOLUTION. The Vessel had been under attachment and arrest since January 31, 2020, after numerous Plaintiffs had filed lien and contract claims for unpaid services and necessaries provided to the Vessel. The Vessel's Owners were unable (or unwilling) to post substitute security for the release of the Vessel. Accordingly, in mid-April, Judge Gergel granted the Plaintiffs' motion seeking to sell the Vessel. Traditionally, vessel auctions in the United States are required to be administered by the U.S. Marshals Service "on the Courthouse steps" and the highest in-person bidder that presents a certified check representing ten percent (10%) of the purchase price wins the rights to buy the vessel free and clear of all liens, claims, and encumbrances.

In the case of the M/V EVOLUTION, the Court (and the parties) recognized that a traditional in-person auction was not going to be possible as the Courthouse had limited accessibility to the public and South Carolina

remained under a directive limiting gatherings to fewer than ten (10) people. Furthermore, with travel and self-quarantine restrictions in place, there was significant concern that a sufficient number of bidders would not be able to attend. This presented the serious risk that the auction would not even obtain the minimum bid price of $1,250,000. Accordingly, District Judge Gergel authorized the auction to proceed both in-person and virtually through the use of a secure Zoom meeting. The Court appointed London-based ship broker CW Kellock & Co. Ltd. to serve as the broker for the auction in an effort to promote interest in the Vessel and assist in administering the auction.

The custodian for the Vessel conducted a walkthrough survey by video and photos, all of which were available for prospective bidders to view prior to the auction. The Court permitted participants to satisfy the earnest money requirement through the transmission of funds to the trust account(s) of local South Carolina law firms instead of requiring the traditional hard copy check in-person. The virtual public auction was held on May 19, 2020.

The vessel sale was administered by the Deputy Marshal for the District of South Carolina in conjunction with the broker. To streamline the proceedings from the Courthouse and obtain a sufficient signal, the in-person auction was relocated to the corner of the parking lot with a laptop propped up on the trunk of a red convertible. All those in attendance outside the Courthouse made sure to practice safe social distancing. Individuals and companies from around the world were able to "log-in," participate, and observe the proceedings. The virtual auction was successfully completed with Wickwar Shipping Ltd. achieving the highest bid of $1,340,000.00. The sale was confirmed by the Court on May 26, 2020.

These are indeed uncertain times we all are facing, but one thing COVID-19 has taught everyone is that the show must go on, even virtually. We look forward to the practice of law post-COVID-19 as law firms and Courthouses adjust to the "new normal" and hopefully the continued use and integration of virtual conference platforms for Court hearings, auctions, and other proceedings.

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Ship Auctioneers in Demand by Paul Willcox, CW Kellock & Co. (UK)

CW Kellock and Co's specialist auctioneering services have come dramatically to the fore in the face of the challenges presented by COVID-19.

The world's leading ship auctioneers for over 150 years, Kellock has witnessed the ebb and flow of world history. At the height of 19th Century imperialism they auctioned Brunel's iconic iron paddle steamer 'Great Eastern'; at the conclusion of the First World War they brought down the hammer on dozens of vessels for the Admiralty; during the Second World War their Liverpool head office was destroyed by bombing, prompting a permanent shift to the City of London.

Most of the work, as is the case with auctioneers in other industries, lies behind the scenes in the preparation and marketing preceding a successful auction. The real skill is to get potential bidders to the point where they are willing to compete. The more bidders that attend an auction, the higher the price that can achieved: the best bidders may often be those who have little experience of the process, and need the encouragement and assistance that Kellock offers. Once such bidders are 'in the room' the auction process itself, competently managed, drives the price as high as it will go.

In the current pandemic, there are more obstacles than usual to persuading buyers to take part in a judicial sale, and it is Kellock's role to help those buyers to overcome them, and thus to maximise the price achieved. Travel and lockdown restrictions are currently a particular problem hindering

- arranging inspection
- bidding in person
- crew changes

Kellock's strength lies in the depth of the experience and being able to anticipate and circumvent such obstacles. Called in to assist on a vessel arrested in the USA whose mortgagees, in the face of mounting costs and declining asset values were keen to press on with a sale during May of this year in spite of the general lockdown, Kellock advised the Court

- to arrange and make available an independent survey report
- to hold the auction by 'Zoom'
- to facilitate discussion between the crew on board and the potential buyers.

The same advice has now been heeded by another US Court, who have ordered Kellock to conduct an auction in Texas on similar terms next month.

Kellock have a range of auction processes in their armoury (sealed bids, for example, have been employed for many years by the Admiralty Marshal for England & Wales), and can advise on what will be best for a particular ship and circumstances.

CW Kellock & Co Ltd successfully auctioned the mv 'Evolution' in Charleston, South Carolina, for the US Marshals Service during May 2020 at the height of pandemic restrictions.

CW Kellock & Co Ltd has been appointed to conduct the auction of mv 'Sam Eagle' in Corpus Christi, Texas, for the US District Court during July 2020.

CW Kellock & Co Ltd are the appointed brokers, auctioneers and valuers of the Admiralty Marshal for England & Wales.

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Covid-19 and the Shipping Sector In India

By Gautham Bhatikar, Legasis Partners

The spread of the Coronavirus has had an enigmatic repercussion on almost every sector and has caused a long lasting distress on the economic, political and financial systems around the globe. The Covid-19 pandemic has overwhelmed (in certain cases collapsed) the public health systems all over the world while the lockdowns ordained by the states for containing the spread of the disease has disrupted the growth rate of the world economy. Stock Markets around the world are reeling under the slump and oil prices have fallen to abysmal depths including a never imagined negative crude price.

There has been a paralysing effect on manufacturing, supply chains and movement of people, the effects of which is expected to last for quite some time. While there is a National Lockdown in India since March 24, 2020, initially only essential supplies were allowed to be ferried causing severe distress on the supply chain management. While trade and commerce has slumped, Indian seaports, operating under safety regulations, have continued to function, although in a disrupted manner. With normalcy slowly resuming, it is essential to analyze the Ministry of Shipping's actions as an example to other government departments.

India's Ministry of Shipping, through the office of the Directorate General of Shipping, Mumbai, was busy announcing relief and guidelines to combat the COVID-19 pandemic during the initial 21-day lockdown period. In order to maintain proper supply lines at the Indian seaports, the shipping lines were advised by the Ministry of Shipping order dated March 29, 2020, not to impose any container detention charge on import and export shipments for the lockdown period over and above free time arrangement that was in place as a part of any negotiated contractual terms.

This article covers some of the Frequently Asked Questions while dealing with the important notifications and circulars taken out by the government to reduce

the impact of the Pandemic and the relevant aspects of the Contract Law prevalent in India.

What are the measures taken by Indian ports to ensure safety of ports?

The Ministry of Shipping through the Director General of Shipping has issued a notification thereby laying down guidelines for vessels and requirement of mandatory declarations for all vessels arriving at Indian Ports. As per the directions, the master of a vessel, before arrival at its first port of call in India, must ascertain the state of health of each person on board the vessel and submit a "Maritime Declaration of Health" to the concerned health authorities of the port and to the other port authorities.

The format of the Maritime Declaration of Health shall be as per the International Health Regulations 2005, issued by World Health Organization which has also been adopted by the International Maritime Organization and by the FAL Convention at section A (2.1). The Maritime Declaration of Health must be forwarded at least 72 hours prior to arrival of the vessel at the port. In the event the voyage duration from the last port of departure is less than 72 hours, the Maritime Declaration of Health must be informed to the port of arrival immediately on departure from the port of departure.

Additionally, the information required by the local health authorities of the port like temperature chart, individual health declaration etc. shall also be provided by the master as per the directives of the local health authorities of the port. In case any person on board the vessel is exhibiting symptoms of COVID-19, the same shall be explicitly mentioned in the Maritime Declaration of Health being forwarded to the health authorities and to the port.

What are the consequences if the information provided by the master are found to be incorrect?

If the maritime declaration of health given by the master is found to be incorrect and not reflecting the factual conditions of health of persons on board the vessel, the master is liable to be prosecuted as per applicable laws. All agents of the vessel shall ensure that this information regarding possible prosecution for incorrect declaration is clearly informed to the vessel before its arrival at Indian ports.

What steps must be taken in case there is a suspected person on board the vessel?

In case of any suspected person on board the vessel, the master shall ensure that the suspected person is isolated in the ship's hospital, or other suitable location on the vessel. All other persons who may have come in contact with the suspected person shall also be isolated at appropriate locations as decided by the master. The master shall also ensure that all instructions issued by the Ministry of Health and Family Welfare, Govt. of India ("MoHFW"), as well as the guidance issued on dealing with COVID-19 matters by World Health Organization ("WHO"), International Maritime Organization ("IMO") and other applicable trade bodies are complied with at all times.

Vessels having persons suspected of COVID-19 will mandatorily be required to be monitored by the health authorities and quarantined, if necessary. Samples from the suspected person(s) will be taken and tested as per the instructions of the health authorities. If the samples are tested positive, the vessel shall remain in quarantine and the infected person(s) will be dealt with as per the procedures laid down by MoHFW. Vessels with infected persons shall also be sanitized as per the extant protocols for dealing with COVID-19 pandemic.

What is the impact of stringent regulations on Laytime and Demurrage?

Laytime commences only after certain requirements are satisfied i.e. the vessel must have physically arrived at the destination port as specified in the Charterparty. Further, it must be in a position to load or discharge cargo and the shipowner should also tender a notice of readiness. This means that all mandatory permits and documents must be obtained and complied with. In situations like a pandemic, port authorities are extremely cautious and are take stringent measures to curb the spread of the disease. Where port authorities are implementing stringent screening processes or compulsory quarantine measures, or where any of the

vessel's crew is suspected of being infected with Covid-19, free pratique is no longer a mere formality. Therefore Laytime will commence once the vessel is physically as well as legally ready. However, parties to the Charterparty must in their capacity do all that is within their control in a bonafide manner in order to justify or defend any claim for Laytime and Demurrages.

In the event laytime has commenced, parties must resort to reviewing the Charterparty in order to ascertain if there are any exceptions. It is not necessary that "pandemics" or "diseases" are specifically mentioned in the laytime clauses. However a thorough examination of the Charterparty / contract may lead to an analogous expression which may assist exemption from the hindrance due to Covid-19 outbreak.

In assessing whether a particular event is captured by a laytime exceptions clause, the following principles indicatively may be relevant:

(i) If the causes of delay listed in the clause are of the same type, the Courts will generally presume that only causes of delay of that type are excluded.

(ii) If there is no commonality in the causes of delay listed in the clause, then the words will be interpreted more widely and may be given a literal meaning.

(iii) Where the final words of exclusion in the clause include the word "whatsoever", or something similar, this will tend to exclude the presumption stated in (i) above. The final words will normally be given a wide meaning.

What are the steps taken by the Ministry of Shipping to tackle economic slowdown and helping the shipping companies stay in business?

The Ministry of Shipping has advised companies not to charge, levy or recover any demurrage, ground rent beyond allowed free period, storage charge in the port, additional anchorage charges and several for the same period. Such relief was granted in addition to an advisory on embargo for imposition of new or additional charges, to facilitate some financial relief during the lockdown period. However, the abovementioned instructions issued in these orders are in the nature of an advisory, the mandatory effect and consequence of non-compliance of any such instructions, has not been adjudicated as yet.

The Ministry while considering the difficulty and inability faced by users of ports, in complying with the mandatory inspections, audits and surveys, has granted further relaxations. The Certificate of Competency, Certificate of Equivalency and STCW Certificates, which were due to expire between the period of March 23, 2020 and October 1, 2020, have been granted an extension for six months.

Concept of Force Majeure and Frustration of Contracts in India and what are its implications?

The Covid-19 Pandemic required the Central Government to invoke its powers under the National Disaster Management Act, 2005 and the Government has rightly done so by issuing a Notification under the said Act thereby calling a nationwide lockdown. Similar Notifications were issued by various State Governments under the Epidemic Disease Act, 1897. The Judiciary also took due judicial notice of the situation on account of the impact of the lock down.

India being a common law country, Indian law per se doesn't statutorily lay down the concept of Force Majeure. Force majeure is a provision which exempts a party from non-performance of contractual obligations which is due to certain circumstances or certain events out of the parties' control and makes the performance of such contracts impossible. These events may include war, floods, drought, civil unrest or terrorist attack, or sudden natural calamities. However, parties whilst executing their respective contracts do include a "Force Majeure" clause as part of the terms of the Contract. This Force Majeure clause generally defines / enlists events which may be termed as Force Majeure event under the contract. Covid-19 could effectively be covered under an exhaustive Force Majeure clause either directly or indirectly.

Although the India Contract Act, 1872 ("Contract Act") does not provide for Force Majeure expressly, it

provides for Frustration of Contract i.e. it deals with agreements to do impossible acts.

The central idea of Doctrine of Frustration is impossibility of performance of the contract and an agreement to do an impossible act is void in itself. The Doctrine of Frustration can be applied in many cases but pre-dominantly applicable in cases:

1. When the performance of the contract becomes impossible to execute, or,

2. Due to occurrence of an unforeseen event which is beyond the control of the party obligated to perform and therefore making it impossible to honor the contract.

Another section of the Contract Act which is applicable in such cases is Section 32 of the Contract Act. It deals with that when performance of a contract is based on a certain future event and the future event becomes impossible the contract becomes void. A Force Majeure event as defined under a contract is covered by Section 32 of the Indian Contract Act. It is pertinent to mention that a Force Majeure clause under the contract will have precedence over the Doctrine of Frustration under common law.

On 19 February 2020, the Ministry of Finance, Department of Expenditure; Government of India clarified via official memorandum to all Central Government Ministries/Departments that the COVID-19 outbreak will be covered Force Majeure clauses (FM clauses). It also directed that the global spread of virus should be considered as a case of natural calamity and the FM clauses may be invoked if appropriate and with due procedure. Most of the Major Ports in India have announced Force Majeure as per the advisory issued by the Ministry of Shipping through the Director General of Shipping.

The Ministry of Shipping has given considerable relaxations and issued advisories to the ports and shipping companies in order to de-congest the port and avoid loses that would likely be suffered by the companies. The swift actions taken by the ministry is commendable and noteworthy. It is also an inspiration to other governmental departments and authorities, both in India and worldwide, to recognize the principle of business continuity in order to survive and minimize the adverse impact of the current pandemic and facilitate operations in a sustained environment.

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High Court Clarifies Scope Of Actions In Rem Under The Admiralty (Jurisdiction And Settlement Of Maritime Claims) Act, 2017 With Reference To The Insolvency And Bankruptcy Code, 2016 And The Companies Act, 1956

By Rohan Janardhanan, Rex Legalis (India)

This article aims to provide clarifications with respect to the interpretation of fundamental questions of law raised before the Bombay High Court with respect to the scope of certain provisions of the Insolvency and Bankruptcy Code, 2016 ('the IBC Code'), The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("the Admiralty Act") and The Companies Act, 1956 ('the Companies Act').

Two very crucial questions arose in light of orders passed by the High Court in Admiralty Suits and Company Petitions with respect to actions in rem and as well as through an Order passed by the National Company Law Tribunal ('NCLT') which put the Learned Single Judge of the Bombay High Court in a legal quandary and warranted apt legal interpretation. The two questions that arose were:

1. Whether there is a conflict between actions in rem filed under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 and the provisions of Insolvency and Bankruptcy Code, 2016 and if so, how could the conflict be resolved?

2. Whether leave under Section 446(1) of the Companies Act, 1956 is required for the commencement or continuation of an Admiralty action in rem, where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the Company that owned the ship?

The aforementioned Question No.1 arose before the Bombay High Court pursuant to an Order passed by the National Company Law Tribunal wherein a Moratorium under Section 14 of the IBC was declared. The Moratorium period came to be extended from time to time, the last of which came to be passed on 31st January, 2020 extending the period of Moratorium by 60 days. The Bombay High Court was then questioned with respect to the effect of the same upon the aforementioned Admiralty Suits and it was of the opinion that this would be a repetitive issue and it ordered to hear and decide upon the applicability, effect and consequences of the proceedings under IBC, as well as, on the Admiralty Suits before the Court.

The Learned Single Judge of the Bombay High Court was therefore faced with the uphill task of interpreting the scope of the provisions of the Admiralty Act, the Companies Act and the IBC. Since the task involved interpreting very important questions of law the Hon'ble High Court was offered assistance by Senior Advocates to correctly resolve the questions. The Hon'ble High Court accepted the gracious offer of assistance made by the Senior Advocates and appointed them as 'Amicus Curiae' i.e., professionals who are not a party to a particular litigation but permitted by the Court to advise it in respect to some matter of law that directly affects the case in question.

In order to resolve the perceived conflict between an action in rem under the Admiralty Act and the provisions of the IBC, the Learned Single Judge of High Court first considered the objectives of the two statutes of the Admiralty Act and the IBC Code and the purposes for which they have been enacted and then considered some of the relevant provisions of both the statutes to examine the nature of the conflict and how it can be resolved. While doing so, the judgments of the Apex Court in the matters Innoventive Industries Ltd. V/s. ICICI Bank & Anr; Duncans Industries Ltd. V/s. A.J. Agrochem and Swiss Ribbons Pvt. Ltd. V/s. Union of India were taken into consideration by the Court. It was thereafter observed that primary focus of the IBC is to ensure revival and continuation of the Corporate Debtor within the framework of the IBC and only if no Resolution Plan is approved for revival of the Corporate Debtor, liquidation would follow. It was thus considered to be a beneficial legislation not only for the Corporate Debtor but also for all stakeholders including secured creditors.

The Learned Single Judge of the Bombay High Court then proceeded to elucidate on what an action in rem under the Admiralty Act entails and the special jurisdiction vested in the High Court along with elucidating a few salient features of actions in rem, maritime liens and maritime claims. The Court carefully perused all the submissions made by the parties involved and also considered the submissions made by the Amicus Curiae and came to the conclusion that an action in rem can be filed and the ship can be arrested before the Moratorium under Section 14 of the IBC comes into force or during the Moratorium period or even when the Corporate Debtor is ordered to be liquidated. The Court was of the view that, a maritime claimant ought to be permitted to enforce his right in rem and obtain an order of arrest of the ship in question. This will enable him to perfect and crystallize his maritime lien or maritime claim as available to him under the Admiralty Act. It was further observed that the action in rem will not proceed till the Moratorium is in place. This will ensure that the rights under the Admiralty Act are not defeated and at the same time it does not create any conflict with the provisions of the IBC. The Court opined that the action in rem will proceed if the Corporate Debtor is ordered to be liquidated and as the action in rem will proceed in accordance with the applicable law namely, the Admiralty Act, the priorities for payment out of the sale proceeds will also be determined in accordance with the Admiralty Act and Section 53 of the IBC will not apply. The Learned Single Judge of the Bombay High

Court also observed that Section 238 of the IBC contains a non-obstante provision giving the Code overriding effect over any other law and that Section 63 of the IBC bars the Jurisdiction of Civil Courts. It observed that Section 231 of the IBC bars the Jurisdiction of Civil Courts in respect of any matter in which the Adjudicating Authority is empowered under the Code to pass an order and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any order passed by the Adjudicating Authority under the Code. On the other hand, Civil Courts do not have Jurisdiction to entertain an action in rem. This jurisdiction has been vested specifically in certain High Courts only. However, the Admiralty Act does not contain a non-obstante clause. It was therefore held that, where there are two special enactments, one of which contains a non-obstante provision and bars the Jurisdiction of the Civil Court and the other which does not contain a non-obstante provision, the clear legal position is that in the event of conflict the former Act will prevail. The Court further held that the later Act will prevail only in cases where both special Acts contain non-obstante provision and there is a conflict. In order to substantiate its view, a reference was made to the Apex Court order in the matter Solidaire India Ltd. V/s. Fairgrowth Financial Services Ltd. where it was held that the Act enacted earlier, i.e. Sick Industrial Companies (Special Provisions) Act, 1985 contained in Section 32 a non-obstante clause. A similar non-obstante provision was also contained in Section 13 in the Act enacted later, i.e., of the Special Court Act, 1992. The Apex Court then held in paragraph 9 of its order that "It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail."

With respect to the second question regarding Section 446(1) of the Companies Act, 1956 and an Admiralty action in rem, the Learned Single Judge of the Bombay High Court stated that the question needed to be resolved on a consideration of whether the Companies Act being a general Act relating to Companies and whether the Admiralty Act being a special Act dealing with Admiralty Jurisdiction and actions in rem, will prevail over the Companies Act solely on being the later act. It was opined by the Bombay High Court that it needs to be considered whether a Company Court would be entitled to exercise Admiralty Jurisdiction in rem and entertain and dispose of a suit in rem by virtue of Section 446(2) of the Companies Act.

The Learned Single Judge of the Bombay High Court pursuant to hearing extensive submissions by the parties involved was of the view that the Admiralty Act which is a special Act prevails over the Companies Act which is a general Act and hence no leave is required under Section 446(1) of the Companies Act for commencing a suit under the Admiralty Act or proceeding with a pending suit against the Company under the Admiralty Act when a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator.

A reference was made to the Apex Court judgment in the matter Damji Valji Shah and Another V/s Life Insurance Corporation of India wherein it was held that a special Act, i.e. the LIC Act in this case shall override the provisions of the general Act, i.e. the Companies Act in this case. The Hon'ble High Court further observed that on a more micro basis, Section 10 of the Admiralty Act will prevail over Sections 529 and 529A of the Companies Act in the matter of determination of priorities. It was held that the Court which is winding up the Company would not have Jurisdiction to entertain or dispose of an action in rem against a ship filed in a High Court which has been conferred with Admiralty Jurisdiction under the Admiralty Act. Such a suit in rem is not against the Company and can only be entertained by the High Court under the provisions of the special Act, viz., the Admiralty Act. The Hon'ble Court dismissed the submission that in an action in rem, the Owner is also included as a Defendant though not named or joined is not correct and held that the true legal position is that an action in rem can proceed to judgement against the ship or its sale proceeds without the presence of the Owner. The resultant decree does not bind the Owner unless he has entered appearance and submitted to the jurisdiction. Likewise

the true nature of an action in rem against a ship is that it is not an action against the Owner (Company) or asset of the Owner (Company). Hence, if leave is not required under Section 446(1) of the Companies Act then Section 537 of the Companies Act is not applicable and the sale of the vessel by the Admiralty Court cannot be treated as void. Similarly, the powers of the Court to stay or restrain proceedings against the Company as provided under Section 442 of the Companies Act, do not affect the question of leave under Section 446 of the Companies Act.

In other words, the Learned Single Judge of the Bombay High Court provided appropriate legal perspective towards both the questions raised. With respect to the Admiralty Act, 2017 / Insolvency and Bankruptcy Code, 2016 conflict, it was held that it is permissible to initiate an action in rem and arrest the ship under the Admiralty Act before the Moratorium under Section 14 of the IBC comes into force or during the Moratorium period or even when the Corporate Debtor is ordered to be liquidated under the IBC Code. With respect to the Admiralty Act, 2017 / Companies Act, 1956, it was held that no leave is required under Section 446 of the Companies Act for the commencement or continuation of an Admiralty Suit in rem under the Admiralty Act where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the Company.

The Hon'ble High Court through its order, also presented various possible scenarios considering the features of Admiralty Law in general and the Admiralty Act in particular and the definition of Corporate Debtor under the IBC, where the provisions of both statutes get involved and explained in detail how those possible scenarios will be adjudicated upon.

This order passed by the Hon'ble High Court of Bombay answers the two fundamental questions of law raised before it and provides much needed clarifications with the help of Senior Advocates appointed as Amicus Curiae and this order shall also serve as a precedent for the Courts to follow when presented with similar questions. This order aims to bring into perspective, the scope of the Admiralty Act, the Companies Act and the IBC Code when presented with the question of conflict between actions in rem in view of the provisions of the Admiralty Act and IBC Code and when presented with the question of requirement of leave under Section 446(1) of the Companies Act for the commencement or continuation of an Admiralty action in rem by dwelling into the provisions of the statutes and by examining the scope and objectives of the statues in absolute detail, thereby leaving no room for ambiguity.

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Insolvency Law Prevails Over Admiralty Law: A Compromised Solution to Save Maritime Claims By Gaurav Srivastav, S.K. Srivastav & Co (India)

Introduction:

1. The Bombay High Court passed a judgment on 19/5/2020, when it was called upon to answer two issues one of which was "[i]s there a conflict between actions in rem filed under the Admiralty Act and IBC and if so, how is the conflict to be resolved?"

2. The Court held that in the event there is any conflict between the Insolvency and Bankruptcy Code, 2016 ("IBC") & the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("the Admiralty Act") the former will prevail since it contains a non-obstanste clause and the latter does not. However, after revisiting the well settled principles of Admiralty law & the provision of IBC code the Court observed reconciliation of both the Acts is possible and there is little conflict between them. The court held that a declaration of moratorium under the IBC will not prohibit the institution of an action in rem or continuation of a pending action in rem as an arrest of the ship would

not amount to Institution of a suit against a corporate debtor as defined under the IBC as it is a ship against whom the proceedings are against and not the owner of the ship or its assets.

Contextual Background:

3. While faced with arguments that Admiralty Courts are powerless to take steps to protect the ships and ensure realization of maximum value during Moratorium, the Court observed Instances where the insolvent owners abandon their ships and the Resolution Professional ("RP"), ignores his duty under the IBC to man, preserve and maintain the ships during the Corporate Insolvency Resolution Plan ("CIRP"); leaving crew members stranded without adequate food, drinking water and essential fuel for survival on board. The Court also observed that the committee of creditors ("COC") on one hand opposes the sale of the Ship by the Admiralty Court but on the other hand does not spend any money in protecting their own mortgaged ships and ultimately sell the ship at scrap value. The Court held that in these situations the Admiralty Court must have the discretion to step in and protect not only the ship but also the rights of crew members who continue to remain on board in order to maintain, preserve and ensure safety of the ships as exercising Admiralty jurisdiction in such cases will be beneficial and assist rather than hinder insolvency resolution. It would protect the ship and in turn the security of a mortgagee who is a financial creditor. At the same time this would also indicate to the mortgagee that they must take steps to protect and preserve their security and if they do not then the Admiralty Court will step in.

The Solution:

4. The Court held that a harmonious interpretation of the IBC and the Admiralty Act brings about a solution which would "serve the interests of all stakeholders under both statutes and would be consistent with the objectives of both acts and give effect to the same."

5. Three scenarios emerged where the provisions of both statutes got involved and the Court provided elaborate solutions for the same and set out below.

6. **Scenario I** – If a Plaintiff has commenced Admiralty proceedings in rem and obtained an order of arrest of a ship from an Admiralty Court, subsequent to which insolvency proceedings are filed against the owner of the vessel and the adjudicating authority declares a moratorium under Section 14 of the IBC.

6.1. If security for release of the vessel has been furnished prior to the declaration of moratorium:

(i) Then the Suit will not proceed as the Suit is no longer an action in rem but in personam against the corporate debtor who has furnished security.

(ii) However, Plaintiff will be considered to be a secured creditor having obtained security exclusively for his claim.

6.2. If after furnishing security the CIRP is successful and a Resolution Plan is approved:

(i) Then the maritime claim of Plaintiff will be determined in accordance with the resolution plan approved by the COC and the adjudicating authority **("**AA"**)** under the IBC.

(ii) Plaintiff's status as a secured creditor and its exclusivity to the security will be considered by the COC / AA in determining the entitlement of Plaintiff and ordinarily be entitled to realise his claim to the full extent of the security provided. To this extent the Admiralty Court will protect the interest of Plaintiff and its right to the security provided to the Admiralty Court for release of the ship.

6.3 If after furnishing security the CIRP is not successful and the company is ordered to be liquidated:

(i) The Plaintiff will be a secured creditor in liquidation and will be entitled to realise its security interest in accordance with the applicable law, viz., Admiralty Act, as provided in Section 52(4) of the IBC itself.

(ii) It will be open to the Liquidator to defend the suit which right is available to him as provided in S. 35(1) (k) of the IBC.

6.4. If security has not been furnished at the time when the moratorium is declared:

(i) Then the Admiralty Court will not proceed further with the Suit in rem as it would defeat the insolvency resolution objective of the IBC.

(ii) However, the vessel will remain under arrest and it would be up to the RP to decide whether security ought to be furnished for release of the vessel. Thus the maritime claimant or his right in rem would not be prejudiced.

(iii) If no security is furnished, the vessel will remain under arrest until the end of the CIRP period.

(iv) In that event, Plaintiff's maritime lien or claim which is a perfected claim against the vessel by virtue of the arrest, will operate as a charge on the vessel and Plaintiff will be considered as a secured creditor.

6.5. If security has not been furnished and the company is liquidated then:

(i) Plaintiff's action being an action in rem will proceed and the vessel will be sold by way of an Admiralty sale to maximize its realisation value.

(ii) Plaintiff and any other claimant who has a maritime claim or a maritime lien and has obtained an order of arrest before liquidation, will be considered a secured creditor and will be entitled to enforce and realize his security interest in accordance with Admiralty Act.

(iii) The Admiralty Court will be entitled to invite claims against the sale proceeds by following the Admiralty procedure prescribed in the Rules.

(iv) Parties having a maritime lien or a maritime claim will be entitled to file an action in rem against the sale proceeds as in law there no difference between an action in rem against a ship and against the proceeds of sale of that ship.

(v) The determination of priorities will also be done in accordance with Section 10 of the Admiralty Act and inter se priorities of maritime liens will be decided in accordance with Section 9 of the said Act.

(vi) Section 53 of the IBC which refers to distribution of assets will not apply.

(vii) If the ship is sold by the Admiralty Court in exercise of its jurisdiction in rem then the machinery of the Admiralty Act will apply and the sale proceeds will be distributed on the basis of priorities determined under the Admiralty Act.

(viii) All those claimants who are unable to recover their claim from the sale proceeds will have to pursue their claim in the liquidation as unsecured creditors.

6.6. If, on the other hand, the company is not liquidated and Resolution Plan is approved, then:

(i) The Plaintiff's claim together with that of all other Claimants who have obtained an order of arrest and have become secured creditors qua the ship will be determined in accordance with the approved plan.

(ii) Being secured creditors, their rights and claims in respect of the vessel under arrest shall be considered by the COC / AA whilst approving the Resolution Plan when it comes to payments to be made to them from the amounts made available to secured creditors by the successful Resolution applicant.

(iii) The claim of Plaintiff and all other maritime Claimants who have arrested the vessel before a moratorium was declared shall be accorded priority in respect of the value ascribed to the vessel in the Resolution Plan.

(iv) The vessel would have been sold by the Admiralty Court and the priorities would have been determined in accordance with the Admiralty Act. However, the ship value for the purpose of ascertaining the proportionate and priority entitlements of the maritime claimants will be the liquidation value assigned to that particular vessel.

6.7. Since the ship was arrested before the declaration of moratorium, the Admiralty Court will protect the interests of Plaintiff and release the ship from arrest only upon being satisfied that the claim of Plaintiff has been accorded priority as required under the Admiralty

Act in respect of the value ascribed to the ship and paid accordingly.

6.8. All those claimants who had arrested the vessel but are unable to recover their claim under the Resolution Plan in part or in full because the value ascribed to the ship is not sufficient to pay all claims against the vessel in full, will rank as operational creditors of the corporate debtor as regards their unrecovered claim and may recover depending on what payment is offered to operational creditors in the resolution plan. They are not secured creditors of the corporate debtor's other assets.

6.9. If security has not been furnished and the vessel remains under arrest:

(i) the Admiralty Court will not order the sale of the vessel during the moratorium period in order to allow the insolvency resolution process to fructify, unless an application for sale is made by the RP or if the vessel is not being manned, equipped and maintained by the RP during the moratorium and all charges for the same are not being paid by the RP including port charges or if the vessel becomes a navigational hazard.

(ii) In such a case the Admiralty Court will have the discretion to sell the vessel at the instance of any party who has filed an Admiralty Suit and has a maritime claim.

(iii) The order of sale is made to ensure that the value of the vessel is not put at risk and the vessel is preserved and/or is not allowed to waste and deteriorate and further encumbered with claims and liabilities during the moratorium period. This is done with a view to maximize the value of the ship (asset) and also to secure the interests of the secured creditors qua the ship in question which is also the objective of the IBC. This will be a matter entirely in the discretion of the Admiralty Court.

6.10.In all such cases notice will be given to the owner who may be represented by the RP before any sale of the ship is carried out by the Admiralty Court.

6.11. In all cases of sale of the vessel during the moratorium period in view of exigencies mentioned in the preceding paragraph, the proceeds will not be distributed but will be retained by the Admiralty Court to await the outcome of the CIRP or liquidation, as the case may be. Once either of these events happen, the procedure laid down in paragraph 6.6 & 6.8 above will apply as regards distribution of the sale proceeds and priorities.

6.12. All expenses incurred for preservation and maintenance of the vessel during the period of arrest with the permission of the admiralty Court will be treated as sheriff's expenses in Admiralty and Resolution Process costs under the IBC and paid out in priority from the sale proceeds of the ship if the company is liquidated or be accorded priority in the resolution plan as resolution process costs.

7. **Scenario II**: If a moratorium has been declared under Section 14 of the IBC before any Admiralty Suit in rem is filed for enforcement of a maritime lien or maritime claim.

7.1. There will be no bar to filing such an action and If an order of arrest is made, the warrant of arrest will be executed against the vessel.

7.2.Upon the RP entering appearance on behalf of the owner/corporate debtor, the Suit will not proceed in rem so as not to defeat the objective of the insolvency resolution and the Admiralty action in rem will have to be stayed and not proceeded with after the vessel has been arrested, till such time as the insolvency resolution process is completed or a Liquidator is appointed.

7.3. If the vessel is trading during the moratorium period the vessel will be permitted to trade under arrest once the RP enters appearance on behalf of the corporate debtor and appropriate undertakings are provided in respect of the vessel. This will ensure that trading of the vessel is not impaired or affected, if this is in the interest of the corporate debtor or the CIRP.

7.4. The Claimant will be considered as a secured creditor and the observations in paragraphs 6.5, 6.6 & 6.8 above will apply if the insolvency resolution

process is successful and a resolution plan is approved or if the resolution process fails and the liquidator is appointed, as the case may be.

7.5. At all stages, in such a situation it would be open to the RP acting on behalf of the owner to furnish security for release of the vessel if he deems fit. The RP, however, will be under an overriding obligation to maintain the vessel in any event and if this is not being it will be open to the Admiralty Court to consider an application for sale of the vessel at any stage during the CIRP. The sale proceeds will, however, not be distributed and will be retained by the Admiralty Court to await the outcome of the CIRP or liquidation as the case may be.

7.6. Same procedure for paying out the incurred expenses will apply as mentioned in paragraph 6.12.

8. **Scenario III:** If the owner of the vessel (corporate debtor) is in liquidation at the time the Plaintiff commences Admiralty proceedings in rem for arrest of the vessel.

8.1. An action in rem can be entertained even at the stage of liquidation of the corporate debtor as the claim is against the res and not against the corporate debtor.

8.2. Once a Plaintiff obtains an order of arrest, the vessel can then be sold by the Admiralty Court in order to realize maximum value as it is only a judicial sale by an Admiralty Court which extinguishes all maritime liens against the res and thereby giving a clear title to the buyer.

8.3. Once the sale proceeds are realized and deposited in Court, paragraph 6.6 above will apply and the matter will proceed on that basis. The Liquidator will be entitled to defend the suit.

8.4. This may also be seen from another perspective. Once Plaintiff obtains an order of arrest, Plaintiff would then become a secured creditor and realize the security interest in accordance the Admiralty Act.

Conclusion

9. An action in rem can be filed and have the ship arrested before or during the moratorium period or even when in liquidation to perfect his maritime lien or maritime claim under the Admiralty Act. The action in rem will not proceed till the moratorium is in place. This will ensure that the rights under both the IBC & the Admiralty Act are not defeated. The priorities for payment out of the sale proceeds will also be determined in accordance with the said Admiralty Act.

Comment:

10. The Judgment indeed advances both fields of law and gives an elaborate rule-book in case of any interplay between both laws. The Discretion given to Admiralty Court to step in and protect the ship and the crew members is an additional judge-created remedy which come to rescue for any concerned party. The Judgment is based on well settled principles of interpretation and its unlikely to be assailed; however, possibility of minor inference & modification can't be ruled out thus it is advisable to be updated on the issue.

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Recent Amendments Impacting the Maritime Industry

By Ms Despoina Xynou & Dr. Deborah Mifsud, Gauci-Maistre Xynou

Amendments to the Merchant Shipping (Shipping Organisations – Private Companies) Regulations

By virtue of Legal Notice 31 of 2020 Merchant Shipping (Shipping Organisations – Private Companies) (Amendment) Regulations (hereinafter referred to as the "**Amendments**"), amendments have been made to the respective domestic law regulating shipping organisations.

Through the implementation of these Amendments, merchant shipping companies should file financial statements starting from financial year 2020, which

should be submitted to the Malta Business Registry, within the periods required for a company incorporated in terms of the Companies Act, Chapter 386 of the Laws of Malta (hereinafter referred to as the "**Companies Act**"). Should a merchant shipping company proceed to file financial statements pertaining to previous years to the Registrar of Companies, the said financial statements will still be uploaded on the Malta Business Registry's website, however, they would be classified as unregistered documents.

Those merchant shipping companies which are incorporated before 21 February 2020, and whose year-end does not fall in December, are requested to file the financial statements within the stipulated timeframes from the year-end. On the other hand, those merchant shipping companies incorporated after 21 February 2020 that have a year-end other than December are required to file a notice of accounting periods with the Malta Business Registry.

The Amendments cater for small companies, and the exemptions applicable under the Companies Act should also apply to merchant shipping companies. The provisions of the Companies Act in relation to the content and timeframes of the audited financial statements should apply.

Nevertheless, a merchant shipping company may be exempt from filing a director's report in the event that the company falls within the thresholds of a "small exempt" company in terms of the Amendments and the Companies Act regulations. In order to fall within the thresholds, the company's balance sheet should not exceed the limits of at least two of the three following criteria:

i. Balance Sheet total: six million euro (€6,000,000);

ii. Turnover: twelve million euro (€12,000,000);

iii. Average number of employees during the accounting period: fifty (50).

Additionally, a merchant shipping company may be exempt from filing an auditor's report as long as the company's balance sheet should not exceed the limits of at least two of the three following criteria:

i. Balance Sheet total: forty-six thousand, six hundred euro (€46,600);

ii. Turnover: ninety-three thousand euro (€93,000);

iii. Average number of employees during the accounting period: two (2).

Having said that, companies which are required to file a corporate tax return in Malta may still need to prepare an auditor's report in order to allow the tax practitioner to complete and file the Corporate Tax Return.

It should be noted that the small companies' rules for parent companies in relation to the preparation of consolidated accounts should also apply. All articles of the Companies Act in relation to the keeping of accounting records (and the content and form thereof), exemptions, disclosure requirements, directors' report, audit reporting, laying and submission of accounts, together with the accompanying liabilities and penalties, should, except in so far as they are entitled to the exemptions allowed in the legislation, be applicable to merchant shipping companies.

It is essential to note that the penalties, as have been amended, will be imposed and have become applicable to merchant shipping companies registered in terms of the Merchant Shipping Act, as from 1st April 2020.

Prior to the recent Amendments, a merchant shipping company incorporated in another jurisdiction which intended to be continued in Malta was required to go through a lengthy bureaucratic procedure. The foreign shipping company would have first been required to go through the process of continuation in accordance with the respective regulations in terms of the Companies Act. Following completion of this process, the directors of the company would have then proceeded to make the required amendments in order to be treated as a merchant shipping company by electing for the company to be regulated by the Merchant Shipping Act by means of the appropriate declaration in the Memorandum of Association of the company.

However, through the introduction of these Amendments, foreign shipping companies have been provided with their own specific rules to cater for this scenario which provide for a smoother transition of foreign companies wishing to continue in Malta, or on the inverse, Malta merchant shipping companies wishing to continue in another jurisdiction. The fees due upon the continuation of such companies, whether inbound and outbound, should apply as from 1 April 2020. A shipping company may elect to be governed by the Companies Act by filing the relevant notice.

The availability of ring-fencing measures in the shipping industry

Amendments have also been made to various financial services laws in Malta through the introduction of Act V of 2020. The most pertinent changes relate to the Companies Act which granted the Minister responsible for the registration of commercial partnerships the authority to publish regulations relating to companies carrying on or engaged in shipping business.

The inclusion of the newly inserted enabling provision, article 84E of the Companies Act, extends the possibility of the creation of, or the conversion into, cell companies by companies carrying on or engaged in shipping business, which benefit could previously only be availed of by insurance companies, securitisation vehicles, investment companies with variable share capital and more recently by foundations and associations.

The Companies Act defines a cell company as "*a company formed or constituted as such or converted into a cell company and creating within itself one or more cells for the purpose of segregating and protecting the cellular assets of the company in such manner as may be prescribed*".

A cell is defined as "*a cell created by a cell company for the purpose of segregating and protecting the cellular assets of the company in such a manner as may be prescribed"*. It also includes a reference to segregated accounts, compartments or units within a company having multiple accounts, compartments or units.

In general, one of the most attractive features of cell company structures is the segregation of patrimonies (assets and liabilities) of each individual cell which are separate from the patrimonies of the other cells as well as from the core. This effectively means that in the event of insolvency of a particular cell, the creditors of that cell may only avail themselves of the assets of that particular cell and may not reach to other cells to cater for the debts due by that particular cell. As a result, risk transfer arrangements may be carried out ensuring that a cell's assets are ring-fenced from the other cells and from the core.

For the purposes of these amendments, the term "company" is extended to include partnerships en *commandite* or similar or equivalent body corporates, the capital of which is divided into shares.

Within the ambit of these amendments, the definition of shipping business is wide ranging. Firstly, it includes the ownership, operation by charter, lease or otherwise, administration and management of any ship together with the carrying on of all ancillary financial security, commercial and other activities connected therewith. In this respect, administration and management includes personnel engagement, as well as employment and management both onboard or otherwise. Additionally, such "business" extends to the holding of shares or other equity interest in any undertaking, whether such undertaking is established in or outside of Malta, provided that such undertaking is solely established or mainly established for the purpose of carrying on or out any one of the activities listed within this definition together with the carrying on of all ancillary financial, security, commercial and other activities connected therewith. The aforementioned activities also extend to the activities of the parent company which holds shares or other equity interest in undertakings, whether Maltese or otherwise, established solely or mainly for the carrying on or carrying out of any of the aforementioned activities. Furthermore, such activities also include the raising of capital through loans, the issue of guarantees or the issue of securities by an undertaking where the

intention of the activity is to achieve the objects or activities mentioned throughout this paragraph.

The amendments may serve as a simplifying tool for shipping companies who wish to consolidate their holdings, vessel portfolios and other assets. Tapping into the cell company structures would prove to be particularly beneficial when a shipping company approaches a bank for loan purposes, as these structures may provide the bank with a clearer picture of the shipping company's holdings when analysing the risk involved in granting a loan.

To date, though the relevant regulations have not yet been enacted, it would be interesting to see the manner in which these regulations will be promulgated. The enabling provision has granted the relevant Minister the power to make regulations providing for the incorporation of cells as limited liability companies with separate legal personalities. The broadening of these regulations to accommodate cell companies in the shipping industry should prove to yield diverse opportunities within this sector which would surely be attractive to the players within the industry.

In view of the above, it is evident that owing to the fact that Malta has long appreciated the maritime industry as one of its economic pillars, efforts are continuously being made in order to ensure the industry remains competitive and robust.

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Ship Arrest in Ukraine: New Approaches

by Arthur Nitsevych & Mikhail Selivanov, Interlegal

The concept of one shipowner–one vessel

The concept of one shipowner–one vessel arose due to shipowners' reasonable desire to secure their business against ship arrest. Today the shipowner, having understood the possibility of imposing arrest on any vessel they own (e.g. whether it be a debt for bunker supply or ship repair), thereby has to incorporate a unified center (holding company) engaged in actual (not legal) control over other companies – vessel owners or operators.

It should be noted that it would be a dense and lengthy article to try to disclose corporate structure in the framework of Ukrainian court proceedings, with regards to judicial practice and poor regulations concerning the above issue.

As shown by the majority of our case studies, ship arrest takes place by means of claim security before filing a lawsuit. The court itself has neither procedural capacities nor sufficient time for analysis of corporate relations between entities with respect to the application on claim security that has been filed. Thus, in the framework of Ukrainian court proceedings, there is a large probability of unsuccessful attempts to arrest vessels belonging to shipowners who have no direct debts against their creditors.

Our practice shows that a real way to settle the above issue is by compulsion of the shipowners, being affiliated to each other, to enter into dispute settlement agreement. Such agreement should stipulate structure and compound of affiliated entities and prescribe joint liability for all the shipowners: one for all and all for one. Since the Ukrainian law does not provide any opportunity to disclose corporate structure of legal entities–shipowners, the aforesaid approach facilitates avoiding the concept of one shipowner–one vessel due to joint liability of shipowners and their affiliation.

Therefore, there is a chance to obtain a proper instrument of filing an application on claim security

against affiliated entities, whose vessel would call at the Ukrainian sea port.

Actual vessel detention without a maritime claim

In practice, we often face the fact of a vessel detention in the absence of a maritime claim or any other claim against the shipowner. Such a case became widespread due to the global financial crisis and is therefore treated as a temporary case. The above situation occurs in the case of filing claims, not against the shipowner itself, but against an owner of cargo loaded on board and arrested by the court.

Due to the restrictions to carry out any actions with respect to cargo, as usually indicated in appropriate court decisions, the shipowner has to wait for dispute settlement between the owner of the seized cargo and third party, acting as a floating warehouse. In such a case, the shipowner is a hostage of circumstance and can only wait for dispute settlement between third party and consignee, as well as calculate in due time and apply for all expenses incurred by the shipowner due to vessel detention (idle stay, discharging the cargo, towage and pilotage, etc.).

Therefore, we may state that an independent procedural instrument has emerged in Ukraine: arrest of sea-going vessels aimed at maritime claim security, facilitating wide opportunities (e.g. for ship repair yards or bunkering companies) for debt recovery, payment of court fees and costs of legal support.

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