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In this issue of *The Arrest News,* members take a look at the peculiarities of the high-profile Force India case; vague details of the IMO's Marine Incident Report and their full disclosure in arbitral/legal proceedings; a precedent decision in Ukraine regarding use of the P&I club LOU, resolutions to perceived conflicts in legislation from the Bombay High Court; and Covid-19's continued impact on the sale of goods carried by sea

Force India by Brian Taylor, Gateley PLC (UK)

Can a judicial sale be stopped by the English Court after judgment and an order for sale of a vessel?

In *Qatar National Bank QPSC v Owners of the Yacht Force India* [2020] EWHC 719 (Ad) the answer to this was affirmed as "yes" – but with a few comments, warnings and caveats.

Brian Taylor of Gately Plc represented the Defendant, "Force India" in the application to set aside the order. It was a judgment of Mr Justice Teare delivered on 25th March this year and was the first case to be heard by the Admiralty Court remotely. It is unusual for several reasons, not least that the Admiralty sale was stopped at almost the exact moment that one of the many bids to purchase the vessel was to be accepted by the Admiralty Marshal.

The background is that on 29th January 2020 the claimant bank had obtained a judgment against the yacht in respect of sums outstanding under its mortgage (limited to €5million) over the vessel. The overall loan was for a significantly higher sum (around €27 million) but lent to a third party. The third party had defaulted under its loan obligations and the bank sought to enforce the yacht mortgage. It arrested the vessel in 2018 and sought judgment and an order for sale.

Unlike a conventional loan, made to purchase a vessel, no monies had been lent to the yacht owner Force India Ltd. This loan had been taken out by a legally unrelated company to finance the purchase of a substantial property in the South of France. The yacht owner agreed to mortgage its vessel as additional security because the property value to loan had

dropped during renovation and in short, the bank required additional security.

At the time of the vessel's arrest the French property was for sale. The bank was aware of this and also that at the date of judgment, agreement had been reached to purchase the property.

In defence of the Admiralty claim the yacht owner claimed that it had been agreed that the security would be enforced only when (and if) the yacht was sold by the owner. This defence ultimately failed and on 29th January 2020 QNB obtained judgment and an order for the sale of the yacht. The Admiralty Marshal was instructed to sell it and purchase bids were to be lodged by 10th March.

Notwithstanding the order for sale, on 4th February 2020, a continuation plan for the administration of the French property-owning company was approved in the commercial Court of Cannes and on 6th March an Assignment Agreement was entered into between the property purchaser and the Claimant. €17.5 million was to be paid to the Claimant in return for an assignment of contracts and receivables, including an assignment of the charge over the French property and the mortgage over the yacht.

The sum of €17.5 million was paid on 10th March. The purchaser, the bank (under its obligation in the Assignment Agreement) and the Defendant had provided letters dated 9th March 2020 confirming their consent to cancellation of the judicial sale of "FORCE INDIA".

In view of the lateness of the day, and the Admiralty Marshal's confirmation that the sale would not be stopped or suspended without a Court Order, applications were therefore made - very late in the day, (on 10th March 2020) by all three parties. The matter was heard remotely on the day of the sale.

The Court initially turned down the application but suspended the sale in order to conduct a full hearing and make a proper determination in the matter. It sought certain undertakings to protect the position of the Admiralty Marshal and its sale broker, and certain other claimants.

The matter was fully heard on 25th March, where the order for sale was set aside. In short, the reason for doing so was simple - in circumstances where the sum secured by the mortgage had in effect been paid by a third party judicial sale of the vessel was no longer required.

The legal position on this is unusual and there is only one other recorded English case of such an application being made - *The Acrux* (1961). In that case, even after an order suspending the sale, the vessel was ultimately sold because it was determined that there were insufficient funds to repay all creditors. Nevertheless, it remains authority for the principle that the order can be set aside, and in this case it was seen as such.

The fact that there is little legal authority is not surprising but arises because of the very unusual facts and late (post judgment) redemption of the mortgage. Illustrative of this is that the Admiralty Marshal made the Court aware that in his broker's 40 year association with court sales he had never known such an application being made to halt a sale at such a late stage.

Whilst the Court was therefore minded to grant the application it was careful to record its concerns:

> *"Sales by the Marshal are free of pre-existing maritime liens, statutory rights of action in rem or other encumbrances. In order to ensure that the market price is achieved the vessel's value is appraised prior to sale. The Marshal cannot sell for less than the appraised value without the permission of the court. These features of an Admiralty sale are well known to the market. If it became the practice for orders for sale to be set aside those willing to incur the time and expense involved in making a bid for a vessel ordered to be sold may feel disinclined to do so. That might lead to vessels being sold for less than their market value and might tarnish the reputation of the Court. In the long term the service provided by the Admiralty Court to the maritime community would or might be damaged.*
>
> *These concerns suggest that the court should be reluctant to set aside a sale, particularly when the application is made as late as the application in this*

case was made. In his witness statement the Marshal has stated that, according to his broker, Paul Wilcox of Kellocks, around 20 potential bidders had carried out inspections and investigations during the sale period and that if it became widespread knowledge that parties can stop a sale process it will make interested parties "more cautious about bidding for vessels being sold through the court's process".

The setting aside of sales should certainly not become a practice."

Mr. Justice Teare was therefore concerned to record the court's comments that this case was very unusual and exceptional, primarily because it is rare that an independent third party would be prepared to discharge the judgment debt and so render the sale unnecessary.

He was also rightly concerned that the whole process of an Admiralty sale should not be undermined at a late stage and that Defendants to such proceedings should not consider from this judgment that this should be the norm. If they did, it could damage the independence of the English Admiralty Court:

"I was therefore persuaded that the need to set aside the order for sale in the present case was brought about by unusual and perhaps exceptional circumstances. So long as this is understood by the market there should not be any damage to the reputation of the Court or to its ability in future cases to achieve a vessel's market value when an order for sale is made."

It is worth commenting that, whilst the sale transaction was not finalised until extremely late in the day, the bank was not in the dark about the advanced negotiations. These were admittedly not straightforward, but they did have a degree of certainty and (as proved to be the case) were capable of reaching fruition. The bank was aware of them as far back as January, when it was seeking judgment. The fact that a late application was made by the bank was therefore a surprise to the court but it was of no surprise to the bank, notwithstanding its proper concerns to proceed to judgment.

This is therefore an unusual case, not only because it was the first Admiralty case to be heard remotely but because the surrounding facts, including the loan, the purchase agreement, redemption of the loan and late applications are not those usually associated with such an action. The fact that there is very little legal authority for the order highlights this. It also illustrates the flexibility of the Admiralty Court, whilst re-affirming its commitment to the certainty and a process of judicial sale by the Court.

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Disclosure of IMO's Marine Incident Reports in Arbitral/Court's Proceedings

By Yoav Harris, Harris & Co. Maritime Law Office (Israel)

IMO's publications on the reporting of marine incident investigations which are published under the topic "lessons learned" regularly include "why did it happen" highlights such as "lack of a detailed passage plan", "lack of knowledge or understanding of the limitation of the anchoring system". However, the reports themselves are not published. Can or should these reports be disclosed in legal or arbitral proceedings taking place between owners and cargo receivers or others? Do cargo receivers have a right of standing to demand the reports and on what grounds? In this article we will present these topics and the importance of the Haifa District Court decision in these regards, handed down in relation to the marine incident of the M/V Diana.

The Voyage

M/V Diana departed Dunkerque port on 2nd January 2018 carrying cargo of steel coils intended for Israeli receivers and Turkish receivers. On the following day

while navigating through the English Channel heading west, according to the AIS records, the vessel seemed to have navigated in an unclear way and reduced its speed to one knot only. On 9th January 2018 the vessel called at Gibraltar Port and thereafter departed towards Haifa Port. On 16th January 2018 it arrived at Haifa port and released its right anchor. On 18th January, due to expected adverse weather conditions, most of the vessels which called at Haifa port navigated towards the west in order to get away from the Haifa Bay shore which is in the east. The M/V Diana remained in its position.

The Marine Incident

During the period beginning on 18 January 2018 at 13:50 and until 19th January at 16:10 the vessel started drifting towards the east, reducing its speed to only one knot, and suffered continued engine shut downs while confronting the adverse weather. Eventually at 16:10 the vessels' Master advised Haifa Port's RCC that the vessel had touched ground and called for assistance. The vessel finally came to a stop about 250 meters from the Haifa shore, where the depth of the water was only 4 metres .

As a result of the vessel's grounding, sea water penetrated the cargo holds, oil pipe lines were damaged and the steel coils were contaminated with mixtures of chlorides and oil. The vessel remained "stuck" at its above-mentioned position for a few days. The steel coil cargoes were discharged from the vessel by barges, and thereafter the vessel was towed to a platform at Haifa Port and underwent necessary operations and preparations to make it fit to be towed to a shipyard in Turkey.

Owners' and Cargo Receivers mutual claims

Owners declared "General Average" and following a claim *in rem* and arrest application filed by the Turkish cargo receivers and underwriters, on 16th February 2018 the Haifa Maritime Court arrested the vessel. Up to that date, a claim and arrest on behalf of the Israeli cargo receivers that was filed on 1st February 2018 was pending. However, on 15th February 2018 this claim was settled with the Owners and the arrest order issued on 1st February in their claim, was set aside.

The Owner's club provided a LOU securing the Turkish cargo receivers' and underwriters' claim (claimed amount US$ 3.8 M). Accordingly, the arrest order was lifted and the vessel went under final preparations for departing Haifa port by towage.

The Administration's Investigation

Following Articles 99 and 100 of the Israeli regulation of Ports Safety (Vessels) 1982, and the IMO's Code for The Investigation of Marine Casualties and Incidents[2,3], The Israeli Shipping and Ports Administration of the Ministry of Transportation (the "Administration") conducted an investigation of the incident. The Administration's officials took statements from the chief engineer and master, viewed the RCC communication and documents, and at the end of the process, issued a Report detailing the sequence of events and causes of the incident having the statements, communications and other documents annexed.

2 International Maritime Organization, CODE FOR THE INVESTIGATION OF MARINE CASUALTIES AND INCIDENTS, Resolution A. 849 (20). Adopted on 27 November 1997, (the "Code").
According to IMO's publications, ://www.imo.org/en/OurWork/MSAS/Casualties/Pages/Default.aspx, the Code amalgamated and expanded the individual resolutions relating to each local administrations' liability to conduct investigations into casualties occurring to ships such as SOLAS regulation I/21 and MARPOL articles 8 and 12, or the United Nations Convention on the Law of the Sea (UNCLOS), article 94 paragraph 7: "Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation." Resolution A.884 (21) provided Amendments to the Code adopted in November 1999 and provided guidelines for the investigation of human factors.

3 According to the Code "Marine Casualty" includes, inter alia, "loss or abandonment of a ship", "material damage to a ship". "Serious Marine Casualty" means a casualty which involves "structural damage rendering the ship unseaworthy, such as penetration of the hull underwater…", or "a break down necessitating towage or shore assistance".
"Marine Incident" means, "an occurrence being caused by, or in connection with, the operation of a ship by which the ship or any person is imperiled, or as a result of which serious damage to the ship or structure or the environment might be caused".

The Application for the examination of the Chief Engineer:

Meanwhile, prior to the expected departure to the vessel, the Turkish cargo receivers and their underwriters filed an Application asking the Haifa Maritime Court, following Article 96 of the Admiralty Court rules to summon the chief engineer for an examination, before he left the country with the vessel and most likely would disappear and would not attend Court/Arbitration when the Hearings would take place. The Owners objected to the Application, arguing, inter alia, that the Israeli Shipping and Port's Administration (of the Israeli Ministry of Transportation) had probably conducted an Investigation and surely that the claimants would require the Authority's Report which could provide evidence on the facts related to the incident. Eventually the Court held that the Chief Engineer answer, in a written statement, the questions referred to by the Claimants and would not undergo an examination before the Court at this stage. On 18th February 2018 a written statement on behalf of the chief engineer was provided. On the following day, 19th February, the vessel departed Haifa Port by towage.

Due to an arbitration clause incorporated in the bills of lading the matter was referred to London Arbitration.

The Application for the disclosure of the Report under the Freedom of Information Act

Against the above background, Turkish cargo receivers and underwriters, through their local attorney, applied to the head of the Freedom of Information department at the Authority and asked for a copy of the Report in order to make use of it in the arbitral proceedings taking place in London.

Following Owner's objection to have the Report enclosed as requested, the Authority released only a blanked out copy of the Report (meaning a copy of the report where parts of it were blanked out) and without any of its annexes, which included, inter alia the written records of the RCC communication which took place between the vessel and Haifa Port RCC throughout the above mentioned period of 18-19th January 2018 and the statements of the RCC operators.

The Petition before the Haifa District Court

The Turkish Cargo Receivers and their Underwriters filed a petition before the Haifa Maritime Court asking it to order the Authority to disclose the Report in full (reinstating the parts that had been blanked out) and its annexes (the "Application"). The Application was grounded both on the Israeli Freedom of Information Act-1998 and the Arbitration Act- 1968. The Respondents to the Petition were the Administration and Owners. After the Court's Hearing and following the Court's observations, the Turkish Cargo Receivers and Underwriters narrowed the Application to the disclosure of the RCC communications and the RCC's operators statements, having all rights reserved to apply for a full disclosure of the Report following and according to the disclosure of documents and arbitral decisions in regard to the Report as would be decided in the future Arbitration which had not reached the disclosure of documents and summoning of witnesses and the provision of documents, at that stage.

The Haifa District Court's decision acknowledging the Cargo Receivers right of standing

Under the above-mentioned background, the Haifa District Court decided the Application. One of the main issues and principles dealt with by the Court was whether a foreign claimant has a "right of standing" to receive information following the Freedom of Information Act. Clause 1 of the Act declares that "*any Israeli citizen or resident has the right to receive information from a public authority*", which indicates, that allegedly the right for information is granted only to an Israeli citizen or resident. However, Clause 12 of the Act orders that: *"The orders of this Act will apply also to an information petitioner which is not an Israeli citizen or resident in relation to information about its rights in Israel."* Accordingly, the Court had to examine whether the Turkish cargo receivers and the underwriters can be considered as *"having rights in Israel"*. The Court held, that the expression *"about its rights in Israel"* should be interpreted broadly and should include not only personal information collected by the authorities, but also the information about a foreigner's assets in Israel or assets he had in Israel at the time of the

collecting of information, and should include information related to entitlements and claimable entitlements related to the period when the foreigner was in Israel or information collected in relation to a claim related to its assets, when he was in Israel.

In the current matter, the Court held that the required information was collected in Israel in relation to a marine incident which took place in the Israeli territorial waters at Haifa Port. The collected information concerns the reasons for the damage caused to M/V Diana and the steel coils carried by the M/V Diana, meaning the Applicant's assets.

The information relates to the Applicants' claimable rights which arose in Israel in relation to an incident which took place in Israel. The Court also mentioned that the claim *in rem* and arrest proceedings took place in Israel and that there is no doubt that the Israeli Courts have authority to hear the claim and that only due to an arbitration clause the claim is to be heard in London. Obviously, if the claim would have been handled before an Israeli Court, the Applicants would have had the standing required from the Administration regarding the collected information required for the execution of their claimed rights (subject to the exceptions by Law), and the fact that the transfer of the proceedings to London should not derogate from their rights to obtain the collected information which is required to materialize their rights which arose in Israel.

The Court also added that the right to receive information can be established by other fields of law and also information which is not listed in the Freedom of Information Act as compulsory information, can also be obtained.

Court's rejection of the Administrations' and Owner's objections

After establishing the Applicants' right of standing, the Court rejected the objections of the Administration to disclose the RCC communication and statements which were based on the Administration's argument that in order to achieve future co-operation in future investigations of marine incidents, the information should not be disclosed. The Court held that it does not see how the disclosure of communications which took place in real time concerning a distressed vessel, which are recorded as a matter of routine - regardless of the existence or non-existence of a future investigation, will disrupt the Administration's investigations.

On the contrary, the Court held, that the disclosure of the full information on a marine incident will help vessel's crew and personnel to learn about the circumstances of the incident and how to avoid such marine incidents in the future.

The Court also denied Owners' objection to disclose the RCC communications and held that it did not find any reasons as to why the disclosure would cause damage to the crew or to the Owners. After viewing the communication and asserting that they do not include any personal private information of either the crew or the RCC operator, the Court held that the RCC communication and RCC operators' statements will be disclosed and made an order of costs ordering both the Administration and Owners to pay the Applicants costs.

Observations:

It should be mentioned that under the Israeli Arbitration Act, clauses 13, 16 and 39, the Courts are authorized to provide assisting orders such as the summoning of witnesses in an arbitration and/or to enforce orders issued by an Arbitrator. These powers apply also to an arbitration taking place abroad.

Accordingly, an Arbitral award ordering the disclosure of documents and information held by an Israeli authority can be enforced by an Israeli Court. According to clause 13 (c) of the Israeli Arbitration such an Authority has the right to oppose such an order, and the Court will have to decide such an objection.

The Haifa District Court's decision, which was handed down by the Haifa Maritime Court Judge, Vice President, the Honourable Judge Mr. Ron Sokol, is a clear recognition of the rights of cargo receivers or others who suffered losses and damages as a result of a marine incident, to receive information collected by an authorized authority while conducting an

investigation and issuing a report on the reasons which cause the incident.

The manner in which this right of standing would be materialised and confronted by objections and exception on behalf of the authorities and owners should emerge in future Applications of this nature.

Folio No. 67484-03-19 **HDI GLOBAL ANTWERP and Others Vs. State of Israel and Owners of the M/V Diana**, Haifa District Court.

For the Applicants: Adv. Yoav Harris of Harris & Co.; For the State of Israel- Adv. Suzan Muklad of the District Attorneys Office; For the Owners of M/V Diana- Adv. Roi Cohen of S. Frieddman & Co.

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P&I Clubs' Letter Of Undertaking Practice In Ukraine By Evgeniy Sukachev, Black Sea Law Company (Ukraine)

International merchant shipping is undeniably a pillar of the global economy. Relations in the merchant shipping sphere are regulated not only by national systems of laws and codes, but also by international law, including the use of documents of a recommendatory nature and customs.

In the process of transporting goods by sea, incidents are not uncommon, which may subsequently lead to claims and a dispute between the parties to the carriage. Since the ship is a permanent participant in such legal relations, the ship can become the first "hostage" of your dispute.

Ukraine has ratified the International Convention Relating to the Arrest of Sea-Going Ships of 1952 (Brussels Convention), which establishes the procedure for the arrest of a ship as security for a maritime claim. The Brussels Convention provides for 17 types of maritime claims. The main criterion for determining a claim as a maritime one is the emergence of a claim from legal relations related to the use of the ship.

To implement international provisions, each of the countries participating in the Brussels Convention additionally has its own legal instruments for the arrest of a ship in order to secure maritime claims, which are determined by national legislation. In Ukraine, such rules are contained in the Merchant Shipping Code of Ukraine, the Commercial Procedural Code of Ukraine and the Civil Procedure Code of Ukraine.

It should be noted that the Brussels Convention clearly indicates that the arrest of a ship should only be imposed by a court or a judicial authority, which, in our deep conviction, excludes the possibility for any state authorities to exercise their authority to arrest a ship and impose restrictions on ship`s commercial activity.

As for P&I Club's LOU – it is an incredibly powerful tool that clubs can provide to the shipowner when they are threatened with the arrest of their vessels by the plaintiff trying to secure a claim. The LOU is not only a form of security recognized in the vast majority of maritime jurisdictions around the world, but also a form that can usually be issued much more easily than other forms of security, allowing the threatened vessel to resume sailing much faster.

A Club, a Shipowner and a Recipient of such a letter of undertaking, have a number of certain advantages: firstly, the letter of undertaking has the simple and flexible form of content, and secondly, the LOU, although it is made in writing, thanks to modern technologies, it can be delivered to any country in minutes. Due to the simple and capacious form of issuing a letter of undertaking from the P&I Club, the Shipowner minimizes, and in some cases avoids the additional costs that could be incurred in connection with the arrest of the vessel and the restriction of its commercial activities.

There is no single international act that would govern the adoption of a letter of undertaking from the Mutual

Insurance Club. But despite this, UK, Hong Kong, Australia, Italy, France, and Singapore accept this type of document as security in common way. Most P&I Clubs note the effectiveness of using the LOU, which is increasingly written in their publications and circulars.

It is the concept of the Letter of Undertaking of the Mutual Insurance Club that is to be considered in this article as a form of security, which must be fixed at the legislative level and introduced into widespread use for the territory of Ukraine in disputes over maritime claims.

Is it possible in Ukraine to use such a modern financial instrument as the Letter of Undertaking of a P&I Club?

It would seem that Ukraine, as a maritime state, should not be an exception, however the using of a P&I Club's LOU was not a common practice in our country, if not to say otherwise.

Chapter 49 of the Civil Code of Ukraine describes the basic terms, conditions, and requirements of the forms of security. According to Article 560 of the Civil Code of Ukraine, under a guarantee, a bank, other financial institution, insurance organization guarantees that the debtor will fulfill his debt to the creditor. The guarantee is valid for the period for which it is issued. The guarantee is valid from the date of its issue, unless otherwise specified in it. The guarantee cannot be revoked by the guarantor, unless otherwise provided in it, in accordance with Article 561 of the Civil Code of Ukraine.

It should be noted that LOU in its essence can be used in Ukraine and be recognized by state authorities of Ukraine without any restrictions. The validity and enforceability of the LOU is indicated by its compliance with the requirements of applicable law. Also, the LOU should be understandable and executable. The validity period of the document as well as the procedure for its execution should be directly displayed in the content.

Analyzing the Ukrainian legislation, it can be confidently stated that a number of certain changes or rather, additions, should be introduced to the existing legal acts in order to clearly determine the procedure for its application in the commercial practice of Ukraine. However, it is important to note that the current regulations do not prohibit the use of such a security tool and recognize the existence of an extensive guarantee institution.

The Commercial Code of Ukraine provides that, by agreement of the parties, the types of security for fulfilling obligations stipulated by law or those that do not contradict it may be applied. The provisions of the Commercial Code clarify such type of security as a "bank guarantee", while pointing to the concept of a "letter of guarantee", but only with respect to a document issued by a bank. The Civil Code clarifies the concept of "guarantee", and also specifies the requirements and procedure for using this type of security.

Taking into account that all cases of the vessel arrest in one way or another relate to the authorities, it is also recommended to amend the Code of administrative legal proceedings of Ukraine. Undoubtedly, the norms of the Merchant Shipping Code of Ukraine require amendments and additions regarding the release of the vessel from arrest in the event that the maritime claim is secured in the form of the LOU from the P&I Club.

The possibility of recognizing the letter of guarantee of the Mutual Insurance Club, issued in accordance with the requirements of the legislation of Ukraine, was reflected in the decision of the Commercial Court of Odessa region dated May 15, 2020, where the letter of undertaking of the P&I Club was recognized as a financial guarantee against the State Ecology Inspection's claim. The court noted that in the systemic interpretation of Article 141 and other Articles of the Commercial Procedure Code of Ukraine, it is possible to accept as evidence a financial guarantee of a person in respect of whom there are no doubts about solvency.

This decision of the Commercial court of Odessa region is inherently revolutionary and progressive. This is actually the first case when the court describes and recognizes an international financial instrument – the Letter of Undertaking of the P&I Club in the process of

securing a maritime claim and declares the possibility of its use taking into account all regulatory requirements.

This decision clearly explained the terms of use for the Letter of Undertaking in Ukrainian jurisdiction against the Maritime claims of State Authorities, Prosecutor's office and other third Parties in Ukrainian courts, and the litigation proceedings became understandable for all shipowners, covered by P&I Clubs' protection "umbrella", and Black Sea Law Company's Team is supporting it's International Clients with reliable legal services in Ukraine.

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Admiralty Act reigns over Insolvency Laws: Bombay High Court rules

By Gautam Bhatikar, Legasis Partners (India)

The Indian Admiralty and Insolvency regime have been effectively revamped over the last couple of years. Prior to 2016, there were a multitude of convoluted legislations dealing with the insolvency process which failed to provide an efficient and time bound resolution to stakeholders. In 2016, following an exhaustive public consultation and recommendations process, the India Legislature introduced the Insolvency and Bankruptcy Code, 2016 ("IBC"/ "Code"). The Code established a separate Adjudicating Authority i.e. the National Company Law Tribunal for dealing with the Insolvency process. The IBC brought about a revival mechanism for Companies such that in case a company is unable to pay its debts, it would first have to undergo a resolution process, through which best efforts would be made to get the Company afloat and running by way of maximum asset utilization and restructuring the Company. This was a welcome change brought about by the IBC as there was no mechanism for reviving the Company under the earlier regime.

In 2017, the Legislature also promulgated and passed the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("Admiralty Act"). The Admiralty Act was a first codified legislation post-independence, concerning to the admiralty jurisdiction in India. It brought about some significant changes to the manner in which adjudication of maritime disputes would take place. The Act not only modernized the Admiralty laws from the colonial era but also incorporated the principles laid down by the Indian Admiralty courts over the years with consistency with the International Conventions.

Although originally it was believed that both the legislation are in no way germane to one another, the promulgation of the IBC and the Admiralty Act brought with it a great dichotomy which remained unresolved. Since the inception of the Admiralty Act, 2017 in various *in rem* actions under the admiralty jurisdiction of the High Courts, a question arose in respect of the likely overlap with provisions of the IBC and/or the Companies Act. Particularly issues arose with respect to the effect and consequences of the proceedings under IBC and issues relating to the need to seek leave of the Company Court. Finally, the Bombay High Court in the case of *Raj Shipping Agencies and Ors. v. Barge Madhwa and Anr.*[1], with a view to put an end to the conflict between the two statutes, listed the issues of law involving complex questions pertaining to the applicability of the IBC and/or the Companies Act while *in rem* proceedings were also instituted.

Questions before the court:
After considering the complex issues in various matters/proceedings before it, the court framed the following questions, thereby summing up issues arising out of the conflict between the statutes:

Question No. 1
Is there a conflict between actions *in rem* filed under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 and the provisions of Insolvency and

1 CHS No. 66 of 2018 in ADMS 6 of 2015

Bankruptcy Code, 2016 and if so, how is the conflict to be resolved?

Question No. 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?

Findings:

After an extensive discussion on the principles of harmonious construction of both the statutes, the fundamental principles of *in rem* proceedings and exploring all the possible scenarios, the court's consideration and efforts were to protect the interests of both the legislation, which would not defeat the purpose of either legislation.

The Court however concluded 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.

A person having a maritime claim (as provided in the Admiralty Act) 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 crystallize his maritime lien or maritime claim as available to him under the Admiralty Act. However, such an action in rem will not proceed till the moratorium period as provided under the IBC is in place. The said conclusion of the Court has ensured that the rights under the Admiralty Act are not defeated and at the same time, the exercise of such rights does not create any conflict with the provisions of the IBC. Further, the action in rem will proceed if the corporate debtor is ordered to be liquidated.

The court also clarified and ordered that an action in rem shall proceed in accordance with the Admiralty Act, the priorities for payment out of the sale proceeds shall also be determined as prescribed under the Admiralty Act and not as per Section 53 of the IBC.

It can be safely observed that the Court, in coming to the aforesaid findings in the process of interpretation of the provisions of the IBC and the Admiralty Act, has laid down great emphasis on the harmonious construction of both the statues. These interpretations would also serve the interests of all stakeholders under both statutes and are consistent with the objectives of both acts.

The Court also took note of the state of affairs in a number of cases wherein the Resolution Professional/ Liquidator was appointed but failed to take any steps to man, preserve and maintain the vessel during the insolvency resolution process/liquidation process. The crew members were left stranded on board the ship and for all practical purposes were abandoned by the Owners. The Court observed that irrespective of the non-obstinate clause in the IBC, Admiralty Act being a special Legislation takes into account all such relevant factors and therefore exercise of Admiralty jurisdiction would in such cases will be beneficial and assist, rather than hinder, insolvency proceedings / process. It would protect the ship and in turn the security of a mortgagee who is a financial creditor as per the provisions of the IBC. Further, 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.

A connected question that arose in the aforesaid matters was whether leave of court 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?

Section 446 of the Companies Act deals with the staying of the suits while the Company is in the process of winding up. The Court held that Admiralty Law is a special enactment while the Companies Act is rather a general enactment. Admiralty law deals with actions in rem and it was enacted for a special purpose and, therefore, it will override the general law. The court further asserted that under the admiralty jurisdiction, the action is against the ship and not the

company nor the owner of the company. Section 3 of the Admiralty law confers admiralty jurisdiction exclusively to the High Courts and no other court of jurisdiction. Thus, the Court concluded that section 446 of the Companies Act 1956 will not apply to Admiralty suits.

Conclusion

The Court has thus amply analyzed and explained the scope of the Admiralty Act and the IBC, after an extensive assessment on the principles of harmonious construction and the fundamentals of in rem proceedings. Given the great dichotomy having arisen due to the overlap of the Admiralty Act with provisions of the IBC and/or the Companies Act, Hon'ble Court in the said judgment has taken note of the intention of the legislature behind the Admiralty Act and the IBC and has sought to harmoniously interpret and construct their provisions. This in turn will ensure that the sanctity of the provisions remains intact and the rights of the person having a maritime claim as well as the corporate debtor remain unaffected. While taking into consideration the special nature of Admiralty Jurisdiction, the court has distinguished a ship/vessel from any other asset and emphasized on the legal personality of the vessel as distinct from its owner. This move is highly appreciated and is a step forward in protecting the interest of the parties having a bonafide maritime claim to prosecute its claim through an action *in rem*.

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COVID-19 and its impact on the Sale of Goods Carried by Sea By Richard Faint, Charter Wise Ltd. (UK)

I have previously drawn attention to the plight of seafarers caught up in the Covid-19 problem where they are unable to leave their ships after completing their period of employment. Repatriation is proving very difficult, as is providing replacement crews because of the restrictions on air travel.

The London based newspaper FINANCIAL TIMES on 13 September 2020 carried a report that "Fidelity International" (a $566bn Asset Management company) has taken notice of the impact of Covid-19 on international trade and the problems it is causing to logistics in the world's supply chains. According to this report it has called on (trading) companies and governments to urgently address the problem of *"hundreds of thousands of ship workers remain stranded at sea because of the pandemic"*. Again, per this report, Fidelity International "*is contacting 30 companies, including shipowners, airlines and groups that charter ships, to raise concerns about the conditions facing seafarers*".

Fidelity International has done this because it has recognised that an estimated 90% of world trade is carried by sea and has called for seafarers to be classified as essential workers – which would ease travel restrictions for them and make crew changes easier.

Per the International Transport Workers' Federation (ITF) about 300,000 seafarers are still trapped aboard vessels and, of course, their replacements are unable to join vessels. This has resulted in some seafarers refusing to work once their contacts have come to an end (this in an attempt to force repatriation).

Ships are being detained/delayed because of Covid-19 and it must be that disputes will follow. Members will no doubt be involved in obtaining security for these claims. This article looks at the problem firstly from a crew perspective and secondly from the disputes that can flow from this problem.

Crew changes are essential to comply with international maritime regulations for safety, crew health and welfare, and employment. ILO's 2006 Maritime Labour Convention (MLC) states that the maximum continuous period that a seafarer should serve on board a vessel without leave is 11 months. See IMO Guidelines at: http://www.imo.org/en/OurWork/

HumanElement/VisionPrinciplesGoals/Documents/ILO-IMO-Hours%20of%20rest_1.pdf

The Maritime Labour Convention, 2006 (MLC, 2006) sets out the requirements for the maximum continuous period that a seafarer can serve on board a vessel without taking leave.

Where a seafarer has served on board for more than 11 months, (but less than 13 months if the seafarer has consented to stay past 11 months) Port State Inspectors will be required to bring this and this "non-compliance" to the attention of the Master and the vessel owner. The expectation is that the non-compliance will be rectified at the earliest possible opportunity. (Flag State policy may have to be taken into account).

If an inspector can identify that a seafarer has served more than 13 months on board a vessel, my understanding is that the non-compliance requires that inspector to take steps to ensure that the vessel does not proceed to sea until the non-conformities have been rectified or until an acceptable plan of action to rectify such non-conformities will be put in place and implemented in an expeditious manner. (See para. 11 IMO Press Briefing 16.06.2020 at http://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx.

That there will be a "massive commercial impact" if seafarers cannot be repatriated in a timely and safe manner goes without saying. There has to be an increased cost in crew changes, but crew changes remain the responsibility of Shipowners. Some may consider this to be unfair on Shipowners and this may well colour clauses in Charterparties.

I present below some of the problems that can arise when ships are delayed/detained because of this matter:

1. Missed delivery dates under a C/P or being unable to sail where most of the crew have reached the end of their employment contracts.

a. The potential for disruption is extensive and a Shipowner may claim impossibility to perform under future fixtures.

b. Charterers will have to deal with Owners requesting renegotiation of C/P clauses and being placed under a requirement to nominate alternative ports.

c. Dealing with what happens when crew on a chartered in vessel are diagnosed as positive for Covid-19

d. Deviation for crew changes with subsequent delay.

i. As mentioned above some 300,000 seafarers worldwide have been unable to go home because of restrictions on flying.

ii) Some ships are now seeing what amounts to a mutiny of the crew not wanting to go anywhere until their repatriation is sorted out.

e. Last, but not least, how this impacts on sale contracts (the vessel cannot be delivered in time to meet a shipping period or cannot enter a port to discharge); cargo shortages - goods not being available to load because of logistical problems due to Covid-19.

2. On Commodity Sales:

a. Missed appropriation dates or even missed shipment dates.

3. Force Majeure: The ILO has apparently confirmed that [FM] "can no longer be used as a blanket excuse for seafarers' contract extensions, but these must be considered on a case-by-case basis"

a. Where there is a Covid-19 problem the first reaction would be for one of the parties to declare FM.

b. If Members have experience of FM being declared because of Covid-19, I would ask that this is shared with other Members.

c. When a party declares FM that declaration "excuses"one party from performing parts of its contractual obligations where those obligations become impossible or impracticable due to an event or circumstances that the parties could not have anticipated or controlled.

d. FM is part of most civil code countries legal systems, but it should be remembered (for any dispute that is to be resolved under English law) that English law does not recognise the concept of FM.

e. For FM to be considered under any contract governed by English law there would need to be a specific clause in the C/P or Sales Contract. Such a clause would then allow any English Arbitration Tribunal or Court to give effect to the words agreed by the parties.

f. The drafting of any FM clause is therefore particularly important and needs to be well thought out.

g. Under English law any FM clause will be interpreted very strictly. It may be difficult to argue that Covid-19 or any coronavirus type problem amounts to an Act of God.

h. A broad FM clause that included words such as epidemics, quarantines, acts of government, all other events beyond the charterers control, would in my opinion be of benefit to the Shipowner.

i. It would then depend on the wording as to whether a FM event falls within the definition of the clause and whether it has a material impact on the ability to perform under the contract.

j. Arbitrators or Judges will look to establish "causation". They will try and establish what caused the problem.

i. e.g. The inability to load cargo in port A because the local government have banned vessels from loading would probably tick the boxes, whereas declaring FM because of the inability to discharge in port B because of virus delays in say 40 days' time may not. From an arbitrator's point of view the question would be *'Why would you load a ship knowing that it can't discharge?'*

4. Port Issues

a. Many ports are working more or less "normally" but with reduced volumes.

b. Bulk trades are fairly well mechanised and require few humans to be in contact.

5. Crew Issues

a. Unlike shore operations where many workers can self-isolate at work remotely that is difficult to do for life on board a vessel.

b. The crew have to interact with port-based staff (pilots, tug crews, stevedores, and agents etc.

c. As mentioned above we now have the added problem of the difficulty in the repatriation of seafarers who have come to the end of their contract of employment and simply want to go home.

6. BIMCO Charterparty Covid-19 Clauses

a. As can be seen many of the clauses attempt to pass full responsibility to charterers for the consequences of the spread of Covid-19 [and do not forget that we have not seen the end of the Ebola problem] regardless of cause.

b. Technically BIMCO clauses are good in that they protect Shipowners interests well. If the vessel proceeds to an Affected Area, the Owners obligation is only to take reasonable measures in relation to the disease as recommended by the WHO and any additional costs, expenses liabilities including screening, cleaning, fumigating and/or quarantining shall be for the charterers account.

c. Charterers may find these clauses are unfair to Charterers who are left to face the consequences despite having no control over

i. the crew or access to the ship - the health of stevedores (or any other persons who go on board)

ii.where and when crew changes take place (where did the replacement crew come from?

7. Insurance Issues

a.If there is a problem does either party have insurance cover in place?

b.Can either party find "after the event" insurance cover?

In conclusion, we have not seen the end of problems arising from Covid-19. Point 4 above mentions Port Issues mainly because of Port Authorities taking steps to stop loading or discharging operations and impose quarantine orders (as is happening in China). Such orders will have an impact on the Sale of Goods Carried by Sea. It is, at this stage of Covid-19 matters, very difficult to say how this will evolve. Members are kindly requested to share their experiences so that this leads to a better understanding of the overall problem.

Finally, should you be involved in any case of cargo being delayed/quarantined I draw your attention to Art. IV of the Hague Rules and Rules 2 and 4.

Rule 2 states: "Neither the carrier nor the ship shall be responsible for loss nor damage arising or resulting from:

> "(h) Quarantine restrictions"
>
> (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier; but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents of the carrier contributed to the loss or damage.

Rule 4 states: Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

Nobody said this was going to be easy.

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