UK P&I CLUB

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LEGAL BRIEFING

Sharing the Club's legal expertise and experience

Cargo claims in India

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Sharing expertise

The UK P&I Club has collaborated with Advocate, Mr V. Subramanian, to issue this Legal Briefing on 'Cargo Claims in India'. This is the third Legal Briefing in this series, providing guidance to Members on the specific issues relating to cargo claims in the jurisdictions covered. Other briefings in this series cover Cargo Claims in China and Cargo Claims in the United States.

If Members have any questions on any part of the briefing, please get in touch with your usual Club contact.

Our thanks to Mr V. Subramanian (Kumar), Advocate, Venky's Chambers, 114, Maker Chambers, 3, Nariman Point, Mumbai 400021, India, for his assistance with this briefing. ■

Previous issues

Copies of previous briefings are available to download as pdfs from our website. Visit www.ukpandi.com/publications.

Cargo claims in India

With the Indian Admiralty Act 2017 coming into force later this year, this publication aims to highlight the types of issues owners may face with cargo claims in India.

The maritime law of India relating to the carriage of goods by sea is governed primarily by the *Carriage of Goods by Sea Act, 1925* as amended in 1993, *the Indian Bills of Lading Act, 1856 and the Multimodal Transportation of Goods Act, 1993*.

The legislations

The statutes and legislations which apply by force of Indian law govern goods loaded in India. Other legislations that could be applicable in India in relation to cargo include:

- *(Indian) Merchant Shipping Act, 1958*
- *Major Port Trusts Act, 1963*
- *Indian Ports Act, 1908*
- *Marine Insurance Act, 1963*
- *Contract Act, 1872*
- *Sale of Goods Act, 1930*

The *Indian Ports Act, 1908* and the *Major Port Trusts Act, 1963* deal with the administration of the ports and the jurisdiction over ships in ports. The *Customs Act, 1962,* contains various regulatory measures in relation to ships, goods and persons, in connection with importation or exportation. It also applies to clearance of goods for home consumption, exports, duty due on goods, prohibitions, etc.

Procedural aspects of claims are covered in the *Civil Procedure Code, 1908* and the *Evidence Act, 1872*.

Apart from these legislations, judgements of various courts in India lay down general principles of maritime law for dealing with cargo claims and other matters.

Indian COGSA

Based on the Hague Rules 1924

The Indian Carriage of Goods by Sea Act, 1925 (was amended in 1993) or COGSA was enacted to recognise and give effect to the *Hague Rules 1924* as they would apply in India, and it substantially follows the Hague Rules.

The Act applies to carriage of goods by sea under bills of lading or similar documents of title issued in India, from a port in India, to any other port whether in or outside India (Section 2). The Act is similar to the Hague Rules, and as in the Hague Rules' Articles, it imposes responsibilities and liabilities, and confers rights and immunities, upon the carrier. The Act applies equally to foreign merchant ships as well as to Indian merchant ships. COGSA is the substantive law in India on the subject of carriage of goods by sea and would apply compulsorily when the carrier is sued by his shipper based in India.

For inbound cargo, the rights, liabilities and obligations of the carrier and the cargo interests are governed by the relevant contract of affreightment. This relates to the applicable law of the relevant contract (if the contract provides for application of a foreign law and/or convention), the general principles of law as applicable in India and Judge-made precedents.

Defences

The Schedule to COGSA, referred to in Article IV provides for certain rights and immunities to the carrier and the ship from liabilities for loss or damage to the cargo. If the ship or carrier is able to set up any of these defences and offer evidence concerning the same, then such defences would be complete answers to cargo claims.

The carrier may also rely on statutory defences such as the right of the plaintiff to bring the claim, privity of contract and jurisdiction. Factual defences such as short loading, weight, quality or quantity loaded unknown or not matching the description in the claused bill of lading are available. Cargo pilfered or missing post-discharge, or where the loss has occurred in spite of the carrier having

complied fully with the customs or practice at the port also applies.

Multimodal Transportation of Goods Act, 1993 (MTOG Act)

The *Multimodal Transportation of Goods Act* was introduced in India in 1993. This Act applies to all cases where two or more modes of transport are used in the course of transportation. The Act recognises multimodal transportation of goods under a single transport document, which covers all the modes of transport. The multimodal transport operator remains liable and responsible to the cargo owner.

The MTOG Act provides for the multimodal transport operator to be liable when the goods are damaged while they are in his charge.

Limitation and Time Bars

The package limitation under Indian law is 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher. If the Claimant can prove that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly with knowledge that damage would probably result, then this package limitation defense will not be available.

Some of the important changes and amendments to COGSA were brought about by the MTOG Act:

- It allows parties to agree an extension of the one-year period to bring suit for cargo claims.
- It increased the per package limitation in India to 666.67 SDRs per package or unit or 2 SDRs per kilogram of gross weight of the goods lost or damaged, whichever is higher.
- Indian law now expressly provides that neither the carrier nor the ship shall be entitled to benefit from the package limitation. That is, if it is proven that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

COGSA

Article III, rule 6 of COGSA lays down that the limitation period for filing a suit under COGSA in India is one year from the date on which the goods were delivered (or ought to have been delivered.) The one year time period can be extended by agreement between the parties after the cause of action has arisen.

Rule 6, however, also contains the following provision:

"Provided that a suit may be brought after the expiry of the period of one year referred to in this sub-paragraph within a further period of not more than three months as allowed by the court."

This means that a suit may be brought after the expiry of the one year period referred to above, but within a further period of no more than three months ("time specified"), if allowed by the court. Therefore, after the 1993 amendment, the period of limitation for filing a suit under Indian COGSA may be up to a maximum of one year and three months. But only if

permission is granted by the court or for a period agreed between the parties after the cause of action has arisen.

Indian law on cargo claims matters recognises that the quoted provision in Article III rule 6 above is not that a suit shall be brought within one year from a specified date or that no suit shall be brought after the expiry of one year, but that if the suit is not brought within the time specified, the carrier and the ship would be discharged from all liability. This is in respect of loss or damage, i.e. that there will be no cause of action surviving against the ship or carrier.

The limitation period for claims by carrier or lines for indemnity, recovery of dues, etc. against the cargo interests or merchant is three years from the date of accrual of the cause of action.

MTOG Act

Under the MTOG Act, however, a Multimodal Transport Operator will not be liable unless action is brought within nine months of the date of delivery of the goods, the date when the goods should have been delivered, or the date on and from which the party entitled to delivery of the goods has the right to treat the goods as lost.

For claims by the carrier (or lines for indemnity, recovery of dues, etc.) against cargo interests or merchant, the limitation period is three years from the date of accrual of the cause of action.

Procedures and Burden of Proof

To bring a cargo claim in India, all that the Claimant has to establish is that goods of a certain quantity in good and sound condition were handed over to the ship or carrier for carriage. Also that the same was discharged and received by the consignee not in the like quantity or order and condition. It would then be for the ship or carrier to establish beyond reasonable doubt with evidence that the loss and damage complained of was not caused by the ship or carrier or that the ship or carrier is exempt from any liability on account of the statutory defences available. Depending upon the facts of each case, the burden of proof required could be onerous and the defence expensive to run. This is especially so due to the time it takes for litigations to come for trial in India.

Due to the backlogs in court, suits take anywhere between eight to ten years to come up for trial at the first instance. Then there are appeals to the Division Bench of the same court, and then to the Supreme Court, all of which make litigation in India a long, expensive process.

It is advisable that appropriate investigations into any damage and loss are conducted thoroughly, reports obtained, and relevant documents retained for future use to defend claims. Also, the Indian Evidence Act requires originals of all documents to be produced and marked as evidence. Consequently, whenever it is expected that claims may have to be made and defended, it has to be ensured that all original documents are collected and filed away safely, to be used in any trial in due course.

Indian law recognises and gives full effect to the terms of contracts between parties and acknowledges exclusive jurisdiction clauses in bills of lading, providing they give full effect to the terms of the relevant bills. If the contract of affreightment provides for a particular law or for a particular jurisdiction to apply to claims and disputes arising from the contract, Indian courts give full effect to such clauses, subject to expert evidence of the foreign law being provided. Of course, it should be absolutely clear from the wordings of such clauses that the law and jurisdiction of a particular place or country shall apply to the exclusion of all other courts or jurisdictions.

Identity of the carrier or party actually liable

More often than not the ship or its owner is not the contractual carrier, and does not have a contract with the actual shipper or merchant. Instead, the ship or its owner contracts with the actual shipper or merchant. Instead, the ship and its owner contracts with a multimodal transport operator, a non-vessel operating common carrier ("NVOCC"), a freight forwarder or a cargo consolidator or such other parties with whom the ship enters into contracts of affreightment. The shipper or merchant is not a party to this contract of affreightment. The multimodal transport operator, the NVOCC, the freight forwarder, the cargo consolidator or such parties, enter into separate contracts of affreightment with the shipper or merchant and issue their own documents. As far as the merchant is concerned, this party would be his contractual carrier and contractual claims, if any, in relation to the said contract and the cargo ought to be directed against this party only.

Shotgun approach

There is an increasing trend by Indian traders also to bring contractual claims against the carrying ship and to seek the ship's arrest. Actions including criminal complaints are often filed against agents of the carrying ship in relation to contractual claims, in spite of the law being clear that an agent of a disclosed principal is not liable for any act, omission or breach of contract by his principal. Therefore, in relation to the issues being discussed, not only is an agent not liable for its principals' contracts or breach of the same, but when the principals themselves do not even have a contract with the merchant, the agent is definitely not liable or responsible. Such criminal actions are only being resorted to by the trade to put pressure on a local party to pay up and for obtaining security for the claim from the carrying ship or her sister ship. Such actions lead to the ship interests suffering prejudice: i.e. their ships being arrested for claims not of their concern and also having to furnish and maintain securities until the suits are disposed of which could be many years. There are no real protective measures that carriers can adopt against such tactics other than ensure that all proper precautionary steps are taken. This will ensure they eventually succeed in these non-meritorious actions and suits.

The Claimants fail to appreciate that by resorting to such actions, they may be prejudicing their own rights. By failing or omitting to sue the proper party, their claim may thereafter become barred by limitation. They may be unable to disclose any cause of action against the ship, be unable to sustain the claim against the ship because of no privity of contract, improper jurisdiction for bringing the claim or other similar issues. Eventually, they may be unable to recover anything in relation to their contractual claim, even in cases where their contractual carrier would definitely have been liable for the claim had they focused their action on him instead.

Criminal cases

Criminal cases for offences under sections 407, 420, 424 and 120B of the Indian Penal Code are often sought to be filed against the carrier, its agents, its directors and principle officers. This is to put pressure on the earner in relation to cargo claims. You will see from below that these sections of the Indian Penal Code would only apply to a carrier on very exceptional sets of facts.

- **Section 407** refers to the offence of a criminal breach of trust by a party in respect of property entrusted to him.
- **Section 420** refers to cheating and dishonestly inducing delivery of property. This provision will not apply if the act complained of has taken place outside India and the carrier has nothing to do with it.
- **Section 424** refers to the dishonest or fraudulent removal and concealment of property and assisting another person to do so.
- **Section 120B** refers to a criminal conspiracy, the grounds for which would usually be lacking in the course of a normal and regular carriage of goods by sea.

Admiralty jurisdiction – Enforcement of rights and claims

The Admiralty jurisdiction exercised by the courts in India is, stated simply, the jurisdiction of courts over maritime claims and the procedures relating to. This includes jurisdiction over the arrest of ships, the determination of claims and priorities, and of liabilities.

Indian High Court

The High Courts in India having admiralty jurisdiction are Bombay, Madras, Calcutta, Gujarat, Andhra Pradesh and Orissa. These High Courts exercise admiralty jurisdiction concurrently over ships found in the territorial waters of India. This means irrespective of where the ship is in the territorial waters of India, any of these High Courts shall have jurisdiction over her. By a decision of a Division Bench of the Kerala High Court in 2011, the Kerala High Court also now exercises Admiralty Jurisdiction over ships found in Kerala when the Court's jurisdiction is invoked.

To arrest a Defendant's ship in respect of a maritime claim, the Claimant has to file a substantive Suit to the concerned Admiralty Court when the Defendant's ship is within the territorial waters of India, and make out a prima facie case. The arrest of the ship would then follow. Once the ship is arrested, the owner or any party interested in the ship can approach the Court and put up security for the release of the ship in the terms of the Warrant of Arrest issued by the Court. The ship would then be released. The Suit would in due course be tried and decided by the Court. The High Courts exercising Admiralty jurisdiction have framed rules in respect of various procedures, filing of caveats against arrest, release, payment out, sale of the ship, determination of priorities, etc.

Security

The recognised security to be furnished by the Defendant for the release of the ship would either be by way of cash deposited in the registry of the concerned Admiralty Court or by a Bank Guarantee issued by a nationalised bank in favour of the Admiralty Registrar of the concerned court. The quantum of such security would be in accordance with the Warrant of Arrest issued by the court in the matter. A P&I Club letter of guarantee is not recognised or accepted by the courts as security. A Club letter of guarantee can be used as security only if the plaintiff agrees to accept the same as security for his claim in the suit.

The Indian Supreme Court

The Supreme Court of India is the highest court in India, and its decisions are binding on all courts and tribunals. The court's decision in the *m.v. Elisabeth case* (reported in AIR 1993 SC 1014) laid down that the principles of International Conventions on Maritime laws are applicable in India as part of India's common law. A ship can be arrested for a variety of claims including claims for damage to cargo, claims for damage done by any ship claims arising out of or in connection with the use and hire of a ship and claims as set out in the Arrest Conventions.

Ships that can be arrested

The offending ship – whose owner or demise charterer is liable for the maritime claim (1999 Arrest Convention, Article 3(1)).

Sister ship(s) – Other ship(s) owned by the person – who is the owner of the ship against which the maritime claim arose, or any ship owned by the demise charterer, time/voyage charterer of the ship who is liable in personam for the maritime claim (1999 Arrest Convention; Article 3 (2) & decision of the Supreme Court in the *m.v. Elisabeth).*

Arrest of sister ships is restricted – to ships owned by the same person OR registered entity who is responsible or liable for the claim.

Arrest of beneficially owned ships is no longer permissible – on account of recent rulings, except if fraud can be alleged and established with evidence, and the Plaintiff establishes beneficial ownership.

Recent decisions of the Bombay High Court relating to sister ship arrests and beneficial ownership:

Ships owned by a subsidiary company – for a claim against another subsidiary company, although forming part of one

common holding company, are not sister ships. *(M/s. Universal Marine & Anr. V. m.t. Hartati, Bombay High Court (2014 SCC OnlineBom 223).*

Ships owned by companies with similar ownership patterns (same shareholders, directors, etc.) are not sister ships *(Condor Maritime Dienstleistung GmbH & Co. m.v. Western Light & Ors, Bombay High Court (2014 SCC OnlineBom 257).*

An arrest of beneficially owned ships would necessitate a lifting of the corporate veil. Under Indian Law, the corporate veil can be lifted only under limited circumstances, such as fraud.

A corporate identity is distinct from the identity of its shareholders and shareholders of a company are not owners of the property of the company. In *Lufeng Shipping Co. Ltd. v. M.V. Rainbow Ace (2013) 4 AIR Bom R 1412,* an arrest of a ship was vacated on the ground that the Plaintiff could not establish a prima facie beneficial ownership without lifting the corporate veil and the latter is not permitted under Indian Law:

"The Plaintiff must plead fraud in the plaint and prima facie establish fraud, at the time of seeking order of arrest (M.T. HARTATI)."

Single ship companies – To arrest a ship owned by such a company for a claim against another such company, the Plaintiff must establish that the separate companies are formed with the sole intention to defraud the creditors. That or the structure of the company whose ship is to be arrested is a sham to mask a fraud.

Apart from the limited circumstances mentioned, beneficial ship arrests are not possible in India.

Other issues in India

Uncleared and abandoned goods

Uncleared and abandoned goods are a big problem in India, particularly for the container trade. Even if a carrier or its agent takes prompt action to de-stuff cargo from containers and to return the containers to the line, due to the shortage of space Customs delay in giving approval for the disposal of uncleared or abandoned goods. Until these goods are auctioned, permission for de-stuffing and returning of empty containers back to the lines is rarely granted. This leads to their agents issuing writs for appropriate orders against Customs to force them into action, which is a time consuming process. This remains the position in spite of circulars and directives by the Government to Customs encouraging them to be prompt and not to detain laden containers.

Suits by major ports

Another peculiar type of claim and suits faced by ship and the carrier's agents in India are claims and suits from the major ports. These claims or suits are filed by the major ports against the consignee or receiver of the cargo, the agents who enter ships at the ports and against the

slot charterers' agents for recovery of the deficit in the sale proceeds of uncleared and abandoned cargoes. These cases relate to unclaimed and or uncleared cargoes, the accrual of the ports' charges there, and their sale and disposal by the port trusts. The subsequent demand for payment of the deficit in the sales proceeds made by the Port Trusts and non-payment is also related. Cargo landed and uncleared is subject to port charges by way of ground rent (in case of containerised cargo) or demurrage, Port Trusts file these suits for recovery of the deficit in the sale proceeds and the shortfall of their charges.

Section 61 of the *Major Port Trusts Act* highlights that if goods in the port's custody are not cleared, the Port Trusts are entitled to sell such goods (or so much as is necessary), for recovery of the rates and rents payable to the Port Trusts. The said provision also describes the procedure to be adopted by the Port Trusts for this purpose. This enables the Port Trusts to sell cargoes that remain uncleared in excess of two months from their respective arrivals and in the port's custody. In practice, the Port Trusts take their own time and follow their own procedures, which are fraught with delays, in selling such uncleared cargoes. Eventually, after the cargoes are sold, the sale proceeds are utilised to defray the cost of sale, the Customs' duty payable on the cargo and the balance towards payment of the port charges accrued on the cargo. In the event of any deficit, the ports file suits for recovery of the deficit, against the consignee and receivers but also against the agents of the line.

The Port Trusts of the major Ports rely on the definition given under section *2(o)(i) of the Major Port Trusts Act* to contend that the ships or lines' agents are agents for the custody, loading or unloading of the goods and are therefore, "owner" and consequently, liable. The Supreme Court recently pronounced that the Ports are entitled to such recovery. The only defence now available against such claims are delay and laches by the Ports in selling cargo, and in cases where the ship agents have issued 'delivery orders', relying upon other Supreme Court judgments to contend that it is the consignee, and not the ship's agent, who is liable for the port charges.

Customs claims

Under the Customs Act, 1962, the Master of the Conveyance is required to file an Import General Manifest (IGM) prior to the arrival of the ship at the Customs Station. The IGM must list all cargoes and containers that are to be discharged at the said Customs Station in India. If the ship discharges a quantity less than that manifested in the IGM, then it becomes liable to a penalty of up to twice the amount of the duty leviable on the short landed cargo. The same applies even if the quantity in excess of the quantity manifested should be discharged. There are provisions that if good and sufficient cause can be shown; applications can be made for amending the IGM. However, once the cargo and containers that are manifested in the IGMs land in India, it becomes an uphill task to seek a return of the cargo. It is also difficult to gain permission for re-exporting the same from Customs even where the shipper still holds the original bills of lading, and thus title in the cargo.

Conclusion

Members are reminded that no two cases are identical. Each unique issue requires a specific solution which has to be found in the facts and circumstances of the case.

The Government of India is currently repealing some of the obsolete legislations prevalent in India and replacing them with a maritime law. This will regulate claims, jurisdiction, procedures and all matters relating to maritime claims and issues in India. The bill for the new law was passed by the *Lok Sabha* (lower House) on the 10th March 2017. It will now go to the *Rajya Sabha* (Upper House), and if passed there, will go to the President of India for his Presidential Assent before becoming law. When the *Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016* comes into force as the *Indian Admiralty Act 2017,* it will be a new comprehensive legislation in India in relation to maritime law. ■

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