International Commerce

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INDIA BULLETIN

Welcome to the latest edition of our regular India bulletin.

Our first article considers the new draft Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill 2012, which has a number of gaps and issues, but broadly speaking our view is that the Bill contains nothing too alarming and will bring India in line with other countries.

Our second article focuses on coal. With approximately 70% of India's coal coming from Indonesia and demand only set to increase, we highlight the problems with fires on board vessels and offer solutions to minimise the risks.

The final article in this edition of our bulletin highlights the importance of planning in advance the enforcement of any arbitral award or judgment in the UAE, if as an Indian business your counterparty's main assets are based there. We comment on the procedures that should be followed and the recent developments that impact on the ability to have awards and judgments enforced.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

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The Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2012

The Admirality (Jurisdiction and Settlement of Maritime Claims) Bill, 2012 is a new piece of draft legislation in India. It serves broadly the same purpose as sections 20-22 of the English Senior Courts Act 1981, i.e. to set out the subject-matter jurisdiction of the Admiralty Court and to define the circumstances in which a vessel may be arrested; as well as tackling a number of subsidiary topics. Our brief comments on the Bill are set out below.

Seven colonial-era instruments are repealed by Clause 21 of the Bill, and it appears that the Bill is intended to consolidate whatever remains of value in these instruments.

The subject matter jurisdiction in Clause 5(2) is similar to s. 20(2) SCA 1981 with some minor differences of detail. The only significant difference is clause 5(2)(i). In our view, the definition of salvage is too narrow and might cover only Common Law salvage. It would perhaps be better if the Bill were to use the more expansive definition in SCA 1981 s. 20(2)(j):

> *"(j) any claim-*
>
> *(i) under the Salvage Convention 1989;*
>
> *(ii) under any contract for or in relation to salvage services; or*
>
> *(iii) in the nature of salvage not falling within (i) or (ii) above;"*

Clause 8(3) contains an odd restriction and it seems possible that something has gone wrong with the drafting. Taken at face value, 8(3)(b) would imply that if a shipowner's ship is arrested, he cannot be sued *in personam* in any other Admiralty suit.

Clause 9 contains a wide discretion, which would appear to allow the court to treat any claim *in rem* as a claim *in personam* or vice-versa. The objection to this is that it could be construed as allowing the court to arrest for any claim at all, regardless of the restrictions contained in Clause 7. This would drive a coach and horses through the Arrest Convention 1952. In our view, it should therefore be qualified by some such expression as *"However, this section shall not be construed as permitting the arrest of a vessel, where such would not be permitted in accordance with the other provisions of this Act".*

Some words may have been omitted from Clause 13(3). Perhaps *"… period, the vessel has been subject to an…"* should be added here. And the explanation at the end of Clause 13 would perhaps better be inserted into a substantive sub-clause.

As for Clause 18, the power of the Court to refer any matter to arbitration is interesting but vague. Amongst other things, this raises the questions whether the Court also has the power to appoint an arbitrator or arbitrators and/or decide under what procedural rules the arbitration is to be held?

As for Clause 21(3)(b), we believe that the word *"provisions"* or similar needs to be inserted in the last line after the word *"corresponding"*.

There are a number of minor typos in the Bill on which we do not comment in this article.

On the whole, though, the Bill is in line with similar legislation in other countries, is broadly in line with the Arrest Convention 1952 (subject to what we say above), and contains nothing alarming.

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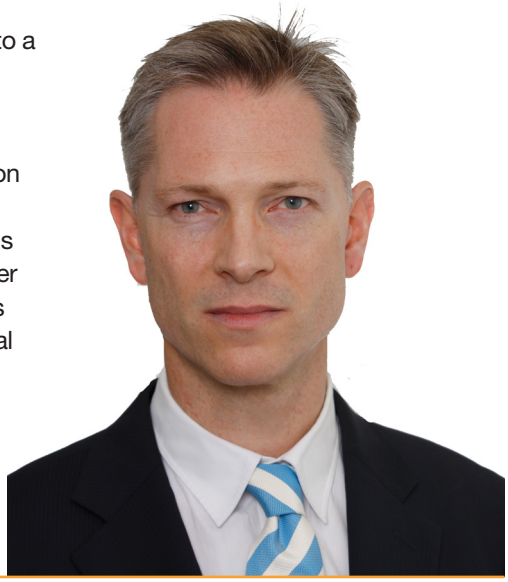

"Clause 8(3) contains an odd restriction and it seems possible that something has gone wrong with the drafting."

Increased demand for coal increases fire risks

Incidents of self-heating involving coal cargoes loaded at Indonesian ports on vessels bound for India have become increasingly frequent in recent years. With approximately 70% of India's coal coming from Indonesia and demand only set to increase, we highlight the problems with fires on board vessels and offer solutions to minimise the risks.

India has some of the largest coal reserves in the world, most of which come from the Jharia coalfield, which is famous for the coal fire that has raged underground for nearly a century. However, India's domestic supply is outstripped by demand. India currently imports about 12 million tonnes of coal per month, but this figure is expected to increase next year to approximately 15 million tonnes. This increase is being driven by India's continued economic growth, which is intrinsically linked to its energy supply, with approximately 60% of electricity capacity being dependent on coal-fired generators. In July 2012, India suffered the largest blackout in history, with over 600 million people being left in the dark. To help combat this problem and achieve energy security, four coal-fired power plants on the east coast are shortly due to begin operations.

This means there will be no shortage of business for local dry-bulk operators and chartering is expected to rise by about 20% next year, to accommodate the increase in imports. Logistically, this may prove problematic, as India only has four ports capable of handling capsize vessels or cargo ships carrying 150,000 tonnes of coal. In addition, when vessels reach Indian ports they often have to wait long periods of time for an available berth, incurring demurrage and other fees associated with the ship's extra use.

However, it is the risks associated with carrying such cargo that is cause for greater concern. The dangers of transporting coal are well documented, but coal shipped from Indonesia has proven particularly problematic, because it is likely to have a high proportion of lower rank coals and brown coal. The lower rank coals are more susceptible to self-heating and are likely to have a higher moisture content, whilst brown coals tend to release more carbon monoxide into sealed cargo holds.

The International Maritime Solid Bulk Cargoes (IMSBC) Code, which became mandatory worldwide on 1 January 2011, is designed to help combat these problems. In particular, Appendix 1 of the Code contains a schedule of recommendations for handling and transporting different coal cargoes.

The UK P&I Club have since published a checklist to help reduce the risk of self-heating, specifically in Indonesian coal cargoes, called "How to monitor coal cargoes from Indonesia". The checklist is divided into four sections: "prior to loading", "during loading", "after loading" and "during the voyage". It provides helpful practical recommendations, such as regular temperature and cargo monitoring.

If followed, these practical guidelines will help minimise the risk of coal fires onboard vessels, but there are additional measures that owners can take to protect themselves. For example, owners may want to ensure they have an express right in any charterparties and contracts of affreightment to inspect the cargo ashore and in barges prior to shipment, to reject cargo which is too hot or otherwise unsafe and to have heating or unsafe cargo removed from the vessel. This later requirement is particularly important, because some vessels have only identified problems after cargo has been loaded. However, once on board, it is not always easy to remove the coal due to a lack of discharging facilities in Indonesia.

Owners may also wish to preserve rights of indemnity under the charterparty, in case they incur liability or loss as a result of shipping a self-heating cargo and the charterer may wish to make provision for a similar indemnity in any sub-charterparty.

In summary, the number of incidents involving coal fires onboard vessels looks set to rise with the increased volumes of coal carried to India. To minimise these risks, the IMSBC Code and UK P&I Club's checklist should be followed, and owners should consider taking precautions to protect their position.

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"In summary, the number of incidents involving coal fires onboard vessels looks set to rise with the increased volumes of coal carried to India."

Recognition and enforcement of Indian arbitral awards and judgments in the UAE

When entering into a sale contract, chartering a vessel or signing a loan facility, it is important to ensure that your remedies can be enforced in practice and not just in theory. If your business operates globally, you may well find that your counterparty is based abroad or, is 'domiciled' in another jurisdiction.

If that party's main assets are in the UAE, it is important to plan in advance how to enforce any arbitral award or judgment which may be obtained. If the award/judgment is unenforceable, the judgment creditor will be faced with the prospect of commencing fresh litigation against the judgment debtor in the UAE, with all the inherent risk and costs. We consider below the UAE's requirements for the enforcement of Indian awards and judgments.

Arbitral awards

Both the UAE and India are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the Convention). In principle, therefore, an Indian arbitral award should be recognised as binding and ought to be enforceable in the UAE.

The Convention sets out conditions for the recognition and enforcement of foreign arbitral awards in the territories of its members states. There are only limited grounds on which recognition and enforcement may be refused as per Article 5 of the Convention and these grounds mainly concern procedural irregularities and not the merits of a case.

Accordingly, subject to Article 5 of the Convention, the UAE courts should enforce Indian arbitral awards, provided the subject matter can be arbitrated under UAE law and such enforcement would not offend public policy.

Following the implementation of the Convention in 2006, it has taken several years for the first cases to come through the local courts. Although recent developments suggest a change in approach by the UAE Courts, there is still some uncertainty as to whether the UAE Courts would apply the traditional UAE Civil Procedures Code (CPC) when considering the enforcement of an Indian award.

Ratification under the CPC prior to the Convention

Before the UAE ratified the Convention, foreign arbitral awards were dealt with in the same manner as enforcing foreign courts' judgments. This allowed the UAE courts to set aside foreign arbitral awards on a variety of grounds and as a result, the UAE Courts inherited a considerable amount of negative precedents.

Prior to accession, the primary sources of law relating to enforcement of foreign arbitral awards were contained in Articles 235 to 237 of the CPC and are applicable provided that:

1. The UAE Courts do not have jurisdiction over the dispute and the arbitral tribunal that issued the award does have such jurisdiction.

2. The arbitral award is in accordance with the rules of the country in which it was issued.

3. The parties were correctly summoned to appear before the tribunal.

4. No further judicial appeal or challenge is possible in the country where the award was issued.

5. The foreign award is not in conflict with any order previously issued in the UAE and does not contradict the public order or morals of the UAE.

Whether a party would be able to advance robust arguments on these points will depend on the circumstances in which the award is issued. Again, the UAE Courts possess a wide discretion in relation to these issues.

Another traditional issue relates to the Arbitration Section provided under the CPC. In particular, articles 203 - 213, which govern the process of recognising arbitration awards and provide the defendant with an opportunity to invalidate the arbitration award on various grounds relating to the validity of the arbitration clause, the appointment of the tribunal or the arbitration procedure. Although these articles do not explicitly provide whether they apply to foreign arbitral awards or not, it has been ruled by the Dubai Court of Cassation (the Supreme Court in Dubai) in 2005 (i.e. before the New York Convention was ratified by the UAE), that these articles apply only to local arbitration awards and do not apply to foreign arbitral awards, which are subject to articles 235 - 246 governing the enforcement of foreign courts' judgments.

Recent developments

There have recently been instances of the UAE Courts adopting a more

Convention-friendly approach to the enforcement of foreign arbitral awards.

The first case where a UAE court recognised and ordered enforcement of a foreign arbitral award under the Convention was before the Fujairah Court of First Instance. In that case, the Court enforced two awards. However, this was a default judgment and many traditional arguments were not raised.

In a more recent case, the Dubai Court of First Instance ordered the recognition and enforcement of two awards (again one on the merits and the other on costs) under the Convention. Significantly, this case was fully contested by the defendant, who raised several of the usual procedural objections. In a very positive outcome, the Dubai Court of First Instance ignored the defendant's arguments in relation to the validity of an arbitration clause. The court concluded that articles 203 – 213 of the Civil Procedures Law, which allow the defendant to request the court to invalidate the arbitration award based on the validity of the underlying arbitration clause, applied only to local awards, and not to foreign arbitration awards.

The judgment was recently upheld by the Dubai Court of Appeal, and upheld again on appeal by the Dubai Court of Cassation[1]. The decision therefore appears to confirm the new approach which should be taken by the UAE courts.

Judgments

Reciprocal agreement

A reciprocal enforcement agreement between the UAE and India was signed in New Delhi on 25 October 1999. This is entitled "The Agreement between the Government of the United Arab Emirates and the Government of the Republic of India on Juridical and Judicial Co-operation in Civil and Commercial Matters" (the Treaty) and was ratified by the UAE on 29 March 2000[2].

Article I states that the Treaty applies to the execution of decrees, settlements and arbitral awards. Article XV provides that each of the contracting parties shall, in accordance with its laws *"recognise and/or execute decrees passed by the Courts of the other Contracting Party in civil, commercial and personal matters and by criminal courts in civil matters."*

Article XXII(1) states that, when asked to recognise or execute a decree, the Courts of the contracting states shall, without reviewing the merits of the case, confine themselves to ascertaining the compliance of the decree with the conditions provided for in the Treaty. The procedure for this is as set out in Article XXIII, which provides that the central authority[3] of the contracting party requesting execution or recognition of a decree shall submit:

1. An official copy of the decree.
2. A certificate showing that the decree is final and executable.
3. In the case of a decree *in absentia*, an authenticated copy of the summons or other document showing that the defendant was properly summoned.

Enforcement in practice

At present, we are not aware of any recorded decision of an Indian judgment being enforced by the UAE Courts. There is however, a Lebanese Court judgment that was successfully enforced in the UAE[4]. In that case, the Dubai Court of Cassation considered an application for the enforcement of a Lebanese judgment under the terms of the Arab Convention on Judicial Co-operation, which provides for enforcement of both court judgments and arbitral awards between its signatories and which was ratified by the UAE on 15 April 1999.

The Court of Cassation held that the provisions of treaties between UAE and foreign countries, and any other ratified conventions, shall be applicable in relation to the enforcement of foreign court judgments.

Although the case is not directly analogous to a judgment creditor attempting to enforce an Indian judgment, we see no real distinction between the operation of a reciprocal convention or bi-lateral treaty, which both provide for the enforcement of foreign judgments. Furthermore, the decision is clear that the provisions of reciprocal treaties are applicable.

Although there is no system of binding precedent in the UAE, it seems

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1. Dubai Court of Cassation No. 132/2012 dated 22 February 2012.

2. Federal decree No. 33 for the year 2000, concerning Judicial Co-operation between the UAE and India.

3. In the Republic of India the Central Authority is the Ministry of Law, Justice and Company Affairs. In the UAE the Central Authority is the Ministry of Justice (Article II).

4. Dubai Cassation Court, claim number 175/2005 civil.

likely that this would be viewed as persuasive and that the Treaty would be applied as if it were local law.

On balance, therefore, there is a reasonably good prospect that, so long as the formal requirements of the Treaty are met, a UAE Court would not interfere in the procedure of the case before it (other than to satisfy that the judgment meets the conditions of the Treaty) and would give effect to an Indian Court judgment.

Conclusion

Although both Indian awards and judgments should, in principle, be enforceable in the UAE, in practice the process and their local court proceedings concerning the recognition and enforcement are still not straight forward.

However, there are recent cases in which both foreign arbitral awards and judgments have been recognised and enforced in the UAE. These set very encouraging precedents, which supports the logical interpretation of the CPC and the spirit of the New York Convention. It is a significant step in the right direction.

Therefore, whilst there is no system of binding precedent in the UAE, such judgments do provide guidance regarding how future cases may be decided and suggest that (at least where local procedural requirements are met) the UAE Courts are prepared to give direct effect to both foreign arbitral awards and judgments.

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News

Obituary: Bill Kerr

Holman Fenwick Willan is deeply saddened to announce the death of Bill Kerr, a Partner in the firm's Singapore office. Bill was killed on 30 December 2012 in a road traffic accident whilst in the Philippines.

An ex-mariner, Bill specialised in handling all forms of marine casualties and insurance, and was recognised for some years by leading legal directory Chambers as "one of the top wet lawyers in the business".

Our thoughts and condolences are with Bill's family and friends at this very sad time.

Holman Fenwick Willan boosts Asia-Pacific capabilities with Partner promotions

HFW is delighted to announce the promotion to partnership of shipping lawyer Dominic Johnson, effective 1 November 2012.

Dominic deals with the issues arising from all types of marine casualties, including collisions, groundings, salvage, total loss, fire and explosion, wreck removal, piracy, limitation of liability and both civil and criminal liabilities. He also deals with insurance coverage and other shipping related commercial and contractual disputes. Dominic is based in HFW's Singapore office.

HFW recognised for Shipping and M&A

ALB The Brief has announced the winners of its inaugural *The Brief Middle East Law Awards 2012* and

we are delighted that we have been awarded Shipping Law Firm of the Year.

Lloyds List Maritime Award Winners

We are delighted to announce that at the Lloyds List Maritime Awards 2012, held in London on 26 September, partners James Gosling and Richard Neylon, and their team, won the title of Maritime Lawyer of The Year, for their pioneering work in resolving issues related to marine piracy.

Conferences & Events

World Shipping Forum
Chennai
(7-9 February 2013)
Speaking: Paul Dean and David Morriss

HFW Commodities Breakfast Seminar
Singapore
(27 February 2013)
Speaking: Chris Swart

TradeWinds Ship Recycling Forum
Dubai
(4 March 2013)
Speaking: Stephen Drury

General Aviation Expo 2013
Ahmedabad
(7-10 March 2013)
Attending: Peter Coles

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