International Commerce

September 2014

INDIA BULLETIN

Welcome to the September edition of our India Bulletin.

We begin by looking at Indian arbitration in light of the significant report recently released by the Indian Law Commission. The report seeks to reduce the cost and delay associated with arbitrating in India, along with reducing the degree of judicial intervention and we analyse the implications.

A recent English Commercial Court case has examined the situation where owners obtain an incidental benefit after charterers' wrongful repudiation of charterparty, such as an advantageous vessel sale. We examine whether owners must give credit for that benefit in the context of their claim against the charterers.

Shipbroking in India has recently seen a trend towards consolidation, potentially allowing overseas brokers more direct access to the Indian market. We look at the likely future developments.

Finally, we review a series of recent key Bombay High Court decisions, which have clarified the grounds for ship arrest in India.

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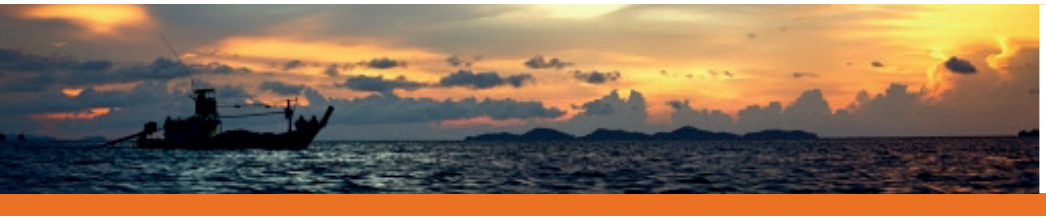

Stop press: new Law Commission report on arbitration

India's long march out of the woods to return to the fairways of international arbitration continues this year. The Law Commission of India issued its Report No 246 on 5 August 2014 (the Report), recommending a number of amendments to the *Arbitration and Conciliation Act 1996* (the 1996 Act).

The Commission suggests that encouraging institutional arbitration will go a long way to fix the *"institutional and systemic malaise"* that has affected arbitration in India.

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The overall tone of the Report is one of refreshing candour, albeit concise – the Report together with the draft amendments only runs to about 70 pages. The Report notes the Law Commission's previous Report No 176, the failure of the *Arbitration and Concilation (Amendment) Bill 2003*, and the efforts of the Indian courts to provide solutions to problems created by the 1996 Act (whilst also criticising the judiciary for being too eager to intervene in the arbitral process).

The Report deals with three categories of issues:

- Those affecting domestic arbitration.
- Those affecting international commercial arbitration.
- Those affecting international commercial arbitration with a seat outside India.

The recommendations concerning domestic arbitration are of interest to an international audience, as they exemplify the Commission's approach to international arbitration.

"Unsatisfactory" domestic arbitration experience

The Report sums up its approach to domestic arbitration in blunt terms:

"... the Commission found that the experience of arbitrating in India has largely been unsatisfactory for all stakeholders".

The Report recommends amendments to deal with the high cost and delays associated with ad hoc arbitration in India, and the *"serious threat of arbitration related litigation"*, noting that the objective of *"quick alternative dispute resolution frequently stands frustrated"* as a result. The Commission suggests that encouraging institutional arbitration will go a long way to fix the *"institutional and systemic malaise"* that has affected arbitration in India.

The Report contains specific recommendations in respect of fees charged by arbitrators, and the conduct of arbitration proceedings. If adopted, these recommendations should help curtail the unsatisfactory practices that have emerged in Indian arbitration over the years, such as frequent adjournments, "per sitting" fees, and the high fees and procedural limitations imposed by retired judges acting as arbitrators.

The Report also deals with the scope of judicial intervention in domestic arbitration, and does not shy away from highlighting that the bar for judicial intervention has been *"consistently set a low threshold by the Indian judiciary"*. It also addresses the messy "public policy" aspect of judicial intervention, by proposing amendments to ensure that patent illegality is dealt with directly without reference to an expansive definition of public policy.

International arbitration – finally out of the woods?

The Report recognises the investment treaty risk arising from the delays caused by arbitration related litigation in India. As a solution, the Commission recommends that all proceedings related to international commercial arbitration be dealt with by *"commercially oriented judges at the High Court level"*. Whether this will work remains to be seen, as even the High Courts in India have tended to look to the Supreme Court for guidance on international arbitration.

In a nod (mainly) to the special relationship Indian parties have with Singapore arbitration, the Report proposes an amendment to recognise "emergency arbitrators" by widening the definition of an arbitral tribunal.

The Report also recommends the restriction of "public policy" in the context of enforcement of foreign awards to (i) the "fundamental policy of Indian law" and (ii) India's "most basic notions of morality or justice". As with any concept that leans on adjectives for its meaning, this formulation might give rise to its own set of problems. However, the Commission has consciously sought to exclude any reference to "the interests of India", on the ground that the term is *"vague and capable of interpretational misuse"*.

The Report also seeks to enable Indian courts, in the post *BALCO* environment, to enforce interim relief obtained by parties from a foreign arbitral tribunal (or a foreign court in support of foreign arbitration) in an effective manner. This is commendable.

What the Report does not recommend, however, is anything similar to the lines of section 45 of the *English Arbitration Act 1996*, which allows the parties to make an application to the Court for a preliminary determination of a point of law. Parties would continue to need to wait until they obtain an award and then seek to set it aside, rather than get a preliminary determination from the courts whilst the arbitration is underway. This might be motivated by the desire to limit judicial intervention, but will remain a factor weighing against selecting a seat in India for international arbitration.

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Giving credit for benefits caused by repudiation of charterparty: the *NEW FLAMENCO*

In the event of a breach which leads to the repudiation of a charterparty, it is expected and usually the case that the innocent party would suffer some form of loss. However, on occasion, the breach could also ultimately result in a gain, by providing the innocent party with the opportunity to exercise a right, such as the sale of the vessel, which would otherwise not have arisen.

In the *NEW FLAMENCO*[1], the English Commercial Court overturned an arbitral decision which had determined that a party who has repudiated a charterparty can obtain credit from the innocent party where the latter has benefited from the former's breach.

The *NEW FLAMENCO* (the vessel) was a small cruise ship time chartered in 2004 by Globalia Business Travel (the charterers) from Fulton Shipping Inc (the owners). In 2007, the parties agreed to extend the duration of the charterparty to November 2009. The charterers disputed having reached such an agreement and redelivered the vessel in October 2007. The owners treated the redelivery as a repudiation of the contract and mitigated their loss by selling the vessel that same month for approximately US$23.8 million. They subsequently brought arbitral proceedings against the charterers in 2013 for loss of profit.

Due to the financial crisis in 2008, it was found that had the owners sold the vessel when she was due to be redelivered in 2009, the value of the vessel would have been assessed at approximately US$7 million, a significantly lower sale price than that received in 2007. The charterers argued that, consequently, the owners had benefited from the former's breach of contract and should give credit for the difference between the vessel's actual sale price and her 2009 value. The arbitrator agreed and made a finding in favour of the charterers.

The Commercial Court overturned the arbitrator's decision and held that the owners' benefit (i.e. the sale price of the vessel in 2007) had not been legally caused by the charterers' breach, but rather by the market fluctuations and by the owners' independent and commercial decision to sell the vessel.

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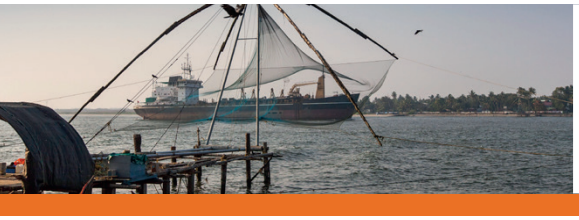
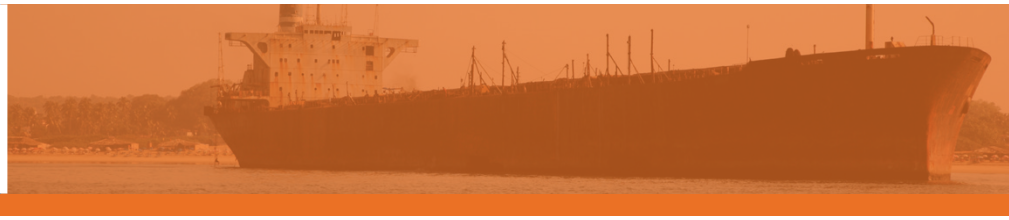
MARIE-ANNE SMITH, ASSOCIATE

1 *Fulton Shipping Inc of Panama v Globalia Buisness Travel S.A.U (NEW FLAMECO)* [2014] EWHC 1547 (Comm)





The charterers' breach had merely provided the *"context or occasion"* for the owners to sell and was therefore the *"trigger not the cause"*. The Court added that the sale was a *"transaction which could, in principle, have occurred irrespective of the breach"*.

The Court further held that a finding that the sale was in reasonable mitigation of loss and therefore caused by the breach was not legally sufficient to establish the necessary causal link between the breach and the benefit. Moreover, to allow the charterers to benefit from the owners' investment would be *"unfair and unjust"*.

The Commercial Court was therefore of the view that it would be unfair to allow a wrongdoer to obtain credit from the innocent party when the latter happened to be lucky enough to benefit from the former's breach and that it was not sufficient to find that the sale had been completed in mitigation of the breach and was therefore caused by the breach. It is also clear from the Court's decision that there is no hard and fast rule on this particular question of law and that the assessment of damages will often depend on the circumstances of the case.

Whilst this decision will reassure parties on the receiving end of a repudiation of contract, as this would mean that they are not under an obligation to account for benefits derived subsequent to the breach, it has also caused some controversy. It has been argued that the Court failed to consider other recent case law which, contrary to the Court's finding, suggest that a causal link between the breach and the benefit is in fact sufficient to justify giving credit for said benefit.

The judgment is currently being appealed and, due to the potential impact on contract law and the assessment of damages where there has been a repudiation of contract, the Court of Appeal's findings on the above question of law are awaited with interest.

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Shipbroking in India

Shipbroking activity in India has become increasingly liberalised. The government no longer exercises its former control and some international shipbrokers have accessed the market. A number of large London based broking houses, including Braemar and Clarksons, have established a presence in Indian cities.

In line with the shipping industry generally, consolidation is a growing trend and more shipbrokers are reported to have sought to band together to strengthen their scale and global reach. A recent example of this is the collaboration between McQuilling Partners, a US shipbroker and marine consultancy, and Indian shipbrokers, Seaway Shipping and Logistics, resulting in the two entities jointly establishing a new shipbroking company, Seaways McQuilling Pte Ltd.

The new company will be based in Mumbai and New Delhi and will focus on providing tanker, dry bulk, chemical and offshore brokerage services, combined with research and logistics consultancy in India and other regional markets. Seaways, a major logistics service provider, has stated it will provide McQuilling with a direct platform to offer their range of services to clients and to the Indian market.

Before the Seaways McQuilling collaboration, UK-based ICAP Shipping purchased Indian shipbroker CTI India, with a workforce of 28 people based in offices in New Delhi and Mumbai. On a global scale, shipbrokers are said to have recognised that larger, consolidated entities have a better ability to attract and retain clients. This has been stated to be the rationale for the merger between Braemar and ACM Shipping, announced only weeks before the McQuilling and Seaways deal. It has been suggested that



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the merger of these two companies may act as a catalyst for further collaborations, potentially allowing overseas shipbrokers greater direct access to the Indian market.

Recent reports suggest that the shipping industry in India may itself benefit from considerably more trading opportunities. In particular, the government's focus on thermal power generation may mean that there will be a rise in thermal coal shipments, which may bolster the dry bulk market. India is already the third largest importer of coal, purchasing some 138 million tonnes of coal in 2012-2013, with imports predicted to reach 200 million tonnes in the coming years.

It has been suggested that this predicted spike in coal imports may provide new trading prospects for owners and operators of supramax and handysize vessels. These are currently the vessels primarily used for moving coal into India given the shallow nature of some Indian ports and the limited availability of shore cargo gear. Braemar ACM has reported that the supramax sector has shown positive gains from the transport of Indonesian coal to India.

India's huge demand for coastal cargo carriage means that a number of improvements are likely to be needed to port infrastructure and the ports sector more broadly in order to cater to the increased volume in traffic. Proposals have recently been announced for the partial deregulation of state controlled pricing at government-owned ports.

It is hoped that this will encourage greater efficiency and promote further public-private partnerships. The Indian shipping ministry has announced that it is to seek cabinet approval for an amendment to the Major Port Trusts Act 1963, with a view to the introduction of a new tariff regime as early as March 2015.

The recently appointed shipping and road transport minister has also stated he will pursue policies that will reform Indian cabotage rules and flagging restrictions. For some time it has been apparent that India-flagged vessels are not available in sufficient number to meet the country's demand for coastal cargo carriage.

Although the easing of cabotage has provoked some controversy, it is likely that changes to port infrastructure will be generally welcomed by the industry. It is hoped that cautious relaxation of regulations will allow the efficient movement of containers and ease congestion at ports and port storage facilities, while also protecting the interests of existing operators. Such developments will be both welcomed and closely monitored by the industry.

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Ship arrest in India: a busy year for the Bombay High Court

2014 has been a busy year on the admiralty side of the Bombay High Court. In a series of decisions, the Court has sought to introduce a greater level of clarity to the law relating to ship arrests within the jurisdiction of that Court.

Beneficial ownership

In *Universal Marine and another v MT HARTATI and another*[1], the Court dealt with the circumstances in which the arrest of a sister ship in the same beneficial ownership was permitted under Indian law. The Court held that, for the purposes of the 1990 Arrest Convention, the term "owner" meant "registered owner". Accordingly, "sister ships" were those that were in the registered ownership of the same entity.

As a matter of Indian law, the Court could look beyond the registered owner and "pierce the corporate veil" only if it can be demonstrated that the ownership structure was a sham, i.e. created with an intention to defraud the claimant or other creditors.

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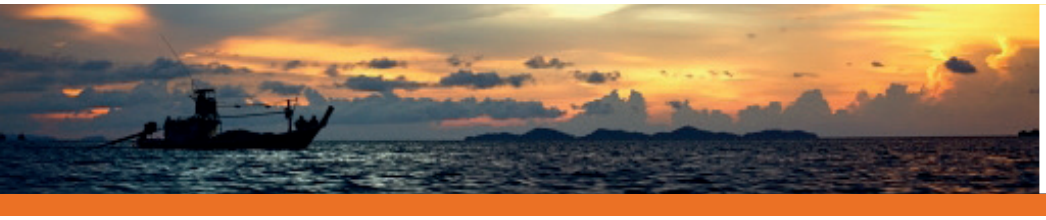
1 (2014) AIR Bom R 311



Wrongful arrest

In *Navbharat International Ltd v Cargo on board MV AMITEES and others* (the *Best Foods* case), the Court had occasion to consider Rule 941 of the Bombay High Court (Original Side) Rules. Rule 941 falls within Part III (Admiralty), and requires an *in rem* arrest application to be supported by an affidavit and an undertaking to *"pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order"*.

The issue in the *Best Foods* case was whether the defendant shipowner had to show bad faith or malice on the part of the claimant in order to be able to call upon the Rule 941 undertaking. The single judge deciding the case held that *"the undertaking gets triggered the moment the order of arrest is held to be wrongful and the order of arrest is vacated"*.

The Court did not go into the question of what constitutes wrongful arrest, and whether malice or bad faith were necessary factors for the Court to take into account when determining whether an arrest is wrongful.

Compensation for wrongful arrest

In *Lufeng Shipping Co v MV RAINBOW ACE and others*, the Court was faced with an application for compensation by an aggrieved shipowner. The Court had previously determined that the arrest of the *MV RAINBOW ACE* was wrongful, and the owners sought compensation on the basis of the earlier decision of the Court in the *Best Foods* case.

The Court held that the claimant's liability was established pursuant to *Best Foods*. However, the shipowner had failed to mitigate its damages by refusing to provide security and leaving the vessel under arrest. A shipowner seeking compensation for wrongful arrest is in the position of any other claimant, and *"all claimants have a duty to mitigate"* their losses. The owner's recourse to the courts could not be considered to be "mitigation" for this purpose.

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Arrest for security for foreign arbitration

In *Rushabh Ship International LLC v MV AFRICAN EAGLE and others*, the Bombay High Court issued a carefully nuanced judgment holding that, as a matter of Indian law, a claimant could not arrest a ship merely to secure its claims in foreign arbitration. To invoke the admiralty jurisdiction of the Indian Courts, a claimant has to file a suit asking the Court to hear and determine its claim; if the defendant seeks to have the proceedings stayed due to the existence of an arbitration clause, the Court was bound to issue a stay.

But if the primary relief sought from the Court was an order for security for foreign arbitral proceedings, the suit was liable to be rejected for want of a cause of action.

The Court pointed out that no cause of action would lie in such cases because the Indian courts did not have the power to issue interim relief in support of foreign arbitral proceedings, pursuant to the decision of the Supreme Court of India in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*[2].

We are grateful to S. Subramanian of the Chambers of S. Venkiteswaran for his assistance with this article.

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1 (2012) 9 SCC 552

Conferences and events

India Shipping Summit
Mumbai
13-15 October 2014
Presenting: Paul Dean
Attending: Dominic Johnson and Hari Krishna

Seatrade Middle East Maritime Conference
Dubai
28-30 October 2014
Presenting: Stephen Drury

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