

Shrikant Hathi and Binita Hathi, partners with Indian law firm **BRUS CHAMBERS**, explains arresting a ship for unpaid bunker dues being necessities

Mumbai has always been regarded as an extremely favorable jurisdiction to arrest ships to secure claims including claims by bunker suppliers.

Bunker fuel is technically any type of fuel oil used aboard ships. It gets its name from the containers on ships and in ports that it is stored in, called bunkers.

Bunker fuel oil is used mainly in powering ships. Bunker fuel is also known by other names: heavy oil, #6 oil, resid, Bunker C, blended fuel oil, furnace oil and other often locally used names.

A common feature of bunker supply contracts is that bunker suppliers frequently allow all or part of the purchase price to fall due some time after delivery of the bunkers. One reason why a bunker supplier may be willing to grant such credit is that the amount owing may be secured by a maritime claim and/or a right to arrest the vessel in rem to which the bunkers were supplied or her sister ship.

Owners trading vessels in the spot market will purchase bunkers on their own account. In such circumstances, fulfilment of the payment obligations under the bunker supply contract will be within owners' control. If, however, the vessel is chartered out on a time or bareboat charter, bunkers will normally be purchased by the charterer. In such cases, owners have no control over the purchaser's fulfilment (or not) of the payment obligations under the bunker supply contract. And if the purchaser defaults, this may lead to actions against the vessel by the bunker supplier.

In many other jurisdictions, while the bunker supplier's claim will not be secured by a maritime lien, it may qualify as a "maritime claim", which may entitle the bunker supplier to arrest the vessel to which the bunkers were supplied (in some cases also sister vessels).

A large number of countries have ratified the 1952 Arrest Convention, which defines claims related to bunker supplies as "maritime claims".

Although the Brussel convention has not been adopted by legislation, the principles incorporated in the International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952 are part of the common law of India and applicable for the enforcement of maritime claims against foreign ships as is held in *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd.*, Goa.

Unpaid dues of Bunker Suppliers are secured by a maritime claim and/or a right to arrest the vessel in rem to which the bunkers were supplied or her sister ship



The Supreme Court of India in the matter of *m.v. Sea Success I* has also held that the principles underlying the 1999 Geneva Arrest Convention were applicable for ship arrest in India.

Countries that have ratified the 1952 Arrest Convention, such as the Scandinavian countries, an arrest by a bunker supplier will only be accepted if the debtor for the unpaid claim is also the owner of the vessel. In time- and bareboat-charter situations this will not normally be the case and the bunker supplier will not be entitled to arrest the vessel.

Certain countries, such as Holland, India as well as at least some court districts in France, apply a less strict interpretation of the Arrest Convention and allow arrest even in cases where the debtor is not the owner of the vessel.

Owners should be aware that if charterers start defaulting under the charterparty, they are also likely to be defaulting on payments to suppliers of bunkers and other services, exposing the vessel to enforcement actions as a result.

Appeal Court of the Bombay High Court in *Chemoil Adani Pvt Ltd versus m.v. Hansa Sonderburg & Ors* confirmed the order of arrest of the vessel 'Hansa Sonderburg' where the bunker supply was requisitioned by time charterer of the vessel and supply of bunker oil was made by the bunker supplier on the vessel although there was no privity of contract with the vessel owner and bunker supplier. In this case the bunkers requisition was signed by time charterer and it was delivered on the vessel and the vessel acknowledged receipt of the supply.

The only Courts statutorily empowered to exercise admiralty jurisdiction in India are certain designated High Courts who derive their power pursuant to the Letters Patent. These are

principally the High Courts of Bombay, Madras, and Calcutta and pursuant to the States Reorganisation Act, the High Court of Ahmedabad, Andhra Pradesh.

Bombay High Court is preferred for several reasons as order of Bombay High Court can be executed on the ship anywhere in Indian territorial waters while there are restrictions at Gujarat, Madras, Calcutta and Andhra Pradesh High Courts.

The Indian Courts possessing Admiralty jurisdiction have jurisdiction to hear and determine any questions with regard to any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs and on the high seas unless it is shown to the satisfaction of the court that at the time of the institution of the action any owner or part-owner of the ship is domiciled in India. The claims should be for goods or materials wherever supplied to a ship for her operation or maintenance or for bunker supplied to the ship for its operation, management, preservation or maintenance and to hear and determine any questions with regard thereto the claims for bunker as defined under Article 1 of the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 'or' under Article 1 of the International Convention on the Arrest of Ships, Geneva, March 12, 1999.

The arrest procedure in India is not difficult to instigate and pursue. Applications for arrest of a ship can be made to the Admiralty judge of the High Court having Admiralty jurisdiction where the vessel is to be arrested. Bombay High Court covers a larger geographical area; the order of arrest of a ship from this court can be executed on the ship anywhere in Indian waters.

It is necessary that the ship should be in Indian waters for filing of an Admiralty Suit but it is not necessary that the vessel should take berth, the vessel can be anywhere in the Indian territorial waters. An order of arrest of a ship can be obtained from the Bombay High Court and executed anywhere in India but Madras High Court and Ahmedabad. High Court has reservations that the ship should be in their respective jurisdiction to file an Admiralty suit in their court.

Bunker supplies are necessities for a ship or necessities for its voyage.

"Necessaries" as specified under the provision of the Admiralty Courts Act, 1861 reads as:

"5. The High Court of Admiralty shall have Jurisdiction over any Claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the

Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales : Provided always, that if in any such Causes the Plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court. [As to claims for necessities]."

Articles 1(k) and 2 of the 1952 Brussels Convention as regards "Maritime Claim", are as under:

1. "Maritime Claim" means a claim arising out of one or more of the following:

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

2. A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction."

The term "necessaries" had not been defined in the Act of 1861. It was given a meaning by judicial pronouncements.

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Australian High Court in *Gould v. Cornhill Insurance Co. Ltd.* [1 DLR 4th Ed. 183] in *The Riga* [(1869-72) L.R. 3 A&E 516], it is stated:

"The definition of the term "necessaries" given by Lord Tenterden in *Webster v. Seekamp* (4 B. & Ald. 352) adopted and applied in proceedings in Admiralty. *Semble*, there is no distinction between necessities for the ship and necessities for the voyage."

In *The Edinburgh Castle* [(1999) Vol. 2 Lloyd's Law Reports 362], it has been held:

"To address these concerns, Mr. Charkham helpfully invited my attention to a number of the authorities and to such discussion as there is on Section 20(2)(m) and its predecessors. Taking the matter very shortly, for present purposes, the following propositions emerge:

1. The words "in respect of" are wide words which should not be unduly restricted: *The Kommunar*, [1997] 1 Lloyd's Rep. 1, at p.5.

2. Section 20(2)(m), which is derived from the equivalent provision in the Administration of Justice Act, 1956, contains

a jurisdiction which is no narrower than the predecessor jurisdiction in respect of claims for "necessaries" : The Fairport (No. 5), [1967] 2 Lloyd's Rep. 162; The Kommunar, sup.

3. No distinction is to be drawn: ...between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category. [Roscoe, The Admiralty Jurisdiction and Practice, 5th ed., at p. 203: The Riga (1872) L.R. 3 Ad. & Ecc. 516].

4. The jurisdiction extends to the provision of services: The Equator, (1921) 9 L1.L.R6. 1: The Fairport (No. 5), sup.

In the light of these propositions, I am satisfied that the plaintiffs bring their claims within Section 20(2)(m). Provisions for the passengers were "necessaries" for the particular adventure on which this passenger vessel was engaged. The provision of services is capable of coming within the subsection and does so here, given the nature of the services provided. I should mention that I was referred in addition to The River Rima, [1988] 2 Lloyd's Rep. 193 (H.L.) and [1987] 2 Lloyd's Rep. 106 (C.A.) but, as I understand it, nothing said there precludes my decision in favour of the plaintiffs on the facts of this case."

In Nore Challenger and Nore Commander [(2001) Vol. 2 Lloyd's Law Reports 103] the claim relating to supply of crew was held to be "necessary" stating:

"Before considering whether the concept of necessaries encompasses the provision or supply of crew, it is important to bear in mind that it has long been established that no distinction need be drawn between the supply of necessaries and the payment for such supply."

Identical view has been taken by a Court of Durban in m.v. Emerald Transporter [1985 2 SALR 448] with reference to the provisions contained in Admiralty Jurisdiction Regulation Act 105 of 1983 wherein it was held that services which are insured solely to the benefit of the ship owner would not be classed as necessaries. The said decision was, however, rendered in the context of ranking of claims against a fund comprising of sale proceeds of the vessel m.v. Emerald Transporter.

The House of Lords in The River Rima (supra) considered the provisions of Article 1(1)(k) of the 1952 Brussels Arrest Convention incorporating "goods or materials wherever

supplied to a ship for her operation or maintenance" as a maritime claim. Having regard to the provisions contained in Section 6 of Admiralty Court Act, 1840 and Section 5 of Admiralty Court Act, 1861 it was held:

Although the Brussel convention has not been adopted by Indian legislation, the principles incorporated in the convention are part of the common law of India and applicable for the enforcement of maritime claims against foreign ships as is held in m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa. The Supreme Court of India in the matter of m.v. Sea Success I has also held that the principles underlying the 1999 Geneva Arrest Convention were applicable for ship arrest in India.



"In other words, what is now called a claim in respect of goods or materials supplied to a ship for her operation or maintenance is the equivalent of what used to be called a claim for necessaries, but without the restrictions which formerly applied to such a claim." (Emphasis Supplied)

The Singapore High Court also in Golden Petroleum (1994 1 SLR 92) considered the expression "goods supplied to a ship for her operation and maintenance" in the following terms:

"In my opinion, bunker oil supplied to the ship for sale to other ships could not be conceived as goods supplied for her operation. The phrase 'operation of the ship' should not be equated with the business activities of the shipowner and the section as enacted could not cover goods which are loaded onto two ship only to be unloaded or disposed of soon thereafter by sale."

Yet again in Gatoil International (supra), it was held:

"An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or hire of a ship would, I think, show a sufficiently direct connection. It is unnecessary to speculate what other cases might be covered. Each case would require to be decided on its own facts. As regards the contract of insurance founded on in the instant appeal, I am of opinion that it is not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of coming within para (e)."



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