

# Arresting Bunker and Freight which has not accrued under Admiralty jurisdiction and de-bunkering the bunker

## SHIP ARREST IN INDIA

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**Dr. Shrikant Pareshnath Hathi, (Partner) and Ms. Disha Chandra Saxena (Legal Researcher) at Brus Chambers, Advocates & Solicitors, studies the possibility of arresting freight 'which has not accrued' and bunker on board the ship and sustaining the order of arrest under Admiralty jurisdiction, here the focus is also on de-bunkering or redelivery of the bunker from ship. The study begins with a rough understanding of bunker fuel as other property. Claimants who have claims against the time charterers can arrest the bunker on board the chartered vessel if it can be shown that the bunker belongs to the time charterers. However, the court may refuse to issue a bunker arrest order if the potential damages to the shipowners or to the time charterers will outweigh any benefits which may be derived from securing the claimants' claim by arresting the bunker, while sustaining the order of arrest of freight under admiralty jurisdiction may be difficult as there is no provision under any Indian law with general principles of maritime law to arrest freight as it is necessary to invoke admiralty jurisdiction that the cause of action and or maritime claim and or a substantive law right has to accrue against the offending ship.**



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.

Bunker is simply the name given to the fuel that is used to operate ships. Bunkering is the action of supplying a ship with bunkers. There are various types of fuel oil and within the fuel oils, there are many classifications,

standards and grades. Few among the type of Fuel Oils are MGO (Marine gas oil), MDO (Marine diesel oil), IFO (Intermediate fuel oil), MFO (Marine fuel oil), HFO (Heavy fuel oil)

The name Bunker came about because, in the past when ships used to run on steam produced from coal, the storage containers for the coal was known as a bunker. This word has stuck on to date. For thousands of years vessels were powered either by sails, or the mechanical work of oarsmen, or paddlers. Some ancient vessels were propelled by either oars or sail, depending on the speed and direction of the wind, later steam produced by coal was used. In today's time neither the ship is run on sail nor traditional wooden oars are used nor steam produced on coal and we are aware that even bunker fuel may be outdated in future date. The trend towards using renewable and alternative energy sources has gathered momentum over the last decade or so. At sea, the shift towards the widespread adoption of alternative energy is only now beginning to take shape.

Recent advances in solar cell and module design has lead to solar power becoming a cost effective fuel reduction option on pleasure boats, ferries and tourist vessels however on large ships the amount of fuel saved through the use of solar power alone is relatively small. So the idea of a commercially viable solar ship seems impractical at the moment but with technology development solar powered ships will replace bunker fuel ships.

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 purchase bunkers on their own account. In such circumstances, fulfillment 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 purchasers fulfillment (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.

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.

Bunker supplier's legal position is unclear as regards their claims under admiralty law when supplies are made at the behest of time charterer while legal position is different when supplies are requisitioned by master of the vessel or by the vessel owner.

Fuel oil is transported worldwide by fleets of oil tankers making deliveries to suitably sized strategic ports. Where a convenient seaport does not exist, inland transport may be achieved with the use of barges alongside the ship receiving bunker. The lighter fuel oils can also be transported through pipelines. The major physical supply chains of Europe are along the Rhine.

Bunkering operations are governed in general terms internationally by the IMO's MARPOL Annexes I & VI. SOLAS Chapter VI Regulation 5.1 also requires that a Material Safety Data Sheet be provided for oil products carried on board ships. In addition to the IMO regulations, many states, and even individual ports, have their own regulatory regimes covering bunkering operations. It is of paramount importance that prior to commencement of any bunkering operation, a check is made with the local agent and/or bulk supplier for information and guidance pertaining to the local regulations.

Under admiralty law bunkers can be arrested and an application for redelivery of the bunker by bunker supplier be made to the admiralty court, this appears to be feasible and a safer route for unpaid bunker dues when vessel is time chartered and requisition for bunker is at the behest of charterer. Bombay High Court and Calcutta High Court under admiralty jurisdiction in several cases allowed *exparte* order for arrest of bunker on board the ship.

For bunker arrest one also needs to understand the concept of charter party. A charter party is a contract whereby an entire ship, or some principal part of it, may be used by the charterer for a voyage or series of voyages or for a period of time. The three main categories of charter party are a) time charter party; b) voyage charter party and c) demise charter party.

#### Time Charter party

A time charter party is a contract in which the master and crew of the vessel perform services during a specified period in consideration of the payment of hire. Under a time charter party, the ship-owner retains possession of the vessel and the master and crew are employed by him. However, the charterer is entitled to determine how the vessel is to be employed, within the agreed trading limits as stipulated in the charter. In a time charter party, the risk of any delay rests with the

time charterer. The charter party usually sets out certain events, the occurrence of any one of which renders the vessel off-hire i.e. that the charterer ceases to be responsible for hire during that period. Such events include breakdown of the ship's machinery, insufficiency of crew, strikes etc. A charterer has the obligation to nominate a safe port. If an unsafe port is nominated, a ship-owner is entitled to ask the charterer to re-nominate another port. If the charterer refuses, the ship-owner may terminate the charter party or he may send the vessel to the nominated unsafe port but reserve his right to claim damages. The charterer is obliged to supply bunkers to the vessel unless the time charter provides otherwise. The duration of a time charter party is usually subject to an express or implied margin. The charterer is obliged to re-deliver the vessel to the ship-owner in the same good order and condition, fair wear and tear excepted, as the vessel was in at the time of delivery to the charterer. The re-delivery must take place by the final terminal date of the charter party, taking into account any express or implied margin.

#### Voyage Charter party

A voyage charter party is essentially a contract to carry specified goods on a defined voyage or series of voyages. Like a time charter party, the ship-owner retains possession of the vessel and employs the master and crew. The ship-owner is remunerated by the payment of freight, which is usually calculated by reference to the quantity of cargo shipped or by a lump sum. There is a rule against the deduction of freight for damage to or loss of cargo. In the absence of any provision entitling the ship-owner to advance freight, freight is only earned when the ship-owner has carried the goods to the discharge port and is in a position to deliver it to the charterer. Under the common law, a ship-owner is entitled to exercise a possessory lien for unpaid freight. A ship-owner must ensure that the vessel is seaworthy at the commencement of the voyage. At common law, this obligation is an absolute one; it may be mirrored or modified by the express terms of the charter. Any provision which excludes or restricts the ship owner's liability to provide a seaworthy vessel must be express, pertinent and apposite. The risk of any delay in the voyage charter party lies with the ship-owner. For loading and discharge operations, the incidence of risk of delay is reversed and placed on the charterer instead through a laytime and demurrage provision. Laytime begins when the vessel is an arrived vessel i.e. having reached her contractual destination, which is in all respects ready to receive or discharge the cargo and has (in the case of arrival at the load port) tendered a notice of readiness. A notice of readiness must only be tendered when the vessel is ready to load or discharge (the latter if expressly required under the charter); a premature notice is ineffective to start

laytime running. The voyage charterer is obliged to load or discharge the cargo within the period of laytime stipulated in the charter party or if not so stipulated, within a reasonable time. Where the charterer fails to load the cargo within the period of laytime stipulated or within reasonable time if no laytime is stipulated, the ship-owner is entitled to either demurrage (which is a form of liquidated damages, if expressly provided) or to damages for detention.

#### Demise or Bareboat Charter party

A demise charter party is a contract for the hire of the ship as a chattel. The charterer becomes for the purposes of the world at large (except the ship-owner himself) the owner of the ship for the time being. The master and crew are his employees. Whether a charter party operates by demise is a question of construction to be determined by reference to the language of the charter party. One other important indication is whether the master is the employee of the owner or the charterer. The charterer has possession of the vessel. A demise charterer operates the vessel for the duration of the charterer as he pleases, subject to any trading or cargo restrictions specified in the charter party. Like a time charter party, he pays charterhire on a periodic basis. Demise charter parties are sometimes entered into as a form of long or medium term financing arrangements.

Although in Australia the action in rem is not confined to ships and may extend to 'other property', it is only certain limited types of property – generally cargo and freight – that might properly be the subject of in rem proceedings. The ability to commence in rem proceedings against the bunkers or fuel on board a ship independently of any proceeding against the ship itself has been significantly constrained (if not ruled out completely) by the recent decision and dicta of the Full Court of the Federal Court in *Scandinavian Bunkering AS v the bunkers on board the fishing vessel "Taruman"*. Moreover, the types of claims that might be pursued as an action in rem against 'other property' and the circumstances in which such claims might be pursued against such 'other property' are also somewhat limited, much more so than proceedings in rem against a ship. Does s. 17 of the Australian Admiralty Act authorise a proceeding in rem against any property at all, as there is no definite article before the word 'property'. This could justify a view that any property at all is included. This view, however, was unanimously rejected by the Full Federal Court in *Metall und Rohstoff Shipping and Holdings V.V –vs- Owners of Bunkers on Board the Ship m.v. Genco Leader*. Allsop J (with whom Lee and Tamberlin JJ agreed). The arrest of bunkers, accordingly, was set aside, the bunkers were not connected with the general maritime claim. Allsop J in the case, expressly left open the question whether 'property' includes

bunkers although he saw no reason to exclude bunkers. But might bunkers constitute part of the 'ship' itself. This question was considered by another Full Federal Court in *Scandinavian Bunkering AS –vs- Bunker on Board the ship FV Taruman- Tamberlin J* having participated in both Full courts.

In England, orders of attachment of the bunker on board the ship are allowed. In South Africa, attachment of bunker is the measure that is taken up in case of dispute of bunker supplier and the time charterer, as arrest of any ship needs a direct link between the bunker supplier and the ship. On the other hand in Norway bunkers are arrested as a method of proclaiming debts against the charterers. Situation in regards to attachment of bunkers for claims against time charterers is similar under Norwegian and South African law.

The other property would mean property appurtenant to the vessel such as her hull, tackles, etc. These observations cannot be construed to mean that every specie of property and/or asset of the owner (whether offending or not) is liable to for arrest in admiralty.

The Supreme Court of India in *M.V. Elizabeth* has held that "It is clear that every person, thing and foreign vessel entering Indian waters comes within the jurisdiction of the High Court of coastal state by the very act of its entering the Indian territorial waters. In such a case if any one has any maritime claim against the owners of offending ship then not only the offending ship but also any other property or ship belonging to such a person within Indian territorial waters, can be attached or arrested by the High Court of the coastal state".

Should the claim falls outside the scope of the 1952 Arrest Convention, is thus not regarded as maritime claim, it is still possible to arrest other objects than the vessel, e.g. the bunkers. From a practical viewpoint, an arrest of the vessel's bunkers may be as effective as arresting the vessel itself, and may often lead to security being put up. The bunkers must, however, be owned by the debtor, and it is important to keep in mind that under a time charter party, the bunkers are normally owned by the Charterers, not the Owners.

If the bunker on board the ship is not ordered to be arrested or attached, the claimant's claim will be frustrated forever thus making it impossible to recover the claim for the bunker supplies made. Claimants who have claims against the time charterers can arrest the bunker on board the chartered vessel if it can be shown that the bunker belongs to the time charterers. However, the court may refuse to issue a bunker arrest order if the potential damages to the ship-owners or to the time charterers will outweigh any benefits which

may be derived from securing the claimants' claim by arresting the bunker.

Both Conventions allow ship arrest for security and in some jurisdictions the concept is used for the founding of jurisdiction. However, no convention has ever addressed the questions of arrest of cargo/bunkers and caveat against arrest and/or release.

The List of Claims in the 1952 and 1999 Arrest Conventions, the wording of the "chapeau" in Article 1 (1) has prompted different state parties to adopt divergent views on whether the list is "open" or "closed". For example, in the legislation of the Scandinavian countries a "maritime claim is a claim which is based on/have one or more of the following circumstances/causes. The national statutes of the United Kingdom and Nigeria have the wording: "The Admiralty jurisdiction of the High (Federal) Code shall be as follows, - (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2) relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2. (See *Berlingieri*, supra note 33, at p. 46-47; Merchant Shipping Act of Denmark; Maritime Code of Norway; Maritime Code of Sweden; Maritime Code of Finland; Admiralty jurisdiction Act of Nigeria; Senior Courts Act 1981.)

The Russian Federation has given the force of law to the 1952 Arrest Convention and adopted, with certain variations, some of its provisions in its Merchant Shipping Code. In view of the fact that the list of maritime claims in Article 389 of that Code is based on Article 1(1) of the 1999 Arrest Convention, they will be considered in connection with the review of the national laws that have adopted it. The maritime claims listed in Article 389 of the Merchant Shipping Code (the claims are neither lettered nor numbered) are preceded by the chapeau: "A maritime claim shall be deemed to be any claim arising out of".

Towage and pilotage - These claims cover damage caused by a tug to its tow or vice versa, and can include non-performance of the contract. Reference is made to the type of services rendered.

Goods or materials wherever supplied to a ship for her operation or maintenance versus goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance

Under the Admiralty jurisdictions of common law countries, this claim is considered to be a claim for "necessaries". The distinction vis-a-vis the 1926 Maritime Lien and Mortgage Conventions (MLM)



Convention is that the materials could be supplied in the homeport and away from it and ordered not only by the master, but by any person, including the ship-owner himself.

The 1999 Convention clarified the scope of this subparagraph by including 'hire (lease) of containers as well as services such as mooring, fireguard, surveys by classification societies. The extension of this provision by the use of the words "provisions, bunkers, equipment..." will certainly benefit the supply companies and ship managers.

Throughout the world, the 'admiralty jurisprudence' system was brought by British settlers along with common law and equity, and courts for the administration of the maritime law were commissioned in almost all the colonies. These admiralty courts continued to exercise the power conferred on them until replaced by the suitable legislation of the country concerned. There is, however, no statutory definition of admiralty jurisdiction, and difficulties arise, if any attempt is made to define its exact limits. The scope of admiralty jurisdiction is limited under classical English law. Since Indian admiralty jurisdiction is founded on English law, it would be proper to briefly refer to the development of admiralty jurisdiction in that country, although not necessary.

The unsatisfactory archaic state of Indian law in admiralty jurisdiction and its inadequacies came to the notice of the Supreme Court in *m.v. Elizabeth & Other -v- Harwan Investment and Trading Pvt Ltd*, examined the various Acts in detail and thereupon it upheld the Admiralty jurisdiction of the Indian High Courts, this was followed by several other Supreme Court judgments including *Liverpool and London S.P. and I Asson. Ltd -vs- m.v. Sea Success I* and *Anr* that expanded the scope of admiralty jurisdiction.

India is now an independent nation and it does not behove its sovereignty that a British statute or judgments should govern its maritime law. Also with vast expansion in India's maritime trade and commerce in recent years, with clear prospects of their future expansion in the coming years consequent on liberalization of its economic policies and the emergence of trade as a global phenomenon, this branch of the law will assume greater importance in coming years and it is necessary and desirable that the scope of admiralty law expand.

Bunker being necessities and without which a motor vessel cannot be engaged in a voyage or sail and for her voyage and her basic engine running operation bunker cannot be detached from the ship.

Bunker oil is 'necessary' goods and supplies for ship. If it is conclusively shown that necessities supplied or services rendered to any ship are prima facie 'necessaries' and are within the category of necessities within the scope and ambit of section 5 of Admiralty Courts Act, 1861, admiralty action will lie. The concept of "necessaries" goods and materials supplied or services rendered to a ship for her operation and maintenance. The operation of the ship would necessarily include operation of ship 'necessary' for voyage and sea worthy necessarily include necessities including bunkers, for the vessel to be seaworthy from commencement and continues to be seaworthy during the voyage. Bunker fuel oil is used mainly in powering ships.

In China and Korea, similar to the arrest of a ship, bunkers can also be arrested by exercising a maritime lien, if they are owned by the time charterer. But there is a practise that the claimant has to submit security of a certain amount to prevent wrongful restraint on the ship. Another way of securing the claim is by attaching the other properties of the time charterer under the Civil laws, while there are litigation/arbitral proceedings are going on. Arrest proceedings in China can be made for securing of the debts, for which arbitration trials are going on in a foreign country. However, the court may not allow arrest of a bunker, if any potential harm is liable to occur to ship owners and time charterer which may outweigh any benefit for the claimant.

Under Chinese Special Maritime Procedure Law the assets to arrest, to attach, or even lien may be of any nature, but will include a ship owned, or chartered, cargoes, bunkers on time chartered vessels, bank account, freights and other accrued monies receivable. The types of properties, which are attachable under Chinese law Art.18 of The Explanations on application of Special Maritime Procedure Law of P. R. China, which was issued by the Supreme Court and came into force on 1st February 2003, provides that, "according to Art.12 of SMPL, the property subjected to preservation is limited to ship, cargo carried by a ship, ship's bunkers and ship's provisions. To attach other properties for maritime claims, procedures of Civil Procedure Law of PR China is referred as general guidance". Art. 50 of the SMPL provides that "where a maritime claimant applies for preservation of a maritime claim in respect of a ship's bunkers and provisions related to the claim, the provisions of this Section shall apply". Art.38 of the Explanations on SMPL provides that "where a maritime claimant applies for preservation of a maritime claim in respect of a ship's bunkers and provisions, general provisions of Section1of Chapter III of SMPL shall also apply. ". It is obviously that, under the SMPL, a maritime claimant is entitled to arrest a ship, attach cargo,

bunkers on time-chartered vessel and to attach ship's provisions for preservation purpose.

In Panama rules and procedure for arresting ship, cargo, bunkers or any other property are simply laid and are almost same.

It is vital for bunker suppliers to know with whom they are contracting. On many occasions bunkers are typically ordered by 'agents' or 'managers'; it is essential to establish exactly whom these agents and managers represent. When making a claim, such information will prove vital.

When the claim is against the bareboat charterer of the ship, the ship can be arrested for the bunker claim. However, when the ship has been time chartered, the situation is more complicated. First, it must be established whether the bunker claim has created a maritime lien, and if so, where and when that lien can be exercised. This will depend on the applicable law in each particular case. For example, under US law, a bunker claim creates a maritime lien. In other countries it is not possible to arrest the ship, irrespective of whether, under the applicable law, a lien has been created.

Time charters will usually contain a 'no lien' clause, which may also prohibit a claim against the ship. Even then, an arrest may still be possible in some countries, such as Belgium, which interprets the Ship Arrest Convention in such a way that a claim for bunkers gives the right to arrest a particular ship. A so-called 'Liverpool and London' clause may help. This clause stipulates that the question of whether a lien exists is governed by a specific law or the law of the place where the ship is located. Such a clause must be incorporated in the supply contract. Depending on where the ship is, this may create the possibility to arrest that ship.

Ship agents appointed by charterers, who do not pay them, may still be able to take action against the ship in certain limited circumstances. This is possible because some debts give rise to what is known as a maritime lien. In simple terms the debt attaches to the ship and legal action can therefore be taken against the ship.

There are some important limitations to this form of action. The disbursements that can be recovered are from a limited range and include items such as pilotage, harbour and tug dues. The agent's own fees are not included and cannot be recovered in this way.

Agents must exercise their rights promptly. The time allowed to bring an action against the ship may be as

little as six months or a year, depending on the jurisdiction involved.

Ship agents should also consider whether they were actually appointed by the charterers. Some voyage charter parties provide that the charterers have the right to nominate the agents, who are then employed by the owners (e.g. Shellvoy 5, clause 24). In these cases the owner and not the charterer is the debtor.

Another form of action is the recovery of funds from the time charterer through the attachment of bunkers on board a ship. This form of action is useful if a charterer owes funds for services rendered to a ship, but the hire of that particular ship comes to an end, and the debtor goes on to charter another ship. The bunkers are normally owned by the time charterer, and as long as the Club has solid evidence to this effect, we will attach the bunkers. Again, this type of action depends on the jurisdiction in which one is arresting. The USA and Northern Europe are good examples of jurisdictions where this type of action can be executed.

The main problem when seeking to arrest bunkers is that it is difficult to ascertain whether the debtor/charterer actually owns the bunkers (they could be owned by the ship-owner or by a voyage charterer). Another practical difficulty could be that in order to secure the Member's position it may be necessary to remove the bunkers from the ship (e.g. by bunker barge). This can be expensive and in some ports would not be allowed. The best time to arrest bunkers is when the ship is loaded and ready to sail, not when the ship is under arrest or idle awaiting orders.

The arrest of ships is a useful weapon but one which is not always available. It is sometimes necessary to instigate legal proceedings directly against the debtor. We will look at such debt collection procedures in a future issue of "The Intermediary".

Arrest or attachment of bunkers under admiralty law are allowed in the Netherlands, Norway, South Africa, United States of America, Canada and Northern Europe while few other countries have also allowed arrest or attachment of bunker on board a ship awaits reasoning.

De-bunkering fuel operations or removal of bunker fuel are rendered by several service providers. Bunkering or de-bunkering takes place at port, anchorage or alongside. It may be pumped in or out from road tanker, bunker barge or another tanker or ship. Bunker vessel is an oil tanker including a tanker barge or bunker barge that is equipped to deliver bunker oil to a receiving vessel and is also equipped to pump out the oil from receiving vessel.

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