INSOLVENCY LAW ACADEMY

An Indian Institute of Excellence in Insolvency

CO-RELATION BETWEEN INDIAN MARITIME AND INSOLVENCY LAWS

THOUGHT PAPER

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India aspires to become the 3rd largest economy over the next 4 years. The waterways sector in India, which comprises coastal shipping and inland waterways transport, is a crucial contributor to the Indian economy. As of 2021, India owns over 30% global market share in the shipbreaking industry and is home to the largest shipbreaking facility in the world at Alang. To promote India's shipping and port industry, the Government has introduced various incentives for enterprises that develop, maintain and operate ports, inland waterways and shipbuilding in India.

Maritime industry across the globe faces many risks, including from climate change. The Indian shipping industry has also been facing distress lately. Insolvency process was commenced under the Insolvency and Bankruptcy Code, 2016 in respect of many enterprises. Some are undergoing liquidation.

India has a robust legislative and adjudicatory framework for governing shipping industry, and in Code, for effective and efficient insolvency resolution and liquidation of enterprises operating in maritime sector. However, many complex issues of law, including the rights of secured creditors and their priorities have arisen in these cases. In fact, every aspect of the law of proprietary security over ships may give rise to significant risks and complexities.

Considering the importance of shipping industry to the Indian economy, and developments under the Code in respect of the shipping industry, ILA decided to undertake a study to understand the co-relation between maritime and insolvency law, particularly with reference to the Code, with focus on rights of creditors. This Thought Paper, is a result of the study. I hope the policy makers, stakeholders and scholars of insolvency and maritime laws will find this Thought Paper useful.

I take this opportunity to thank Mr. Raghav Mittal, Senior Associate at New Delhi office of Dentons Link Legal, and a member of Insolvency Law Academy's Emerging Scholars Group, for leading the Study, and ILA Team for their support in research.

SUMANT BATRA

Insolvency Lawyer
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March, 2024

Justice Sanjay Kishan Kaul

Hon'ble Judge, Supreme Court of India

"I am confident the Insolvency Law Academy will continue to contribute towards turning the insolvency regime of India into a globally recognised story."

Amitabh Kant

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"I am confident that Insolvency Law Academy is positioned to provide the capacity building, research and awareness support towards making the IBC and its impact significant one and one that can be looked at by other countries as a precedent for effective insolvency resolution."

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"Sumant Batra has a sound track record of building new institutions. I am confident that under his leadership, ILA will rise to become a formidable institute of excellence of global recognistion."

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"ILA is the first institution in the world with a unique pedigree. I am confident many jurisdictions will be inspired to adopt this model."

Scott Atkins

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"...Insolvency Law Academy is a demonstration of Sumant's ongoing leadership across the globe insolvency and restructuring not just here in India."

EXECUTIVE SUMMARY

Maritime transport is the backbone of international trade and global economy. The shipping industry has been at the centre of the global economy with its ability to offer economical and efficient long-distance transport. Lately, the industry is grappling with heightened risks of geopolitical tensions, volatile market conditions, climate change, and other challenges, which has given rise to distress in maritime sector, globally. In particular, the physical and transitional risks arising from climate change pose dramatic challenges for the shipping industry. These factors have made the shipping market volatile and risk averse.

The Indian shipping industry has also been grappling with similar issues. In the last few years, many enterprises from shipping industry were pushed into insolvency under the Insolvency and Bankruptcy Code, 2016. Many complex issues of law, including the rights of secured creditors and their priorities have arisen in these cases. In fact, every aspect of the law of proprietary security over ships may give rise to significant risks and complexities. The maritime insolvency cases have drawn attention to several unaddressed instances of dissonance between the maritime and insolvency laws, and highlighted the need for harmonization of maritime and insolvency frameworks.

India aspires to become the 3rd largest economy over the next 4 years. The waterways sector in India, which comprises coastal shipping and inland waterways transport, is a crucial contributor to the Indian economy. As of 2021, India owns over 30% of the global market share in the shipbreaking industry and is home to the largest shipbreaking facility in the world at *Alang*. To promote India's shipping and port industries, the Indian Government has introduced various fiscal and non-fiscal incentives for enterprises that develop, maintain and operate ports, inland waterways and shipbuilding in India. Government policies envision the annual cargo movement and passenger movement to increase by almost three times on inland waterways, and by almost 1.2 times for cargo movement on coastal shipping as a run up to the year 2030.

Considering the importance of shipping industry to the Indian economy, and an impending need to address the instances of conflict between these two laws, for maximisation of the value of assets for distribution. Insolvency Law Academy decided to undertake a study to understand the co-relation between maritime and insolvency laws, particularly with reference to the Code, with a focus on the rights and priorities of creditors and cross-border issues. This Thought Paper is an outcome of this study.

The Thought Paper is expected to assist the policy makers and the market in addressing the issues brought out by the study.

International Treaties on Maritime, and Creditors' Rights

Unlike the treaties consisting of the Convention on the International Recognition of Rights in Aircraft, adopted in Geneva in 1948, and the Luxembourg Protocol on Matters Specific to Railway Rolling Stock, which provide a comprehensive substantive law regime for security rights over mobile assets, there is no single international convention for security rights over seagoing ships. Different international treaties have been developed for different types of assets by a variety of international organizations. These treaties, a principal focus of which is the conflict of laws do not provide a comprehensive uniform regime for security rights.

Absence of an agreed international framework raises a concern for secured creditors holding (or considering to obtain) ship mortgages or hypothecations in cross-border business, particularly with regard to recognition of consensual proprietary security rights under a foreign law. There are a number of jurisdictions which do

not recognise foreign ship mortgages and hypothecations under the rule of the law of the flag. This gives rise to considerable insecurity among market participants as regards the status of proprietary security over ships under foreign law.

Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017

The terms 'maritime' and 'admiralty' are often used interchangeably. Though maritime law, including admiralty law, and Admiralty Courts are parts of the national legal system, and pertain to municipal laws of the countries concerned, they have an international aspect.

India has a robust legislative, administrative, regulatory and adjudicatory framework established under several legislations for the governing shipping industry. In 2017, India enacted the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act to consolidate the laws relating to admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith. It confers admiralty jurisdiction on the High Courts of coastal states which extends up to Indian territorial waters. The Admiralty Act is a complete code in itself as regards the legal proceedings in connection with vessels (actions *in rem*), their arrest, detention, sale and determination of priorities in respect of the sale proceeds of the vessels that were ordered to be arrested. A maritime lien attaches only to the *res* (property) in respect of which the claim arises. The proceeds of the sale of the ship are available for the satisfaction of the maritime liens. It is an admiralty action *in rem* against the vessel and continues to bind it, until discharged. It continues to exist on the vessel notwithstanding any change of ownership or of registration or of the flag and shall be extinguished after the expiry of a period of one year unless a forced sale has been made by the High Court upon arrest or seizure of the vessel. The Admiralty Act also provides the right to invoke the jurisdiction of the court by an action *in rem,* to hear and determine any question on a maritime claim, against any vessel. It further provides *inter se* priority in admiralty proceedings. Maritime claims fall in the category of "*All other claims*" and rank below maritime liens and mortgages. A financial creditor who has a registered mortgage on the ship would recover in priority over all parties who have maritime claims, but not maritime liens. Only maritime liens shall have priority over a registered mortgage.

Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 is a self-contained comprehensive legislation for insolvency resolution of both, the corporate persons and individuals. The Code provides a predictable, market-led, incentive-compliant, and time-bound mechanism for insolvency resolution and liquidation. The Code aims to maximize the value of assets of debtor, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. Under the Code, the rescue mechanism for a corporate debtor is achieved through a corporate insolvency resolution process, while the exit mechanism is dealt with through a liquidation process.

Nature of Conflict between Insolvency and Maritime Laws

Both, the insolvency and maritime law, deal with the rights of creditors. While insolvency law seeks to centralise all the assets of the debtor in a single forum, Maritime Law contemplates a multiplicity of proceedings in a multiplicity of fora. Maritime law allows creditors to obtain security for their claims by arresting the ship that is connected with their claims in a port where such a ship may be found. Classically, these two bodies of law have therefore assumed different priorities in response to different historical circumstances and socio-economic realities.

The approach under maritime law may often be at odds with the collectivist creditors' approach in insolvency. Under the Code, all assets of the corporate debtor, including those held as security interest by its

creditors, must be pooled into a common kitty so that a resolution of insolvency of corporate debtor can be found and payment of debt of creditors is made in accordance with the provisions of the Code. The distribution to be made to the creditors is to be decided by the committee of creditors taking into consideration the waterfall provided in the Code. Creditors are prohibited from taking any legal or enforcement action against the corporate debtor. Maritime liens persist despite changes in ownership and generally, can only be extinguished by way of a judicial sale by an admiralty court.

Quite often to evenly dispense risk, where a business owns more than one ship, legal ownership of each of the vessels is transferred to a separate legal entity, each entity known as a "one-ship" company. In the insolvency context, in order for the restructuring to be successful, it would be ideal for all the assets of the business to be centrally administered. However, under the law, since each of the one-ship company is a separate entity, separate insolvency proceedings may have to be initiated in respect of each of such one-ship company.

Recognition of Foreign Proceedings and Arrest of Ships

Different jurisdictions have taken differing approaches to reconcile the two laws. Japan, South Africa and United States do not provide any exemption to secured creditors. Singapore, on the other hand, explicitly preserves such rights of the secured creditors to enforce their security over debtor's property. In United Kingdom, if the proceedings have culminated in a judicial seizure and sale, the claimant can proceed against the funds of the sale notwithstanding the opening of insolvency proceedings. If no sale has taken place, the claimant cannot commence proceedings *in rem* but must instead participate in the insolvency. Some other jurisdictions like, New Zealand and Kenya have granted their courts complete discretion in deciding whether the stay ought to apply. Certain jurisdictions exempt maritime lien holders from the applicability of the insolvency and such creditors resultantly, are able to enforce their rights as secured creditors outside the insolvency process. The maritime lienholders generally prefer to sue in a jurisdiction that exempts them as secured creditors from the application of the provisions of moratorium during the insolvency of the corporate debtor so that they may enforce their rights as a secured creditor under the domestic admiralty law of that particular jurisdiction.

This Thought Paper studies the practices adopted in four jurisdictions, (i) China, (ii) Australia, (iii) USA and (iv) Singapore to compare the measures taken across jurisdictions to carve out a balance between maritime and insolvency provisions. The instances of disharmony and practices adopted are highlighted by looking at the notable cross-border maritime insolvency cases.

Reconciliation between Maritime and Insolvency Laws in India

Before the Enactment of the Admiralty Act and the Code

Prior to the enactment of Code and the Admiralty Act, certain judicial precedents briefly examined the aspect of the jurisdiction of the admiralty when proceedings for winding-up/ liquidation of the entity owing the vessel were also pending. The Indian Supreme Court held that the lien enacted under the Merchant Shipping Act, 1958 would prevail over the confiscation of the ship under section 115 read with section 126 of the Customs Acts, 162. Therefore, the lien available to a seaman for his wages was held to be superior to the rights of the company even after confiscation of the ship. The Madras High Court held that once a ship has been sold in exercise of the powers of the Admiralty Court and the proceeds deposited with the Admiralty Court, the initiation of proceedings for winding up before the High Court cannot have the effect of operating to stay the admiralty proceedings. The Bombay High Court in a subsequent judgment held that once the

company is in liquidation, only such claimants would have charge over the vessel who had executed a warrant of arrest prior to the date of admitting of winding up petition. However, staking the claim against the sale proceeds of others is not permitted. Once the company goes into liquidation, all the properties of the company, including various vessels become the properties which are available to all, other than those claimants who have executed a warrant of arrest against any vessel prior to the commencement of liquidation.

After the Enactment of the Admiralty Act and the Code

The Code and the Admiralty Act were codified and enacted to reduce complexities. Both the statutes are aimed at resolving issues of conflict pertaining to the jurisdiction of insolvency tribunals and Admiralty Courts. However, despite the enactment of these laws, several issues still remain contentious.

There have been a few, but significant court cases on the applicability of Code and the Admiralty Act since the Code came into effect. A notable judgment in this respect is of the Bombay High Court of *Raj Shipping Agencies v. Barge Madhwa* ('Barge Madhwa'), where the Bombay High Court held that the provisions of the Admiralty Act and the Code have to be read harmoniously to strike a balance between the two. *Vis-à-vis* the Code, an action *in rem* may be filed and the ship arrested (a) before the moratorium under section 14 of the Code comes into force; or (b) during the moratorium period; or (c) even after the corporate debtor is ordered into liquidation. The Bombay High Court held that the provisions of the Code have to read harmoniously with the provisions of the Admiralty Act; the Admiralty Act, being a special Act, would prevail over the provisions of the Companies Act; it being a general legislation and no leave would be required under section 446 (1) of the Companies Act for (i) commencing a suit under the Admiralty Act; or (ii) proceeding with a pending suit against the company under the Admiralty Act, when a winding up order has been passed or the official liquidator has been appointed as provisional liquidator. Pertinently, the Court has also held that an action *in rem* against a vessel will proceed in accordance with the Admiralty Act (being the applicable law), and the priorities for payment out of the sale proceeds of the vessel will also be determined in accordance with the Admiralty Act and not as per the priorities set out in section 53 of the Code. The Court has also held that in the matter of priorities for payment out, section 10 of the Admiralty Act would prevail over sections 529 and 529A of the Companies Act.

The Court observed that abandoned ships pose not only huge risks to the port that they are berthed at, but also to the environment as such and the Admiralty Court is not powerless and ought to take steps to protect the ship as well as ensure that their maximum value is realised which would benefit all the stakeholders involved under the Admiralty Act as well as the Code.

The *Barge Madhwa* (*Supra*) is a welcome step in so far it attempts to harmonise the provisions of the Code and Admiralty Act, in line with the object and purpose of these legislations. However, scholars and practitioners have flagged concerns that the judgement seeks to harmonize the provisions of the Code and the Admiralty Act, but such harmonization comes at the cost of practicality.

Some useful guidance can be drawn from the experiences in US, China, Singapore, and other jurisdictions.

Treatment of Expense

Under the Admiralty Act the vessels are preserved and maintained to ensure value maximisation. There are considerable expenses related to the safekeeping, maintenance, berthing, salvaging, manning and porting

charges which are required to paid. There have been increasing instances involving a fleet of vessels where the resolution professional and the committee of creditors have not taken timely steps to man, preserve and maintain the vessels during corporate insolvency resolution process. These concerns have been highlighted by courts in many cases. In India, confusion persists on the manner in which such expenses are required to be treated and a set of guidelines/ clarifications issued in this respect would certainly promote certainty and boost market confidence for stakeholders to timely maintain, preserve, and carry out the sale of the vessels.

Preference of sale by Admiralty Court

Peculiar dynamic conditions in insolvency of maritime enterprises require constant maintenance and preservation of the vessels. It is therefore, equally important that the judicial sale take place at the earliest to reduce the considerable expenses on account of vessel maintenance, preservation and custody; and have asset sale value maximisation. which may deplete considerably with time. It has been recognised that the sale of vessel by an admiralty court extinguishes all maritime liens against the *res* thereby giving a clear title to the buyer. Therefore, a sale by the admiralty courts is likely to fetch a better price since it would be free from all encumbrances, in comparison to the sale under the Code through liquidation. The *Barge Madhwa* (*Supra*) judgment provides broad guidance where despite the pendency of the corporate insolvency resolution process or the liquidation, sale of the vessel may be undertaken by the Admiralty Courts.

Other issues

The *Barge Madhwa* (*Supra*) holds that once a plaintiff has obtained an arrest, the plaintiff becomes a secured creditor. Accordingly, any resolution plan must treat that plaintiff as a secured creditor in terms of section 3(31) of the Code for the value of his charge on the vessel. However, section 3(31) of the Code stipulates that a right, title or interest or a claim to a property must be created in favour of a secured creditor by a transaction which secures payment or performance of an obligation of any person. Considering that there will be no adjudication of the plaintiff's claim and further proceedings will be stayed, the creation of a security interest by the mere factum of an arrest or deposit of money in court may vitiate the process. It will also create an artificial distinction between similarly placed creditors and avenues for forum shopping.

Section 53 of the Code and sections 9 and 10 of the Admiralty Act provide a different order of determination of priorities in liquidation. As per *Barge Madhwa* (*Supra*), in case of liquidation, the determination of priorities will be done under section 10 of the Admiralty Act and *inter se* priorities will be decided under section 9 of the Act. Section 53 of the Code shall not apply in so far as the distribution of claims which are already covered under sections 9 and 10 are concerned. Conferring priority upon similarly situated workmen in different classes would be violative of the principles of natural justice. For instance, providing priority to wages of seamen over the wages of workers, when both fact considerable personal peril, may be difficult to reconcile with the intent of the Code. These issues of conflict in the priorities need to be clearly addressed to promote certainty and enable effective restructuring.

A cross border insolvency framework or its absence can significantly impact the outcome of proceedings. There is no framework to address cross-border issues under the Code. To address the limitations of the prevailing cross-border insolvency mechanism, a draft set of guidelines containing a specific chapter i.e. Part Z on cross-border insolvency has been proposed by the Indian Ministry of Corporate Affairs. Considering the rise in the initiation of maritime insolvency cases in India, due to the regulatory challenges and potential risks involved, there is an urgent need to have a robust framework to address all issues on cross-border maritime insolvency.

CONCLUDING REMARKS

Indian maritime industry is a significant catalyst for overall industrial growth due to spin offs to other industries, including steel, engineering equipment, port infrastructure, trade and shipping services. The indirect potential of shipbuilding industry in employment generation and contribution to GDP is therefore tremendous. The dynamics of India's economic growth will continue to create demand for new ships and trade. The robust insolvency resolution framework provided under the Code is expected to be used by the creditors and borrowers for effective restructuring to deal with distress situations, while individual creditors are expected to pursue their rights under the Admiralty Act. This makes a formidable case for greater reconciliation between the two legislations.

Developing awareness

Though India has been carrying on maritime trade for a long time, the maritime law has been very slow in its development, particularly post-Independence. There is a need to build awareness about maritime law, including with reference to the insolvency laws amongst stakeholders.

Greater harmony between maritime law and the Code

While *Barge Madhwa* (*Supra*) has addressed some of the tensions between the two jurisdictions and preserved the rights of the claimant to pursue statutory rights of action *in rem*, while balancing against the objectives of the Code, jurisprudence in relation to the interaction and interplay of admiralty law and insolvency law is far from fully developed. Several issues still remain unanswered. The law in this respect is still evolving.

Judicial sales of vessels under the Admiralty Act may be more efficient and incentivise asset maximisation. However, appropriate provisions should be provided to ensure that the sale takes place in a timely manner at the earliest possible stage, so that the expenses related to maintenance, custody and preservation of the vessel are minimised.

The Insolvency and Bankruptcy Board of India may consider taking suitable steps to address issues of disharmony in the insolvency resolution process *vis a vis* the arrest and sale by Admiralty Courts. Steps for inclusion of maritime claims in the insolvency resolution process can reduce contingency risks. Similarly, clarity on the treatment of expenses incurred during the maintenance, custody and sale of the vessel and other ancillary and related costs under the Code, may promote certainty and provide an impetus to stakeholder incurring such expenses to take ensure that the vessel is adequately maintained to enable its value maximisation.

While striking a balance between the Admiralty Act and the Code, caution ought to be exercised to ensure that the there is no dilution of Code. The provision for exemption and encroachment by sectoral laws, may stimulate a dissimilar insolvency dispensation for each sector and risk altering the rights of stakeholders in an insolvent company. It is also imperative that any exemption from moratorium under section 14 of Code is grounded on a systematic impact analysis of the overall economic considerations in addition to the maritime sector-specific stakeholder rights, to minimise resource misallocation and dilution of Code.

Cross-border Insolvency framework

In an admiralty action, jurisdiction may be exercised irrespective of the nationality of the ship or that of its

owners, or the place of business, domicile or residence of its owners, or the place where the cause of action arose wholly or in part. In such a scenario, situations arise where the ship owner of a vessel is incorporated outside India, and is subject to insolvency proceedings in the respective country. When an insolvency spreads across several nations, different courts may not treat creditors equally. A universalist international insolvency treaty would resolve these problems by ensuring cooperation and mutual recognition of bankruptcy proceedings involving various nations' courts. Adoption of UNCITRAL Model Law on Cross Border Insolvency is necessary can help in dealing with cross-border insolvency issues, effectively.

Impact of climate change

The physical and transitional risks of climate change is going to significantly impact the shipping enterprises. In the event of distress in shipping enterprises, many complex questions of law may arise. The global insolvency standard setting bodies are currently looking at changes that may be required in insolvency policy to deal with climate change. While separate treatment of sectoral laws in the Code is avoidable, shipping enterprise may demand a separate set of restructuring to address the climate change issues. This makes out a strong case for deeper study.

Use of mediation

Alternate dispute resolution mechanism, particularly mediation has emerged as an effective means of dispute resolution in many jurisdictions. Mediation is now well known for improving the efficiency of dispute resolution. Alternate dispute resolution has played a crucial role in resolving conflicts in the maritime industry. Compared to traditional litigation, which can often lead to lengthy court battles and substantial costs, mediation offers a more efficient and cost-effective alternative in admiralty disputes. By engaging in mediation, parties can maintain greater control over the outcome and actively participate in crafting a resolution that meets their specific needs.

Insolvency resolution under the Code is not an adversarial process, yet implementation-wise, it has become litigious in India. This is primarily due to multiple contentious issues brought before the NCLT for resolution by various parties. This creates several systemic bottlenecks and leads to cascading delays in the resolution process and increasing pendency. Many jurisdictions have benefited from the adoption of alternate dispute resolution mechanism, particularly mediation under their respective insolvency laws.

India enacted Mediation Act in the year 2023. As on the date of publication of this Thought Paper, Mediation Act is yet to be fully operationalised. IBBI Expert Committee on Framework for Use of Mediation under the Code has emphatically recommended the application of mediation in insolvency. The mediation process envisaged under the Mediation Act, based on a 'one-size-fits-all' approach, may not be made applicable to the insolvency resolution processes under the Code. Entry 13 of the First Schedule to the Mediation Act, allows the Central Government to exclude by notification the subject matter of dispute that may be kept out of the purview of the Mediation Act. Recognising that *in rem* rights and aspects of public interest get involved at many stages during the proceedings under the Code, and the timelines prescribed under the Code being tighter, IBBI Expert Committee on Framework for Use of Mediation has recommended there is a strong case for seeking exemption by making a specific amendment to the Mediation Act or through a notification under Entry 13.

It is expected that mediation will reflect positively in effective litigation management in the event of tensions between the Admiralty Act and the Code through cost and delay reduction; and augment procedural, operational and cultural changes in how India resolves insolvency.

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I. BACKGROUND

Seventy percent of the earth's surface is made up of the oceans and seas. This large area of the earth's surface is used by humans, mainly for fishing and transportation. The Maritime sector could include industries such as, shippers, brokers, ship builders, port authorities, banks, insurance authorities, maritime court, shipbreaking companies, and survey and classification companies.[1]

Maritime transport is the backbone of international trade and the global economy. The international shipping industry accounts for the carriage of around 90% of world trade.[2] With 12 government-owned major ports and approximately 200 minor and intermediate ports that handle some 1,400 million tonnes of cargo every year,[3] about 95% of India's trade by volume and 70% by value, is moved through maritime transport.[4]

The global shipping industry is facing a heightened risk due to various reasons, including volatile market conditions, an increase in the workload on the crew, greater risk of incidents and other factors.[5] Many shipping enterprises are facing insolvency proceedings due to considerable levels of distress in the shipping industry, with weak demand leading to depressed and unpredictable charter and freight rates and over capacity.[6] Some prominent examples include the insolvency of *Dragon Pearl*[7], *Sanko Steamship*[8], *STX Pan Ocean*[9] and the *Hanjin Shipping case*[10], and more recently, the *Vietnamese State Owned Shipbuilding Industry Corporation.*[11]

The Indian shipping industry has also been grappling with similar issues. Many enterprises from the shipping industry were pushed into insolvency under the Insolvency and Bankruptcy Code, 2016 ('Code'). As on 30 June ,2023, liquidation orders have been passed in respect of 17 entities operating in shipping industry in India, while resolution plans have been approved under the Code in respect of two.[12] These cases involve substantial claims by creditors. Many complex issues of law, including those affecting the rights of secured creditors and their priorities have arisen in these cases.

Insolvency of a shipping enterprise also raises cross-border issues. Even where the financing transaction may involve only parties from one jurisdiction, the ship itself is likely to move from one jurisdiction to another in the course of its commercial operation. Thus, even where a ship financing transaction has been concluded domestically, it could become necessary to enforce any proprietary security rights over the ship that the secured creditor has obtained under the domestic transaction while the ship itself may be within the jurisdiction of foreign courts. Virtually every aspect of the law of proprietary security over ships may give rise to significant risks and complexities when a cross-border element is involved.[13]

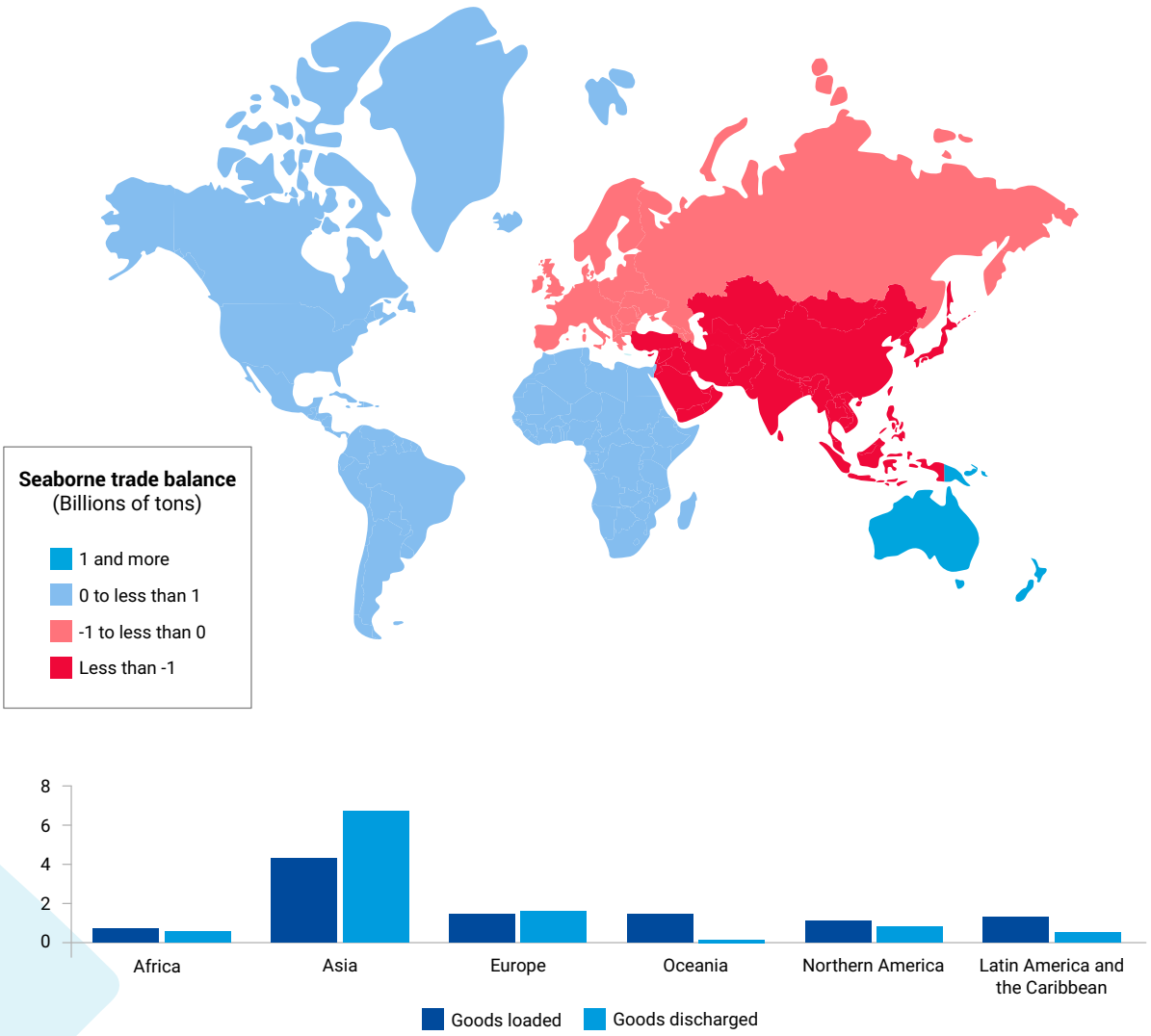
Considering the importance of the shipping industry to the Indian economy, Insolvency Law Academy ('ILA') decided to undertake a study to understand the co-relation between maritime and insolvency laws, particularly with reference to the Code, with focus on rights and priorities of creditors and cross-border issues. This *Thought Paper on Maritime and Insolvency Laws* ('Thought Paper') is an outcome of this study. The study was led by Mr. Raghav Mittal[14], under the guidance of Mr. Sumant Batra[15], with research support from Ms. Mehreen Garg, Advocate and Assistant Research Associate, ILA, Maryam Beg, Advocate and Assistant Research Associate, ILA, and Ms. Ayat Khursheed, Law student, serving as an intern with ILA.

The Thought Paper has benefited from review by ILA Standing Committee on UNIDROIT, chaired by Dr. M.S. Sahoo, former Chairperson, Insolvency and Bankruptcy Board of India. The draft of the Thought Paper was discussed with stakeholders in the roundtables held on 14 February and 7 March, 2024.

A. GLOBAL SHIPPING INDUSTRY TRENDS

Throughout history, oceans have played a crucial role around the world as a means of transportation.[16] As the markets have become increasingly globalised, shipping volumes have soared.[17] Seaborne trade continues to expand with an impressive 1.5 tons per person worth of goods being transported by ship each year.[18] The massive increase in shipping has been fuelled by not just the growth in world trade, but also the development of highly sophisticated logistical chains, which have enabled faster, cheaper and more specialised trade to take place. For instance, sea transport contributes just 0.38 US Dollars (INR 31) to the 3.19 US Dollars (INR 264) cost of a cup of coffee, 0.25 US Dollars (INR 20.72) to the 6.4 US Dollars (INR 532) cost of a bottle of wine, and 6.4 US Dollars (INR 532) to the 127 US Dollars (INR 10524) cost of a Nike trainer.[19] The global shipping marketplace today is a complex interplay of many eco-systems operating, competing and cooperating to enable efficient transportation.[20]

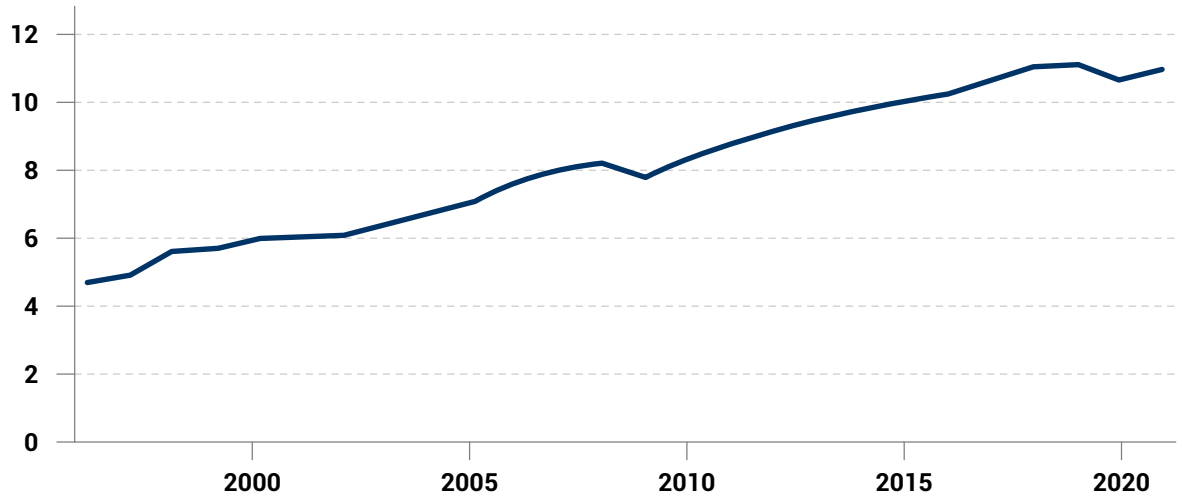
Figure 1: Tonnage Loaded and Discharged in 2021



Note: Europe includes the Russian Federation and the French overseas departments.

Asia remains the world's leading maritime freight area loading around 4.6 billion tons of goods, or about 42 percent of total goods loaded in ports worldwide. Participation in globalized manufacturing and containerized trade has generally been concentrated in Asia, notably in China and neighbouring East Asian economies. Asian developing economies alone discharged 50% and loaded 35% of the global seaborne trade.[21]

Figure 2: Goods Loaded Worldwide



Maritime trade contracted by 3.8% in 2020 due to the COVID-19 ('Pandemic') and the war in Ukraine but it rebounded later despite the pandemic, and the shipments reached 11.10 billion tons, a volume slightly below pre-pandemic levels.[22] United Nations Conference on Trade and Development ('UNCTAD') Report estimates show that the medium-term predictions for the shipping industry post pandemic remain positive but are subject to mounting risks and uncertainties.[23]

However, the pandemic has put pressure on the global supply chains, created dramatic spikes in freight rates and importers and sparked potential shifts in trade patterns. It has also accelerated digitisation and automation, to deliver efficiency and cost savings, with several adjustments which are likely to lead to a demand for flexible shipping services with implications for vessel types and sizes, ports of call, and distances travelled.[24] The tonnage (in billions of tons) loaded and discharged, and the shares spread globally, shows that while developing economies reported a maritime trade deficit in 2021, developing economies had a maritime surplus.[25]

Notably, the shipping rates have fallen around 75% between the start and the end of the year.[26] Similarly, while container shipping plateaued at a high level in 2022, a declining trend has been witnessed towards the end of 2023, signalling weakness in goods trade into 2023.[27] Of late, there have been several incidents of attacks on various ships. Many countries have increased security measures due to increasing incidents of attacks on ships at the Red Sea and the Bab-el-Mandeb strait by the Houthis in Yemen which have been at war with Saudi Arabia.[28] Distressed calls reporting marine casualties and incidents have increased significantly over the last 4 years.[29] Container shipping rates have also fallen with many major ports piling up with empty containers.[30]

Even as companies around the world continue to struggle with the impacts of the pandemic and the war in Ukraine on global supply chains, there is another challenge looming: climate change. Sea levels are rising due to the thermal expansion of water and the melting of glacial and mountain ice. Penetration of heat into the ocean's water causes thermal expansion of the ocean or sea that causes a rise in sea level. Large volumes of ice in the polar region are melting due to rise in temperature, which is also another cause of sea level rise. Besides climate change, there are other factors that could contribute to local sea level change. The factors include land accretion, regional uplifting, soil compaction, wind and pressure patterns, ocean circulation and water density. However, climate induced causes, such as ice melting and thermal expansion of water, are the main cause of global sea level rise.[31]

Sea level rise affects low lying coastal areas and deltas of the world, which leads to flooding of the coastal infrastructure, like ports. Climate change will dramatically affect shipping industries. Erosion and accretion caused by sea level rise and ice melting in the Polar Regions will change present shipping routes. Ice melting will also open up the possibility of oil exploration in the Polar Regions.[32]

The shipping industry is using fossil fuels for energy emitting CO_2. Global emissions from ships are showing an increasing trend. GHG emissions by the international transport sector of 25 member states of the European Union have grown 86.1% between 1990 and 2004, having a growth rate of 4.5% per annum. The emissions from international maritime transport in the same region have increased 44.6% since 1990 (2.7% per annum), with an increase of 5.6% between 2003 and 2004 (T&E, 2006). When the Kyoto Protocol[33] is implemented, oil production and transportation patterns also changed. Changes in shipping routes, changes in export-import patterns and changes in oil transportation will all potentially affect shipping industries.[34]

The International Maritime Organization ('IMO') devised a strategy to reduce greenhouse gas emissions from freight ships. The plan is to reduce carbon emissions by 80% in 2040 compared to 2008. By 2050, the goal is to approach or reach net-zero emissions. This climate strategy has a massive impact on the design and construction of new cargo ships, and it also requires cargo ships to measure and report an annual efficiency ratio to the IMO. Vessels that receive a low grade will have either a one-year or three-year period to become compliant. Freight companies will need to use various strategies to comply with the latest IMO initiative. Some cargo ships may need to switch to a different fuel while others will need to make technical refinements to the ship.

The shipping enterprises will be among the most affected sectors by the physical risk[35] and transition risk[36] of climate change.

Physical risks: Warmer ocean waters result in stronger storms, more instances of low-pressure areas, and a build-up of strong, gale-force winds. For the shipping industry, storms are detrimental to how it does its functions. Ports are among the biggest losers as climate change grips the world. For apparent reasons, ports are at sea level and take the full brunt of the effects of rising seawater levels. Freight and infrastructures inundated by storm surges can drastically cut down the operations of many port facilities. Even after the storms die down, flooding can continually disable port operations for a while. Laborers would be prevented from working, which creates a more drastic downtime. Rising seas are a problem on their own. As water levels drastically rise, most of these infrastructures will experience significant issues with their structural integrity. Over the next few years, ports face the risk of being submerged and destroyed. These factors become detrimental to the safety and productivity of shipping workers everywhere. A good chunk of the shipping business relies on the round-the-clock movement of freight and materials. Gales and tidal waves put ship workers in harm's way. Almost zero activity happens during a storm for shipping industries, hence a drop in productivity. These factors will likely cause distress for shipping enterprises.

The widely discussed devastating catastrophe, the tsunami of the 26th December 2004 destroyed 28 lighthouses out of 30 in the Andaman and Nicobar islands. It is estimated that an amount of US$ 65,446,716. (3.04 billion Indian Rupees) will be required to restore the damage to the shipping sector in the Islands. Since 1990, worldwide losses by natural hazards have been over $40 billion each year with few exceptions losses were as high as $167 billion in 1995 alone.[37] Most of the natural hazards, including storm surges, hurricanes, typhoons, and tsunamis are initiated from the sea. The shipping sector is likely to be more exposed to these hazards than other industries. Increasing losses in the shipping sector by natural hazards are responsible for raising insurance premiums in the shipping business. To pay more insurance premiums for the compensation of losses by natural disasters, the shipping industry needs to spare its money from different sub-sectors for insurance, which leads to decreased shipping activities.

Transition risks: In 2018, global shipping emissions represented 1076 million tonnes of CO2, and were responsible for around 2.9% of global emissions caused by human activities.[38] The cost of decarbonization in ocean shipping is going to be phenomenal. The new IMO regulations require individual ships to measure and report a carbon intensity index in the form of an annual efficiency ratio, a function of a ship's deadweight tonnage — how much weight it can carry in cargo, fuel, crew, fresh water, passengers, supplies, etc. — plus how much and what type of fuel it consumed and how far it travelled in the previous year.[39] This data has been part of an IMO mandatory annual submission since 2019 for ships over 5,000 GT. Climate change is also forcing the shipping industry to change how it deals with the resources it uses. In particular, the shipping industry would need drastic changes in how it works with fuel. Oil spills have become damaging to the environment, and climate change is worsening. Ship owners would need to balance the pros and cons of different fuel types. Compliance with IMO 2020 will cut sulphur levels to 0.50% m/m from 3.50% m/m, which means ship companies need to start finding ways to reduce their emissions or face penalties.[40] The cost of transition may be prohibitive to many enterprises forcing them out of business.

B. INDIAN SHIPPING INDUSTRY

Indian maritime activities have a long history covering a period of about five millennia from the very dawn of the Indus Valley civilization. The earliest known instance of people from maritime activities commenced in India as early as early as 3000 BC.[41] Ancient Indian literature has ample references to maritime trade, shipping and commerce. The roots of maritime trade can be traced back to ancient civilizations, notably the *Indus Valley* and *Mesopotamia*, where evidence of seafaring activities dates back to around 3000 – 2000 BCE. About 400 km Southwest of Ahmedabad, a dry-dock, dating back to 2400 BC was discovered at *Lothal,* giving insight into the knowledge of tides, winds and other nautical factors that existed during that period and regarded as the first such facility, equipped to berth and service ships. The *Vedic* texts[42], composed between 1500 – 500 BCE, provide vivid accounts of seafaring expeditions, further highlighting the maritime prowess of ancient Indian societies. The *Rig Veda* refers to *Varuna*, the Lord of the Sea, and credits him with the knowledge of the ocean routes which were used by ships. It is the earliest mention of merchants sailing ships across the oceans to foreign countries in quest of trade and wealth. The Epics, *Ramayana* and *Mahabharata* have references to ships and sea travels. Even the *Puranas*[43] have several stories of sea voyages.[44]

Extensive maritime trading activities, bringing many nations closer to India, were noted in the age of the *Nandas* and *Mauryas*. Wide sea trade was also carried on during the *Chola* and the *Gupta* empires. The *Cholas, Cheras*, and *Pandyas*, major powers of peninsular India had established strong maritime trade links with the local rulers of Sumatra, Java, Malay Peninsula, Thailand and China. The *Cholas* (3rd-13th Century) were especially noted for their powerful navy and maritime prowess. The Pandya dynasty (6th – 16th Century) were eminent sea traders, with links extending from the Roman Empire and Egypt in the West to China in the East. The *Cheras* (12th Century) had a flourishing trade with the Greeks and the Romans. They navigated through various rivers which opened into the Arabian Sea. By the Common Era, the Indian Ocean had evolved into a bustling "trade lake," with India positioned at its heart. Through both the Western and Eastern trade routes, India served as a vital conduit for the exchange of goods, ideas, and cultures. Ports like Bharuch and Muziris facilitated connections with Europe through the Middle East and Africa, while evidence of Indian artifacts in Hepu, China, and Tamralipti in Bengal attests to the extensive maritime networks linking India to East Asia.

Apparently some form of rule or code of conduct did exist in ancient India for governing maritime trade and commerce. Maritime trade and other aspects were generally regulated by local customs. Evidence of the same can be found in *Arthashastra* where adherence to these customs has been advised. However, the exact nature of these customs is difficult to ascertain.[45] One of the earliest and most significant sources of information in early India, *Manu Smriti* which lays down certain rules to govern commercial maritime disputes, refers to seaborne traffic as well as inland trading and commerce.[46] *Kautilya* in his Arthashastra has detailed the duties of the Superintendent. In chapter XXVIII of the Arthashastra, it is stated that the Superintendent of ships examined accounts of navigation on oceans, mouths of rivers, natural or artificial lakes, as well as nearby rivers.[47] Additionally, sources like the Buddhist fables, known as *Jataka Tales* and *Tamil Sangam*, composed between circa 300 BCE-300 CE, offer invaluable insights into the maritime activities of the period, including trade routes and navigation techniques.[48] The nature of the advancement of maritime conduct and rules in ancient India is evidenced by the fact that the maritime codes of Malacca and Macassar contained customary rules and provisions borrowed from the Indian law.[49] The doctrines of Grotius and other classical European Jurists were influenced by such Asian maritime practices.[50] Although India, had its own rules of inter-state conduct, these had very little effect on the development of modern international law as almost all these countries became colonized and thus lost their international personality.[51] Despite these hints and decades of scholarly research on India's maritime networks, the country's maritime heritage has often been overlooked in broader historical narratives.

Economic Significance

As of 2021, India owns over 30% global market share in the shipbreaking industry and is home to the largest shipbreaking facility in the world at Alang. To promote India's shipping and port industry, the Government has also introduced various fiscal and non-fiscal incentives for enterprises that develop, maintain and operate ports, inland waterways and shipbuilding in India. The waterways sector in India, which comprises coastal shipping and inland waterways transport, is a crucial economic contributor, adding up to USD 1.6 billion (INR 13,007 crore) as Gross Value Added (GVA) in FY20.[52] Government policies envision the annual cargo movement and passenger movement to increase by almost three times on inland waterways and by almost 1.2 times for cargo movement on coastal shipping between 2019 and 2030.[53]

Historically, investments in the transport sector, particularly in the ports, have been made by States considering sizeable investments with a long gestation period are required, and associated external risks.[54] However, the growing resource requirements and concern for managerial efficiency have driven private

sector investments. The Indian Ministry of Ports, Shipping, and Waterways has also laid down comprehensive policy guidelines to encourage private sector participation.[55] The Budget estimate for the Gross Budgetary Support for the financial year 2022-23 was enhanced to INR 1793.37 Crores.[56]

In 2017, the Indian government launched the ambitious Sagar Mala Program with the vision of port-led development and growth of logistics-intensive industries. Under the program, $123 Bn would be invested in 415 projects across the following identified components:[57]

- *Port Modernization and New Port Development*
- *Port Connectivity Enhancement*
- *Port-Linked Industrialization*
- *Coastal Community Development*

The Maritime India Vision 2030 ('MIV 2030') has identified over 150 initiatives to boost the Indian maritime sector. Launched in March, 2021, MIV 2030 is aimed at accelerating the growth of the maritime sector over the next decade. It outlines key themes such as developing best-in-class port infrastructure, driving logistics efficiency and cost competitiveness, strengthening policy and institutional support, enhancing global share in shipbuilding, repairing and recycling and leading the world in a safe, sustainable and Green Maritime sector.[58] The vision serves as a blueprint to achieve an accelerated and coordinated development of India's diverse maritime sector, comprehensively identifying over 150 initiatives covering all facets of the country's maritime sector.

The MIV 2030 aims to make India the top country in the world for ship recycling and among the top 10 countries for shipbuilding (MoPSW 2021a). Currently, India ranks second in the world in ship recycling and 21st in shipbuilding.[59] While China, Japan, and South Korea together contribute 90 per cent of the world's shipbuilding capacity, India accounts for less than 0.045 per cent today.[60] Further, India ranks among the top five countries in supplying trained manpower, with about 12 per cent of all seafarers globally coming from India (MoPSW 2021a).[61]

To provide an impetus to ship leasing activities in the GIFT City in India, the International Financial Services Authority ('IFSCA') has issued a notification in line to notify ship leasing as a financial product under the International Financial Services Centre Authority Act, 2019. Ship leasing under the notification includes operating lease, hybrid of operating and financial lease of a ship or ocean vessel, the engine of a ship or ocean vessels or any part thereof.[62] In line with the notification, a *"Framework for Ship Leasing"* was issued on 16 August, 2022 by the IFSCA.[63] The framework permits operating ship leasing as well as finance ship leasing. The lessor is permitted to undertake activities including operating leases, voyage charters, commercial transactions for employment of ships, assets management support services, sale and lease back, purchase, novation, transfer, assignment and other similar transactions in relation to ship lease.[64] Financial leasing and a hybrid of operational and financial leasing are permitted under the framework.[65]

Both Sagar Mala and Maritime India Vision focus on unlocking additional potential such as annual revenue of $ 2.7 Billion from extant assets and generating employment, targeting 2 Million direct and indirect jobs by 2030. 100% FDI was allowed under both government and automatic routes.[66] Government policies envision the annual cargo movement and passenger movement to increase by almost three times on inland waterways and by almost 1.2 times for cargo movement on coastal shipping between 2019 and 2030.[67]

More recently, the Global Maritime Summit 2023 was held in India where the *Amrit Kaal* Vision of 2047 of India was unveiled.[68] Building upon the MIV 2030, the *Amrit Kaal* Vision 2047 was published by the Ministry of Ports, Shipping and Waterways, underlining the efforts to realise the holistic vision for India's maritime Sector by identifying key action points across the themes identified in MIV 2030. India strives to become a global player in shipping by enhancing efficiency through technology and innovation and leading the world in a safe, sustainable and green maritime sector.[69]

The 2021 SAFAL Report[70] of the government flagged several challenges regulatory, financial and legal challenges related to ship leasing, financial and operational leasing, indicating that the current legal and regulatory framework in India is less favourable than jurisdictions such as Panama, Dubai and Singapore which are currently the preferred jurisdictions for ship leasing and financing activities.[71]

Indian shipping industry also faces many challenges, including physical and transitional risks from climate change. The Economic Survey 2022-23 noted how India is considered to be one of the most vulnerable countries given its long coastline, monsoon-dependent agriculture and large agrarian economy. Noting how the share of developing countries in the stock of greenhouse gases has been minimal compared with developed countries, it highlighted how India has contributed only about 4% in the cumulative global emissions (for the period 1850-2019) and maintained its per capita emission at far less than the world average. By 2030, India may account for 34 million of the projected 80 million global job losses from heat stress-associated productivity decline, a World Bank report stated. Lost labour from rising heat and humidity could put up to 4.5% of India's GDP – approximately $150-250 billion – at risk by the end of this decade.[72]

India has a robust legislative and regulatory established under several legislations for governing the shipping industry. Merchant Shipping Act, 1958 deals with pollution by ships (both Indian and foreign ships). The emissions and pollution of air are governed under the Environment (Protection) Act, 1986 (EPA); Air (Prevention and Control of Pollution) Act, 1974 (Air Act) and Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976. The pollution caused in coastal areas are dealt with by Ministry of Shipping through its organizations viz., National Shipping Board and Director General of Shipping. Under the Merchant Shipping Act, 1958, several powers have been conferred with the Central Government regard to pollution caused by ships from sewage, garbage and oil.[73] Many changes are expected in the legislative and regulatory framework to deal with climate change.

Insolvency in Maritime Industry

As stated, the Indian shipping industry has been facing distress lately. There has been a rise in the initiation of maritime insolvency cases in India. Some notable cases in which the insolvency process was commenced under the Code include, *ABG Shipyard*[74], *Barge Madhwa*[75] and *Angre Port*.[76] Liquidation orders have been passed in respect of the many entities operating in the shipping industry in India as on 30th June 2023, involving substantial Claims.[77] *(See Table 1)*[78]

Table 1

Sr. No.	NAME OF THE CORPORATE DEBTOR	TOTAL ADMITTED CLAIMS DURING CIRP (FIGURES IN CRORES)
1.	ABG Shipyard Limited	19316.68
2.	MM Cargo Container Line Private Limited	0.24
3.	Cargo Planners Limited	40.57
4.	AGI Cargo Private Limited	0.82
5.	Swift Shipping and Freight Logistics Pvt. Ltd.	0
6.	Diamond Shipping Company Ltd.	38.92
7.	Himanshubhai Pravinbhai Pandya v. Bansal Shipping (P) Ltd.	0.05
8.	Rahi Shipping (India) Private Limited	15.28
9.	Lloyds Shipping Private Limited	1.03
10.	Pinky Shipyard Private Limited	10700.70
11.	Western India Shipyard Limited	123.72
12.	Cross Link Shipping Private Limited	2.85
13.	Bansal Shipping Private Limited	0.05
14.	Maeksin Shipping Co. Private Limited	9.85

Resolution plans have been approved under the Code in respect of the following entities in the shipping industry in India as on 30th June 2023:[79]

Sr. No.	NAME OF THE CORPORATE DEBTOR	TOTAL ADMITTED CLAIMS DURING CIRP (FIGURES IN CRORES)
1.	Master Shipyard Private Limited	0.43
2.	Tebma Shipyards Limited	606.28

Source: Insolvency and Bankruptcy Board of India, Corporate Insolvency Resolution Processes Ending With Order of Liquidation: as on 30th June, 2023, accessible at https://ibbi.gov.in/uploads/whatsnew/afbc3ed75951b88ba4e70c7795213a00.pdf

Many complex issues of law, including the rights of secured creditors and their priorities have arisen in these cases. In fact, every aspect of the law of proprietary security over ships may give rise to significant risks and complexities. Considering the importance of the shipping industry to the Indian economy and developments under the Code in respect of the shipping industry, ILA decided to undertake a study to understand the co-relation between maritime and insolvency law, particularly with reference to the Code, with a focus on the rights of creditors.

III. INTERNATIONAL TREATIES ON MARITIME, AND CREDITORS' RIGHTS

There exists no single international convention for security rights over seagoing ships. Different international treaties have been developed for different types of assets by a variety of international organizations.

The international framework for the treaties containing enforcement provisions largely consists of a body of earlier treaties that each cover only some aspects of the enforcement of security rights. These treaties, a principal focus of which is the conflict of laws, but which also address some substantive law rules are:

- The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted in Brussels in 1926 ('1926 Brussels Convention').
- The second International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, was adopted in Brussels in 1967 ('1967 Brussels Convention').
- The third International Convention on Maritime Liens and Mortgages, adopted in Geneva in 1993 ('1993 Geneva Convention').
- Draft Convention on the Judicial Sale of Ships ('the Beijing Draft').[80] (Collectively, 'Maritime Conventions').

Unlike the treaties consisting of the Convention on the International Recognition of Rights in Aircraft, adopted in Geneva in 1948 ('1948 Geneva Convention') and the Luxembourg Protocol on Matters Specific to Railway Rolling Stock ('Rail Protocol'), which encompass a far more comprehensive, primarily substantive law regime for security rights over mobile assets, the Maritime Conventions do not provide a comprehensive uniform regime for security rights. They regulate selected aspects of security rights by formulating some uniform conflicts-of-law provisions and some uniform substantive law provisions, leaving the regulation of other relevant aspects to national law.[81] The Maritime Conventions presume that secured creditors have a (national) right to a 'forced' or 'judicial' sale, as a right of sale is inherent in a security right. The exact content of a secured creditor's right of sale may vary from State to State. However, based on the premise that there is some kind of sale, the Maritime Conventions set out substantive law provisions on notifications prior to enforcement, the possibility for the purchaser of a vessel subject to enforcement to acquire the vessel free from any security rights of other creditors, and deregistration and reregistration.[82]

The Convention on International Interests in Mobile Equipment ('Cape Town Convention') was concluded in Cape Town on 16 November, 2001, as was the Protocol on Matters Specific to Aircraft Equipment ('Aircraft Protocol'). The Convention and the Protocol, adopted under the joint auspices of ICAO and UNIDROIT, is read and interpreted together as a single instrument (Article 6(1) of the Convention).

The security rights over ships (and their enforcement) are on the International Institute for the Unification of Private Law ('UNIDROIT') agenda. In 2013, UNIDROIT included work on an additional Protocol to the Cape

Town Convention for ships and maritime transport equipment in its work program.[83] No formal draft Protocol is available at present, but the UNIDROIT Secretariat continues to monitor developments in this area, conduct research, and engage with the industry.[84]

The Maritime Conventions concerning security rights over seagoing ships do not stand on their own. A range of other international legislative initiatives are directly or indirectly relevant to the issue of enforcement. Besides the Maritime Conventions, secured creditors may be faced with the International Convention Relating to the Arrest of Sea-going Ships (Brussels, 1952) and the International Convention on the Arrest of Ships (Geneva, 1999). However, these instruments only contain provisions for the detention of a ship by judicial process to secure claims including those arising out of security interest in any ship.[85] However, neither covers the seizure of a ship in execution or otherwise provides guidelines for the enforcement of security rights.

There are several legal instruments pertaining to inland vessels such as, the Geneva Convention on the Registration of Inland Navigation Vessels of 1965, annexed to which is a protocol featuring substantive law provisions on rights in rem for such inland vessels; the United Nations Commission on International Trade Law ('UNCITRAL') Legislative Guide on Secured Transactions of 2007 and the Model Law on Secured Transactions of 2016; the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes of 2016; and the ongoing project of UNIDROIT to develop 'best practices for effective enforcement'.

The Cape Town Convention, along with the Aircraft Protocol can be stated to be one of the most successful transnational instruments in the international scene of uniform private law. The Geneva Convention has obtained wide consensus with a large number of States adopting it. In view of this immense success, it was considered surprising that the Cape Town Convention so far does not cover ships as one of the most obvious and most common examples of mobile assets of high value. This is even more so given the fact that while the market for secured finance in shipping is enormously huge, this market is traditionally riddled with difficulties stemming to a large extent from an unsatisfactory legal framework especially as regards differences between the legal systems concerning the use and status of proprietary security in cross-border business, i.e., legal difficulties that are typically regarded as arguing for legal harmonization. In fact, in the very early stages of the development of the project that was to become the Cape Town Convention, the possibility of covering security over ships had indeed been contemplated by drafters.[86] But it was decided against associating ships with the Cape Town Convention. The arguments for such rejection were short: it was feared lest the new Convention of a general nature - not shipping focused - might prove to be a source of conflict with the newly drafted International Convention on Maritime Liens and Mortgages (adopted by the 1993 Geneva Conference) and cause confusion and uncertainty; and the preparation of international rules governing ships and shipping was described as an issue that was traditionally the preserve of specific international organisations with the full participation of shipping circles.[87]

A primary concern for secured creditors holding (or considering to obtaining) ship mortgages or hypothecations in cross-border business is whether and under which conditions these consensual proprietary security rights (i.e., proprietary security rights created on the basis of an agreement of the parties) would be recognised under a foreign law. In the absence of any international instrument providing for proprietary security over ships as an international interest, ship mortgages or hypothecations are currently created and made effective, usually by registration, under the rules of the applicable national law only.[88] Regardless of this widespread reference to the law of the flag on this matter, there still appears to be considerable insecurity among market participants as regards the status of proprietary security over ships under foreign law. There are a number of jurisdictions said traditionally not to recognise foreign ship mortgages and hypothecations under the rule of the law of the flag.

IV. INDIA: OVERVIEW OF THE ADMIRALTY (JURISDICTION AND SETTLEMENT OF MARITIME CLAIMS) ACT, 2017

Maritime and admiralty law is considered one of the major legal systems of the world. It is one of the oldest surviving major legal systems prevalent in modern life. Maritime law, by its transnational nature, is an important part of transnational commercial law. Every country engaged in maritime commerce has, in its national legal system, a special branch of law called maritime law, and the courts that administer this special branch of law exercise a special kind of jurisdiction known in English law as admiralty jurisdiction. The rules governing jurisdiction, practice and procedure of these courts constitute admiralty law.

The terms 'maritime' and 'admiralty' are often used interchangeably. Maritime law refers to the body of legal rules and concepts concerning the business of carrying goods and passengers by water.[89] On the other hand, the 151st Report of the Law Commission of India observes that admiralty law is a branch of jurisprudence regulating maritime matters of civil and criminal nature and it contemplates a court or tribunal administering maritime law by a procedure peculiar to it.[90] Sometimes the term maritime law is used comprehensively to include admiralty law, being its procedural or adjective part, and sometimes the term is used in a narrow sense denoting only the substantive body of principles and usages recognized by commercial nations as just and equitable for determination of questions pertaining to affairs of shipping and navigation and assimilated into their national legal systems. Though maritime law, including admiralty law, and Admiralty Courts are parts of the national legal system and pertain to municipal laws of the countries concerned, they have an international aspect because maritime commerce is, by its very nature, international.[91]

Admiralty law in India has been deeply influenced by the English jurisprudence on the point. The admiralty powers of the High Court of England were extended to the colonial courts by the Colonial Courts of Admiralty Acts of 1890 and 1891. Even after attaining independence, no active efforts were taken to lay down the law relating to admiralty matters. This insufficiency was highlighted by the Supreme Court in *M.V. Elisabeth And Ors vs Harwan Investment And Trading Pvt.*[92] The decision prompted a series of efforts culminating in the enactment of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act in 2017 ('Admiralty Act').[93]

Generally speaking, the quickest way of grasping the fundamental concepts of admiralty law is to take a basic, long-established principle of the general law and stand it on its head. For example, maritime liens, which are secret, are almost everywhere given priority over mortgages, which are required to be made public by registration. In the general law, a non-possessory lien is displaced by a transfer to a bona fide purchaser for value without notice; by contrast a maritime lien binds the bona fide purchaser. At common law a junior incumbrancer may sell the charged asset without the consent of the senior incumbrancer, the sale taking effect subject to the latter's interest; in maritime law the consent of the senior incumbrancer is required. The general role of the common law is that security interests rank in order of time. By contrast maritime liens generally rank in *reverse* chronological order.

The body of the law that governs maritime commerce and navigation has commonly been referred to, by the scholars as *Lex Maritima*.[94] The *Lex Maritima* could be seen as a component of the broader "*Lex Mercatoria*". *Lex mercatoria* or the law of the merchant refers to the customary rules and procedures developed within the merchant communities to support trade.[95]

The fraternity of admiralty courts around the world are found to administer what appears to be a common system of laws, which, notwithstanding national codifications, reveal considerable commonality amongst nations, even in the codified forms. That is because even before codifications there existed customary laws, which were international in character. These courts have a tradition of deferring to a comity of nations and

would readily travel beyond their national statutes in order to do justice unless express words of the statutes action prevent them from doing so.

India enacted the Admiralty Act[96] to consolidate the laws relating to admiralty jurisdiction, legal proceedings in connection with vessels[97], their arrest, detention, sale and other matters connected therewith. With the enactment of the Admiralty Act, four archaic admiralty laws on civil matters were repealed.[98] It confers admiralty jurisdiction on High Courts of coastal states[99] which extends up to Indian territorial waters. The Admiralty Act covers every vessel irrespective of the place of residence.[100] The purpose of the Admiralty Act is to vest certain rights in respect of the identified maritime claims, called rights *in rem* and provides a mechanism for enforcement of such claims by the arrest of a ship.[101] The Admiralty Act is a complete code in itself as regards the legal proceedings in connection with vessels (actions in *rem*), their arrest, detention, sale and determination of priorities in respect of the sale proceeds of the vessels that were ordered to be arrested.[102] The Civil Procedure Code, 1908 is applicable in so far as the provisions are not inconsistent with or contrary to the provisions of the Act.[103] The rules framed by the concerned High Courts having jurisdiction, set out the procedure to be followed in the matter of arrest of ships and determination of the priority of claims.[104] Though admiralty jurisdiction is now vested in the High Courts in India, it is not distinct and separate from their ordinary civil jurisdiction. The admiralty law administered by them in this jurisdiction has its peculiarities and is *sui generis*.[105]

Action in Rem and not in Personnam

A ship or a vessel is a separate legal entity that can be sued without reference to its owner.[106] The purpose of an action *in rem* against the vessel is to enforce the maritime claim against the vessel and to recover the amount of the claim from the vessel by an admiralty sale of the vessel and for payment out of the sale proceeds. Pertinently, the owner's presence is not required and the owner is not a necessary or a proper party to the proceedings.[107] The significance of an admiralty action *in rem* is that jurisdiction can be assumed in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place where the cause of action arose.[108] This action is different from an action *in personnam* which is a proceeding amongst the parties, for which a personal service on a defendant within the jurisdiction, leading to a judgement against the owner of the *res* personally.[109]

Maritime Liens

A maritime lien attaches only to the *res* (property) in respect of which the claim arises. It arises by operation of law without any formal requirements from the moment the circumstances which gave rise to the claim occur. It is *sui generis* and binds the *bona fide* purchaser for value, without notice.[110] Many scholars have reasoned that to hold that a maritime lien such as, seamen's wages is a right to a part of property in *res* and a privileged claim upon the aircraft or other maritime property. The proceeds of the sale of the ship are available for satisfaction of the maritime liens.[111] It is an admiralty action *in rem* against the vessel and continues to bind it, until discharged. It continues to exist on the vessel not with standing any change ownership or of registration or the flag and shall be extinguished after the expiry of a period of one year unless forced sale has been made by the High Court upon arrest or seizure of the vessel.[112]

A maritime lien has the following inter-se order of priority of claims:

- Claims for wages and other sums due to master, officers and other members of the vessel's complement;
- Claims in respect of loss of life or personal injury occurring in direction connection with the operation of the vessel;
- Claims for reward of salvage services;
- Claims for port, canal and other waterways dues and pilotage dues and any other statutory dues related to the vessel; and
- Claims based on tort arising out of loss or damage caused by the operation of the vessel other than loss or damage to cargo and containers carried on the vessel.[113]

Maritime Claims

The Admiralty Act also provides the right to invoke the jurisdiction of the court by an action *in rem*, to hear and determine any question on a maritime claim, against any vessel. A list of maritime claims has been provided under section 4 of the Admiralty Act, which also includes maritime liens as a sub-set within the broader set of maritime claims.[114] The crystallisation of a statutory charge occurs when the admiralty jurisdiction *in rem* is invoked against the *res* and the warrant of arrest is executed i.e., the date of service of the warrant of arrest. The arrest of the vessel is the only means of perfecting the lien or claim which may have arisen.[115]

Order of Priority of Maritime Claims

Section 10 of the Admiralty Act provides that the *inter se* priority in admiralty proceedings shall be as follows:

- A claim on the vessel where there is a maritime lien;
- Registered mortgages and charges of some nature on the vessel; and
- All other claims.

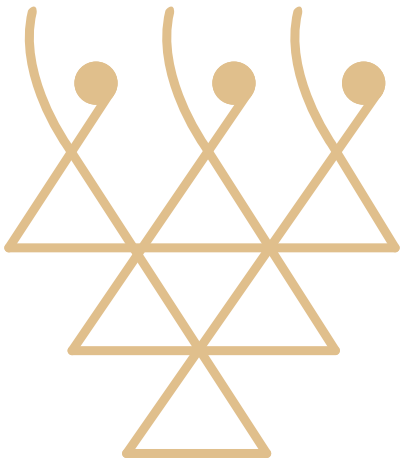
Maritime claims fall in the category of *"All other claims"* and rank below maritime liens and mortgages. Thus, a financial creditor who has a registered mortgage on the ship would recover in priority over all parties who have Maritime claims but not maritime liens. Eighteen out of twenty-three claims listed in section 4 of the Admiralty Act are maritime claims and will consequently, rank below a mortgage. Only maritime liens shall have priority over a registered mortgage.

Arrest of the Vessel in Rem and Provisioning of Security

Section 5 of the Admiralty Act provides for the arrest of a vessel in rem, where:

- The owner of the vessel is liable for the claim;
- The demise charterer of the vessel is liable for the claim;
- The claim is based on mortgage or similar charge;
- The claim relates to possession or ownership; and
- The claim is against the owner, demise charterer, manager, or operator of the vessel.
- The claim is based on mortgage or similar charge;

As a condition of the arrest of a vessel, the courts may impose upon the claimant an obligation to provide an unconditional undertaking to pay money as damages or security for any loss or damage which may be incurred by the defendant because of the arrest.[116]



V. OVERVIEW OF THE RELEVANT PROVISIONS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Code is a landmark piece of legislation which provides for institutionalised creditor- in-control mechanism for reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit, while balancing the interests of all the stakeholders. The Code was enacted as a critical building block of India's progression to a mature market economy.

The foundational objectives of the Code:

"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith and incidental thereto"[117]

The provisions relating to insolvency and liquidation of corporate persons came into force on 1 December, 2016, while those of insolvency resolution and bankruptcy of personal guarantors to corporate debtors came into effect on 1 December, 2019. Insolvency and bankruptcy provisions for other category of individuals are yet to be notified (as on the date of this publication).

Under the Code, the rescue mechanism for a corporate debtor[118] ('CD') is achieved through a corporate insolvency resolution process, while the exit mechanism is dealt with through a liquidation process. Thus, the insolvency process for a CD under the Code proceeds in two phases—in the first phase an attempt is made to resolve the CD's default through a CIRP; if no resolution is reached, the CD is liquidated in the second phase.

The Code introduced a shift from the 'debtor in possession' regime under the Sick Industrial Companies (Special Provisions) Act, 1985 (since repealed) to a 'creditor in control' regime. The Code provides that all financial creditors with the exception of the connected parties of corporate debtor, make up the committee of creditors ('CoC'). Their voting shares are assigned based on the amount of debt owed to them. An alternate provision provides that CoC is formed with operational creditors when there is no financial debt or when all financial creditors are related parties of debtor.

The CoC has a statutory role. The Code entrusts it with the responsibility of unlocking the valuable assets for their more productive use in the economy. Even though it is the resolution professional who is responsible for the management of the day-to-day affairs of corporate debtor envisages CoC as the supreme decision-making body during corporate insolvency resolution process ('CIRP'). Commercial decisions are left to the collective wisdom of CoC. It decides the fate of corporate debtor by approving a plan for resolution of its insolvency or opting for its liquidation. The Code has vested the CoC with the authority to pick the best feasible resolution plan for a company's long-term survival. Distribution to be made to the creditors is decided by CoC taking into consideration the relevant provisions of the Code. The Supreme Court has

repeatedly recognized the importance of the CoC and supremacy of its commercial wisdom. This has been critical in establishing the Code as a credible bankruptcy resolution process.

The CIRP under the Code vests an insolvency professional with a whole array of statutory and legal duties and powers. He exercises the powers of the board of directors of a company under CIRP, has to manage operations of corporate debtor as a going concern, make every endeavour to protect and preserve the value of its property and comply with applicable laws on behalf of the corporate debtor. He takes important business and financial decisions having substantial bearing on such persons and its stakeholders, negotiates deals, settles claims, resolves conflict of interests, conducts meetings of the committee of creditors, invites and examines resolution plans, reports on irregular transactions and discharges other onerous responsibilities. He conducts the entire insolvency resolution process - he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors - financial as well as operational, and resolution applicants.

On the insolvency commencement date, a moratorium is imposed.

"S14 (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

***Explanation -** For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;*

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

The order of the moratorium has effect from the date of order of the admission passed by the Adjudicating Authority[119] i.e. the insolvency commencement date till the completion of CIRP.[120]

If the Adjudicating Authority is satisfied that the resolution plan approved by the CoC[121] satisfies the stipulations provided in the Code, it shall by order approve the resolution plan for restructuring of the CD.[122] Where no resolution plan is received or where the resolution plan is rejected for non-compliance of the statutory requirements, a decision may be taken by the CoC to liquidate the CD.[123]

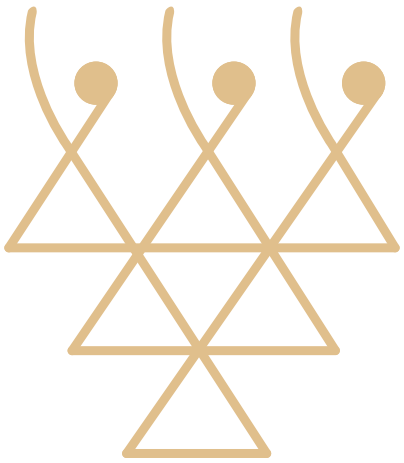
A secured creditor is a creditor in whose favour a security interest has been created.[124] A security interest means a right, title or interest, or a claim to the property, created in favour of, or provided for a secured creditor by a transaction that secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.[125] A secured creditor may relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator.[126]

Section 53 of the Code provides the following order of priority for the distribution of assets. (Refer: The waterfall in the box).

1) *Insolvency Resolution Process costs and liquidation costs paid in full.*
2) *The following debts each ranking equally:*
   a. Workmen's dues for twenty-four months preceding the liquidation commencement date.
   b. Debts owed to a secured creditor in the event such secured creditor has relinquished security.
3) *Wages and any unpaid dues owed to employees other than workmen for twelve months preceding the liquidation commencement date.*
4) *Financial debts owed to unsecured creditors.*
5) *The following dues shall rank equally:*
   a. Dues to Central Government and State Government.
   b. Debts to a secured creditor for any amount unpaid following the enforcement of security interest.
6) *Any other remaining debts and dues.*
7) *Preference shareholders.*
8) *Equity shareholders or partners.*

The issue of priority of secured creditors under the Code continues to be a contentious subject matter of judicial pronouncements laid down particularly in the cases of *Sanjay Kumar Agarwal v. State Tax Officer & Anr.*[127] and *Greater Noida Industrial Development Authority v. Prabhjit Singh Soni & Anr.*[128]

Civil courts are barred from exercising jurisdiction to entertain any suit or proceedings or in respect of any other matters under the Code.[129] The provisions of the Code have an overriding effect, over any other law in force or any instrument having such force pursuant to section 238 which is a non-obstante provision.[130] It has been held by the Supreme Court of India that the jurisdiction of Adjudicating Authority under the Code is limited to discharging certain specific functions under the Code and cannot be elevated to the status of a superior court having the power of judicial review over any administrative actions under any other statutes. The Adjudicating Authority does not have the power of judicial review of orders passed by a public statutory authority under special enactments.[131]



VI. RECONCILITATION BETWEEN MARITIME AND INSOLVENCY LAWS: GLOBAL STATUS

A. NATURE OF CONFLICT BETWEEN INSOLVENCY AND MARITIME LAW

Globally, both the insolvency and maritime law, deal with the rights of creditors to payment of their claims. While insolvency law seeks to centralise all the assets of the debtor in a single forum, maritime law, contemplates a multiplicity of proceedings in a multiplicity of fora.[132] Maritime law allows creditors to obtain security for their claims by arresting the ship that is connected with their claims in a port where such ship may be found.[133] Classically, these two bodies of law have therefore assumed different priorities in response to the different historical circumstances and socio-economic realities.[134]

Usually, vessels are mobile and suppliers would not be willing to supply goods to a vessel without assurance of payment. Therefore, maritime law permits an action *in rem* to be commenced directly against the *res* to afford claimants direct and immediate recourse for the payment of their vessel.[135]

1. MULTIPLICITY OF FORUMS IN MARITIME PROCEEDINGS

Since the vessels are mobile, a maritime claimant has to act speedily to arrest the vessel the moment such vessel is within the jurisdiction of the country. Resultantly, maritime creditors would have to approach various courts to seek urgent relief, which inevitably gives rise to forum-shopping in such actions *in rem*.[136] This approach may often be at odds with the collectivist creditors' approach in insolvency. In CIRP, all assets of the corporate debtor, including those held as security interest by its creditors, must be pooled into a common kitty so that a resolution of insolvency of the corporate debtor can be found and payment of the debt of creditors is made in accordance with the provisions of the Code. Distribution to be made to the creditors is to be decided by the committee of creditors taking into consideration the waterfall provided in section 53 (1) of the Code. Creditors are prohibited by section 14 of the Code from taking any legal or enforcement action against the corporate debtor. Maritime liens persist despite changes in ownership and generally, can only be extinguished by way a judicial sale by an admiralty court.[137] The delay in judicial sale imposes a wide variety of different costs such as the opportunity cost of lost hire, the costs associated with wear and tear and the upkeep of the vessel during the pendency of the sale and anchorage costs.[138]

2. SECRECY OF MARITIME LIENS

Maritime liens are described as invisible and inalienable encumbrances that attach to a ship from the time of the accrual of the cause of action and travel with the ship until it is carried into effect by an arrest. This approach may be at odds with the rule of equity which states that *bona fide* purchasers for value without notice are not bound by prior equitable charges.[139] Further, different jurisdictions might recognise different maritime liens. A claim for necessaries for instance, is secured by a maritime lien in some jurisdictions, while this not in others such as UK or Singapore.[140] The creditors are therefore often unsure of their rights and the priority which may be accorded to them during distributions.

3. INSOLVENCY OF A GROUP ENTERPRISE OF VESSELS

Quite often to evenly dispense risk, where a business owns more than one ship, legal ownership of each of the vessels is transferred to a separate legal entity, each entity known as a "*one-ship*" company.[141] In the insolvency context, in order for the restructuring to be successful, it would be ideal for all the assets of the business to be centrally administered. However, under the law, since each of the one-ship company is a separate entity, separate insolvency proceedings may have to be initiated in respect of each of such one-ship companies.[142]

4. RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS AND THE ARREST OF THE SHIPS

Article 20(1) of the UNCITRAL Model Law on Cross-Border Insolvency ('Model Law') states that when a foreign main proceeding ('FMP') is granted recognition, all legal actions are automatically stayed and a claimant cannot proceed against the vessel unless two conditions are satisfied:

- The forum provides for the mandatory stay to be modified in respect of secured claims
- The forum recognises the claim which is being asserted as a secured claim.

With respect to secured claims, different jurisdictions have taken differing approaches. Japan, South Africa and United States for instance, do not provide any exemption to secured creditors. Singapore, on the other hand, explicitly preserves such rights of the secured creditors to enforce their security over the debtor's property. In United Kingdom, if the proceedings have culminated in a judicial seizure and sale, the claimant can proceed against the funds of the sale notwithstanding the opening of insolvency proceedings. If no sale has taken place, the claimant cannot commence proceedings *in rem* but must instead participate in the insolvency. Some other jurisdictions like New Zealand and Kenya have granted their courts complete discretion in deciding whether the stay ought to apply.[143]

With respect to the second stipulation, it is pertinent to note that certain jurisdictions exempt maritime lien holders from the applicability of the insolvency and such creditors resultantly, are able to enforce their rights as secured creditors outside the insolvency process. The maritime lienholders generally prefer to sue in a jurisdiction that exempts them as secured creditors from the application of the provisions of moratorium during the insolvency of the Corporate Debtor so that they may enforce their rights as a secured creditor under the domestic admiralty law of that particular jurisdiction.[144]

B. LEGAL POSITION IN OTHER JURISDICTIONS

1. THE PEOPLE'S REPUBLIC OF CHINA ('CHINA')

China has adopted the Enterprise Bankruptcy Law of 2006 ('EBL'). China, like India, has not adopted by the Model Law thus far. However, the EBL contains provisions with respect to international cooperation between Chinese courts and foreign counterparts where cooperation in international insolvency may be based on treaty obligations or reciprocity.[145] Once an application for bankruptcy protection is filed, EBL states that measures for preservation and the procedure for execution are suspended.[146] However, the scope does not extend to other legal proceedings. In a liquidation proceeding, the majority opinion in China is that secured creditors are exempted from the stay and may take actions to enforce their security.[147]

Maritime claims in China are categorized into maritime lien claims, ship mortgage claims and other general maritime claims.[148] While ship mortgage claims are secured, there is less clarity on the status of maritime liens and other general maritime claims. Scholars have asserted that maritime liens are substantive property rights that can only be enforced by a maritime court by arresting the relevant ship. Such a right to travel with the ship regardless of changes in its ownership.[149] Additionally, the Special Maritime Procedure Law of China also provides a list of 22 claims for claimants to apply for arrest of the vessels to ensure their claims are fulfilled, such as claims regarding charter parties, cargo damage, general average, towage, pilotage, ship insurance premiums and ship construction costs.[150] The Arrest Convention 1999 provides for arrest as an interim remedy in support of a maritime claim and as a means of establishing jurisdiction. However, it does not create any security interest.[151]

Maritime courts have been established in China to exclusively adjudicate maritime claims and disputes.[152] However, bankruptcy proceedings may be filed in general people's court (bankruptcy court) which deals with all civil matters.[153] In practice, when creditors learn that their debtor is about to open or has opened an insolvency proceeding, they will usually try to enforce their maritime claims by arresting ships in maritime courts.[154] There is no court selection clause in either the EBL or the Chinese Maritime Code with respect to actions for enforcing the maritime claims. Many scholars have asserted that enforcement of maritime claims must be allowed to prevail over the pending or subsequent insolvency proceedings and the proceedings of ship arrest and judicial sales should be resumed or initiated in maritime courts. Thereafter, the proceeds of judicial sales, after satisfying the maritime court's cost of arrest, custody and sale, should be transferred back to bankruptcy courts for the purpose of distribution or reorganisation.[155]

Article 20 and 21 of the EBL provide that bankruptcy courts will generally have jurisdiction over all disputes against debtors once an application for bankruptcy is accepted. However, if jurisdictional conflicts arise between bankruptcy cases and maritime cases, courts at a higher level have been empowered to specify which court may entertain the dispute, which has led to some amount of uncertainty, in practice.[156] For instance, in the 2014 liquidation of the Shipbuilding company, *STX Dalian Limited*[157] and its five affiliated companies, the bankruptcy court exercised jurisdiction over the liquidation proceedings and the relevant claims initiated against the debtor, whereas the judicial sale was under the jurisdiction of the maritime courts. On the contrary, in the case of bankruptcy of *Jiangsu Sainty Marine Co. Ltd.,*[158] the bankruptcy court exercised jurisdiction over all claims relating to the reorganisation proceeding of the debtor and organised the judicial sale of all the assets, including the vessel.

Another issue faced by China has been the treatment to be provided in respect of expenses of arrest, custody and sale. This issue was highlighted in the case of *In re Qinzhou Guiqin Shipping Group Co.*[159] where the debtor's vessel was kept by a third party custodian company appointed by the Maritime Court. The vessel was later scheduled for judicial sale to enforce judgments against the debtor. The Maritime Court suspended the enforcement against the vessel, considering that a reorganisation petition was pending. It was instructed that the vessel shall be sold and expenses of arrest, custody and sale shall be adjusted from the proceeds of judicial sale before transferring the remaining fund to the insolvency proceedings for the benefit of all creditors. The vessel was sold at approximately USD 890,000 but the custody expenses arising because of the substantial delay amounted to more than USD 300,000.

Scholars have pointed out that due to separate and parallel bankruptcy and maritime proceedings, there is considerable confusion which leads to inefficiencies and delays. It has been asserted that it is pertinent that clarifications are issued to understand who is responsible for the expenses related to arrest, custody, sale and other related costs. It would also be more practical and efficient for maritime courts to conclude an ancillary judicial sale process of any vessel and thereafter transfer the proceeds of the judicial sale back to bankruptcy courts for the benefit of all creditors.[160]

2. AUSTRALIA

The Corporations Act, 2001 in Australia deals with the issue of proceedings before the Admiralty and Insolvency Courts and provides specific provisions that address situations where there may be a conflict. The Admiralty Act, 1988 of Australia provides the mechanism for enforcement of maritime liens. When the proceedings *in rem* before the Maritime Courts have commenced before the presentation of a winding-up petition, the *in rem* proceedings shall initially be stayed once the winding up order is granted. An application to the insolvency court for permission to proceed with the in rem proceedings be required.[161] An *in rem*

creditor who has issued is writ before the presentation of a winding up petition acquires the status of a secured creditor.[162] The courts also have a broad discretion to do exercise equitable jurisdiction in such cases.[163]

When the issue of proceedings *in rem* is after the petition for winding-up, although the court's permission would be required in order to commence it, the same result will be obtained in an action *in rem* to enforce a maritime lien or a proprietary claim brought after the presentation of the winding up petition or after the winding up order.[164] The court's permission in such cases is usually forthcoming in order to permit the maritime lien holder to realise his security.[165] However, this position is different in relation to claims which attract only a statutory right of action *in rem*, particularly where the claimant must establish the beneficial ownership of the ship to be arrested is vested in the relevant person at the time when the proceedings have commenced.[166]

The Cross-Border Insolvency Act, 2008 ('CBIA') provides provisions on similar lines as the Model Law and provides for measures for state cooperation and recognition of foreign main proceedings. Under Article 20 of the CBIA once, the foreign main proceeding is recognised by the Australian court, the automatic stay will preclude all actions against the debtor's assets, rights or obligations. However, courts in Australia have chosen to limit the scope and effect of automatic stay as its domestic insolvency proceedings, secured creditors retain the right to proceed if allowed by the local proceedings.[167]

3. USA

US provides recognition to a broad set of maritime liens and provides protection to local creditors, such as ship mortgagors, cargo owners, bunker suppliers and other necessary suppliers.

Chapter 15 of the US Bankruptcy Code adopts the Model Law to provide efficient and detailed procedures for dealing with cross-border insolvency issues. Once the foreign insolvency proceeding is recognised as a foreign main proceeding, an automatic stay is issued against all actions in respect of the debtor's assets, rights, obligations and liabilities.[168] Section 362(a)(5) provides that automatic stay shall apply to any act to create, perfect or enforce against the property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case.[169] However, secured creditors may avail leave from the automatic stay on two grounds:

- The secured creditor's interests in the collateral lack adequate protection which may be on account of loss of collateral value due to delay in proposing a reorganisation plan.[170]
- The value of the property must not exceed the amount of all debts secured by liens on such property.[171]

Additionally, secured creditors have to establish that an effective reorganisation may occur without the particular piece of property at issue. Seaman's maritime lien for wages or maintenance and cure are not subject to the automatic stay under section 362.[172] Although different circuits in US have given diverging opinions on the operation of automatic stay on a vessel,[173] the majority of the rulings on this subject hold that maritime liens are considered to be sacred and protect the stay as long as a plank of the ship remains.[174]

Under section 363, a debtor or a trustee may seek authority from the court to sell property of the debtor's estate such as a vessel or other marine property. When such permission is granted, the court may sell the property of the estate, free and clear of all liens.[175] A bankruptcy court's power does not extend far enough to extinguish a maritime lien since maritime liens follow the maritime property even through changes of ownership and only federal courts sitting in admiralty and acting *in rem* have the jurisdiction to extinguish maritime liens.[176]

US Admiralty law permits maritime attachment and vessel arrest action. In the maritime context, upon recognition of foreign main proceedings, Chapter 14 provides foreign shipping debtors sufficient protection through an automatic stay, which would stay any arrest or attachment proceedings against the debtor's assets, obligations and liabilities.[177]

4. SINGAPORE

The restructuring and insolvency framework in Singapore underwent major changes with recent amendments in 2018 to Chapter 50 of the Companies Act. These tools were introduced to enhance the rescue regime for distressed companies and adopted Model Law.

Generally, a secured creditor stands outside the liquidation and his right to realise his security is unaffected by a winding-up order or the priorities of preferential debts.[178] In contrast, a judicial sale of a vessel under the Admiralty jurisdiction of the Singapore court, a mortgagee, prima facie ranks below the sheriff's expenses and maritime liens. A conflict arises here because the secured creditor and mortgagee enjoy the highest priority in insolvency but rank below a maritime lien under the Admiralty priorities.[179] Section 262(3) of the Companies Act stipulates that upon the granting of a winding-up order, no action or proceeding shall be proceeded with or commence against the company except with the leave of the Singapore Court. Since maritime lien and statutory lien holders are secured creditors, they fall outside the insolvent estate and are able to pursue their security unaffected by the winding-up orders.

In practice, such maritime lien and statutory lien holders obtain the leave of Singapore court and such leave is typically granted.[180] However, a statutory lien holder who fails to issue the *in rem* writ prior to the insolvency of the defendant shipowner, will not be granted leave to proceed against the vessel and will instead have his claim dealt with as an unsecured creditor in liquidation.[181]

While considering a scheme of arrangement, the Singapore courts are empowered to restrain secured creditor from enforcing their security. This extends to the holder of a maritime lien or a statutory lien in a moratorium granted in support of the restructuring of the ship owning companies.[182] The Singapore courts have the power to grant leave for commencement or continuation of the proceedings or process, or enforcement of security.[183]

C. NOTABLE CROSS-BORDER MARITIME INSOLVENCY CASES

Hanjin Shipping Company Limited Case

A notable case is of *Hanjin Shipping Company Limited*, where these two areas of law collided on a global scale. The *Hanjin Shipping Company* applied for rehabilitation with the Korean Bankruptcy Court that adopted Model Law preventing its creditors from arresting Hanjin's ships. However, under the Model Law, it is left to each enacting country to decide whether maritime arrest proceedings can prevail over pending or subsequent insolvency proceedings.[184] Hanjin's fleet of 96 containers were left stranded at sea with about $ 14 billion worth of cargo on ports. 11 of Hanjin's vessels were arrested.[185] Hanjin obtained certain provisional orders to preserve its assets and tried to obtain interim orders against the arrest of its fleet.[186] The courts were constrained to consider, whether insolvency's collectivistic preference should prevail, or whether admiralty's protection of maritime lien by way of arrest should take precedence.

The Australian Courts on the other hand were asked to identify the specific rule of the Corporations Act that would apply to foreign proceedings.[187] On 23 September, 2016, Hanjin petitioned the Australian Court to

recognise the Korean rehabilitation proceedings as foreign main proceedings.[188] The court found that the Korean proceeding met all elements and requirements laid out in Article 2 and 17 of the Model Law and therefore, concluded that Hanjin's Korean insolvency proceeding qualified as the foreign main proceedings. The court also concluded that mandatory stay order under Article 20 of the Model Law should be in the same scope as voluntary administration proceedings under the Corporation Act and therefore, maritime lien holders cannot proceed to enforce their liens unless with the court's relief or the debtor's consent.[189] Considering the unique nature of conflicting interests between insolvency debtors and maritime lien holders, the court held that the automatic stay order did not prejudice the maritime liens. In conclusion, the Australian court seems to be more willing to protect the debtor's owned and operated vessels from arrest, to further the objective of foreign rehabilitation proceedings.[190]

The maritime lien holders in the US opposed the relief arguing that maritime lien rights under the United States were far superior to those of Korea. The court, however, did not accept the notion that maritime lien claimants were in a better position for supplies in the US. However, the courts refused to grant relief exceptions to maritime lien claimants and ordered that nothing the US public policy would justify allowing the claimants to arrest Hanjin's vessels.[191] Therefore, this case indicates that US courts provide some leeway for granting relief for pre-existing vessel arrest by recognising the claims as secured claims.

OW Bunker Case

In late 2014, OW Bunker Group became insolvent and lost its status as the world's largest supplier of bunkers. Subsequently, ING Bank N.V. ('ING') financed the OW Bunker Group and claimed as the assignees of any claim that OWBM had against the owners. Since the owners had not settled any payment for all the bunkers consumed after the 60-day credit period, the issue arose as to whether the Owners have to pay the immediate bunker supplier, OWBM, in the circumstances where OWBM has not passed the title of the bunkers to the owners. Another dispute was whether the owners could rely upon the Sale of Goods Acts 1979 ('SOGA') to defend against OWBM/ING's claim. The contract was for the sale and delivery of bunkers, coupled with a retention of title clause and 60-day credit period. Under the contract, the owners also agreed that they would not acquire title or property rights in the bunkers until full payment to OWBM. Instead, they would merely hold them as bailees with a license to consume them solely for the propulsion of their vessel.

Both of the English Commercial Court and the English Court of Appeal took the view that the contract was not a sale of goods contract within the meaning of the SOGA, thus the SOGA was not applicable. The Court of Appeal went further and held that the contract was in essence a hybrid contract, comprising (1) an agreement that OWBM would give the Owners a license to consume the bunkers upon delivery and (2) an agreement for the sale of any remaining bunkers at payment due date. More importantly, the Court of Appeal was of the view that the transfer of title in the bunkers was not the crucial subject matter of the contract. Even if OWBM/ING did not transfer the title of the bunkers, which the owners had already consumed all the bunkers within the agreed credit period, the owners would still be obliged to pay for them. The Supreme Court upheld the lower courts' decision and dismissed the owners' appeal.[192]

There were physical suppliers, purchasers and the OW Entities itself who had claims in respect of the bunkers. Therefore, the purchasers received claims from both the physical suppliers and liquidators of the OW entities. The claims brought by the physical suppliers were primarily based on the alleged existence of a maritime lien over the bunkers that were supplied, which is recognised in US. The purchasers in turn filed applications for reliefs which delayed the liquidation of OW Bunkers.[193]

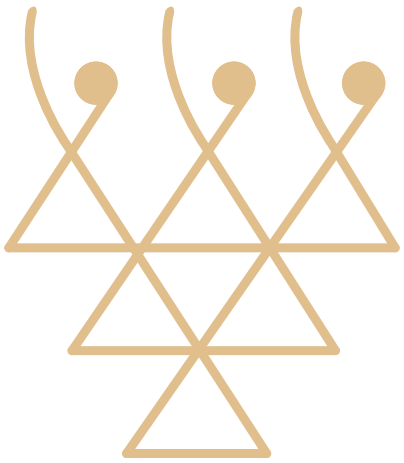
OW Bunker Entities commenced insolvency proceedings across several jurisdictions. OW Bunker Germany openined insolvency proceedings in Germany and applied to the US Bankruptcy Court for the Southern District of New York asking for recognition of the insolvency proceedings as a foreign main proceeding under Chapter 15 of the Bankruptcy Code, the US enactment of the Model Law.[194] The Bankruptcy Court issued an order recognising the German insolvency proceedings as an FMP, but then lifted the automatic stay to allow the interpleader proceedings in the district court to continue.[195] The District Court both retained jurisdiction over the interpleader actions and transferred the Chapter 15 bankruptcy proceedings to itself, holding that there were interesting and novel questions regarding the interplay among the United States bankruptcy law, maritime law, and federal interpleader statutes, which demanded consideration by the District Court.[196]

This raised several pertinent questions regarding the rights of creditors of a vessel which are situated globally since, with each of them laying claim to payment in full from the ultimate buyer, the ship operators, whose main concern is to pay for the bunkers only once, not twice or thrice.

Diablo Fortune Inc.

Another case wherein this conflict was sought to be resolved was the case of *Diablo Fortune Inc. v. Duncan, Cameron Lindsay,*[197] where the Singapore Court of Appeal held that the shipowner's lien had to be registered, despite the substantial inconvenience, in accordance with the insolvency law which required registration of all charges. Subsequently, however, the parliament passed an amendment to the Companies Act of Singapore exempting Shipowners' lien from the requirement of registration.[198]

While every jurisdiction must strive to strike a balance between these two bodies of law, this balance is often difficult to achieve in light of the unique features of maritime law and in-particular cross-border insolvency.[199]



VII. RECONCILIATION OF MARITIME AND INSOLVENCY LAWS IN INDIA

A. INSOLVENCY AND MARITIME LAW BEFORE THE ENACTMENT OF IBC AND ADMIRALTY ACT, 2017

1. Development of Admiralty Laws in India

After India's independence in 1947, the First Law Commission of India examined the British statutes which were applicable and forwarded a detailed report. It was observed that existing statutes on subjects like merchant shipping, extradition and Admiralty jurisdiction needed to be replaced at the earliest.[200]

Broadly, the following four laws dealt with admiralty jurisdiction before the Admiralty Act:

- *the Admiralty Court Act, 1861,*
- *the Colonial Courts of Admiralty Act, 1890,*
- *the Colonial Courts of Admiralty (India) Act, 1891, and*
- *the provisions of the Letters Patent, 1865 in so far as it applies to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts.*

As stated earlier, no cogent steps were taken to enact new laws. In fact, in 1993, the Supreme Court of India in the case of M.V. Elizabeth (Supra) had expressed its dismay at the absence of a legislative exercise in the sphere of admiralty jurisdiction:

"But what was surprising to hear, even, in 1991 was that the admiralty jurisdiction exercised by the High Courts in Indian Republic is still governed by the obsolete English Admiralty Courts Act, 1861 (referred hereinafter as `the Act') applied by (English) Colonial Courts of Admiralty Act, 1890 (in brief `1890 Act') and adopted by Colonial Courts of Admiralty (India) Act, 1891 (Act XVI of 1891). Yet there appeared no escape from it, notwithstanding its unpleasant echo in ears. The shock was still greater when it transpired that this state of affairs is due to lack of legislative exercise, even, when in wake of the decision of this Court in State of Madras v. C.G.Menon & Ors., [1955] 1 S.C.R. 280, that Article 372 of the Constitution cannot save this law (Fugitive Offenders Act 1881) because the grouping is repugnant, to the concept of a sovereign democratic republic.'. …But the Admiralty jurisdiction remained untouched. In respect of Colonial Courts of Admiralty Act the recommendation of the Commission was that, `The necessary substantive provisions of the English Statute may be incorporated into our Act XVI of 1891 so as to make it the comprehensive Indian law relating to courts of admiralty.'. Unfortunately, nothing was done. Neither the law was made up-to-date and brought in line with international conventions on maritime law passed in 1952 etc. nor even the salient features of English law as amended by Administration of Justice Act, 1920, and 1956 were adopted. And rights and interests of citizen of the independent sovereign state continued to be governed by legislations enacted for colonies by the British Parliament. Various provisions in 1890 Act have been rendered not only anomalous but even derogatory to the sovereignty of the State. No further need be said except to express the hope that the unfortunate state of affairs shall be brought to end at the earliest."

Consequentially, the 151st Law Commission of India was formed and prepared a report on the Admiralty Jurisdiction in 1994. In its report, the Law Commission of India provided recommended that steps may be taken at the earliest to update the law.[201]

2. Pre-Code Judicial Precedents on Admiralty jurisdiction

Prior to the enactment of Code and the Admiralty Act, certain judicial precedents briefly examined the aspect of the jurisdiction of the admiralty when proceedings for winding up/ liquidation of the entity owing the vessel were also pending. In *O. Konavalov v. Commander, Cost Guard Region*[202], the Supreme Court held that the lien enacted under the Merchant Shipping Act, 1958 would prevail over the confiscation of the ship under section 115 read with section 126 of the Customs Act. Therefore, the lien available to a seaman for his wages was held to be superior to the rights of the company even after the confiscation of the ship. An interesting development came about in the case of *M/s Smit India Marine Service v. Mr. Shanmugam Rajasekar*[203], where a ship called "*Nilam*" was caught in the eye of a cyclonic storm, as a result of which some of the crew members jumped into the sea and were later rescued and claimed compensation. Several applications were filed by Maritime lien holders and claim holders seeking the arrest of the ship, invoking the Admiralty jurisdiction of Madras High Court. Pending the applications, winding up proceedings were initiated under the Companies Act, 2013 and an official liquidator was appointed.

The Madras High Court determined the issue of the nature and scope of the Admiralty jurisdiction when winding up proceedings were pending. It was held that once a ship has been sold in the exercise of the powers of the Admiralty Court and the proceeds deposited with the Admiralty Court, the initiation of proceedings for winding up before the High Court cannot have the effect of operating to stay the Admiralty proceedings. Once the order of the sale of the ship is passed and the proceeds are in the custody of the court, it is for the court to decide on the priorities and the initiation of proceedings under the Companies Act, will not result in stay of the proceedings.[204] The Madras High Court held that the action *in rem* under the Admiralty jurisdiction stands on a totally different footing and the same cannot be made subject to the proceedings under the Companies Act against the owner of the ship. The proceedings *in rem* under the Merchant Shipping Act, 1958 which is a special enactment will not be affected by the proceedings under the Companies Act, which is a general law.[205]

The Bombay High Court in a subsequent judgment[206] held that once the company is in liquidation, only such claimants would have a charge over the vessel who have executed a warrant of arrest prior to the date of admitting of winding up petition. However, staking of the claim against the sale proceeds of others is not permitted. Once the company goes into liquidation, all the properties of the company, including various vessels become the properties that are available to all, other than such claimants who have executed a warrant of arrest against any vessel prior to the commencement of liquidation.

B. INSOLVENCY AND MARITIME LAW AFTER THE ENACTMENT OF CODE AND ADMIRALTY ACT, 2017

The Code and the Admiralty Act were codified and enacted to reduce complexities. Both the statutes were aimed at resolving issues of conflict pertaining to the jurisdiction of insolvency tribunals and Admiralty Courts. However, despite the enactment of these laws, several issues still remain contentious. Certain judicial precedents have highlighted these issues and attempted to harmoniously interpret the conflicting provisions of the Code and the Admiralty Act.

The Code and Admiralty Act – Judicial Precedents

There have been few, but significant cases on the applicability of the Code and the Admiralty Act after the coming into effect of the Code. A notable judgment in this respect is of the Bombay High Court of *Raj Shipping Agencies v. Barge Madhwa* (*Supra*)[207]where the Bombay High Court held that the provisions of the Admiralty Act and the Code have to be read harmoniously to strike a balance between the two. The primary question that the court dealt with was:

> *"Is there a conflict between actions in rem under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 and the provisions of Insolvency and Bankruptcy Code, 2016 and if so, how is the conflict to be resolved?"*

The Bombay High Court held that an action *in rem* against the ship is not an action against the owner of the ship who may be the CD as defined under the Code. Neither is the action in rem considered as a proceeding against the ship to recover the claim from the ship, not an action against the owner/corporate debtor to recover the claim by attachment of the asset of the owner/corporate debtor.[208] It was held that the claimant is not a secured creditor of the owner but only that of the particular ship and to the extent of the value of the ship, in line with the definition of the "*secured creditor*" as provided under section 3(31) of the Code.[209] The Court reasoned that an arrest cannot be equated to an attachment. A maritime claimant has a right *in rem* which he is entitled to exercise by an arrest of the ship, while an order of attachment is not available as a manner of enforcement of a right.[210] An action *in rem* filed under the Admiralty Act for the arrest of the ship would not amount to an institution of a suit against CD as defined under the Code and would not contravene section 14 of the Code. Further, if an order for liquidation of the CD is made under section 33 of the Code, this by itself will not bar the institution of an action *in rem* against the ship as it is not a suit instituted against the CD which is barred under section 33(5) of the Code. If the ship is sold, then the sale proceeds will be available to satisfy the maritime claims including maritime liens. The priorities of maritime claims will be decided in accordance with the provisions of the Admiralty Act.[211]

In other words[212]:

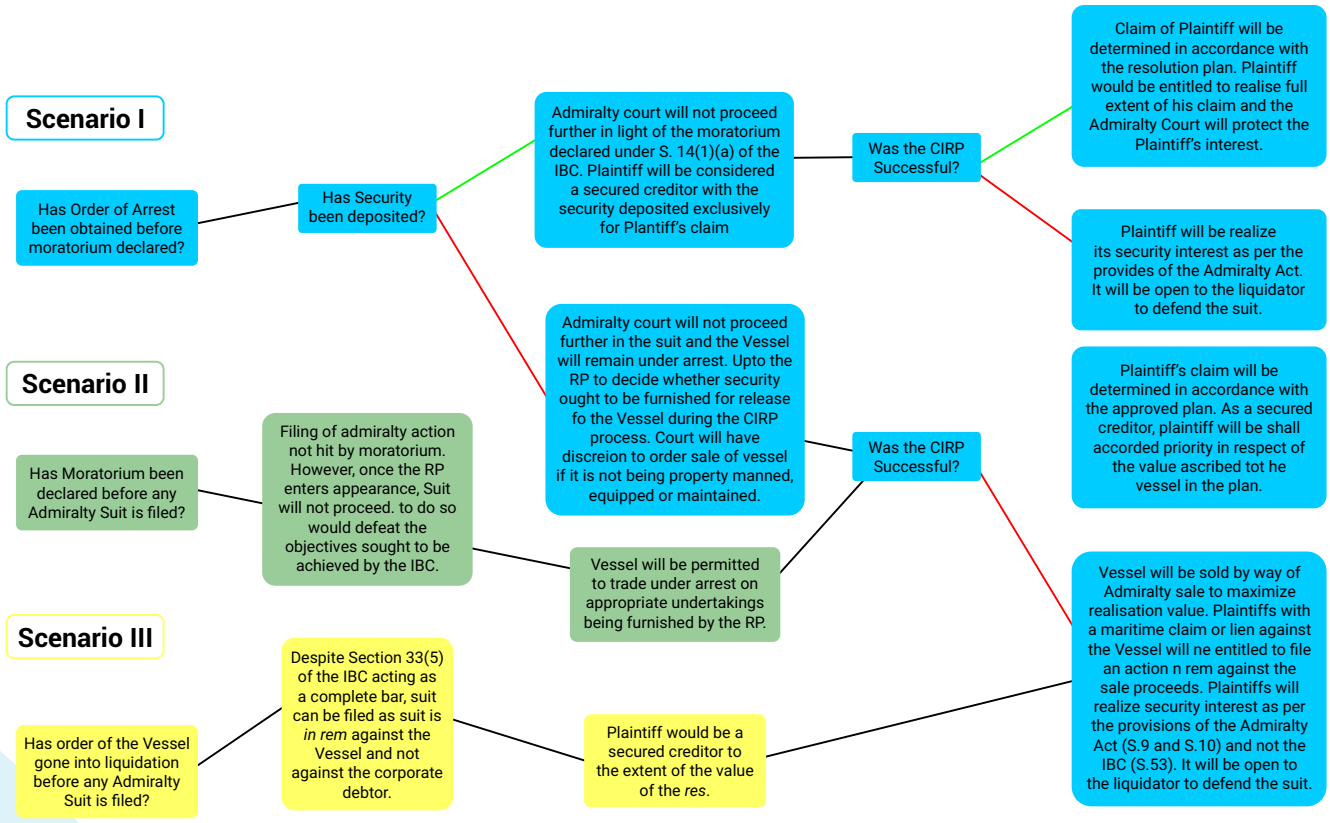
- *Vis-à-vis* the Code, an action *in rem* may be filed and the ship arrested (a) before the moratorium under section 14 of the Code comes into force; or (b) during the moratorium period; or (c) even after the CD is ordered into liquidation. The Bombay High Court held that the provisions of the Code have to be read harmoniously with the provisions of the Admiralty Act, 2017;
- The Admiralty Act, being a special Act, would prevail over the provisions of the Companies Act, 1956 ('Companies Act'), it being a general legislation and no leave would be required under section 446 (1) of the Companies Act for (a) commencing a suit under the Admiralty Act; or (b) proceeding with a pending suit against the company under the Admiralty Act, when a winding up order has been passed or the official liquidator has been appointed as provisional liquidator.
- Pertinently, the Court has also held that an action *in rem* against a vessel will proceed in accordance with the Admiralty Act (being the applicable law), and the priorities for payment out of the sale proceeds of the vessel will also be determined in accordance with the Admiralty Act and not as per the priorities set out in section 53 of the Code. The Court has also held that in the matter of priorities for payment out, section 10 of the Admiralty Act would prevail over sections 529 and 529A of the Companies Act.
- On the question of differences between the provisions of the Admiralty Act and the Code, the Court lamented at the state of affairs in a number of cases wherein the RP/ Liquidator appointed, failed to take any steps to man, preserve and maintain the ships during the insolvency resolution

process/liquidation process. The crew members were left stranded on board the ship and for all practical purposes were abandoned by the owners. The Court took note of the order dated 12th October 2017 passed in *Fleet Ship Management Inc. v. LPG Maharshi Mahatreya, Notice of Motion (L) No.608 Of 2017 in Commercial Suit (L) No.499 of 2017, wherein it was observed that "despite this plea, strangely, the Committee of Creditors is not in a position to indicate as to whether and in what manner the arrested vessel ought to be maintained. Apparently, the crew of the vessel must fend for themselves and suffer whilst the Committee of Creditors takes its own time to take a call on these issues which required urgent attention".*

- As a matter of public policy, the Court observed that abandoned ships pose not only huge risks to the port that they are berthed at but also to the environment as such and the Admiralty Court is not powerless and ought to take steps to protect the ship as well as ensure that their maximum value is realised which would benefit all the stakeholders involved under the Admiralty Act as well as the Code.

Considering the above position of law, the following scenarios and the manner in which the courts may deal with the same have been laid down:

Diagrammatic Representation of Various Scenarios



Source: https://www.linkedin.com/pulse/conflict-admiralty-insolvencycompany-laws-bombay-high-majumdar

Scenario I: If a plaintiff has commenced Admiralty proceedings in rem and obtained an order of arrest of the ship from an Admiralty Court, subsequent to which insolvency proceedings are filed against the owner of the vessel and the Adjudicating Authority declares a moratorium under section 14 of the Code.

(i) When security has been furnished

In the event security has been provided to the Admiralty Court for release of the vessel prior to the declaration of moratorium, then the suit is no longer an action *in rem*. It is in personnam against the CD who has furnished security. Therefore, the suit will not proceed against the CD in light of section 14 of the Code. Plaintiff's claim shall be determined in accordance with the approved resolution plan. In such a situation, the plaintiff should be entitled to realise his claim to the full extent of the security provided. In liquidation, the plaintiff shall be treated as a secured creditor and shall be entitled to realise its security interest. The Admiralty suit will proceed in personnam and the plaintiff will be entitled to realise its security.

(ii) When security has not been furnished

In the event security has not been furnished at the time when the moratorium is declared, the admiralty suit will not proceed further. Continuation of the suit would defeat the objective of the Code. The vessel will remain under arrest until the end of the CIRP period. In that event, the plaintiff's maritime lien or claim which is a perfected claim against the vessel by the arrest, will operate as a charge on the vessel and plaintiff will be considered a secured creditor.

If the resolution plan is approved, then the Plaintiff's claim together with that of all other claimants who have obtained an order of arrest and have become secured creditors qua the ship will be determined in accordance with the approved plan and provided priority since they are secured creditors. If the company is liquidated, then the vessel will be sold by way of an admiralty sale to maximise its realisation value. All such claimants who are unable to recover their claim in liquidation shall have to pursue their claim in liquidation as unsecured creditors.

(iii) Order of sale of the ship

If security has not been furnished and the vessel remains under arrest, the Admiralty Court will not order the sale of the vessel during the moratorium period to allow the insolvency resolution process to fructify unless an application for sale is made by the resolution professional during the moratorium or if the vessel is not being manned, equipped or maintained during the moratorium and all charges for the same are not being paid by the resolution professional including port charges or if the vessel becomes a navigational hazard. In such a case, the Admiralty Court will have the discretion to sell the vessel at the instance of any party who has filed a maritime suit and has a maritime claim.

Further, in all cases of the sale of the vessel, the proceeds will not be distributed but will be retained by the Admiralty Court to await the outcome of CIRP or liquidation.

Scenario II: If a moratorium has been declared under section 14 of the Code before any Admiralty Suit *in rem* is filed for enforcement of a maritime lien or maritime claim.

Although there is no bar to the filing of an admiralty suit, the same being an action in rem, the suit will not proceed in rem upon the resolution professional entering appearance. The vessel will be permitted to trade under arrest once the resolution professional enters an appearance on behalf of the CD and appropriate

undertakings are provided in respect of the vessel. This will ensure that trading of the vessel is not impaired or affected, and this is in the interest of the CD or the CIRP.

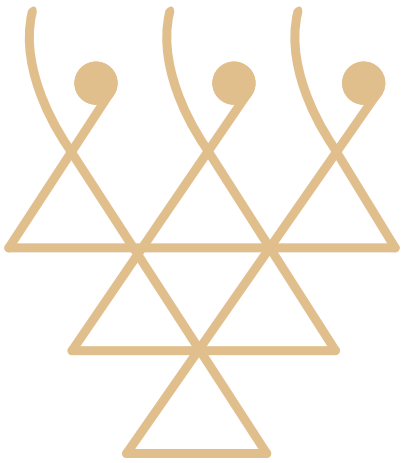
The claimant will be considered a secured creditor. All expenses incurred with the permission of the court for preservation and maintenance of the vessel during the period of arrest will be treated as sheriff's expenses in Admiralty and resolution professional costs under the Code and paid out in priority from the sale proceeds of the ship if the company is liquidated or be accorded priority in the resolution plan as the resolution process costs.[213]

Scenario III: If the owner of the vessel is in liquidation at the time the plaintiff commences Admiralty proceedings in rem for the arrest of the vessel.

Since an action *in rem* can be entertained even at the stage of liquidation of the CD, there is no bar to filing an Admiralty Suit even at the stage of liquidation. Once a plaintiff obtains an order of arrest, the vessel can then be sold by the Admiralty Court to realise maximum value. A sale by the liquidator will not extinguish the maritime claims. Plaintiffs shall realise security interest as per the provisions of sections 9 and 10 of the Admiralty Act and not under section 53 of the Code. It will be open to the liquidator to defend the suit.[214]

The *Barge Madhwa* (*Supra*) was subsequently followed in *Angre Port Private Limited v. TAG 15*[215] where it was reaffirmed that a suit invoking the Admiralty jurisdiction of the court was maintainable even though the liquidation proceedings in respect of the owners of the vessel were pending before the Adjudicating Authority under the Code.

In *Angsley Investments Limited Vs. Jupiter Denizcilik Tasimacilik Mumessillik San. Ve Ticaret Limited and Ors.*[216] The principle laid down in *Barge Madhwa* (*Supra*) that an attachment cannot be equated to an arrest under the Admiralty Act was reaffirmed by the Bombay High Court.



VIII. DISHARMONY BETWEEN MARITIME LAW AND INSOLVENCY

The *Barge Madhwa* (Supra) is a welcome step in so far it attempts to harmonise the provisions of the Code and Admiralty Act, in line with the object and purpose of these legislations. However, scholars and practitioners have flagged concerns that the judgement seeks to harmonise the provisions of the Code and the Admiralty Act, but such harmonisation comes at the cost of practicality.

It can be seen that different jurisdictions have adopted different approaches to resolve the conflict between maritime laws and insolvency. In China, while the superior courts have the authority to decide which court would have jurisdiction, in practice, there seems to be a lot of uncertainty and often, leads to a jurisdictional conflict between the insolvency and maritime courts. Australia, on the other hand, an application is required to be made to the insolvency court for permission to proceed with the in *rem* proceedings. However, the courts are liberal in granting such permission so long as the rights of the secured creditor have been established. In the US, maritime liens are exempted from the stay provided under Chapter 11 of US Bankruptcy Code and the bankruptcy courts are not empowered to extinguish maritime liens by sale under the bankruptcy process. Therefore, sale by admiralty courts fetch better value. A similar practice has also been adopted in Singapore where the courts are liberal in granting permissions for exempting the application of moratorium maritime lien and statutory lien holders, in winding up proceedings.

A. TREATMENT OF EXPENSES RELATED TO MAINTENANCE, CUSTODY, SALE AND OTHER RELATED COSTS INCURRED DURING THE CIRP

It is pertinent under the Admiralty Act the vessels are preserved and maintained to ensure value maximisation. There are considerable expenses related to the safe keeping, maintenance, berthing, salvaging, manning and porting charges which are required to be paid. There have been increasing instances involving a fleet of vessels where the resolution professional[217] and the Committee of Creditors have not taken timely steps to man, preserve and maintain the vessels during CIRP. These concerns have been highlighted in the case of the order dated 12 October, 2017 in *Fleet Ship Management Inc. v. LPG Maharshi Mahatreya,* in Notice of Motion (L) No. 608 of 2017 in Commercial Suit (L) No. 499 of 2017 by the Bombay High Court.[218] The Bombay High Court also pointed out instances where the crew members had been left stranded on ships, without adequate food, drinking water and essential fuel for survival on board or had abandoned the vessels due to an inadequate supply of such essentials.[219] Such abandonment of ships poses a serious risk to not only the environment but also is a huge risk to the ports that the vessels are berthed there.[220]

In the case of *Angre Port Private Limited v. TAG 15 (IMO. 9705550) & Ors.*[221], on account of strong winds and currents, the vessel broke her mooring rope, floated away, and posed a serious navigational hazard and dander to the life and property of the villagers nearby. Therefore, a nearby tub had to be employed for salvaging and bringing back the vessel and questions were raised whether the resolution professional should have provided the necessary assistance for such salvaging expenses. Subsequently, an application was moved by the RP seeking recall of the order of arrest by the Admiralty Court, on the grounds that if the vessel is not sold, its value will diminish and the vessel will incur port charges and manning costs aggregating to USD 3,000 per day which would further increase the liquidation costs.

A similar issue has also been faced by China where the courts have tackled the question of whether the expenses of arrest, custody and sale should be paid before the vessels are released and whether the

proceeds of judicial sales should be transferred back to the trustees or administrators, as stated hereinabove. It has been suggested by scholars such expenses may be paid from the proceeds of judicial sale before transferring those proceeds back to the bankruptcy courts. The importance of having clarity as to who is responsible for the expenses of arrest, custody, sale and expenses incurred for the common interests of all creditors has been highlighted by many scholars.[222]

It was noted by the Bombay High Court in *Barge Madhwa (Supra)* that in such cases, the Admiralty Courts must have the discretion to step in and protect not only the ship but also the rights of crew members who continue to remain on board these ships in order to maintain and preserve the ships and ensure that the ships remain safe. This would also be in line with the objectives of Code and protect the interest of stakeholders.[223]

Under the Code, while CIRP expenses are paid in priority in terms of section 53(1)(a), there is confusion regarding the inclusion of expenses incurred on account of maintenance, custody and sale of the vessels. The *Barge Madhwa (Supra)* in order to strike a balance between the two laws states that all the expenses incurred for preservation and maintenance of the vessel during the period of arrest, with the permission of Admiralty courts will be treated as sheriff's expenses in Admiralty and resolution process costs under the Code and paid in priority from the sale proceeds of the ship if the company is liquidated or be provided payment priority under the resolution plan.[224]

A similar issue has also been faced by China where the courts have tackled the question of whether the expenses of arrest, custody and sale should be paid before the vessels are released and whether the proceeds of judicial sales should be transferred back to the trustees or administrators, as stated hereinabove. It has been suggested by scholars such expenses may be paid from the proceeds of judicial sale before transferring those proceeds back to the bankruptcy courts. The importance of having clarity as to who is responsible for the expenses of arrest, custody, sale and expenses incurred for the common interests of all creditors has been highlighted by many scholars.[225]

In India, there is still considerable confusion on the manner in which such expenses are required to be treated and a set of guidelines/ clarifications issued in this respect would certainly promote certainty and boost market confidence for stakeholders to timely maintain, preserve and carry out the sale of the vessels.

B. INSTANCES WHERE A SALE OF VESSEL BY THE ADMIRALTY COURTS MAY BE PREFERRED DESPITE MORATORIUM ON SALE OF ASSETS UNDER THE CODE

Peculiar dynamic conditions in insolvency of maritime enterprises require constant maintenance and preservation of the vessels. It is therefore equally important that the judicial sale takes place at the earliest to reduce the considerable expenses on account of vessel maintenance, preservation and custody; and have asset sale value maximisation. which may deplete considerably with time. It has been recognised that the sale of a vessel by an admiralty court extinguishes all maritime liens against the res thereby giving a clear title to the buyer. Therefore, a sale by the admiralty courts is likely to fetch a better price since it would be free from all encumbrances, in comparison to the sale under the Code through liquidation.[226]

Broad guidelines for sale

The *Barge Madhwa* (*Supra*) judgment provides broad guidance where despite the pendency of the CIRP or the liquidation, the sale of the vessel may be undertaken by the Admiralty Courts:

1. A vessel cannot be sold where there is no order of arrest in respect of the ship or in a situation where

there is an order of arrest which has subsequently been vacated due to the furnishing of security for its release from the arrest. Only vessels that have been arrested may be sold.

2. If no security is furnished and the moratorium is operating against the owner of the vessel, the vessel will remain under arrest until the end of the CIRP period.[227] The Admiralty Court will not order the sale of the vessel during the moratorium period to allow the insolvency resolution process to fructify.[228] However, there is no such bar during, liquidation and a sale may be made.

3. The Admiralty court will have the discretion to sell the vessel at the instance of any party who has filed an Admiralty Suit and has a maritime claim, after providing due notice to the owner of the vessel, in the following circumstances:
   (i) An application for sale is made by the Resolution Professional;
   (ii) The vessel is not being manned, equipped and maintained by the Resolution Professional during the moratorium. At all such stages, the Resolution Professional will have an overriding obligation to maintain the vessel. If the following charges are not being paid by the Resolution Professional, then an application for sale is maintainable:
      - Crew wages
      - Necessary costs
      - Charges and other expenses[229] and

   (iii) The vessel becomes a navigational hazard.

4. The proceeds from the sale will not be distributed until the outcome of CIRP or liquidation.[230] The proceeds from the sale may be distributed in terms of the priorities under the Admiralty Act and stipulated at the same time, in the resolution plan of the CD during CIRP. It has been reasoned that such an order of sale may be required to ensure that the value of the vessel is not put at risk, the vessel is preserved and/or not allowed to waste or deteriorate or further encumbered with claims and liabilities during the moratorium period. This would maximise the value of the ship and secure the interest of the secured creditors.

Let us take there is insolvency of a vessel – SHIP "**X**" which is owned by the CD –"**A**".[231] An Admiralty suit has been commenced by the Plaintiff – B against the Corporate Debtor – A. Generally, in line with the law down in terms of the B*arge Mahdwa Judgment*, the following stages may arise in respect of a maritime insolvency in India:

Stage 1: Commencement of Admiralty proceedings

Commencement of maritime proceedings under the Admiralty Act before the concerned High Court in India. The proceedings may be commenced by a creditor having a maritime claim seeking arrest and the subsequent sale of the Vessel X to enforce its rights as a secured creditor.

Stage 2: Commencement of Insolvency Proceedings

Commencement of insolvency proceedings under Section 7, 9, or 10 of the Code against the owner of the Vessel – CD A, either before or after the commencement of Admiralty proceedings against Vessel X. In line with the *Barge Madhwa* (Supra), there is no bar against commencement of Admiralty proceedings, even after the initiation of insolvency proceedings against the CD – A.

Stage 3: Furnishing of Security before the Admiralty Courts

The CD or the Resolution Professional ('RP') acting on behalf of the CD – A, may appear before the Admiralty Courts and furnish appropriate security for the Vessel -X to not be arrested and so that it may be freely used for requisite purposes. Whether the security has been furnished or not, the Admiralty Suit will not proceed further. Till the pendency of the CIRP, there shall be no sale of the Vessel – X, as doing so would frustrate the insolvency proceedings.

Stage 4 : Sale of the Vessel – X during the CIRP of the Corporate Debtor – A

The Admiralty court will have the discretion to sell the vessel at the instance of any party who has filed an Admiralty Suit and has a maritime claim, after providing due notice to the owner of the vessel, in the following circumstances:

(i) An application for sale is made by the RP;

(ii) The vessel is not being manned, equipped and maintained by the RP during the moratorium. At all such stages, the RP will have an overriding obligation to maintain the vessel. If the following charges are not being paid by the RP, then an application for sale is maintainable:

- Crew wages
- Necessary costs
- Charges and other expenses[232]

(iii) The vessel becomes a navigational hazard.

Pertinently, the obligation rests with the RP to ensure proper maintenance and also to ensure the payment of crew wages, necessary costs, charges and expenses. All the expenses incurred for the preservation and maintenance of the vessel during the period of arrest with the permission of the Admiralty Court will be treated as sheriff's expenses and paid out in priority as resolution process costs.

The proceeds from sale will not be distributed until the outcome of CIRP or liquidation.[233] This would mean the proceeds from the sale may be distributed in terms of the priorities under the Admiralty Act and stipulated at the same time, in the resolution plan of the CD during CIRP.

Stage 5: Approval of the resolution plan of the Corporate Debtor – A

If the CIRP is successful and the resolution plan is approved, then the claim of Plaintiff B shall be considered in accordance with its status as a secured creditor who is entitled to the security provided for release of the vessel.

Stage 6: Liquidation of the CD – A

If the CIRP is not successful and the CD is ordered to be liquidated, the security provided for Plaintiff's claim will inure to the benefit of Plaintiff alone. In such a case, the Plaintiff will be a secured creditor in liquidation and will be entitled to realise its security interest as per section 52(4) of the Code.

Stage 7: Sale of the vessel during Liquidation when no security is furnished

If the CD is being liquidated, then the Vessel – X shall be sold by way of an Admiralty Sale to maximise its realisation value and extinguish all maritime claims. The Admiralty court will be entitled to invite claims against the sale proceeds by following the Admiralty procedure prescribed in the Rules. Parties having a maritime lien or a maritime claim such as the Plaintiff, will be provided the distribution proceeds in line with the priorities provided under sections 9 and 10 of the Admiralty Act.

All the claimants unable to recover their claims from the sale proceeds would have to pursue their claims in the liquidation of the CD - A

C. PRACTICES IN JURISDICTIONS WITH RESPECT TO ADMIRALTY SALE OF VESSEL

Singapore

In Singapore, the new Insolvency Restructuring and Dissolution Act, 2018 read together with the Insolvency Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020, carves out an exception with respect of the commencement of any admiralty proceedings. Generally, a secured creditor stands outside the liquidation and his right to realise his security is unaffected by a winding-up order or the priorities of preferential debts.[234] In contrast, a judicial sale of a vessel under the Admiralty jurisdiction of the Singapore court, a mortgagee, prima facie ranks below the sheriff's expenses and maritime liens. After the judgment of *Ocean Winner*[235] by the Singapore High Court, it is settled law that the automatic moratorium leading to the scheme of arrangement cannot operate to deny statutory liens under the admiralty proceedings. While granting a leave to lift the moratorium, to enable the admiralty sale of a vessel, the following broad considerations apply:

- Leave should be granted if the action is unlikely to impede the achievement of the purpose of administration, by balancing the individual and collective creditor rights, considering in particular the probability that the relative detriment caused to other creditors.[236] In carrying out the balancing exercise, weight is to given to be the proprietary rights of the applicant.
- If granting leave to an applicant with proprietary rights (e.g., a lessor of land to exercise his proprietary rights and repossess his land) is unlikely to impede the achievement of that purpose, leave should normally be given.

China

Due to conflict of jurisdiction between its maritime and bankruptcy courts, China has also faced similar issues. It is the view of courts and scholars that judicial sale may be made to maximise the asset value.[237] In China, the superior courts may decide whether the insolvency courts or the maritime courts may deal with all the issues in relation to the sale of the vessel, and therefore, may also decide the appropriate manner in which the sale of the vessel may take place. However, in practice this has led to a great deal of uncertainty, considering that the stakeholders are unsure of the manner and time in which the sale of the vessel may take place.[238]

Australia

In Australia, the court may order that a ship may be sold upon the application by a party either before or after the judgment. The Admiralty Rules provide that where the ship is deteriorating in value, the court can order its sale at any stage of the proceeding with or without any application.[239] If despite orders of arrest, the vessel has left Australia, further in rem proceedings may be brought against the vessel elsewhere and an order of the vessel may be obtained there.[240] The courts also have a broad discretion to exercise equitable jurisdiction in such cases.[241]

USA

In USA, secured creditors may avail leave from the automatic stay due to moratorium on two grounds:

(i) The secured creditor's interests in the collateral lacks adequate protection which may be on account of loss of collateral value due to delay in proposing a reorganisation plan.[242]

(ii) The value of the property must not exceed the amount of all debts secured by liens on such property.[243]

(iii) secured creditors have to establish that an effective reorganisation may occur without the particular piece of property at issue.

Although different circuits in US have given diverging opinions on the operation of automatic stay on a vessel,[244] the majority of the rulings on this subject hold that maritime liens are considered to be sacred and protect the stay as long as a plank of the ship remains.[245]

D. TREATMENT OF MARITIME CLAIMS AS SECURED CREDITORS UNDER THE CODE AND ARTIFICIAL DISTINCTION BETWEEN SIMILARLY PLACED CREDITORS

The *Barge Madhwa* (*Supra*) holds that once a plaintiff has obtained an arrest, the plaintiff becomes a secured creditor. Accordingly, any resolution plan must treat that plaintiff as a secured creditor in terms of section 3(31) of the Code for the value of his charge on the vessel.

However, section 3(31) of the Code stipulates that a right, title or interest or a claim to a property must be created in favour of a secured creditor by a transaction that secures payment or performance of an obligation of any person. Considering that there will be no adjudication of the plaintiff's claim and further proceedings will be stayed, in terms of the *Barge Madhwa* (*Supra*), the creation of a security interest by the mere factum of an arrest or deposit of money in court may vitiate the process. It will also create an artificial distinction between similarly placed creditors.[246] It may also create avenues for forum shopping where the creditor may prefer choosing one jurisdiction over another based on the treatment of their claims. For instance, mortgage debts would be satisfied on a priority basis under the Code whereas, under the Admiralty Act, they would be satisfied only after all maritime liens have been discharged. On the other hand, several of the claims provided under the Admiralty Act might fall within the residual category of "*Any remaining debts and dues*" under the Code (ranking 6th in the order of priority).

E. VARIANCE IN THE PRIORITY ACCORDED DURING LIQUIDATION UNDER THE ADMIRALTY LAW AND THE CODE

Section 53 of the Code and sections 9 and 10 of the Admiralty Act provide a different order of determination of priorities in liquidation. As per *Barge Madhwa* (*Supra*), in case of liquidation, the determination of priorities will be done under section 10 of the Admiralty Act and *inter se* priorities will be decided under section 9 of the Act. Section 53 of the Code shall not apply in so far as the distribution of claims which are already covered under sections 9 and 10 are concerned. Conferring priority upon similarly situated workmen in different classes would be violative of the principles of natural justice. For instance, providing priority to wages of sea men over the wages of workers, when both face considerable personal peril, may be difficult to reconcile with the intent of the Code.[247] These issues of conflict in the priorities need to be clearly addressed to promote certainty and enable effective restructuring.

F. CROSS BORDER MARITIME INSOLVENCY PROVISIONS

There is no framework to address cross-border issues under the Code.[248] Section 234 of the Code empowers the Central Government to enter into bilateral agreements with foreign jurisdictions to resolve the issues of cross-border insolvency. Section 235 empowers the Adjudicating Authority to issue letters of request on courts of the country with which such bilateral agreement has been entered into under section 234 to ascertain how assets located outside the country are to be dealt with. To address the limitations of the prevailing cross-border insolvency mechanism, a draft set of guidelines containing a specific chapter i.e. Part Z on cross-border insolvency has been proposed.[249] Considering the rise in the initiation of maritime insolvency cases in India, due to the regulatory challenges and potential risks involved, there is an urgent need to have a robust framework to address all issues on cross-border maritime insolvency. While enacting

such a framework, the legislature may find orientation in the maritime insolvency framework and precedents of Australia, US and Singapore, as outlined in this Thought Paper.

CROSS-BORDER MARITIME PROCEEDINGS

A cross-border insolvency framework or its absence can significantly impact the outcome of proceedings. In particular, cross-border insolvency issues with respect to the sale of the vessel pending moratorium and the instances in which the sale may be made despite the pendency of the moratorium have not been exhaustively dealt with in the *Barge Madhwa* (*Supra*). A stay on sale of the vessel pending the moratorium under the Code may result in inefficiencies by increasing the expenses incurred and also reducing the asset pool available for distribution. There is justification in granting a stay as an exception and not as a general rule.[250] Further clarity on circumstances under which the sale of the vessel may take place despite the moratorium under section 14 of the Code will be of help. Further clarity on the maintenance obligations of the ship is also needed.

Illustration 1: For instance, in the event, an order of arrest is obtained, however, the vessel has left India, can the sale still be enforced? In such a situation, presumably *in rem* proceedings would have to be initiated in a different jurisdiction where the vessel is located. Insolvency proceedings, and particularly, cross-border insolvency, in such another jurisdiction would also have to be considered.

Illustration 2: Another issue on which clarity would be required is the treatment of expenses incurred by the Resolution Professional for the expenses incurred for the period of arrest for the safety and preservation of the vessel and its crew for the period of arrest.

Illustration 3: The *Barge Madhwa* (*Supra*) does not exhaustively deal with the issues of abandonment of vessels. For instance, the Maritime Labour Convention of 2006 deals with the issues relating to Seafarer's Repatriation Requirements and states to ensure implementation of regulation 2.5, paragraph 2, requiring that the provision of an expeditious and effective financial security system to assist seafarers in the event of their abandonment.

Where a moratorium is pending appropriate provisions, requiring fixation of liability upon the RP or the appropriate authority responsible for maintaining the vessel would have to be provided. Provisions would be required to address:

1) failure to cover the cost of seafarer's repatriation:
2) deal with situations where the seafarers may be left without the necessary maintenance and support.[251]
3) Essential needs of the seafarers including items such as adequate food, clothing, accommodation etc.

If the employment relationship is terminated, then crew members may seek to recover wages up until the termination and thereafter damages for breach of contract calculated by reference to the wages lost, the cost of sustenance for a reasonable time at the place of termination pending repatriation to their home port, and the cost of repatriation. Such a claim ranks after the Sheriff/ Marshal's claim against the ship, substitute security, or proceeds of sale for the Sheriff/ Marshal's charges and expenses, the plaintiff's costs of the action, and other claims having priority.

Illustration 4: Costs with respect to the damage or threat of damage caused by the vessel to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such

damage; and damage, costs, or loss of a similar nature to those identified, in with the International Convention on the Arrest of Ships (1999 Arrest Convention), would have to be looked at, from the perspective of the Cross-border maritime Insolvency.

Other cross-border issues may arise impacting the outcome of the insolvency proceedings as illustrated below.

Where CD – A is an offshore shipping company with multiple offices in several jurisdictions, the following stages may have to be taken into account in addition to the stages stipulated above in respect of a domestic maritime insolvency proceeding assuming Model Law comes into play.

Determination of COMI

In this situation, a foreign proceeding can only be recognised as a foreign main proceeding by the assisting country if the foreign proceedings take place in the Centre of Main Interest (COMI) of the CD – A.[252] This determination is further complicated by the fact that in practice, shipping companies usually separate their ownership from the ship management. As pointed out earlier, the framework in India currently does not address the factors which are required to be taken into account for determination of the COMI. These factors would of course have to be in line with the Model Law principles.

Supposing in the present case, proceedings have been instituted against the CD in both India and Singapore, in the event the proceedings in Singapore are recognised as the Foreign Main Proceedings, would the insolvency proceedings in India get stayed in light of Article 20(3) of the Model Law?

Treatment of Admiralty Claims

Although the assisting country must respect the existence of FMI in another country by staying the admiralty proceedings in its own courts, it may choose to preserve the exceptions stating that the mandatory Article 20(1) stay does not apply to a secured creditor. Therefore, such provisions would have to be expressly provided for, by India to be able to effectively deal with such maritime insolvency cases where proceedings in Singapore have been recognised as the FMI.

Scope of Corporate Debtor's Assets

Vessels are often owned by subsidiaries and then leased to the operating company in the group under a charter arrangement. Sometimes, ships are also chartered by the debtor from third parties. Article 20(1)(a) of the Model Law applies the automatic stay or moratorium to the debtor's assets. It would need to be considered whether the interest of non-owners of the vessels such as the charterers (demise, bareboat, time or voyage charterers) would have to be considered and provided sufficient protection from arrest.[253]

Treatment of Plaintiff having obtained arrest orders as a secured creditor

In order to release the vessel, security has to be furnished. The treatment of such security would have to be considered and may have an impact on the arrest orders that may be provided by the Admiralty Courts in India. Here also, it is not necessary that the Plaintiff who has obtained arrest orders may be considered to be a secured creditor and therefore, their treatment and priority would have to be decided based on the domestic law of the FMP.

IX. CONCLUDING REMARKS

The shipping industry is the backbone of international trade handling more than two-thirds of the world's trade value. It is the most cost-effective way to move large volumes of goods such as oil, mineral ores, grains, and containerized cargo over long distances.

Indian maritime industry is a significant catalyst for overall industrial growth due to spin-offs to other industries, including steel, engineering equipments, port infrastructure, trade and shipping services. The indirect potential of the shipbuilding industry in employment generation and contribution to GDP is therefore tremendous. The dynamics of India's economic growth will continue to create demand for new ships and trade.

The shipping industry is facing challenges of its own as highlighted in this study. The robust insolvency resolution framework provided under the Code is expected to be used by the creditors and borrowers for effective restructuring to deal with distress situations, while individual creditors are expected to pursue their rights under the Admiralty Act. This makes a case for greater reconciliation between the two legislations.

Developing Awareness

Though India has been carrying on maritime trade for a long time, the maritime law has been very slow in its development, particularly Post-Independence.[254] So much so that the Law Commission even in its 1994 report has observed that the law relating to admiralty remains unfamiliar to the lawyers and even the judges in the country. In spite of recent legislative efforts in this area, hardly there exists any ground that suggests that the observation of the Law Commission in 1994 does not hold true today.[255] There is a need to build awareness about maritime law, including with reference to the insolvency laws amongst stakeholders.

Greater Harmony between Maritime Law and the Code

The tension between how maritime law relating to admiralty *in rem* claims and insolvency law deal with creditors' rights is not new. While every jurisdiction must strive to strike a balance between these two bodies of law, this balance is often difficult to achieve in light of the unique features of maritime law and insolvency law, in particular cross-border insolvency.[256]

From the broad overview of the practices adopted in China, Australia, USA and Singapore, it can be seen that various jurisdictions have adopted different approaches to resolve the conflict between maritime laws and insolvency, based on each jurisdiction's peculiar circumstances and the applicable domestic laws.

The advantage of arresting a ship, which elevates a maritime claimant to the status of a secured creditor, sits uncomfortably with principles of insolvency law, which do not contemplate an action in rem and the peculiar consequences that follow from it.[257] It is imperative that a balance is stuck between the competing interests of admiralty claimants and secured creditors of an insolvent company. While the outcome in *Barge Madhwa* (Supra) addresses some of the tensions between the two jurisdictions and preserves the rights of the claimant to pursue his statutory right of action *in rem*, while balancing against the objectives of the Code, jurisprudence in relation to the interaction and interplay of admiralty law and insolvency law is far from fully developed. Several issues still remain unanswered. The law in this respect is still evolving.

Judicial sales of vessels under the Admiralty Act may be more efficient and incentivise asset maximisation.

However, appropriate provisions should be provided to ensure that the sale takes place in a timely manner at the earliest possible stage, so that the expenses related to maintenance, custody and preservation of the vessel are minimised.

IBBI may consider taking suitable steps to address issues of disharmony in the insolvency resolution process vis a vis the arrest and sale by Admiralty Courts. Steps for inclusion of the maritime claims in the insolvency resolution process can reduce contingency risks. Similarly, clarity on the treatment of expenses incurred during the maintenance, custody and sale of the vessel and other ancillary and related costs under the Code, may promote certainty and provide an impetus to stakeholders incurring such expenses to take ensure that the vessel is adequately maintained to enable its value maximisation.[258]

While striking a balance between the Admiralty Laws and Code, caution ought to be exercised to ensure that there is no dilution of the Code. The provision for exemption and encroachment by sectoral laws may stimulate a dissimilar insolvency dispensation for each sector and risk altering the rights of stakeholders in an insolvent company. It is also imperative that any exemption from moratorium under section 14 of the Code is grounded on a systematic impact analysis of the overall economic considerations in addition to the maritime sector-specific stakeholder rights, to minimise resource misallocation and dilution of the Code.[259]

Cross-border Insolvency Framework

The current international acquis offers ample inspiration for further alignment of the international legal framework for the enforcement of security rights over ships, both from a conflict-of-laws and from a substantive law perspective.[260] The Maritime Conventions approach the issue of enforcement primarily from a conflict-of-laws point of view and address only a few substantive law matters. The issue of enforcement remedies is crucial from the point of view of a secured creditor wishing to enforce its rights. However, no clear-cut rules exist in relation to this topic. This vacuum can be filled by UNIDROIT.

In an admiralty action, jurisdiction may be exercised irrespective of the nationality of the ship or that of its owners, or the place of business, domicile or residence of its owners, or the place where the cause of action arose wholly or in part. In such a scenario, situations arise where the ship owner of a vessel is incorporated outside India and is subject to insolvency proceedings in the respective country.[261] When insolvency spreads across several nations, different courts may not treat creditors equally. A universalist international insolvency treaty would resolve these problems by ensuring cooperation and mutual recognition of bankruptcy proceedings involving various nations' courts. Adoption of Model Law is necessary to deal with cross-border insolvency issues.

Impact of Climate Change

The physical and transition risks of climate change are going to significantly impact the shipping enterprises. In the event of distress in shipping enterprises, many complex questions of law may arise. The global insolvency standard-setting bodies are currently looking at changes that may be required in insolvency policy to deal with clime change. While separate treatment of sectoral laws in the Code is avoidable, shipping enterprises may demand a separate set of restructuring to address the climate change issues. This makes a strong case for deeper study.

Use of Mediation

Alternate dispute resolution mechanism, particularly mediation has emerged as an effective means of dispute resolution in many jurisdictions. Mediation is now well known for improving the efficiency of dispute resolution.

Alternate dispute resolution has played a crucial role in resolving conflicts in the maritime industry. Compared to traditional litigation, which can often lead to lengthy court battles and substantial costs, mediation offers a more efficient and cost-effective alternative in admiralty disputes. By engaging in mediation, parties can maintain greater control over the outcome and actively participate in crafting a resolution that meets their specific needs.

In 2007, the "Cosco Busan," a Hong Kong flagged container ship, collided with a tower of the San Francisco-Oakland Bay Bridge, resulting in an oil spill that caused significant environmental damage, triggering a dispute between the ship's owner and various government agencies. The parties engaged in arbitration. The operating company pleaded guilty to charges of water pollution and falsifying the documents and agreed to pay $10 million in fines and penalties. The federal, state, and local agencies announced a final comprehensive civil settlement for $44.4 million, including $32.2 million for natural resource damages, $1.25 million for state penalties, and $10.9 million for unpaid government response and assessment costs.[262] In 2011, "Rena," a container ship, ran aground on a reef off the coast of New Zealand, resulting in an oil spill and significant environmental damage. The incident led to a dispute between the ship's owner and the New Zealand government over liability for the damage. The parties engaged in arbitration to resolve the dispute. The arbitrators considered various factors such as liability, salvage operations, environmental damage, and compensation claims. Through a series of hearings and expert testimonies, they facilitated a fair and impartial resolution that satisfied all parties involved.[263] In 2013, "MOL Comfort", a container ship broke and sank in the Indian Ocean. The incident led to a dispute between the ship and cargo owners over liability for the cargo losses. The parties engaged in mediation to resolve the dispute. The mediation process was successful, and the parties reached a settlement agreement.

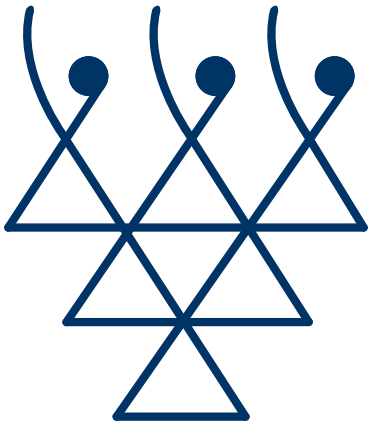
Insolvency resolution under the Code is not an adversarial process, yet implementation-wise, it has become litigious in India. This is primarily due to multiple contentious issues brought before the NCLT for resolution by various parties. This creates several systemic bottlenecks and leads to cascading delays in the resolution process and increasing pendency. In insolvency cases, mediation offers an opportunity for parties to reach mutually agreeable commercial solutions to business disputes without intervention of courts.

India enacted the Mediation Act in the year 2023 ('Mediation Act'). As on the date of publication of this *Thought Paper,* Mediation Act is yet to be fully operationalised. This transformative legislation aims to enhance the mediation process, streamline dispute resolution, and promote the use of mediation as an effective means of resolving conflicts.

IBBI Expert Committee on Framework for Use of Mediation under the Code ('IBBI Expert Committee on

Mediation') has emphatically recommended the application of mediation in insolvency.[264] The mediation process envisaged under the Mediation Act, based on a 'one-size-fits-all' approach, may not be made applicable to the insolvency resolution processes under the Code. Entry 13 of the First Schedule to the Mediation Act, allows the Central Government to exclude by notification the subject matter of dispute that may be kept out of the purview of the Mediation Act. Recognising that *in rem* rights and aspects of public interest get involved at many stages during the proceedings under the Code, and the timelines prescribed under the Code being tighter, IBBI Expert Committee on Mediation has recommended there is a strong case for seeking exemption by making a specific amendment to the Mediation Act or through a notification under Entry 13.

It is expected that mediation will reflect positively in effective litigation management in the event of tensions between the Admiralty Act and the Code through cost and delay reduction, augment procedural, operational and cultural changes in how India resolves insolvency.



FOOTNOTES

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"Ships are elusive, as Lord Simon of Glaisdale observed in his dissenting speech in The Atlantic Star [1974] AC 436, 472H. Ships engaged in international trade and commerce are literally here today and gone tomorrow. Sheen J accurately noted in The "Freccia del Nord" [1989] 1 Lloyd's Rep 388 at 392 that many a writ in rem has been issued in the hope or expectation that the ship against which the plaintiff has claimed will sail into the jurisdiction. Frequently, that hope or expectation is frustrated or thwarted by a change in sailing orders to the ship's master.";; Julie Soars, Cross-border Insolvency and Shipping – a practical guide, Federal Court of Australia, available at https://comitemaritime.org/wp-content/uploads/2018/05/2016-04-11-CBI-and-Shipping-paper-Julie-Soars-.pdf

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[40] International Monetary Fund, *The 2020 global sulphur limit,* available at *https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/2020%20sulphur%20limit%20FAQ%202019.pdf*

[41] R.P Anand, *Origin and Development of the Law of the Sea,* 10 (Martinus Nijhoff Publishers, Hague/Boston/London,1983)

[42] The Vedas are considered the earliest literary record from Indo-Aryan region. They are classified into four volumes: the Rig-Veda, the Sama Veda, the Yajur Veda and the Atharva Veda, with the Rig Veda serving as the principal text.

[43] The Purana is a sacred text comprising the Veda, Brahmans, Aranyakas, Upanishad, and the great epic. The first versions of numerous Puranas were likely to have been composed in the middle of the 3rd and 10th centuries.

[44] Maritime Heritage - join Indian Navy | Government of India. (n.d.). available at https://www.joinindiannavy.gov.in/en/about-us/maritime-heritage.html

[45] Tracing Admiralty Law in India, Mr. Shuvro Prosun Sarker, Ms. Shreyasi Bhattacharya, CMR University Journal for Contemporary Legal Affairs, Vol. 3 Issue 2, August 2021

[46] Mr. Shuvro Prosun Sarker, Ms. Shreyasi Bhattacharya, "Tracing Admiralty Law in India", CMR University Journal for Contemporary Legal Affairs Vol. 3 Issue 2, August 2021 available at https://www.cmr.edu.in/school-of-legal-studies/journal/wp-content /uploads/2022/02/05-Tracing-Admiralty-Law-in-India.pdf

[47] *Kautilya's Arthashastra* Translated into English by R Shamasastry (2016) Chapter XXVIII, p 179

[48] Drishti IAS. (2023, September 26). India's maritime history available at https://www.drishtiias.com/daily-updates/daily-news-analysis/india-s-maritime-history

[49] Nagendra Singh, *India and International Law: Ancient and Medieval (State Practice of India Series)* 41-45 (S. Chand& Co., New Delhi 1973).

[50] *Supra* note 7, 10-12

[51] R P Anand, "Role of the "New" Asian-African Countries in the Present International Legal Order" 56 AM. J. INT'L L.384-385 (1962)

[52] Decarbonising Shipping Vessels in Indian Waterways through Clean Fuel, Nilanshu Ghosh, Abhinav Soman, Harsimran Kaur, and Himani Jain, March, 2023

[53] Ibid

[54] Government of India, Ministry of Ports, Shipping & Waterways, *Annual Report 2022-23,* available at https://shipmin.gov.in/sites/default/files/Annual%20Report%202022-23%20English.pdf

[55] Ministry of Ports, Shipping and Waterways, *'Guidelines For Private Sector Participation In Ports Through Joint Ventures And Foreign* Collaborations', available at https://shipmin.gov.in/sites/default/files/80273874-PSPForeign.pdf

[56] See for instance, the Guidelines issued by the Ministry of Ports, Shipping and Waterways, for Shipping, *Sagarmala, Ports and Inland Water Transport,* available at https://shipmin.gov.in/orders/guideline

[57] Ministry of Ports, Shipping and Waterways, *'Sagarmala',* available at *https://shipmin.gov.in/division/sagarmala*

[58] Ministry of Ports, Shipping and Waterways, *Maritime India Vision* 2030, February 19, 2021, Appendix 2 Initiatives Summary and Roadmap, available at https://shipmin.gov.in/content/maritime-india-vision-2030

[59] Prakash Shipping Policy, 2021.

[60] *Ibid*

[61] Decarbonising Shipping Vessels in Indian Waterways through Clean Fuel, Nilanshu Ghosh, Abhinav Soman, Harsimran Kaur, and Himani Jain, March, 2023

[62] Notification No F. No. IFSCA/2021-22/GN/021 issued by International Financial Services Authority (ISFCA), 7th January 2022

[63] Circular no. F. No. 496/IFSCA/FC/SLF/2022-23/00, *Framework for Ship Leasing,* International Financial Services Authority (ISFCA), August 16, 2022, available at https://ifsca.gov.in/Viewer?Path=Document%2FLegal%2Fframework-for-ship-leasing-16-08-202216082022050455.pdf&Title=Framework%20for%20Ship%20Leasing%20-%20Finance%20Company%2FUnit&Date=16%2F08%2F2022

[64] Circular no. F. No. 496/IFSCA/FC/SLF/2022-23/00, *Framework for Ship Leasing,* International Financial Services Authority (ISFCA), August 16, 2022, available at https://ifsca.gov.in/Viewer?Path=Document%2FLegal%2Fframework-for-ship-leasing-16-08-202216082022050455.pdf&Title=Framework%20for%20Ship%20Leasing%20-%20Finance%20Company%2FUnit&Date=16%2F08%2F2022

[65] Circular no. F. No. 496/IFSCA/FC/SLF/2022-23/00, *Framework for Ship Leasing,* International Financial Services Authority (ISFCA), August 16, 2022, available at https://ifsca.gov.in/Viewer?Path=Document%2FLegal%2Fframework-for-ship-leasing-16-08-202216082022050455.pdf&Title=Framework%20for%20Ship%20Leasing%20-%20Finance%20Company%2FUnit&Date=16%2F08%2F2022

[66] Invest India, *Ports and Shipping,* available at https://uat.investindia.gov.in/sector/ports-shipping

[67] Decarbonising Shipping Vessels in Indian Waterways through Clean Fuel, Nilanshu Ghosh, Abhinav Soman, Harsimran Kaur, and Himani Jain, March, 2023

[68] PM inaugurates Global Maritime India Summit 2023, available at https://www.pib.gov.in/PressReleasePage.aspx?PRID=1968331

[69] Maritime Amrit Kaal, Vision 2047, dated October 10, 2023 available at https://shipmin.gov.in/content/amrit-kaal-2047

[70] The Committee on Development of Avenues for Ship Acquisition, Financing and Leasing Activities (SAFAL) from the International Financial Services Centres (IFSC) in India was constituted by the International Financial Services Centres Authority (IFSCA) vide its Office Memorandum No. 355/IFSCA/Dev/SL/2021-22/241 dated 24 June 2021. The SAFAL Report dated 28th October 2021 is available at https://www.ifsca.gov.in/Document/ReportandPublication/safal-report-final-2021-10-28-signed-live12121120210321 38.pdf

[71] See Section 6, *Challenges and Barriers to Ship Lease in India, SAFAL, Ship Acquisition, Financing and Leasing, Report of the Committee on Development of Avenues for Ship Acquisition, Financing and Leasing from IFSC in India,* 28 October 2021 available at https://www.ifsca.gov.in/Document/ReportandPublication/safal-report-final-2021-10-28-signed-live1212112021032138.pdf

[72] Will India get too hot to work?, Climate risk and response: Physical hazards and socioeconomic impacts, November, 2020, McKinsey Global Institute.

[73] Shipping Industry in India and its Environmental Law Challenges, Prof. (Dr.) Sairam Bhat Mr. Raghav Parthasarathy, CMR University Journal for Contemporary Legal Affairs.

[74] *ICICI Bank v. ABG Shipyard,* CP (IB) 53 of 2017; Supreme Court Civil Appeal No. 7667 of 2021; *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs,* available at https://ibbi.gov.in//uploads/order/3e757794a8ff5f880b0ee07005ee4133.pdf

[75] *Raj Shipping Agencies v. Barge Madhwa,* Admiralty Suit No. 6 of 2015, 2020 SCC OnLine Bom 651

[76] *Angre Port Private Limited v. TAG 15 and Anr,* (2022) 1 AIR Bom R 689

[77] See sub section (6) of section 3 of the Code.

"(6) "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

[78] Insolvency and Bankruptcy Board of India, Corporate Insolvency Resolution Processes Ending With Order of Liquidation: as on 30th June, 2023, 55029/2023/CIRP- IBBI, available at https://ibbi.gov.in/uploads/whatsnew/263c2b8181cdd74ee0ed3de79c1836d6.pdf

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[80] Unless indicated otherwise, references are to the fifth revision of the Beijing Draft dated 30 November 2021 as set out in the Annex to UNCITRAL 2021, A/CN.9/WG.VI/WP.94 (the 'fifth Beijing Draft').

[81] Enforcement of security rights over seagoing ships, aircraft, and trains in international treaties, Thomas Keijser and Feben van der Linden van Sprankhuizen, (2022). Published by Oxford University Press on behalf of UNIDROIT.

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[83] UNIDROIT 2013, C.D. (92) 5 (c)/(d); UNIDROIT 2013, A.G. (72) 4, paras 20–3; UNIDROIT 2013, A.G. (72) 9, para 24 and p 20.

[84] See UNIDROIT 2022, C.D. (101) Misc. 2, p 7; UNIDROIT 2022, C.D. (101) 4 rev., p 29. On a possible future shipping Protocol, see Bo ger (n 3); O. Bo ger, 'The Case for a New Protocol to the Cape Town Convention Covering Security over Ships', Cape Town Convention Journal, 5/1 (2016), 73–102; J.P. Rodriguez-Delgado, 'Security Interests over Ships: From the Current Conventions to a Possible Shipping Protocol to the UNIDROIT: Lege Data and Lege Ferenda', Journal of Maritime Law & Commerce, 49/2 (2018), 239–305.

[85] See Articles 1(1)(q) and (2) of the 1952 Convention and Articles 1(1)(u) and (2) of the 1999 Convention. On these treaties, see also CMI (1984) (n 3) 100–37; M. Faghfouri, International Convention on Arrest of Ships, (accessed 1 June 2022); Kriz, Part Two (n 12).

[86] The Case for a New Protocol to the Cape Town Convention Covering Security over Ships, Dr. Ole Böger, LL.M. (London), Richter am Landgericht Bremen.

[87] Security Interests over Ships: From the Current Conventions to a Possible Shipping Protocol to the UNIDROIT - Lege Data and Lege Ferenda, *Journal of Maritime Law and Commerce, vol. 49, 2018, pp. 239-306.*

Juan Pablo Rodriguez Delgado

Charles III University of Madrid, April 2018, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341513

[88] The Case for a New Protocol to the Cape Town Convention Covering Security over Ships, Dr. Ole Böger, LL.M. (London), Richter am Landgericht Bremen.

[89] Thomas J. Schoenbaum and A.N.Yiannopoulos, Admiralty *and Maritime Law, Cases and Materials.* (Charlottesville, Va.: Michie Co, 1984), at p. 1.

[90] Law Commission of India, "151st Report on Admiralty Law", (1994)

[91] Samareshwar Mahanty *Maritime Jurisdiction and Admiralty Law in India,* Second Edition, 2023 Universal Law Publishing.

[92] 1993 AIR SC 1014

[93] Tracing Admiralty Law in India, Mr. Shuvro Prosun Sarker, Ms. Shreyasi Bhattacharya, CMR University Journal for Contemporary Legal Affairs

[94] See William Tetley QC, 'The General Maritime Law – The Lex Maritima' (1994) 20 Syracuse JICL 105

[95] Sir Roy Goode, Emeritus Professor of Law in the University of Oxford and Emeritus Fellow of St John's College, Oxford. This paper reproduces the 1999 Donald O'May Lecture, delivered at the Institute of Maritime Law, University of Southampton, on 10 November 1999, updated to take account of the revised text resulting from the third Joint Session convened by UNIDROIT and ICAO and held in Rome in March 2000.

[96] The Admiralty Act came into force on 1st of April 2018.

[97] According to Section 2(l) "*Vessel*" includes any ship, boat sailing vessel or other description of vessel used or constructed for use in navigation by water, whether it is propelled or not and includes a barge, lighter or other floating vessel, a hovercraft, an off-shore industry mobile unit, a vessel that has sunk or is stranded or abandoned and the remains of such a vessel.

[98] Four admiralty laws on civil matters namely (1) the Admiralty Court Act, 1861, (2) the Colonial Courts of Admiralty Act, 1890, (3) the colonial Courts of Admiralty (India) Act, 1891, and (4) the provisions of the Letters Patent, 1865 in so far as it applies to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts

[99] Section 2(1)(a), (b) and (e) stipulate that the following High Courts have jurisdiction, (1) Calcutta, (2) Bombay, (3) Madras, (4) Karnataka, (5) Gujarat, (6) Orissa, (7) Kerala, and (8) Hyderabad

[100] Section 3, *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[101] Sections 4 to 11, *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[102] Preamble and Sections 4 to 11, *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[103] Section 12, *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.*

[104] Section 16, *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[105] Samareshwar Mahanty, Maritime Jurisdiction and Admiralty Law in India , Second Edition, 2023 Universal Law Publishing.

[106] *M.V. Elisabeth v. Harwan Investments and Trading Private Limited,* 1993 Supp (2) SCC 433; *M. Siddiqi v. Mahant Suresh Das,* (2020) 1 SCC 1

[107] See *Raj Shipping Agencies v. Barge Madhwa and Anr,* 2020 SCC OnLine Bom 651

[108] *M.V. Elisabeth v. Harwan Investments and Trading Private Limited,* 1993 Supp (2) SCC 433

[109] DR Thomas, *Maritime Liens,* British Shipping Laws, Volume 14, pp. 51-67

[110] *O. Konavalov v. Commander, Coast Guard Region,* (2006) 4 SCC 620

[111] DR Thomas, *Maritime Liens,* British Shipping Laws, Volume 14, pp. 51-67

[112] Section 9(2), *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[113] Section 9(1), *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[114] Section 4(1)(w), *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[115] *Raj Shipping Agencies v. Barge Madhwa and Anr,* 2020 SCC OnLine Bom 651, Paragraph 38 and 39

[116] Section 11(1), *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*

[117] Preface of the Insolvency and Bankruptcy Code, 2016

[118] As per Section 3(8), *Insolvency and Bankruptcy Code, 2016* "*corporate debtor*" means a corporate person who owes a debt to any person." A corporate person is defined in sub-section (7) of section 3 of the Code and means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

[119] Under the *Insolvency and Bankruptcy Code, 2016*, National Company Law Tribunal is designated as the Adjudicating Authority, See section 60.

[120] Section 14(4), *Insolvency and Bankruptcy Code, 2016*

[121] Under the Code, the Committee of Creditors comprises of financial creditors, simply stating, those creditors which have lent money to the corporate debtor against time value for money. [Refer section 21 of the Code.]

[122] Sections 30(2) and 31, *Insolvency and Bankruptcy Code, 2016*

[123] Section 33(2) and (3), *Insolvency and Bankruptcy Code, 2016*

[124] Section 3(30), *Insolvency and Bankruptcy Code, 2016*

[125] Section 3(31), *Insolvency and Bankruptcy Code, 2016*

[126] Section 52(1), *Insolvency and Bankruptcy Code, 2016*

[127] *Sanjay Kumar Agarwal v. State Tax Officer & Anr,* Review Petition (Civil) No. 1620 of 2023, Supreme Court of India, judgment dated 31.10.2023. By virtue of this judgment, the Supreme Court affirmed an earlier judgment passed by the Division Bench of the Supreme Court in *State Tax Officer v. Rainbow Papers Limited,* Civil Appeal No. 1661 of 2020, Judgment dated 06.09.2022, which held that the definition of a secured creditor under the Code included any government or governmental authority and that a resolution plan which ignored dues to the government was liable to be rejected.

[128] *Greater Noida Industrial Development Authority v. Prabhjit Singh & Anr.* Civil Appeal Nos. 7590-7591 of 2023, Judgment dated February 12, 2024, where it has been held by the Supreme Court of India that in cases where by virtue of a statute, a charge is created on the assets of the Corporate Debtor by a governmental authority, such a governmental authority would be considered to be a secured creditor

[129] Section 63 and 231 of the Code

[130] Section 238 of the Code

[131] *Embassy Property Developments Private Limited v. State of Karnataka and Ors,* (2020) 13 SCC 308

[132] Steven Rares, Ship Arrests, Maritime Liens and Cross-Border Insolvency, Address at the 6th Annual World Congress of Ocean 2017, 3 November 2017 accessible at http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/rares-j-20171103/left-column/rares-j-20171103

[133] *Chan Siew Lee Jannie v. Australia and New Zealand Banking Group Limited,* [2016] 3 SLR 239

[134] G Seitz, *Interaction between Admiralty and Bankruptcy Law: Effects of Globalisation and recurrent tensions* (2009) 83 Tulane Review 1339

[135] Mohammud Jaamae Hafeez-Baig, *"Navigating the waters between admiralty and cross border insolvency: a comparison of the Australian, German and French positions"* [2017] LMCLQ 97, 108–109. Kim v Daebo International Shipping, Co Ltd [2015] FCA 684

[136] See for instance the discussion by Lord Simon of Glaisdale in his dissenting judgment in *The Atlantic Star* [1974] 1 AC 436

[137] See for instance the discussion by the Bombay High Court of India, in *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651 where common law precedents on this subject have also been discussed

[138] Paul Myburgh, Satisfactory for its Own Purposes: Private Direction Arrangement and Judicial Vessel Sails" (2016) 22 Journal of International Maritime law 355, 23 February 2017 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921700

[139] Position of law in Singapore, New Zealand and South Africa, See Sarah Derrington and James Turner QC, The law and practice of Admiralty Matters (OUP, 2nd Ed, 2016) citing the *The Halcyon Isle* [1981] AC 221, *The Ship Bett Ott v General Bills Ltd* [1992] 1 NZLR 655, and *Transol Bunker BV v MV Adrico Unity* (1987) 3 SALR 794

[140] Hasit Seth, FCIArb, Admiralty law and Maritime Liens, September 17, 2017 available at https://www.linkedin.com/pulse/admiralty-law-maritime-liens-hasit-seth/

[141] Shrikant Pareshnath Hathi (Dr) and Binita Hathi (Ms), Partners, Brus Chambers, Advocates & Solicitors, *Ship Arrest in India and Admiralty Laws of India,* available at https://admiraltypractice.com/chapters/80.htm

[142] Steven Rares, Ship Arrests, Maritime Liens and Cross-Border Insolvency, Address at the 6th Annual World Congress of Ocean 2017, 3 November 2017 available at http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/rares-j-20171103/left-column/rares-j-20171103

[143] Martin Davies, *Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity,* 17 September 2018, available at http://comitemaritime.org/wpcontent/uploads/2018/05/Cross-border-insolvency-and-admiralty-a-middle-path-MartinDavies-.pdf,;

[144] For instance, see the decision of the Federal Court of Australia in *Yu v. STX Pan Ocean Co Limited* (2013) 223 FCR 189 at 40-42

[145] Article 5, Enterprise Bankruptcy Law, China 2006, available at http://www.npc.gov.cn/zgrdw/englishnpc/Law/2008-01/02/content_1388019.htm

[146] Article 19, Enterprise Bankruptcy Law, China 2006

[147] Xinxin Wang, On the Exercise and Protection of Secured Claims in Bankruptcy Proceedings, (2017) Journal of CUPL, 23; See also, Article 109, Enterprise Bankruptcy Law, China 2006

[148] Article 11, Chinese Maritime Code

[149] Article 21 and 28, Chinese Maritime Code; Yuzhuo Si, *Maritime Law Monograph*, 4th Edition, China Renmin University Press, 2018; Tingzhong Fu, *Value Conflicts of the Maritime Lien and Limitation of Liability for Maritime claims and way to harmonise,* (2013) Chinese Journal of Law 193, 195

[150] Article 21, Special Maritime Procedure Law of China

[151] International Convention for Unification of certain Rules of Law Relating to Maritime Liens and Mortgages 1926; International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages 1967 and the International Convention on Maritime Liens and Mortgages 1993; Nicholas Gaskell and Richard Shaw, *The Arrest Convention 1999,* [1999] LMCLQ 470

[152] Provision of the Supreme People's Court on the Case Acceptance Scope of Maritime Courts, Interpretation No. 4 [2016] of the Supreme People's Court, available at http://enccmt.court.gov.cn/chinamaritimetrial/2016-10/26/c_59507.htm

[153] Article 3, Enterprise Bankruptcy Law, China 2006

[154] Dr. Jingchen XU, Post-Doctoral Fellow, Centre for Maritime Law, Faculty of Law, NUS, *Maritime Cross-Border Insolvency in China,* NUS Law Working Paper Series, July 2019, available at https://doi.org/10.1002/iir.1374

[155] See for instance the discussion *In re M/V Xin Dong Fu; Dr. Jingchen XU*, Post-Doctoral Fellow, Centre for Maritime Law, Faculty of Law, NUS, *Maritime Cross-Border Insolvency in China,* NUS Law Working Paper Series, July 2019, available at https://doi.org/10.1002/iir.1374

[156] Chun Li, *Analysis of the jurisdiction of disputes related to bankrupt Enterprises,* Journal of Law Application 15

[157] [2014] Dalian Interm Ct. Civ Third No. 3-1, Notice on the First Creditors' Meeting of STX (Dalian) Shipbuilding Co. Ltd. and its affiliated companies, available at http://court.dl.gov.cn/info/33836_84479.vm

[158] In Re Reorganisation of Jiangsu Sainty Marine Co. Ltd. [2015] Ning Comm. Bankr No. 26, available at njfy.gov.cn/www/njfy/cpws_mb_a39171226112833.htm

[159] *In re Qinzhou Guiqin Shipping Group Co,* [2014] Yong Ningbo Maritime Ct. First No. 63; [2015] Zhe Higher Ct. Maritime Final No. 169; Also see, Dr. Jingchen XU, Post-Doctoral Fellow, Centre for Maritime Law, Faculty of Law, NUS, *Maritime Cross-Border Insolvency in China*, NUS Law Working Paper Series, July 2019, available at https://doi.org/10.1002/iir.1374

[160] Shengshun Wu, Conflict and Connection: Maritime Litigation and Bankruptcy Procedure Run Separately (2017), Chinese Journal of Maritime Law 85; Xinxin Wang, *On the legal Application of the Bankruptcy of Shipping Enterprises,* (2018) Journal of Law Application

[161] Section 471B of the Corporations Act, 2001

[162] *In Re Aro Co. Ltd.* [1980] Ch 196; *In re Lineas Navieras Bolivianas* SAM [1995] BCC 666; *In re Aro* was followed by the Court of Appeal in Singapore in Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd [1999] 3 SLR 721

[163] *In re Grosvenor Metal Co Ltd [1950] Ch 63, 65; Mitchell and another v Buckingham International plc (in liq) and others, Re Buckingham International plc (in liq) (No 2)* [1998] 2 BCLC 369

[164] *Danny Morris & Anor v The Ship "Kiama"[1998] FCA 256*

[165] *In re Australian Direct Steam Navigation Co* (1875) LR 20 Eq 325; *In re Lineas Navieras Bolivianas* [1995] BCC 666, 677H

[166] Julie Soars, 7 Wentworth Selborne Chambers Sydney, *Cross-border insolvency and shipping – a practical guide,* 11 April 2016, accessible at 2016-04-11-CBI-and-Shipping-paper-Julie-Soars-.pdf (comitemaritime.org)

[167] *Kim v. Daebo International Shipping Co. Ltd.* [2015] FCA 684 Para 14

[168] 11 USC Section 1520

[169] 11 USC Section 362(5) (Such stay is applicable extraterritorially)

[170]11 USC Section 362(d)

[171] *Ibid*

[172] *Barnes v. Sea Haw. Rafting*, LLC, 889 F.3d 517 (9th Cir. 2018)

[173] See for instance, Atl. Richfield v. Good Hope Refineries, 604 F.2d 865, 869–70 (5th Cir. 1979) where it was held that an automatic stay will apply to a vessel; See also *In re Millennium Sea Carriers*, 419 F. 3d at 94–96 (2d Cir. 2005) (noting the uncertainty of a bankruptcy court's jurisdiction over maritime assets)

[174] United States v. ZP Chandon, 889 F. 2d 233, 238 (9th Cir. 1989)

[175] 11 USC Section 363

[176] *In re Barnes*, 889 F. 3d at 534

[177] 11 USC Section 362(d) and Section 1520

[178] Section 327(2) of the Companies Act, read with Section 76(3) of the Bankruptcy Act; *Director of Customs, Federal Territory v. Ler Chang Chye (Liquidator of Castwell Sdn Bhd, in liq)* [1995] 2 MLJ 600

[179] For instance, in a liquidation, an employee's claim for unpaid salary would not be enforceable against a company asset subject to a mortgage. However, a crewmen's claim for wages which gives rise to a maritime lien would have priority over the mortgagee in relation to the proceeds of the sale of the vessel; *The 'Halcyon Isle* [1979-1980] SLR(R) 538 (SGPC)

[180] *Lim Bok Lai v Selco (Singapore) Pte Ltd* [1987] SLR 423; In re Rio Grande Do Sul Steamship Co (1887) 5 Ch.D 282

[181] The 'Hull 308' [1991] 2 SLR(R) 643; *Lim Bok Lai v Selco (Singapore) Pte Ltd* [1987] SLR 423

[182] Section 211B(1)©; Singapore Parliamentary Debates, volume 94, Companies (Amendment) Bill (10 March 2017), The Senior Minister of State for Finance (Ms Indranee Rajah)

[183] Section 211B, Companies Act.

[184] Article 20(2), MCLBI

[185] Costas Paris and Erica E. Phillips, *Hanjin Shipping's Troubles Leave $14 Billion in Cargo Stranded at Sea,* September 7, 2016 available at https://www.wsj.com/articles/billions-in-cargo-remains-stranded-at-sea-1473285117

[186] *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co. Limited)* [2016] 5 SLR 787 and *Tai- Soo Suk v. Hanjin Shipping Co. Limited* [2016] FCA 1404

[187] Tai-Soo Suk v. Hanjin Shipping Co. Ltd. [2016] FCA 1404

[188] *Ibid* Paras 3-4

[189] Tai-Soo Suk v. Hanjin Shipping Co. Ltd. [2016] FCA 1404, Paras 51-58

[190] Rares, Justice Steven, Admiralty Law the flying dutchman of Cross-border insolvency, (FCA) [2009] Fedjschol 22, 28 November 2009, available at https://www5.austlii.edu.au/au/journals/FedJSchol/2009/22.html

[191] *In re Hanjin Shipping Co.* 2016 AMC 2113, 2124 (S.D.N.J., 2016)

[192] https://chambers.com/articles/ow-bunker-crisis-saga-supreme-court-confirmed-the-owners-liability-to-pay-ow-bunker

[193] *Precious Shipping Public Co. Ltd. and Others v. OW Bunker Far East (Singapore) Pte. Limited and Ors.* [2015] 4 SLR 1229; *PST Energy 7 Shipping LLC v. OW Bunker Malta Ltd.* [2016] AC 1034

[194] 11 U.S.C. §§ 1501-32; *In re OW Germany, G.m.b.H.*, No. Civ. 15-13018 (Bkrtcy. S.D.N.Y. 2016)

[195] 11 U.S.C. §§ 1501-32; *In re OW Germany, G.m.b.H.,* No. Civ. 15-13018 (Bkrtcy. S.D.N.Y. 2016)

[196] *Bonny Gas Transport Ltd v. OW Bunker Germany,* G.m.b.H., 2016 AMC 1560, 1564 (S.D.N.Y. 2016)

[197] *Diablo Fortune Inc v. Duncan, Cameron Lindsay and Another,* [2018] 2 SLR 129

[198] Companies (Amendment) Act 2018 (Act 35 of 2019) Singapore.

[199] The Honourable Judge of Appeal Steven Chong, Supreme Court of Singapore, *Keynote address at the 2nd meeting of the Judicial Insolvency Network, When Worlds Collide: The Interaction between insolvency and maritime law,* 22 September 2018, available at https://jin-global.org/content/jin/pdf/2018-sept-jin-keynote-address-new-york.pdf

[200] Appendix III of the Fifth Report, *First Law Commission of India,* accessible at 2022080589.pdf (s3waas.gov.in)

[201] *One Hundred and Fifty First Report,* Law Commission of India, 1994,

[202] *O. Konavalov v. Commander, Coast Guard Region,* (2006) 4 SCC 620

[203] *M/s Smit India Marine Service v. Mr. Shanmugam Rajasekar,* 2018 SCC OnLine Mad 13

[204] *M/s Smit India Marine Service v. Mr. Shanmugam Rajasekar,* 2018 SCC OnLine Mad 13, Paragraph 34

[205] *M/s Smit India Marine Service v. Mr. Shanmugam Rajasekar,* 2018 SCC OnLine Mad 13, Paragraph 37

[206] *Praxis Energy Agents SA v. M.T. Pratibha Neera,* (2018) 4 AIR Bom R 148

[207] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, judgment dated 19.05.2020 (A Special Leave Petition (C) No. 009384/2020, "*Sudip Bhattacharya v. Barge Madhwa*" has been filed assailing the judgment dated 19.05.2020 which is presently pending before the Hon'ble Supreme Court of India and is likely to be listed on 11.03.2024 for further consideration. However, there is no stay on the judgment 19.05.2020 of the Hon'ble Bombay High Court).

[208] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 84

[209] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 87

[210] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 88

[211] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraphs 91 to 95

[212] Amitava (Raja) Majumdar, Bose and Mitra and Co., Conflict of Admiralty & Insolvency/Company Laws: The Bombay High Court charts a clear course, May 23, 2022 vailable at https://www.linkedin.com/pulse/conflict-admiralty-insolvencycompany-laws-bombay-high-majumdar

[213] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraphs 112 to 121

[214] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraphs 123 to 127

[215] *Angre Port Private Limited v. TAG 15 and Anr.,* (2022) 1 AIR Bom R 689

[216] Angsley Investments Limited Vs. Jupiter Denizcilik Tasimacilik Mumessillik San. Ve Ticaret Limited and Ors., MANU/MH/0840/2023

[217] Under the Code, an insolvency professional is appointed as resolution professional to discharge various functions. See, particularly sections 18, 23 and 25 of the Code for the main functions and duties of resolution professional.

[218] See for instance, the order dated 12th October 2017 in *Fleet Ship Management Inc. v. LPG Maharshi Mahatreya,* in Notice of Motion (L) No. 608 of 2017 in Commercial Suit (L) No. 499 of 2017 of the Bombay High Court

[219] See for instance, the case of *Angre Port Private Limited v. TAG 15 (IMO. 9705550) & Ors.,* (2022) 170 SCL 244 (Bom)

[220] *Fleet Ship Management Inc. v. LPG Maharshi Mahatreya,* in Notice of Motion (L) No. 608 of 2017 in Commercial Suit (L) No. 499 of 2017 of the Bombay High Court

[221] (2022) 170 SCL 244 (Bom)

[222] Article 43, Enterprise Bankruptcy Law, China, Article 24, Chinese Maritime Code,

[223] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraphs 128 to 131

[224] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraphs 110

[225] Article 43, Enterprise Bankruptcy Law, China, Article 24, Chinese Maritime Code,

[226] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 125

[227] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraphs 99 and 100

[228] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 107

[229] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 114

[230] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 109

[231] For the purposes of this illustration and for ease of understanding, it is assumed that the Vessel Owner – A has ownership of only one asset, which is the Vessel X which forms a part of the assets of the Corporate Debtor under Section 14 of the Code.

[232] *Supra note 229*

[233] *Raj Shipping Agencies v. Barge Madhwa,* 2020 SCC OnLine Bom 651, paragraph 109

[234] Section 327(2) of the Companies Act, read with Section 76(3) of the Bankruptcy Act; *Director of Customs, Federal Territory v. Ler Chang Chye (Liquidator of Castwell Sdn Bhd, in liq)* [1995] 2 MLJ 600

[235] Ocean Winner, [2021] SGHC 8 Admiralty in Rem No. 86 of 2020

[236] Re Atlantic Computer Systems plc [1992] 2 WLR 367

[237] In re Qinzhou Guiqin Shipping Group Co, [2014] Yong Ningbo Maritime Ct. First No. 63; [2015] Zhe Higher Ct. Maritime Final No. 169; Also see, Dr. Jingchen XU, Post-Doctoral Fellow, Centre for Maritime Law, Faculty of Law, NUS, Maritime Cross-Border Insolvency in China, NUS Law Working Paper Series, July 2019, available at https://doi.org/10.1002/iir.1374 ; Shengshun Wu, Conflict and Connection: Maritime Litigation and Bankruptcy Procedure Run Separately (2017), Chinese Journal of Maritime Law 85; Xinxin Wang, On the legal Application of the Bankruptcy of Shipping Enterprises, (2018) Journal of Law Aplication

[238] Dr. Jingchen XU, Post-Doctoral Fellow, Centre for Maritime Law, Faculty of Law, NUS, *Maritime Cross-Border Insolvency in China,* NUS Law Working Paper Series, July 2019, Pages 26 to 28, available at https://doi.org/10.1002/iir.1374

[239] Rue 69(1) and 69(5) of the Admiralty Rules, 1988 of Australia

[240] Sections 4(2)© and 16 of the Admiralty Act, 1988 of Australia

[241] *In re Grosvenor Metal Co Ltd* [1950] Ch 63, 65; *Mitchell and another v Buckingham International plc (in liq) and others, Re Buckingham International plc (in liq) (No 2)* [1998] 2 BCLC 369

[242] 11 USC Section 362(d)

[243] *Ibid*

[244] See for instance, Atl. Richfield v. Good Hope Refineries, 604 F.2d 865, 869–70 (5th Cir. 1979) where it was held that an automatic stay will apply to a vessel; See also *In re Millennium Sea Carriers,* 419 F. 3d at 94–96 (2d Cir. 2005) (noting the uncertainty of a bankruptcy court's jurisdiction over maritime assets)

[245] United States v. ZP Chandon, 889 F. 2d 233, 238 (9th Cir. 1989)

[246] *Supra note 75*

[247] *Ibid*

[248] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee,* March 2018, Page 6, available at https://ibbi.gov.in/ILRReport2603_03042018.pdf

[249] Public Notice, Ministry of Corporate Affairs, *Draft Chapter on Cross-Border Insolvency,* 20th July 2018, available at https://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf

[250] Shyam Kapadia and Dhruva Gandhi, *No Smooth Sailing for Insolvency Law,* (2021) 5 SCC J-31

[251] See for instance the case of the *Swedish Club v. V8 Pool Inc,* Commercial Appeal No. 108 of 2021

[252] UNCITRAL Model Law, Article 2(b) and 16(3)

[253] Dr. Jingchen XU, Post-Doctoral Fellow, Centre for Maritime Law, Faculty of Law, NUS, *Maritime Cross-Border Insolvency in China,* NUS Law Working Paper Series, July 2019, available at https://doi.org/10.1002/iir.1374

[254] Tracing Admiralty Law in India, Mr. Shuvro Prosun Sarker, Ms. Shreyasi Bhattacharya, CMR University Journal for Contemporary Legal Affairs

[255] Law Commission of India, "151st Report on Admiralty Law", (1994), note 1 at para 3.1

[256] The Honourable Judge of Appeal Steven Chong, Supreme Court of Singapore, *Keynote address at the 2nd meeting of the Judicial Insolvency Network, When Worlds Collide: The Interaction between insolvency and maritime law,* 22 September 2018, available at https://jin-global.org/content/jin/pdf/2018-sept-jin-keynote-address-new-york.pdf

[257] https://bhattandjoshiassociates.com/11289-2/

[258] See for instance, an earlier circular dated 12th June 2018 issued by the IBBI which provided clarifications on the treatment of CIRP expenses , Fee and other expenses, IBBI/IP/013/2018, Circular dated 12th June 2018, available at https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20[June%202018]_2018-06-18%2014:06:58.pdf

[259] See for instance, a similar reasoning provided in respect of the exemptions provided for aircraft leases from the IBC moratorium in India by M.S. Sahoo and Harshita Garg, *Don't let sectoral laws dilute* IBC, Financial Express, November 6, 2023, available at https://www.financialexpress.com/opinion/dont-let-sectoral-laws-dilute-ibc/3297817/ ; *See also* in respect of the position in Australia, Julie Soars, 7 Wentworth Selborne Chambers Sydney, *Cross-border insolvency and shipping – a practical guide,* 11 April 2016, accessible at 2016-04-11-CBI-and-Shipping-paper-Julie-Soars-.pdf (comitemaritime.org)

[260] Enforcement of security rights over seagoing ships, aircraft, and trains in international treaties, Thomas Keijser and Feben van der Linden van Sprankhuizen, (2022).Published by Oxford University Press on behalf of UNIDROIT.

[261] *Ibid*

[263] Cosco Busan: Lack of communication, poor oversight and 53,500 gallons of oil in San Francisco Bay, safety4sea, May 21, 2019, availabe at https://safety4sea.com/cm-cosco-busan-lack-of-communication-poor-oversight-and-53500-gallons-of-oil-in-san-francisco-bay/

[264] available at https://fastercapital.com/keyword/mvrena.html#:~:text=The%20%22MV%20Rena%22%20Case%3A,cargo%20owners%2C%20and%20government%20authorities.

[268] Report of IBBI Expert Committee on Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016, January, 2024 available at https://ibbi.gov.in/uploads/whatsnew/1256aa8a9e2c89bd09d8186dae2e6019.pdf

Mediation in Insolvency, 2024; *Salem Advocate Bar Association, T.N. versus Union of India (Salem II),* (2005) 6 SCC 344; and *Afcons Infrastructure Limited and another versus Cherian Varkey Construction Company Private Limited and others (Afcons),* (2010) 8 SCC 24.

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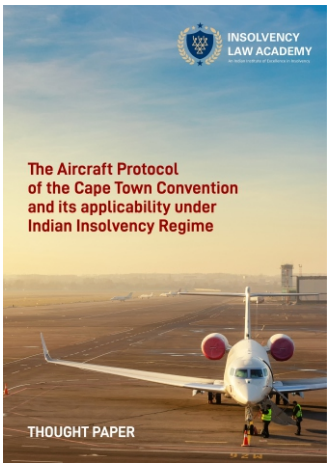

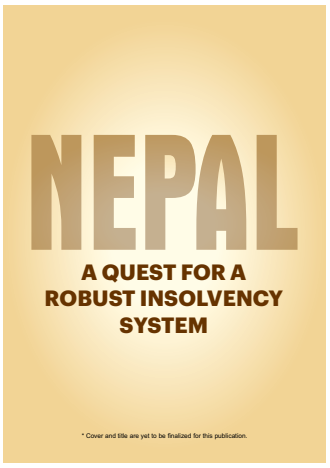

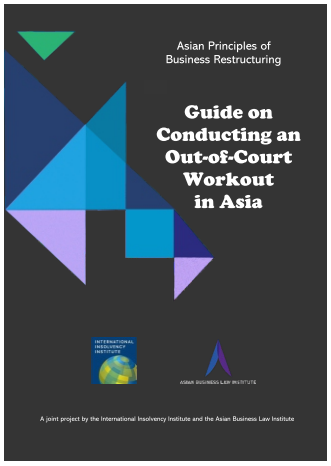

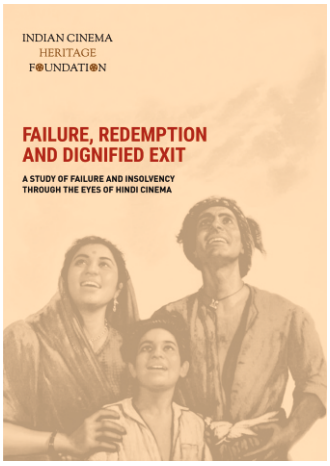

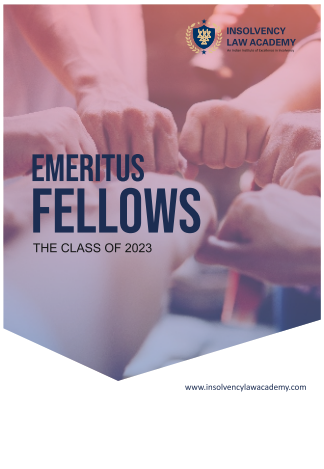

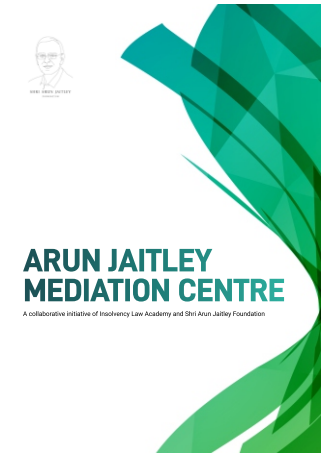

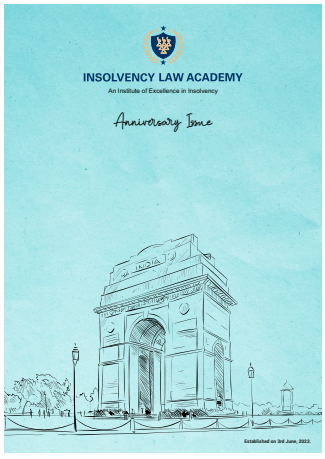

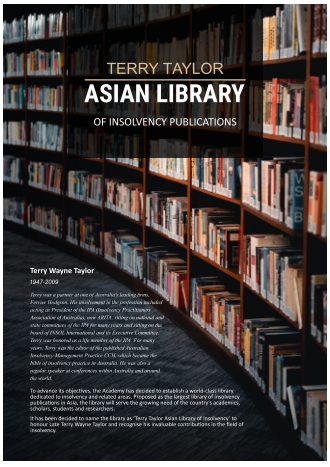

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