

THE
TRANSPORT
FINANCE LAW
REVIEW

FOURTH EDITION

Editor
Harry Theochari

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

ACCOUNT MANAGERS

Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCHER

Arthur Hunter

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Anna Andreoli

SUBEDITOR

Janina Godowska

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-38-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE ACQUISITION AND LEVERAGED FINANCE REVIEW
THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW
THE ASSET MANAGEMENT REVIEW
THE ASSET TRACING AND RECOVERY REVIEW
THE AVIATION LAW REVIEW
THE BANKING LITIGATION LAW REVIEW
THE BANKING REGULATION REVIEW
THE CARTELS AND LENIENCY REVIEW
THE CLASS ACTIONS LAW REVIEW
THE CONSUMER FINANCE LAW REVIEW
THE CORPORATE GOVERNANCE REVIEW
THE CORPORATE IMMIGRATION REVIEW
THE DISPUTE RESOLUTION REVIEW
THE DOMINANCE AND MONOPOLIES REVIEW
THE EMPLOYMENT LAW REVIEW
THE ENERGY REGULATION AND MARKETS REVIEW
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW
THE EXECUTIVE REMUNERATION REVIEW
THE FOREIGN INVESTMENT REGULATION REVIEW
THE FRANCHISE LAW REVIEW
THE GAMBLING LAW REVIEW
THE GOVERNMENT PROCUREMENT REVIEW
THE HEALTHCARE LAW REVIEW
THE INITIAL PUBLIC OFFERINGS LAW REVIEW
THE INSOLVENCY REVIEW
THE INSURANCE AND REINSURANCE LAW REVIEW
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW
THE INTELLECTUAL PROPERTY REVIEW
THE INTERNATIONAL ARBITRATION REVIEW
THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW
THE INTERNATIONAL TRADE LAW REVIEW
THE INVESTMENT TREATY ARBITRATION REVIEW
THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW
THE LENDING AND SECURED FINANCE REVIEW
THE LIFE SCIENCES LAW REVIEW
THE MERGER CONTROL REVIEW
THE MERGERS AND ACQUISITIONS REVIEW
THE MINING LAW REVIEW
THE OIL AND GAS LAW REVIEW
THE PATENT LITIGATION LAW REVIEW
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW
THE PRIVATE COMPETITION ENFORCEMENT REVIEW
THE PRIVATE EQUITY REVIEW
THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW
THE PRODUCT REGULATION AND LIABILITY REVIEW
THE PROJECTS AND CONSTRUCTION REVIEW
THE PUBLIC COMPETITION ENFORCEMENT REVIEW
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW
THE REAL ESTATE LAW REVIEW
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW
THE RESTRUCTURING REVIEW
THE SECURITIES LITIGATION REVIEW
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW
THE SHIPPING LAW REVIEW
THE SPORTS LAW REVIEW
THE TAX DISPUTES AND LITIGATION REVIEW
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW
THE THIRD PARTY LITIGATION FUNDING LAW REVIEW
THE TRADEMARKS LAW REVIEW
THE TRANSFER PRICING LAW REVIEW
THE TRANSPORT FINANCE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BASCH & RAMEH ABOGADOS ASOCIADOS

FENECH FARRUGIA FIOTT LEGAL

HAN KUN LAW OFFICES

JURINFLOT INTERNATIONAL LAW OFFICE

KVALE ADVOKATFIRMA DA

LS LEXJUS SINACTA

MCMILLAN LLP

MULLA & MULLA & CRAIGIE BLUNT & CAROE

NORTON ROSE FULBRIGHT

URÍA MENÉNDEZ

WALKERS

YOSHIDA & PARTNERS

CONTENTS

PREFACE.....	vi
<i>Harry Theochari</i>	
Chapter 1	COMPLIANCE OF TAX LEASE FINANCINGS WITH THE EUROPEAN STATE AID REGIME..... 1
<i>Christine Ezcutari and Yann Anselin</i>	
Chapter 2	BRAZIL..... 4
<i>Carlos Rameh, Victor de Oliveira Fernandes, Paulo Mattar Filho, Renata Iezzi and Nicole Cunha</i>	
Chapter 3	CANADA..... 15
<i>Damon Chisholm, Joanna Dawson, Ryan Gallagher and Lucia Stubldreier</i>	
Chapter 4	CAYMAN ISLANDS..... 23
<i>Richard Munden, Nick Dunne and Edward Rhind</i>	
Chapter 5	CHINA..... 30
<i>Wang Shu, Zhu Jun, Zhang Ling and Ren Jiyu</i>	
Chapter 6	INDIA..... 44
<i>Shardul J Thacker</i>	
Chapter 7	ITALY..... 60
<i>Anna Masutti, Claudio Perrella and Pietro Nisi</i>	
Chapter 8	JAPAN..... 74
<i>Norio Nakamura and Taichi Hironaka</i>	
Chapter 9	MALTA..... 83
<i>Tonio Fenech, Christian Farrugia and Neil Chetcuti</i>	

Contents

Chapter 10	MARSHALL ISLANDS.....	94
	<i>Sung-Hwan Choi</i>	
Chapter 11	NORWAY.....	100
	<i>Jostein Moen and Christian B Østlie</i>	
Chapter 12	PORTUGAL.....	107
	<i>João Anacoreta Correia, Maria João Dias, André Almeida Martins and Sara Cabecinha</i>	
Chapter 13	RUSSIA.....	118
	<i>Alexander Mednikov</i>	
Chapter 14	SPAIN.....	123
	<i>Tomás Fernández-Quirós and Carlos López-Quiroga</i>	
Chapter 15	UNITED KINGDOM.....	133
	<i>Kenneth Gray, Richard Howley and Tom Johnson</i>	
Chapter 16	UNITED STATES.....	145
	<i>Brad L Berman</i>	
Appendix 1	ABOUT THE AUTHORS.....	153
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	165

PREFACE

The Transport Finance Law Review is intended to provide the industry with a guide to transport finance today, in each of the key jurisdictions globally in which aircraft, rolling stock and ships are financed.

Traditional asset finance, in the form of bank debt, has long been the mainstay of the transport sector. It is apparent, however, that debt finance alone is no longer sufficient to meet the needs of the global aviation, rail and shipping sectors. As a result, the transport finance sector is undergoing a revolution, requiring its legal advisers to respond by providing clients with a far broader set of legal skills and market knowledge than was previously required.

Ten years on, the impact of the global financial crisis on the transport sector continues to be felt. Following the crisis, new regulation intended to prevent future crises has been introduced, notably Basel III and Basel IV, which are designed to strengthen banks' balance sheets by requiring them to hold additional capital against their loan books. The impact on an industry as capital-intensive as the transport sector is that long-term lending is now less attractive. This has led certain banks to exit the asset finance market altogether, with a number of banks taking the decision to sell all or part of their loan books to help them meet the new capital requirements.

However, it must be said that there is a marked difference in the attitude of banks and financial institutions when considering loans to the aviation and rail sectors and the shipping sector. At the time of writing, capital is readily available to much of the aviation industry, and there is competition between banks for what are considered to be the best customers. The capital markets are also open for business for the aviation sector, and there is a flow of equity investments from both hedge funds and private equity as well as large-scale investments from Asia (and China, in particular). In the rail market, where significant investment is being made globally, participants are increasingly looking outside their traditional markets in search of new opportunities. So far as the shipping industry is concerned, the amount of debt finance available to it has fallen dramatically, and alternative sources of finance, such as private equity, hedge funds, bond markets and capital markets, have also reduced greatly. This is not surprising to many as shipping gradually emerges from possibly the worst recession it has ever experienced in modern times, impacting across the entire spectrum of the industry, from dry bulk to tankers and from container ships to offshore vessels.

Asset finance in its traditional form is now available from relatively few banks, who in turn are prepared to lend to relatively few names, which are usually leaders in their relevant sectors. Despite this, the majority of capital available to the transport sector continues to take the form of bank debt. Tenors are shorter, however, and borrowing is more expensive. For a sector that requires billions of dollars to fund itself annually, a shortfall in funding is inevitable.

In response to the financial crisis, many companies operating in the transport sector reduced their debt, in preparation for more difficult trading conditions. Now, however, aviation and rail in particular face an upsurge in demand as passenger numbers rise, particularly in developing economies, and while industrial shipping remains bruised by overcapacity and lower freight volumes, demand in certain subsectors is growing, notably in the cruise sector and particularly in new markets.

This, coupled with the introduction of increasingly sophisticated and more costly technology, including fuel-efficient jets, high-speed rail and high-specification cruise vessels, is leading to increased funding requirements in many areas of the transport sector.

New participants see significant opportunities in transport and are entering the market using innovative new structures.

Capital markets and private equity structures now account for a substantial proportion of the transport finance market. In the shipping industry, well-known private equity players invested their own cash and continue to support the businesses into which they have invested rather than writing off these amounts, in the belief that the cyclical nature of shipping will result in some returns in the medium to long term. Other private equity investors consider that we have reached the bottom of the shipping cycle and that investments made now may yield attractive returns in the short term, while some funds are buying loans from traditional banks at a large discount in order to see immediate returns. In the aviation industry, leasing firms, who are frequently supported by private equity players, now account for around 40 per cent of the major aircraft manufacturers' sales. In the case of rail, privatisations are being considered in some jurisdictions and new investors are being attracted to the industry by the commitments made by governments worldwide to improve existing infrastructure and invest in new, sophisticated rail links. China's Belt and Road initiative is an example of a government-led programme that is likely to have a far-reaching impact on rail activity and indeed, on all transport and infrastructure assets.

The aviation, rail and shipping industries each have their own unique characteristics and need lawyers with a deep understanding of how each of these complex industries operates. A detailed knowledge of the principles of asset finance is now also required, combined with the ability to advise on new capital markets and corporate structures. In addition, while the majority of asset financings in the transport sector tend to be governed by New York or English law, an understanding of the principles of local law in the key jurisdictions in which transport assets are registered is also of great importance.

We have sought contributions from jurisdictions that play a leading role in the financing of transport assets. Each chapter provides an overview of the transport finance industry in these jurisdictions, with an analysis of how key lenders have changed over the past five years and how the financing of assets has developed as a result. Contributors have provided an overview of the legislative framework for transport finance and financial regulation affecting lenders to the transport sector. Authors have also been asked to review any significant innovations and notable recent and pending financings and cases, and to provide assessments of how the transport sector is likely to continue to develop in their markets.

I would like to thank the contributors to this volume. Their efforts are deeply appreciated and represent a substantial contribution to the transport law library during a period of transformation for the sector.

Each contribution reflects the significance of the transport sector today, and the need for readily available funding for industries that underpin the global economy by transporting people and commodities around the world every day.

While we are now beginning to see new banks entering the asset finance market, traditional asset finance is likely to remain in short supply in the coming years, and innovation will remain at the centre of our industry. The days of one asset financed by one bank have passed and, in response, lawyers have had to become increasingly nimble as clients require advice on developing intricate joint-venture agreements and complex capital market products. It is an incredibly exciting time to be a lawyer in this field, as our contributors demonstrate in the following chapters.

Harry Theochari

Norton Rose Fulbright

London

April 2018

INDIA

*Shardul J Thacker*¹

I INTRODUCTION

The transportation industry – aviation, shipping and rail – has been predominantly owned by government entities since India’s independence in 1947. Air India and Indian Airlines, both government-owned, rules the skies; the Shipping Corporation of India (SCI), established in 1961 and owned by the government, owns and operates around one-third of the Indian tonnage. All railway property is government owned.

i The transport finance industry

Since shipping and aviation are global industries, with cyclical ups and downs, Indian entrepreneurs, in the context of other industries, have not considered them ‘safe havens’ for their investments. Both are also dollar-based industries, and global banks tend to focus on large fleet-owners of aircraft and ships, which are rare in India. Indian banks are unable to commit long-term foreign currency financing to such cyclical industries, even if there is a natural hedge by earnings from freight. Besides this, the financing costs of the Indian banks are not competitive in terms of global financing, as interest rates are high.

Owing to the vast difference in the costs of domestic borrowing and external commercial borrowing (ECB), Indian companies have long since obtained finance for the acquisition of ships and aircraft from foreign banks located predominantly in Singapore, Hong Kong and Dubai. Indian banks such as SBI, ICICI and Axis Bank also provide finance through their offshore branches. The regulations governing ECB are framed by the Ministry of Finance and the Reserve Bank of India (RBI), and ECB borrowed by Indian companies to finance the cost of acquisition of ships must be in accordance with the Foreign Exchange Management Act and the guidelines, notification and circulars issued thereunder.

ii Recent changes

Traditionally, the ECB advanced by foreign lenders for acquiring ships and aircraft was secured by the creation of mortgages or charges over the underlying assets (the acquired ships or aircraft) and the assignment of insurance, and charter hire income of such underlying assets in favour of such foreign lenders. Owing to the global economic crisis and the average interest margin, which is charged at a higher rate for Indian companies than in other Asian countries, security prices in India have fallen drastically over the past few years, which in turn has resulted in domestic borrowers offering additional security over their other vessels or aircraft, cross-collateralising vessels to maintain the minimum security value. Such additional

¹ Shardul J Thacker is a partner at Mulla & Mulla & Craigie Blunt & Caroe.

security has resulted in ships or aircraft financed under other loans being mortgaged to the enforcing lenders and created heavy debt-mortgage profile for the ship or aircraft owner – this has raised concerns of a single loan default triggering several cross-default provisions. Since 2012, however, the RBI has been periodically reviewing and relaxing its guidelines relating to the securities that can be offered by ECB borrowers. Indian borrowers can now offer charges over their immovable and movable assets, and their financial securities. They can issue corporate or personal guarantees, subject to prior permission from the authorised dealer banks and compliance with the terms and conditions laid down by the RBI. This has brought great relief to Indian borrowers and foreign lenders alike. Domestic borrowers can now offer a variety of securities to maintain the minimum security values specified under facility agreements.

In keeping with macroeconomic developments and the experience gained by the RBI in administering the ECB regime over the past 10 years, the RBI, in consultation with the Indian government, has reviewed the extant ECB framework and issued new Master Directions on External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers (the Master Direction) on 1 January 2016. The overarching principles of the new Master Directions, among others, are as follows:

- a* a more liberal approach, with fewer restrictions on end uses, a higher all-in-cost ceiling, etc., for long-term foreign currency borrowings as the extended term makes repayments more sustainable and minimises rollover risks for the borrower;
- b* similarly, a more liberal approach for Indian rupee-denominated ECBs where the currency risk is borne by the lender;
- c* expansion of the list of overseas lenders to include long-term lenders like sovereign wealth funds, pension funds and insurance companies;
- d* only a small negative list of end-use requirements applicable to long-term ECB and Indian rupee-denominated ECBs;
- e* alignment of the list of infrastructure entities eligible for ECB with the harmonised list of the government of India;
- f* companies in the infrastructure sector, non-banking financial companies-infrastructure finance companies, non-banking financial companies-asset finance companies, holding companies and core investment companies are now also included in the list of eligible borrowers for medium-term foreign currency borrowings;
- g* several provisions have been introduced allowing start-up entities to borrow ECB up to a ceiling of US\$3 million per financial year without any end-use restrictions; and
- h* by way of a notification dated 4 January 2018, RBI has permitted the overseas branches or subsidiaries of Indian banks to refinance the ECB of highly rated (AAA) corporates as well as Navratna and Maharatna PSUs, providing the outstanding maturity is not reduced and all-in cost of fresh ECB is lower than the existing ECB. Partial refinancing of existing ECBs is also permitted subject to same conditions.

The framework for ECB as a means to attract flow of funds from abroad continues to be a major tool for calibrating the policy towards capital account management in response to an evolving macroeconomic situation.

However, under the Master Direction, shipping and airline companies are now eligible to raise ECB only for import of vessels and aircrafts respectively. The aviation industry opened up to domestic private participants in 1994, restricting them to Indian skies for five

years, and requiring them to maintain a fleet of minimum of 20 aircraft, before allowing them to fly to overseas destinations. In addition to the national airline, there are now eight private airlines operating in India, with a fleet of 370 aircraft, of which 263 are run by private airlines.

Indian airlines prefer leasing aircraft to acquiring them. Since availing themselves of ECB for working capital was not possible under ECB guidelines before 2012, Indian airlines used to borrow funds from domestic lenders for working capital purposes. In view of this, the RBI relaxed the ECB guidelines in 2012, allowing ECB to be used as working capital in the civil aviation sector, and also for the refinancing of outstanding working-capital rupee loans from domestic banks, under the approval route, provided the borrower has complied with the terms and conditions stipulated in the ECB guidelines. However, under the Master Direction, airline companies are now allowed to borrow ECB for import of aircraft only, and not for any other purpose. That said, ECB loans that have already been fulfilled prior to 2 December 2015 may continue without requiring any further consent from the RBI or the authorised dealer bank.

II LEGISLATIVE FRAMEWORK

i Domestic and international law and regulation

Shipping

Flag or mortgage registration

The registration of Indian ships and mortgages are governed by:

- a the Merchant Shipping Act 1958 (MSA);
- b the Merchant Shipping (Registration of Indian Ships) Rules 1960, as amended in 1966, 1970, 1994 and 1997; and
- c notifications issued by the Ministry of Shipping and the Directorate General of Shipping (DGS) under the MSA.

The Union Cabinet recently approved the Merchant Shipping Bill 2016. Under said Bill, Indian vessels have an obligation to register at any port as prescribed under the Bill. An Indian vessel can also be registered in a country other than India, subject to certain conditions, as may be prescribed. However, an Indian vessel must be substantially owned (having more than 50 per cent of the shares of the ownership of the vessel) by an Indian citizen or a company that has its principal place of business in India, and also by a cooperative society, in order to be registered as an Indian-flagged vessel.

An Indian-flagged vessel may be registered at any one of the five ports of registry. Foreign investment regulations were relaxed 15 years ago, enabling foreign entities to invest 100 per cent equity in an Indian shipping company, thereby operating in cabotage-regulated coastal trade. There is no parallel registration for bareboat charter structures, either for charter-in or charter-out or for vessels under construction, where mortgages in favour of lenders could be registered.

Pursuant to the cabotage policy, no foreign ship can engage in coastal trade between two Indian ports except under licence from the DGS. In 2012, the cabotage policy was relaxed at the International Container Transshipment Terminal (ICTT) Vallarpadnam, Cochin for

exim² container cargos. This relaxation enables foreign vessels to call at the ICTT, which is only 76 nautical miles from the main east–west shipping route, allowing the discharge of Indian cargo at Cochin rather than at neighbouring mainline transshipment ports such as Colombo or Singapore. From 2015, cabotage has been relaxed for certain special vessels for five years up to 2020. The cabotage policy was also relaxed to allow foreign-flagged vessels carrying passengers to call at more than one Indian port for a period of 10 years (i.e., from 6 February 2009 to 5 February 2019) without obtaining a licence from DGS. This relaxation period was further extended for a period of five years (i.e., up to 5 February 2024).

Further, since July 2014, Indian shipping companies can now own foreign-flagged ships subject to compliance with the DGS guidelines the Indian-controlled tonnage scheme allows shipowners based in India to acquire ships abroad and also flag them in the country of their convenience – typically tax-friendly jurisdictions to help access cheap sources of funds – while achieving fiscal and cargo benefits available in India.

Admiralty

The Lok Sabha as well as the Rajya Sabha has given its approval to the proposal of Ministry of Shipping to enact Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill 2016, and to repeal five archaic admiralty statutes. The Bill consolidates the existing laws relating to admiralty jurisdiction of courts, admiralty proceedings on maritime claims, arrest of vessels and related issues. It also repeals five obsolete British statutes on admiralty jurisdiction in civil matters, namely:

- a* the Admiralty Court Act 1840;
- b* the Admiralty Court Act 1861;
- c* the Colonial Courts of Admiralty Act 1890;
- d* the Colonial Courts of Admiralty (India) Act 1891; and
- e* the provisions of the Letters Patent 1865, applicable to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts.

This proposal seeks to fulfil a long-standing demand of the legal fraternity.

The jurisdiction with respect to maritime claims under the Bill will vest with the respective High Courts, and will extend up to the territorial waters of their respective jurisdictions. The admiralty jurisdiction currently applies to the Bombay, Calcutta and Madras High Courts and is further extended to Karnataka, Gujarat, Orissa, Kerala and Hyderabad.

The High Courts may exercise jurisdiction over claims relating to:

- a* disputes regarding ownership of a vessel;
- b* disputes between co-owners of a vessel regarding employment or earnings of the vessel;
- c* mortgage; and
- d* environmental damage caused by a vessel.

While determining maritime claims under the specified conditions, the courts may settle any outstanding accounts between parties with regard to the vessel. They may also direct that the vessel or a share of it be sold. With regard to a sale, courts may determine the title to the proceeds of such sale. Maritime liens are given the highest priority among all claims, followed

2 Export–import.

by mortgages and all other claims. In the case of maritime claims, claim for wages is given the highest priority, followed by claims with regard to loss of life or personal injury. Such claims shall continue to exist even with the change in ownership of the vessel.

Courts may exercise admiralty jurisdiction against a person with regard to maritime claims. However, the courts will not entertain complaints against a person in certain cases. These include:

- a* damage, loss of life or personal injury arising out of a collision between vessels that was caused in India; or
- b* non-compliance with the collision regulations of the Merchant Shipping Act 1958 by a person who does not reside or carry out business in India.

Further, courts will not entertain action against a person until any case against them with regard to the same incident in any court outside India has ended.

The courts may order the arrest of any vessel within their jurisdiction for providing security against a maritime claim that is the subject of a proceeding. They may do so under various reasons, such as:

- a* the owner of the vessel is liable for the claim;
- b* the claim is based on the mortgage of the vessel; and
- c* the claim relates to ownership of the vessel, etc.

With regard to appeals, any judgments made by a single judge of the High Court can be appealed against to a division bench of the High Court. Further, the Supreme Court may, on application by any party, transfer an admiralty proceeding at any stage from one High Court to any other High Court. The latter High Court will proceed with the matter from the stage where it stood at the time of the transfer.

The High Court vested with admiralty jurisdiction exercises the enforcement of maritime liens and maritime claims through the arrest of vessels and cargo on board and their judicial sale. This antiquated statutory law³ was largely updated to match those prevailing in most maritime nations by the landmark judgment of the Supreme Court in *MV Elizabeth* in 1993, allowing sister-ship arrest, etc.

In addition, the Major Ports Authorities Bill 2016 was introduced in the Lok Sabha on 16 December 2016. The Bill repeals the Major Port Trusts Act 1963 and seeks to provide greater autonomy and flexibility to major ports. It provides for the creation of a board of major port authority for each major port. The Bill decentralises decision making and ensures transparency in operations. The Bill provides for the composition of the board and ensures that various stakeholders including railways, customs, revenue, local state governments and road authorities are adequately represented. The Bill defines public-private partnership projects as projects taken up through a concession contract by the Board on a revenue or royalty-sharing basis. For such projects, the board may only fix the tariff for the initial bidding purposes. The appointed concessionaire will be free to fix the actual tariffs based on market conditions. It also envisages creation of an adjudicatory board for adjudication of disputes and looking into complaints received from port users.

3 The admiralty jurisdiction of the High Courts has been traced to the Charters of the British parliament 1774/1798, as expanded by the Letters Patent of 1823, 1862 and 1865 read with the Admiralty Court Act 1861, the Colonial Courts of Admiralty Act 1890 and the Colonial Courts of Admiralty Act 1891, which are still in force as preserved by Government of India Act 1935, and the Constitution of India.

Aviation

The civil aviation sector is regulated by:

- a* the Aircraft Act 1934 and the Aircraft Rules 1937;
- b* the Airports Authority of India Act 1994;
- c* the Airports Economic Regulatory Authority of India Act 2008;
- d* the Civil Aviation Requirements, issued from time to time;
- e* the Convention on International Interests in Mobile Equipment 2001 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment 2001 (Cape Town Convention); and
- f* the Carriage by Air Act 1972.

The Cape Town Convention was ratified by India in 2008 to protect the interests of the lenders and lessors involved in the financing of aircraft. It provides for the repossession of aircraft or collateral in the event of financial default by the lessee of the aircraft or borrower.

ii Specific practices

For most lenders, Indian-flagged vessels have not been suitable targets owing to a host of procedural issues. For instance, lenders have to make do with only provisional mortgage registration as security for one or two months following loan disbursements. Further, mortgages over ships in India only secure the principal and interest, whereas the norm elsewhere is that a mortgage allows lenders to claim enforcement costs.

Additionally, while the MSA permits enforcement of a mortgage by a sole mortgagee without intervention of the court, in order to gain a clean title to the vessel, free and clear of all claims, liens and encumbrances and to avoid mortgagee's exposure to claims from other parties to also ensure cooperation of the master and crew, lenders are usually left with no choice but to enforce the mortgage through the admiralty courts.

Also, pursuant to the General Insurance Business Act 1972, Indian entities are not allowed to insure any of their property in India, including any ship or aircraft registered in India, with insurers whose principal places of business are outside India, except with prior permission of the government. This restriction is not applicable in respect of types of insurance that are not offered by Indian insurance companies – for example, protection and indemnity insurance cover. This is a hindrance to some extent, as foreign lenders prefer insurance policies to be maintained with international insurance companies.

The Indian flag, although considered expensive, is still bankable with several international lenders, having lent funds to Indian shipowners such as SCI, the Great Eastern Shipping Company Limited, Greatship (India) Limited, Great Offshore Limited, and Mercator Limited.

III FINANCIAL REGULATION

i Regulatory capital and liquidity

In accordance with the RBI guidelines, implementation of Basel III commenced on 1 April 2013, to be phased in by 31 March 2018. Of late, industry-wide concerns have been expressed about the potential stresses on the asset quality and consequential impact on the performance or profitability of the banks. This may necessitate some lead time for banks to raise capital within the internationally agreed timeline for full implementation of the Basel III Capital Regulations. Accordingly, the transitional period for full implementation

of Basel III Capital Regulations in India is extended up to 31 March 2019, instead of as of 31 March 2018. The RBI has fixed the minimum Tier 1 capital ratio at 7 per cent of risk-weighted assets (RWA), of which 5.5 per cent must be common equity. One of the key features of Basel III is that all non-common Tier 1 and Tier 2 instruments issued by the banks must allow such instruments to be either written off or converted into common equity by banks that have solvency issues. In India, the RBI has not published the requirements on countercyclical capital buffers (zero to 2.5 per cent of RWAs), which aims to ensure that banking sector capital requirements take account of the macro financial environment in which banks operate.

On 31 March 2015, the RBI made several revisions to the Basel III regulations. Pursuant to the revised guidelines that came into effect on 1 April 2015, all new restructured loans must be classified as bad loans and provided for. Banks should call in the loan and take recovery action at the earliest opportunity or sell non-performing assets to asset reconstruction companies. This is broadly similar to the situation in US bankruptcy law.

ii Supervisory regime

Under the ECB regulations, whether under the automatic route or under the approval route, Indian borrowers have to apply for and obtain loan registration numbers from the RBI. Monthly reporting of withdrawals, utilisation, repayment and other payments is required, including any revisions or modification in the ECB, such as an increase or reduction in the loan amount or revisions to the schedule of disbursements, repayments or interest payments. Thus, the RBI governs and regulates the borrowing of funds and security, and also monitors ECB until it is repaid, including enforcement of security.

Such stringent regulations have reassured foreign banks that borrowers' crucial activities are being overseen. On the other hand, restrictions on charging default interest, on mandatory repayments following a default event, and restrictions on the tenor make loans inflexible, which has put off some foreign lenders. The RBI has, however, recently permitted authorised dealer banks to allow changes or modifications in the drawdown and repayment schedules, average maturity period and changes to the all-in cost, provided the ceilings imposed by the RBI guidelines are complied with.

IV SECURITY AND ENFORCEMENT

The ECB guidelines permit Indian borrowers to grant security of their choice to foreign lenders. Primarily, ships and aircraft for the acquisition of which the ECB is borrowed are secured in favour of the lenders. No approval is required from the RBI or authorised dealer for creation of a mortgage or charge over the ships and aircraft, as well as for the assignment of insurance, charter hire income of such ships and aircraft. Security over aircraft may also be created by way of hypothecation, fixed or floating charge, lien, pledge, retention of title, conditional sale and assignment.

Pursuant to the MSA, multiple mortgages can be created over a vessel, but the sole mortgagee of a vessel can enforce its rights over the vessel without the intervention of the court whereas, in the case of multiple mortgages registered over a vessel, a mortgage can only be enforced by applying to the competent court.

i Financing of contracts

Under Indian law, a mortgage can only be created over a vessel that has been provisionally or permanently registered with the Registrar of Ships and cannot be created over a hull under construction. Hence, financing of newly built ships is secured by the assignment of the shipbuilding contract executed between the shipbuilder and the borrower (i.e., purchaser) and the refund guarantees issued by the banks of the shipbuilders in favour of the lenders until such time as the ship is constructed and delivered to the borrower and registered with the Registrar of Ships.

ii Enforcement

Shipping

A mortgage registered over an Indian vessel may be enforced in India or outside India.

In India, a vessel can be arrested and sold through the admiralty courts in India by public auction, thereby ensuring clean title to the vessel, free and clear of all claims, liens and encumbrances. Port dues, admiralty marshal's costs and maritime liens ranking in priority, however, must be paid.

Under the MSA, the sole mortgagee may also enforce a mortgage by taking possession of the vessel and selling it to a third party without the involvement of the courts. Although in law, a sole mortgagee has the right to proceed against and sell a vessel without the intervention of the court, in reality, the cooperation of the master and crew is necessary. Also, a private sale does not clear the title of the vessels of all claims and encumbrances, and the buyer of the vessel has to acquire the vessel subject to such claims and encumbrances.

A mortgage registered over an Indian vessel can also be enforced outside India, provided the loan documentation permits such enforcement. If the mortgage is enforced outside India, the foreign lender who has obtained a decree from a court in a foreign country can approach an Indian court for enforcement of the decree under the Civil Procedure Code.

If a judgment has been obtained in any reciprocating territory, the same will be recognised and enforced by the courts in India without re-examination of the issues, provided the judgment is pronounced by a competent court and is on the merits and based on principles of international law, and not opposed to natural justice, or founded on fraud or a breach of any Indian law.

Aviation

The Cape Town Convention confers remedial rights on a lender when the facility has been charged and registered as per the Convention. The chargee can take possession of the aircraft from the lessee in the event of default. Since India is a signatory to the Cape Town Convention, the Directorate General of Civil Aviation (DGCA) will cancel the registration of the aircraft, thereby permitting the chargee to take possession of it.

In the event of financial default, the lessor may unilaterally terminate the agreement and repossess the aircraft or obtain an order from the district court having jurisdiction over the place at which the aircraft is located, for its repossession. The lessors are also required to get the aircraft deregistered from the DGCA prior to repossessing the aircraft. Unless there is an explicit provision in the Cape Town Convention requiring the chargee to seek leave of the court, India has declared that a chargee will not require leave of the court. This can be construed to imply that, even in the case of a bankruptcy of an Indian lessee, such chargee will not be required to obtain leave of the court to repossess the aircraft.

The DGCA requires the consent of the lessee to deregister the aircraft. It may also receive objections to such cancellation from government departments if they are owed money by the defaulting airlines. Moreover, even after deregistration of the lessor's aircraft by the DGCA, the Airports Authority of India (AAI) may impose a lien on the aircraft for unpaid dues by way of ground rent, landing charges, etc., and has the right to detain the aircraft. Also, the aircraft are sometimes impounded by the custom authorities for non-payment of custom duties, which can be a problem in the repossession of an aircraft by lessors.

The power to detain aircraft and other assets is derived from Section 142(c)(ii) of the Customs Act 1962 and Section 87(c) of the Finance Act 1994 (the Finance Act), which allow attachment of 'any movable or immovable property belonging to or under the control' of a defaulter. In a matter brought by the service tax authorities, relating to the attachment of engines belonging to Natixis, the High Court rejected the lien exercised by the service tax authorities. In another similar matter, International Lease Finance Corporation (ILFC) challenged the attachment order passed under Section 87(c) of the Finance Act by the service tax authorities – the engines have now been redelivered. In the *Natixis* decision, the court held that property owned by a third party cannot be attached for the dues payable by Kingfisher Airlines.

In the case of *Aer Lingus Limited v. Airport Authority of India*, the Bombay High Court held that if dues are owed by the airline operator to the Airport Authority of India, the owner of such a craft cannot be deprived of deregistering and repossessing its aircraft in circumstances where the lessee has outstanding airport parking fees. However, this case is very different from the *Kingfisher* case.

iii Arrest and judicial sale

Courts may order the arrest of any vessel within their jurisdiction for providing security against a maritime claim that is the subject of a proceeding. They may do so under various grounds, such as:

- a the owner of the vessel is liable for the claim;
- b the claim is based on mortgage of the vessel; and
- c the claim relates to ownership of the vessel.

For admiralty actions, a ship must be in Indian territorial waters. The prerequisite for an admiralty action for enforcing *in rem* rights is that the claimant must demonstrate that the res – the ship – is in Indian waters; hence, no action can be filed in anticipation of a ship that is yet to arrive. A substantive admiralty suit must be filed, unlike in other jurisdictions where only a writ need be entered. Further arrest of bunkers is not permissible in India. As per Indian law bunkers are not considered to be maritime property. Therefore the courts exercising admiralty jurisdiction do not permit the arrest of bunkers.⁴ Recently, the Division Bench of the Bombay High Court in *Mansel Limited v. The bunkers on board the Ship m.v. Giovanna Luliano & Ors*⁵ did not accept the contentions of the arrestor that even in England, an admiralty court in exercise of its admiralty jurisdiction can order arrest of bunkers on board a vessel. The Division Bench upheld the view in the matter of *Peninsula Petroleum Limited v. Bunkers on Board the vessel m.v. Geowave Commander Ltd.*

4 *Peninsula Petroleum Ltd v. Bunkers on Board the Vessel, M.V. Geowave Commander* 2015(3) Bom CR 693.

5 Appeal No. 319 of 2015 by an Order of 5 May 2017.

The suit must be filed in the admiralty division of the High Court by submitting a complaint with full documentation. The High Court will schedule a hearing to consider the merits of the claim for arrest. The arrest warrant is issued by the sheriff's office, and is served on the vessel or the master, ports agent and the customs authorities. A court sale is by public auction conducted by the sheriff, inviting offers through advertisements in leading shipping papers such as Lloyd's List or Tradewinds. If the borrower contests the mortgage claim or other creditors apply to intervene in the proceedings, additional hearings are scheduled and the priorities of claim determined.

With regard to appeals, any judgments made by a single judge of the High Court can be appealed against to a division bench of the High Court. Further, the Supreme Court may, on application by any party, transfer an admiralty proceeding at any stage from one High Court to any other High Court. The latter High Court will proceed with the matter from the stage where it stood at the time of the transfer.

Security for costs and damages is not a condition for the arrest, but when applying for the arrest, an undertaking is required to pay such sum by way of damages as the court may award in the event of an affected party sustaining harm from the arrest.

V CURRENT DEVELOPMENTS

i Recent cases

Shipping

In 2017, the Bombay High Court in the matter of *Pacific Gulf Shipping (Singapore) Pte Ltd v. SRK Chemicals Ltd & Anr* (Notice of Motion (L) No. 74 of 2017), held that an admiralty court does not have jurisdiction to arrest cargo on board a ship for an unrelated claim.

In 2016, the Supreme Court of India in the case of *CIT v. Trans Asian Shipping Services (P) Ltd*,⁶ observed that whenever there is a question of a tonnage of ship and the said tonnage is to be determined, it has to be in accordance with the valid certificate indicating its tonnage and it is a compulsory obligation of the taxpayer to produce such a certificate. Nonetheless, the arrangement pertains only to purchase of slots, slot charter and the sharing of the break-bulk vessel. The requirement of producing a certificate does not apply when the entire ship is not chartered. Allowing the benefit of a tonnage tax scheme to the taxpayer, this Supreme Court decision may help the shipping companies to claim the benefit of a tonnage tax scheme for slot charter arrangements.

In 2015, in the case of *Petromarine Products Ltd v. Ocean Marine Services Co Ltd*,⁷ the Supreme Court held that when a suit is filed before court having jurisdiction over vessel in question and that court passes order for arrest and sale of vessel pursuant to which sale is effected, vessel and sale proceeds become custodial legis of that court and no subsequent proceedings by any other person interested can be maintained before another court without leave of jurisdiction court (Section 3(15) of the Merchant Shipping Act 1958). Since the vessel was berthed at Madras Harbour, the Madras High Court alone had the jurisdiction to enter any claim against the subject vessel as per the aforementioned Section. The arrest of the vessel by the Madras High Court being the first arrest, the vessel and the sale proceeds are *custodia legis* of the said court.

6 *CIT v. Trans Asian Shipping Services (P) Ltd* (2016) 8 SCC 604.

7 *Petromarine Products Ltd v. Ocean Marine Services Co Ltd* (2015) 7 SCC 229.

In 2016, in the case of *Union of India v. Sancheti Food Products Ltd*, the Supreme Court,⁸ within the short compass of facts, justified the award of compensation for damage suffered by the vessels in question. This was because of the following contradicting and conflicting stands that delayed the registration of the vessel: Part XVA of the Act that deals with the registration of ‘fishing boats’ was brought into the statute book in 1982 (to include seagoing shipping vessels) and was pursuant to the exercise of fresh legislation for the registration of vessels; whereas the Rules of 1960 that governed the parameters of registration were not substituted by this amendment made to the Merchant Shipping Act 1958 – the relevant statute dealing with registration of vessels.

In *MT Hartati* in 2014, the Bombay High Court, while deciding on the issue of arrest of a sister ship, also considered whether beneficial ownership existed, and held that the Court could look beyond the registered owner and ‘pierce the corporate veil’ only if it could be demonstrated that the ownership structure was a sham – created with the intention of defrauding creditors.

An associated ship owned by one company cannot, however, be arrested for a claim against another associated ship owned by another company, even though both companies might have common beneficial ownership, because the Indian courts generally do not pierce the corporate veil.

In the matter of *MV African Eagle* in 2013, the Bombay High Court decided that since the primary relief was for securing the foreign arbitral award, the Court had no jurisdiction to issue interim relief in support of a foreign arbitral proceeding in view of the Supreme Court decision in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc.*⁹

Aviation

In Delhi High Court in 2013, in the matter of *DVB Aviation Finance Asia Pte Ltd v. Directorate General of Civil Aviation*, the lessee, Kingfisher Airlines, objected to the repossession by claiming ownership rights as it was a financial lease. The court directed the DGCA to deregister the aircraft. No no-objection certificate was required from Kingfisher for deregistration of the aircraft.

In the *ILFC* matter, six aircraft leased to Kingfisher Airlines were directed by the Ministry of Civil Aviation to be deregistered to enable the lessor to repossess the aircraft to be flown out of India. However, the airport authorities detained the aircraft for their own claim for ground rent, etc. At the behest of the IFLC, the Delhi High Court passed an order releasing the aircraft. Eventually, the Supreme Court directed the AAI to release the aircraft upon ILFC furnishing a bank guarantee for the AAI’s claim.

In March 2015, in the matter of *Awas 39423 Ireland Ltd and Ors v. Directorate General of Civil Aviation and Ors*, the Delhi High Court ordered the latter to deregister six of SpiceJet’s Boeing 737 planes, following the termination of lease agreements. Babcock and Brown Aircraft Management had also sought the return of six Boeing B737 aircraft and a payment of US\$100 million from SpiceJet for unpaid rent and maintenance costs. The court observed that the DGCA was obliged to deregister planes on receiving a request from a leasing company in accordance with the Cape Town Convention.

8 *Union of India v. Sancheti Food Products Ltd* (2016) 3 SCC (Civ) 390.

9 *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 5520.

ii Developments in policy and legislation

Shipping

2016 has been one of the most remarkable years for Indian shipping, as it witnessed major policy changes that aim to drastically improve the overall growth of the industry. A slew of reforms were initiated to ensure a better policy environment conducive to business. The highly ambitious ‘Sagarmala’ project, which was conceptualised in 2015, has finally seen the light of day. The project aims to promote port-led direct and indirect development and to provide infrastructure to transport goods along the long coastline and the inland waterways to and from ports, quickly, efficiently and cost-effectively.

The types of development project currently being undertaken at the Sagarmala initiative include:

- a port-led industrialisation;
- b port-based urban development;
- c port-based and coastal tourism and recreational activities;
- d shipbuilding, ship repair and ship recycling; and
- e offshore renewable energy projects with base ports for installations.

As part of Sagarmala Project, more than 400 projects have been identified for implementation between 2015 and 2035 across the areas of port modernisation and new port development, port connectivity enhancement, port-linked industrialisation and coastal community development. Out of these, 199 focus projects are phased out up to 2019.

Maritime India Summit 2016

The maiden Maritime India Summit (Mumbai, 14–16 April 2016) was organised by the Ministry of Shipping. The objective of the Summit was to create awareness of the untapped potential of the Indian maritime sector and to showcase investment opportunities. More than 140 business agreements were signed during the Summit. The value of investments in these 140 projects is around US\$13 billion. The Ministry of Shipping also showcased around 240 projects that present investment opportunities in this sector in India over the next few years. The investment potential of these projects is around US\$66 billion.

The India Maritime Summit 2017 was held on 3 February 2017 at Mumbai. The objective of this summit was to discuss the emerging opportunities in India’s seaborne oil, chemicals and gas tanker trade and to provide the necessary platform for networking with the agenda to promote this industry.

Inland waterways

India has a vast riverine system that lies underdeveloped and is underutilised for transportation of cargo. The Indian government has realised the potential of the inland waterways and has directed the Inland Waterways Authority of India (IWAI) to make riverine transportation in India a reality. There is an enormous focus on the development of ‘inland waterways’, and the IWAI is going full throttle on reviving the inland waterways. The development of these waterways opens up new opportunities for business, such as:

- a supplying dredgers;
- b barges and cargo-handling equipment;
- c construction and management of terminals; and
- d hydrographic services.

In July 2014, the Ministry of Shipping permitted Indian shipping companies to acquire and own foreign-flagged vessels on the condition that the tonnage flagged outside India should not exceed the tonnage owned in India. This recent development has encouraged foreign lenders to lend ECB to Indian companies wishing to acquire foreign-flagged ships, as the consequent security (mortgage) would be created in the flagship registry, often having lesser procedural issues and faster and easier enforcement mechanisms than those in India.

The RBI has also proactively taken several progressive steps to overcome the global financial crisis. In September 2014 it allowed foreign banks to offer rupee-denominated loans to domestic companies by mobilising Indian rupees through swap transactions with authorised dealer banks in India. For the purpose of executing swaps for ECBs denominated in Indian rupees, a recognised ECB lender may also set up a representative office in India. Around four dozen foreign banks from 22 countries, including Japan, China and Germany, have representative offices in India. This additional source of money should benefit the corporate sector and also bring in competition.

Recently, the Asian Development Bank approved US\$631 million in loans and grants to develop the first key 800km section of a planned 2,500km East Coast Economic Corridor that will spur development on India's Eastern Coast and create seamless trade links with other parts of South and South-East Asia.

The Ministry of Shipping has also announced the preparation of framework or rules for Indian vessels to be given exim and domestic state-owned cargo support for three to five years.

The Central Road Fund (Amendment) Bill, 2017 was introduced in the Lok Sabha on 24 July 2017 by the Minister of Road Transport and Highways, Mr Nitin Gadkari. The Bill amends the Central Road Fund Act 2000. The Bill defines national waterways as those that have been declared as 'national waterways' under the National Waterways Act 2016. Currently, 111 waterways are specified under the 2016 Act. Under the 2000 Act, the fund can be utilised for various road projects including: (1) national highways, (2) state roads including roads of inter-state and economic importance, and (3) rural roads. The Bill provides that in addition to these the fund will also be used for the development and maintenance of national waterways. The Bill is not currently in force and would only come into force after receiving presidential assent.

Port-led developments

The Indian government plays an important role in supporting the ports sector. It has allowed foreign direct investment (FDI) of up to 100 per cent under the automatic route for port and harbour construction and maintenance projects. The Ministry of Shipping has formulated a revised central sector scheme to provide financial support to major or non-major ports and state governments for the creation of infrastructure for movement of cargo or passengers by sea or national waterways. This is in line with the Ministry's port-led development programme – Sagarmala – for creating better infrastructure and to promote coastal shipping. Simultaneously, a bill was passed in March 2016 to begin work on the '101 waterways' to transport cargo through the riverine systems and reduce the carbon footprint and logistics cost. During 2016–2017, major and non-major ports in India have accomplished a total cargo throughout of 1,133.09 million tonnes, an increase of 5.7 per cent previous year 2015–2016.

In order to improve port-rail connectivity, the Ministry of Shipping set up the Indian Port Railway Corporation Limited (IPRCL) to link all ports to the railway network across the

country. The IPRCL is currently conducting a feasibility study for implementation of seven projects connecting various ports. The projects are deemed to be implemented by relevant central ministries, state governments, ports and other agencies through public–private partnerships (PPPs). Around 20 projects were taken up for consideration across eight major ports, out of which, 11 projects total US\$1.13 billion.

There has been a lot of emphasis recently on the development of coastal shipping by the government. In July 2016, the government announced the creation of 14 coastal economic zones (CEZs), to be aligned to relevant ports in the maritime states, that will house coastal economic units for setting up manufacturing facilities. The CEZs are spatial-economic regions that could extend along 300–500km of coastline and 200–300km inland from the coastline. Each CEZ will be an agglomeration of coastal districts within a state.¹⁰

Although the Indian coastline is 7,517km, it has only 13 major ports administered by the government. The Union Cabinet gave ‘in-principle’ approval for the concept and institutional framework of the Sagarmala project in March 2015. Its prime objective is to promote port-led direct and indirect development and to provide infrastructure to transport goods along the long coastline and the inland waterways to and from ports, quickly, efficiently and cost-effectively. There are 187 minor ports, which are owned by the federal coastal state or PPPs or are private ports. These are not integrated with the major ports through coastal trade. At the major ports, tariffs are regulated, but at other ports they are market-driven. The Sagarmala project, *inter alia*, aims to enhance connectivity with the main economic centres and expand rail, inland water, coastal and road services, in order to lessen congestion on the road and railways. This would also be a more eco-friendly mode of transport, reducing greenhouse gas emissions. The current fiscal year has seen an investment of 700 billion rupees.

The Sagarmala Development Company Limited (SDC) was incorporated on 31 August 2016, after receiving Cabinet approval on 20 July 2016, for providing equity support to residual projects under Sagarmala. The first board meeting of the SDC was held on 21 September 2016. SDC currently has an authorised capital of 10 billion rupees and a paid up capital of 2,150,000,130 rupees. Mr Rabindra Kumar Agarwal has been appointed as the managing director of the SDC.

Aviation

Since 2012, foreign airlines have been permitted to invest up to 49 per cent in domestic airline companies. The Union Cabinet has approved the changes in FDI norms to allow foreign carriers to own 49 per cent in Air India after obtaining government approval route, a change that will allow foreign carriers to bid for the national carrier but with an Indian partner. This resulted in Etihad Airways acquiring a 24 per cent stake in Jet Airways. Furthermore, there are talks about Etihad Airways raising its stake in Jet Airways up to 49 per cent. Similarly, India’s newest airline Air Vistara is a result of the joint venture (i.e., Vistara) between Tata Sons Ltd and Singapore Airlines Ltd, wherein Tata Sons Ltd holds a 51 per cent stake in the said joint venture and the remainder (49 per cent) is held by Singapore Airlines in accordance with the governmental norms. In the case of non-scheduled air transport services or non-scheduled airlines, chartered airlines and cargo airlines, foreign direct investment (FDI) of up to 74 per

10 Maritime Gateway, August 2016.

cent is allowed¹¹ and investment by non-resident Indians of up to 100 per cent is allowed via the automatic route. Helicopter services and seaplane services require DGCA approval on FDI up to 100 per cent using the automatic route.

The same levels of investment are allowed with respect to ground-handling services, but this is subject to sectoral regulations and security clearances. FDI up to 100 per cent is allowed on the automatic route for maintenance and repair organisations, flight training schools and technical training institutions.

The Indian government has recently amended the Aircraft Rules to protect the interests of creditors in the aircraft leasing and lending sector in accordance with the provisions of the Cape Town Convention. Rule 30 of the Aircraft Rules has been amended by the insertion of a new Sub-rule 7, which provides for mandatory cancellation of the registration of an aircraft by the DGCA on receipt of an application from an IDERA holder prior to the expiry of the lease, subject to fulfilment of certain conditions mentioned therein by the IDERA holder. The Cape Town Convention Indian Aircraft Rules, reflecting the Indian Declarations, eliminates any residual arguments concerning the availability of a 'fleet-type' lien in India.

iii Trends and outlook for the future

Shipping

The Indian Shipping Registry is ranked 18th in the world in terms of tonnage, having the largest merchant shipping fleet among developed countries, with private interests having grown from 12 per cent in 1990 to the current level of 55 per cent, comprising 10.23 million tons held among 102 shipping companies. The current registered gross tonnage in 2017 stands at 11.48 million and 17.18 million deadweight tonnage, and the size of the Indian fleet is currently 1,625 vessels.

Considering that half of the present Indian fleet is 20 years old – an average of 17.5 years – approximately 4 million tonnes is due to be replaced, and an additional 16 million new gross tonnage required in the next five years to meet demand in the growing exim trade; this opportunity is valued at US\$20 billion. With the foreign flag relaxation, Indian shipping companies can now own 50 per cent of the new tonnage under foreign flags as foreign-controlled tonnage. Foreign banks should take this as some comfort in funding this new tonnage, enabling the Indian shipping companies to grow in terms of exim trade and the offshore oil and gas energy industry offering opportunities in investing in floating production, storage and offloading units, floating storage and regasification units, LNG vessels and specialist vessels for project cargo and river–sea transportation vessels, etc.

The remainder of this US\$10 billion could be debt in equity funding shared between Indian corporates and Indian lenders, thereby making the shipping industry an opportunity for domestic investment.

Increasing investments and cargo traffic point towards a healthy outlook for the Indian ports sector. Providers of services such as operation and maintenance, pilotage and harbouring and marine assets such as barges and dredgers are benefiting from these investments.

The Planning Commission of India forecasts an investment of 1.80626 billion rupees for this industry in its 12th five-year plan.¹² In addition, through the Maritime Agenda 2010–

11 Via the automatic route, up to 49 per cent, and Foreign Investment Promotion Board (FIPB) approved, between 49 per cent and 74 per cent.

12 www.ibef.org/industry/ports-india-shipping.aspx.

2020, the Ministry of Shipping has set a target capacity of over 3,130MMT by 2020, which would be driven by participation from the private sector. Non-major ports are expected to generate over 50 per cent of this capacity.

Aviation

FDI inflows into air transportation between April 2000 and December 2017 stood at US\$1,608.51 million according to the Department of Industrial Policy and Promotion Board. Boeing is planning to set up an aircraft-manufacturing base in India in keeping with the Make in India programme of the Indian government. The government has also decided to put management contracts out to tender for Kolkata, Chennai, Jaipur and Ahmedabad airports and request for qualification documents have already been sent out by the AAI. The government agency predicts that there could be around 500 airports, on both brownfield and greenfield sites, by 2020 with private-sector participation through PPP models with state support by way of finance, concessional land allocation and tax breaks. India's first ever greenfield airport was constructed at Andal near Durgapur in West Bengal, and became operational on 18 May 2015. However, since Air India was the sole airline functioning from the newly built Kazi Nazrul Islam Airport (Andal), it decided to withdraw its services from 17 June 2016 for operational reasons, resulting in no scheduled flights to and from the airport. After such withdrawal, Zoom Air, after receiving its DGCA licence, began its operations at Andal from 12 February 2017.

The National Civil Aviation Policy was approved by the Indian Cabinet on 15 June 2016, and covers 22 areas of the civil aviation sector. The timelines for effecting the schemes introduced under the said Policy differ, and will come into force at different times as may be notified. The new policy aims to take flying to the masses by making it affordable and convenient; establish an integrated ecosystem that will lead to significant growth of the civil aviation sector to promote tourism; increase the number of airports, employment and balanced regional growth; enhance regional connectivity through fiscal support and infrastructure development; and enhance ease of doing business through deregulation, simplified procedures and e-governance.

In October 2014, the Union Cabinet stipulated that for Indian carriers to fly abroad, they must fly on domestic routes for five years and have a fleet of 20 aircraft. With the introduction of the Civil Aviation Policy, the aforementioned requirement has now been modified, and all airlines can commence international operations provided that they deploy 20 aircraft or 20 per cent of total capacity (in term of average number of seats on all departures put together), whichever is higher for domestic operations.

Furthermore, the Goods and Service Tax Act 2017, (GST) a significant tax reform was implemented by the government of India on 1 July 2017. Many of the indirect taxes have been subsumed to GST. Thus the provisions of GST would have to be taken into consideration for the aforementioned sectors.

ABOUT THE AUTHORS

SHARDUL J THACKER

Mulla & Mulla & Craigie Blunt & Caroe

Shardul Thacker has extensive experience in infrastructure projects in terms of oil and gas, ports, PPP projects, offshore construction and logistics. He contributes actively to structuring and negotiations in such projects. He currently acts for a multinational in India's first FSRU project.

Mr Thacker also has extensive experience of ship finance practice, having completed 350 ship finance deals over the past 10 years, including the acquisition of LNG carriers flying foreign flags and chartered by Indian companies. He advises on obtaining statutory long-term licences for chartering LNG carriers, and advises rig owners on Oil and Natural Gas Corporation Limited tender documents, requests for qualifications and requests for proposals.

He was ranked third in the 'Top 10 lawyers' by *Lloyd's List* for 2014, and has been rated as a leader in the fields of banking and finance, and shipping by *Chambers Asia-Pacific* since 2011. He is also the India correspondent for *Lloyd's Maritime and Commercial Law Quarterly* and vice president of the Indian Maritime Law Association, affiliated to the CMI

MULLA & MULLA & CRAIGIE BLUNT & CAROE

Mulla House, 51 Mahatma Gandhi Road

Flora Fountain

Mumbai 400 001

India

Tel: +91 22 6634 5496 / +91 22 2262 3191

Fax: +91 22 6634 5497

shardul.thacker@mullaandmulla.com

www.mullaandmulla.com



ISBN 978-1-912228-38-6