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The Legal 500 Country Comparative Guides

India

SHIPPING

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This country-specific Q&A provides an overview of shipping laws and regulations applicable in India.

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INDIA
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1. What system of port state control applies in your jurisdiction? What are their powers?

In India, the office of the Directorate General of Shipping **("DG Shipping")**, along with the Mercantile Marine Departments (MMD) form the Port State Control **("PSC")** and are tasked with the inspection of foreign flagged ships in Indian port and ensuring compliance with mandatory IMO Conventions such as the International Safety Management Code (ISM), International Ship and Port Facility Security code (ISPS), the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74), MARPOL 73/78, COLREGS 72 etc. The Merchant Shipping Act, 1958, is the umbrella provision, which confers powers upon the PSC in enforcing the various IMO conventions that India is a party to.

2. Are there any applicable international conventions covering wreck removal or pollution? If not what laws apply?

Whilst India has acceded to the Nairobi International Convention on the Removal of Wrecks, 2007, the same has not yet been incorporated into the domestic law. Wreck removal is presently dealt with under the Provisions of Part XIII of the Merchant Shipping Act, 1958, The Merchant Shipping (Wrecks and Salvage) Rules, 1974 (as amended in 1975) and to some extent, the Indian Ports Act, 1908.

India is party to the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992 along with its 1976 and 1992 Protocols, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (IOPC). The CLC and the IOPC have been statutorily incorporated into Indian domestic law in Part X-B and Part X-C respectively of the Merchant Shipping Act, 1958. However, India has not ratified the International Oil Pollution Compensation Supplementary Fund, 2003 (Supplementary Fund) nor incorporated its terms into domestic law.

The International Convention for Prevention of Pollution from Ships 1973 including its Protocol of 1978 (MARPOL), has been made a part of Indian Domestic law and enacted in Part XI-A of the MS Act.

Various rules and regulations have been made to enforce the above conventions under the Merchant Shipping Act, 1958.

3. What is the limit on sulphur content of fuel oil used in your territorial waters? Is there a MARPOL Emission Control Area in force?

India implemented the provisions of MARPOL Annexure VI, Regulation 14 *vide* Engineering Circular No. 02 of 2019 dated 28th August 2019. Thereby the Indian PSC prohibits the use of any fuel oil onboard ships with a sulphur content of more than 0.5 % m/m. on or after 1st January 2020.

The requirement related to carriage of non-compliant fuel oil is applicable to all ships except where equivalent means of compliance such as Exhaust Gas Cleaning Systems (as per MARPOL Annex VI Regulation 4), are provided. The ban on carriage does not cover the carriage of fuel oil as cargo.

4. Are there any applicable international conventions covering collision and salvage? If not what laws apply?

The Indian Merchant Shipping Act, 1956 and the Merchant Shipping (Prevention of Collisions at Sea) Regulations, 1975 incorporate the Convention on the International Regulations for Preventing Collisions at Sea, 1972 and its Annexures.

India has ratified the International Convention on Salvage, 1989 but has not yet incorporated this into domestic legislation. The current provisions dealing with salvage fall under Part XIII of the Indian Merchant

Shipping Act, 1956 along with The Merchant Shipping (Wrecks and Salvage) Rules, 1974 (Amended in 1975).

5. Is your country party to the 1976 Convention on Limitation of Liability for Maritime Claims? If not, is there equivalent domestic legislation that applies? Who can rely on such limitation of liability provisions?

India is a party to the 1976 Convention on Limitation of Liability for Maritime Claims. The same has been brought into force through Part XA of the Indian Merchant Shipping Act, 1958 with certain reservations (for example, Section 352A(1)(c) of the Act expressly excludes claims arising out of loss resulting from contractual rights which occur in direct connection with the operation of the ship).

The subsequent 1996 protocol was brought into force through the Merchant Shipping (Limitation of Liability for Maritime Claims) Rules, 2015 and the amendment to the 1996 protocol has been brought in through Merchant Shipping (Limitation of Liability for Maritime Claims) Rules, 2017.

The ship owner (which includes owner, charterer, manager and operator of a sea going ship), salvor, any person for whose act, neglect or default the ship owner or salvor, as the case may be, is responsible, and an insurer of liability for claims to the same extent as the assured himself can rely on such limitation of liability provisions. However, please note that Section 352E of The Merchant Shipping Act , 1958, specifically provides that "***any ship in relation to which the right of limitation is invoked or whose release is sought and which does not at the time specified above fly the flag of the State, which is a party to the Convention, is wholly excluded from the provisions of this Part"***

6. If cargo arrives delayed, lost or damaged, what can the receiver do to secure their claim? Is your country party to the 1952 Arrest Convention? If your country has ratified the 1999 Convention, will that be applied, or does that depend upon the 1999 Convention coming into force? If your country does not apply any Convention, (and/or if your country allows ships to be detained other than by formal arrest) what rules apply to permit the detention of a ship, and what limits are there on the right to arrest or detain (for example, must there be a "maritime claim", and, if so, how is that defined)? Is it possible to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration?

In the event that cargo is delayed, lost or damaged, the receivers of the cargo can file an admiralty suit and arrest the vessel to secure their claims, subject to their satisfying the pre-requisites under the Indian Bills of Lading Act, 1856 and the requirements under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 **("Admiralty Act").**

Whilst India is not a party to the Arrest Conventions of 1952 and 1999, the principles enshrined therein are a part of the common law of India (per the judgements of the Supreme Court in *M.V. Elisabeth v. Harwan Investment & Trading Pvt Ltd.*, 1993 Supp (2) SCC 433 and *Liverpool & London S.P. & I Assn. Ltd. v M.V. Sea Success I & Anr.*, (2004) 9 SCC 512).

India has enacted the Admiralty Act (with effect from 1st April 2017) and this statute now governs arrest of ships in India. Under the Admiralty Act, a ship can only be arrested for the limited cluster of maritime claims listed in Section 4 of the Admiralty Act. High Courts of all littoral states in India have admiralty jurisdiction under the Admiralty Act.

Arrests in India are granted upon a *prima facie* case being made out.

In India, it is not possible to initiate an action/ Suit only for interim measure/ security. Although the Admiralty Act does not specifically allow the arrest of a Vessel in the admiralty jurisdiction of the Court for obtaining security for foreign proceedings and/ or pending arbitration, the Bombay High Court has held that it is permissible for a party to obtain security pending arbitration by way of an arrest in India, provided that the Suit is filed praying for a decree and determination on the merits of the underlying maritime claim (*Siem Offshore Redri AS v. Altus Uber*, 2018 (6) ABR 361 as upheld by the Court of Appeal in *Altus Uber v. Siem Offshore Redri AS* (2019) 5 Bom CR 256).

7. For an arrest, are there any special or notable procedural requirements, such as the provision of a PDF or original power of

attorney to authorise you to act?

In order to file an admiralty suit for arrest of a Vessel, a Power of Attorney ("POA") is required and is to be signed by a director who is duly authorised by a Board Resolution to execute the POA and is to be notarized by a notary public and legalized by the Indian High Commission or Apostilled as applicable. Initially, a scanned copy of the notarized POA can be sent and the original POA can be subsequently sent once it has been legalized/apostilled.

Further, the requisite Court fees are to be deposited with the High Court at the time of institution of the admiralty suit as applicable. Court fees are generally calculated on an *ad valorem* basis, though in some High Courts this is capped.

8. What maritime liens are recognised?

Section 9 of Admiralty Act recognises the following maritime liens in India in order of *inter-se* priority:

a. claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
b. claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
c. claims for reward for salvage services including special compensation relating thereto;
d. claims for port, canal, and other waterway dues and pilotage dues and any other statutory dues related to the vessel;
e. 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.

9. Is it a requirement that the owner or demise charterer of the vessel be liable in personam? Or can a vessel be arrested in respect of debts incurred by, say, a charterer who has bought but not paid for bunkers or other necessaries?

Section 5(1) of the Admiralty Act *inter alia* provides that a vessel may be arrested where the court has reason to believe that the person who owned/ demise chartered the vessel at the time when the maritime claim arose is liable *in personam* for the claim and is the owner/ demise charterer of the vessel when the arrest is effected. However, in case of maritime liens, there is no requirement for *in personam* liability of the owner/ demise charterer and the Claimant can proceed in rem against the Vessel, irrespective of her ownership.

The Supreme Court has held that supply of necessaries and/or bunkers does not constitute a maritime lien under Indian law (*Chrisomar Corpn. v. MJR Steels (P) Ltd.*, (2018) 16 SCC 117). Therefore, in order to effect the arrest of a vessel for necessaries or bunkers, privity of contract i.e. *in personam* liability of the owner or demise charterer of the Vessel will have to be made out.

10. Are sister ship or associated ship arrests possible?

Section 5 (2) of the Admiralty Act permits the arrest of any other vessel for the purpose of providing security against a maritime claim (subject to the test of ownership/ privity as set out in Section 5(1) being satisfied) and thus Indian law allows sister ship arrests. However, associate ship arrests are not permitted in India.

11. Does the arresting party need to put up counter-security as the price of an arrest? In what circumstances will the arrestor be liable for damages if the arrest is set aside?

This depends on the procedure of the particular Court where the admiralty action is being moved. Some admiralty Courts (such as the High Courts of Bombay, Gujarat etc.) require the Plaintiff to provide an undertaking to pay damages for any losses suffered by the Defendant for wrongful arrest, at the time of institution of the suit.

Under Section 11 of the Admiralty Act the courts have been empowered to impose on a claimant, either as a condition to obtain an arrest or to maintain an order of arrest, an obligation to provide an undertaking to pay damages, or furnish counter-security for damages, for any loss or damage to the shipowner as a result of a wrongful/unjustified arrest or for excessive security having been demanded and provided by the Owners.

Whilst granting an order for damages, the Court will take into account steps taken in mitigation. The limitation period to lodge a claim for damages/counterclaim is one year from the date of the arrest (*M.V. Tongli Yantai and*

Ors v. Great Pacific Navigation (Holdings) Corporation Ltd., 2018 SCC OnLine Bom 2694).

12. How can an owner secure the release of the vessel? For example, is a Club LOU acceptable security for the claim?

A party seeking release of the Vessel is required to furnish security for the Plaintiff's claim (inclusive of interest and costs), either by way of cash deposit or a Bank Guarantee. Indian Courts do not accept Letters of Undertaking issued by P&I Clubs as security as a right (*Stephen Commerce Pvt. Ltd v. Owners and Parties in Vessel MT 'Zaima Navard'*, AIR 1999 Cal 64). However, if the Plaintiff consents or if the parties can agree to such letter of undertaking as security, the courts may accept the same.

13. Describe the procedure for the judicial sale of arrested ships. What is the priority ranking of claims?

The Court is vested with the powers under section 11(3) of the Admiralty Act, to pass an order for sale of the vessel and the sale proceeds are deposited in Court to the benefit of the maritime claims.

Judicial sale of arrested vessels is by way of public auction and the Vessel is sold free of all encumbrances and liens to the Purchaser. Proceedings for the sale of a vessel under arrest can be taken out on expiry of three days after the date of arrest if the Owner fails to enter appearance and/or furnish security for the Plaintiff's claim. The sale order would set out timelines for (a) valuation by a court appointed surveyor basis which a reserve bid price may be set; (b) settling of terms of the auction; (c) publication of advertisement in newspapers inviting bids; (d) submissions of the bids in a sealed envelope to Court along with the Earnest Money Deposit (EMD) as set in the terms of auction; and (e) the date for opening of bids in open Court and awarding the sale to the highest bidder subject to the contents of the Valuation Report.

In the event the Court does not receive a satisfactory bid, the Court will direct the Vessel be put up for re-auction.

14. Who is liable under a bill of lading? How is "the carrier" identified? Or is that not a relevant question?

The contractual carrier is liable under a bill of lading contract. Common law principles would be followed in identifying the carrier.

Under the Indian Bills of Lading Act, 1856 only a named consignee or endorsee would have the right to initiate a cargo claim against the carrier under the bill of lading contract.

15. Is the proper law of the bill of lading relevant? If so, how is it determined?

In general, Indian Courts will give effect to express governing law clauses in contracts including bills of lading. The choice must be bona fide and legal, and not against public policy. Under Section 57 of the Indian Evidence Act, 1872, foreign law is a question of question of fact and would have to be proved by both parties proffering evidence absent which the Court would presume that foreign law is the same as Indian law.

16. Are jurisdiction clauses recognised and enforced?

Indian Courts generally recognize the enforceability of forum selection clauses in contracts. The Supreme Court in *British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries*, (1990) 3 SCC 48 held that such clauses bind consignees/ holders of bills of lading and are enforceable as a matter of Indian law.

However, should the cause of action be shown to be in India, or India be shown to be the more natural or appropriate forum for determining disputes, Indian Courts may hold that they are seized of jurisdiction, irrespective of the exclusive jurisdiction clauses in the bills of Lading. In this regard, Indian Courts would apply the same principles as set out by the House of Lords in the case of *Spiliada Maritime Corporation v Cansulex* (1987) 1 AC 460, in considering whether India is the more appropriate forum for determining disputes under the bills of lading.

17. What is the attitude of your courts to the incorporation of a charterparty, specifically: is an arbitration clause in the charter given effect in the bill of lading context?

To incorporate an arbitration or dispute resolution clause, the bill of lading will be required to specify that the arbitration or dispute resolution clause is incorporated per the judgement of the Supreme Court in *MV 'Baltic Confidence' v. The State Trading Corporation*

of India Ltd (2001) 7 SCC 473.

In *British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries*, (1990) 3 SCC 48, the Supreme Court of India expressed the opinion that a consignee or an endorsee may be bound by the terms of the charter party terms incorporated into the bill of lading contract even when the consignee or endorsee is unaware of those terms.

18. Is your country party to any of the international conventions concerning bills of lading (the Hague Rules, Hamburg Rules etc)? If so, which one, and how has it been adopted – by ratification, accession, or in some other manner? If not, how are such issues covered in your legal system?

The Indian Carriage of Goods by Sea Act 1925 **("COGSA")** incorporates the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) in its Schedule. In 1993, India amended the COGSA and included certain provisions of the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules). Significantly, the legislation increased the limits as prescribed in the Hague-Visby Rules. However, the Rules do not, in themselves, have the force of law in India. The courts have also allowed carriers to take defences enumerated under Article IV of the Hague Rules (e.g., fire).

For the COGSA to become applicable, the port of loading has to be in India (*British India Steam Navigation Co. Ltd v Shanmughavilas Cashew Industries and Ors.,* (1990) 3 SCC 481) i.e. the COGSA applies to outward cargo i.e., for ships carrying goods from Indian ports to foreign ports or between ports in India.

19. Is your country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? If not, what rules apply? What are the available grounds to resist enforcement?

Although India is party to the New York Convention which has been incorporated into the Indian Arbitration and Conciliation Act, 1996 **("the Arbitration Act")**, a foreign arbitral award can be enforced in India only if the government declares the country in which the award was passed to be a 'reciprocating territory' under Section 44 or 53 of the Arbitration Act. India has presently notified 48 New York Convention territories, of the 164 contracting states to the Convention.

Article V of the New York Convention which sets out the grounds for refusal to enforce an arbitral award has been incorporated into Section 48 of the Arbitration Act.

By the 2015 amendment to the Arbitration Act, the scope of challenge to a foreign award was further narrowed, especially on the ground of public policy, by inserting a specific clarification that the test of whether there is a contravention with the fundamental policy of Indian Law cannot entail a review on the merits. The Supreme Court has, in a catena of judgements (most recently *Vijay Karia and Ors v. Prysmian Cavi E Sistei SRL,* 2020 SCC Online SC 177) held that an enforcing court cannot go behind the Award and/or Arbitrator's interpretation on the ground of public policy.

20. Please summarise the relevant time limits for commencing suit in your jurisdiction (e.g. claims in contract or in tort, personal injury and other passenger claims, cargo claims, salvage and collision claims, product liability claims).

The general time limit for commencing an action in India is governed by the Limitation Act, 1963. Parties cannot extend or reduce the limitation period by contract.

For most types of causes of action including for any contractual claim or tortious claim for damages or for personal injury, the period of limitation is 3 years from the date of the accrual of the "*right to sue*" i.e. the date from which the cause of action accrued.

The limitation period for bringing an action for loss or damage to cargo under the COGSA, i.e. for outward cargo and coastal cargo, is one year. For inward cargo i.e. import cargo the time bar is 3 years.

Under the Multimodal Transport of Goods Act, 1993, in cases of multimodal transportation, an action is to be brought under a multimodal transport document issued by a registered multimodal transport operator within nine months of the date of delivery of the goods or the date when the goods should have been delivered or the date on and from which the party entitled to receive delivery of the goods has right to treat goods as lost (being 90 consecutive days following the date of delivery expressly agreed upon).

Under the Consumer Protection Act, 2019, a consumer complaint must be filed within two years from the date on which the cause of action or deficiency in service or

defect in goods arises.

The Supreme Court has by its orders directed that the period from 15th March 2020 till 2nd October 2021 stands excluded whilst computing all statutory limitation periods in India, in light of the COVID-19 pandemic.

21. What restrictions, if any, has your jurisdiction imposed on crew changes in the wake of the Coronavirus pandemic?

Crew change restrictions have fluctuated from State to State and port to port at various times during the Coronavirus pandemic. Crew, shipowners and ship managers should check with their local agents for guidance on the restrictions being imposed at a particular state or port.

22. Does your system of law recognize force majeure, or grant relief from undue hardship? If so, in what circumstances might the Covid-19 pandemic enable a party to claim protection or relief?

The concept of Force Majeure has not specifically been defined under any Indian statute and any relief, if available, would be basis a Force Majeure Clause if incorporated into the terms of a contract. Such clauses are to be strictly read and any ambiguity would be read against the party seeking to rely on the clause (*Energy Watchdog v CERC*, (2017) 14 SCC 80).

Under Indian law, if the contract does not include a force majeure clause, the affected party can still claim relief under the doctrine of frustration. Therefore, if a Court finds that the contract itself contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Indian Contract Act, 1872 **("the Contract Act")** If, however, frustration took place *de hors* the contract, it will be governed by Section 56 of the Contract Act.

In light of the Covid-19 pandemic, various courts in India have considered the ambit of the Force Majeure declarations and parties invoking the force majeure clauses of the contract *vis-à-vis* frustration of the contract. Courts have also come down on government authorities for issuing advisories and circulars declaring the COVID-19 Pandemic as force majeure events and calling upon parties such as the CFSs', ICDs and Shipping Lines to excuse the demurrage being charged to cargo interests. The Courts have clarified that Force Majeure being a creature of contract cannot be enforceable against third parties and that the circulars and advisories issued by the government bodies are not binding.

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