



INSOLVENCY IN MARITIME INDUSTRY

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Confluence of Maritime and Insolvency Law

Maritime (Admiralty) and Insolvency are both age old systems of laws and rules. The Government of India has passed a Code which is uniform and comprehensive insolvency legislation encompassing all companies, partnerships and individuals.

One of the major areas of conflict between the two laws is that Admiralty always has *in rem* proceedings whereas Insolvency Law does not. *In Rem*¹ proceedings would operate only against the *res*, i.e., the assets that the ship owner company would own as opposed to *in personam* proceedings of insolvency where the proceedings would be against a legal person.² The clash is in particular between the important and unique admiralty law remedy available to the admiralty creditor, the action *in rem* which allows the arrest of the *res* in relation to which the debt arose, and the “universalist” Insolvency law principles.³

In India, maritime law is governed by *The Admiralty (Jurisdiction And Settlement Of Maritime Claims) Act, 2017* and *Admiralty Court Act, 2017* and Insolvency is governed by primarily Insolvency and Bankruptcy Code, 2016. In the clash between the two laws one issue in particular would be how an *in rem* law could co-exist with insolvency law that has little to no *in rem* provisions. It is an established principle of law that *in rem* and *in personam* claims cannot co-exist, and that would be the first and major area of clash. Another area of clash would be the non-obstante clause under Insolvency law and whether they would recognize any sort of *in rem* claims and proceedings.

The common questions that arise when the two laws conflict are⁴:

- Whether or not, a party can effectively enforce its rights under the Admiralty Act upon the commencement of a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 for the principal debtor?

¹“An action *in rem* is a proceeding that takes no notice of the owner of the property but determines rights in the property that are conclusive against all the world”- <https://legal-dictionary.thefreedictionary.com/in+rem>

²<https://www.lexology.com/library/detail.aspx?g=f88290f5-b308-43e8-8891-660b376df006#:~:text=The%20Court%20distinguished%20between%20an,operates%20against%20the%20shipowner%20defendant.&text=However%2C%20where%20the%20owner%20of,to%20the%20in%20personam%20claim.>

³<https://comitemaritime.org/wp-content/uploads/2018/05/2016-04-11-CBI-and-Shipping-paper-Julie-Soars-.pdf>

⁴<https://indiankanoon.org/doc/190648846/>



- Whether arrest of a vessel can be done by a maritime claimant, such as crew, salvors, port authorities, secured creditors and other claimants, during the pendency of winding up proceedings or insolvency proceedings against the principal debtor?
- How a maritime claim should be treated during the Corporate Insolvency Resolution Process (CIRP) and/or liquidation.
- Whether an Admiralty sale of a vessel can be ordered by the Admiralty Court during the pendency of winding up proceedings or insolvency proceedings or liquidation?
- Determination of priorities vis-à-vis maritime claims during winding up proceedings or insolvency proceedings or liquidation.
- The difference in manner of distribution of sale proceeds following an Admiralty sale of a vessel during the pendency of winding up proceedings or insolvency proceedings or liquidation.

While all these questions cannot be answered just from the reading of two laws harmoniously, Bombay High Court in a case recently has attempted to interpret the two laws to answer some of these questions. (Covered under “case study”)

To understand how much correlation is there between the two laws, impact of Insolvency law on the maritime industry is to be seen.

Impact of IBC on Maritime Industry

The maritime industry in India is wrought with chronic problems related to ageing fleet, inability to participate in critical sectors and large-ticket contracts of LNG trade and carriage. As per the shipping ministry, there is a need to augment Indian tonnage and increase the quantity of EXIM and coastal cargo carried on Indian ships. The problems that push the shipping companies into insolvency range from restricted cash inflows due to very low charter hire and freight rates in all segments. The challenges include regulations framed to meet tighter environmental requirements (which would mean huge upfront costs for shipping companies); continued supply of new tonnage leading to depressed freight rates and shortage of trained and qualified seafarers at optimum pay scales. These factors eventually impact transportation cost and insolvency.⁵ There is lack of specialised funding to Indian shipping companies. The cost of borrowing of an Indian company is higher by an average of 8-9 per cent compared to foreign companies while funding a 10-year-old oil tanker costing ₹280 crore.

Major Indian shipping companies are not doing well. Some are bankrupt, while others are in insolvency process. More and more shipping companies are opting to go into insolvency through Insolvency and Bankruptcy Code, 2016. As per the Annual Report by Ministry of Shipping of 2019-20⁶, a Shipping company by the name of “*Central*

⁵<http://shipmin.gov.in/sites/default/files/1405631573Anuleng.pdf>

⁶http://shipmin.gov.in/sites/default/files/Shipping%20Annual%20Report%20English_compressed.pdf



Inland Water Transport Corporation Limited”(CIWTC), which is a Government undertaking, the Cabinet decision for voluntary winding-up of CIWTC, the company on 19.12.17 had appointed an Insolvency Professional for conducting voluntary liquidation in terms of Insolvency & Bankruptcy Code, 2016. However, in view of the claims made by Kolkata Port Trust (KoPT) and Garden Reach Shipbuilders & Engineers (GRSE), the Liquidator of CIWTC on 21.06.2018 filed an application with National Company Law Tribunal (NCLT) in terms of Regulation 40(2) of Insolvency and Bankruptcy Board of India Regulations, 2017 for suspending the process of voluntary liquidation of CIWTC and for further directions. NCLAT *vide* order dated 07.08.2019 had disposed the case directing CIWTC to move before Adjudicating Authority with the request to act under Section 59 of IBC in view with the Govt. of India, Ministry of Shipping decision *vide* meeting dated 05.07.2019 to consent for Voluntary Liquidation of CIWTC and taking into account consideration the claim of Garden Reach Shipbuilders & Engineers Ltd. (GRSE) and Kolkata Port Trust (KoPT) and order of release of certain fund. The Adjudicating Authority, after hearing the parties will pass appropriate order in accordance with law.

As more and more companies in the maritime industry are opting for restructuring under IBC. Recently, *Reliance Naval and Engineering and the other against its subsidiary Reliance Marine and Offshore* were also brought in the ambit of insolvency by IFCI. IFCI aims to recover Rs 150 crore from the subsidiary Reliance Marine through the insolvency application. Reliance Marine and Offshore is engaged in building and repairing ships and boats. Reliance Naval and Engineering reported a net loss of Rs 523 crore in 2016-17, marginally smaller than the Rs 528 crore in 2015-16. Reliance Naval had claimed that its operations were “severely impacted” due to long gestation period of large-scale infrastructure created by the company and non-availability of timely working capital.⁷

As more and more companies in the maritime industry are accounting for losses and coming under the ambit of insolvency, claims are being received through Insolvency Law instead of under Admiralty Law which does not ensure admission and recovery of claims against the company.

Case Study

In a recent case of *Raj Shipping Agencies v. Barge Madhwa and Anr*⁸ along with other related matters, by a order on 19.05.2020, the Bombay High Court has attempted to considered the nature and provisions of proceedings under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (Admiralty Act) and harmonised the provisions of the Admiralty Act with the Insolvency and Bankruptcy Code, 2016 (IBC) and the Companies Act, 1956 (Companies Act) respectively, in a way to best protect the claimants in the case.

⁷<https://www.financialexpress.com/industry/insolvency-code-reliance-naval-reliance-maritime-taken-to-nclt-by-ifci/955030/>

⁸<https://indiankanoon.org/doc/190648846/>



Facts: Admiralty suits were filed and Arrest orders were passed by the Bombay High Court against vessels, whose owners were insolvent. The High Court issued a winding up order against one of the ship owners under the Companies Act. In parallel, insolvency proceedings were commenced against another ship owner by the National Company Law Tribunal and a moratorium ordered against commencement or continuation of all proceedings against that owner and its assets under IBC.

The official liquidator in the winding up proceedings objected to the continuation of the admiralty actions without the leave of the Company Court under Section 446 of Companies Act, 1956. As regards the insolvency proceedings against the other vessel owner, the maritime claimants argued that the moratorium under the IBC would not prevent continuation of the admiralty actions in the Bombay High Court.

Issues:

1. Is there a conflict between actions in rem filed under the Admiralty Act and IBC and if so, how is the conflict to be resolved?
2. Whether leave under Section 446(1)[3] of the Companies Act is required for continuation of an Admiralty action where a winding up order has been made or the Official Liquidator has been appointed?

Findings:

1. Is there a conflict between actions in rem filed under the Admiralty Act and IBC and if so, how is the conflict to be resolved?
 - The Court held that the Admiralty Act is a complete code as regards legal proceedings in connection with vessels (otherwise called actions *in rem*), their arrest, detention, sale and determination of priorities in respect of the sale proceeds of the vessels that were ordered to be arrested.
 - The Court noted that a maritime claim is enforced by an action *in rem* against the vessel (or its sale proceeds) and thus the vessel is liable to pay the claim. In such proceedings the owner is not a necessary or proper party.
 - This action *in rem* continues as an action *in rem* notwithstanding that the owner may have entered appearance, if security is not furnished for release of the vessel.
 - The vessel could be treated as an independent legal personality was reiterated. In Admiralty proceedings only the vessel is sued in its own name dehors the status of its owner (who may be the corporate debtor) and without reference to its owner. The vessel is itself liable and can be arrested for crystallizing the maritime claim in this respect. Thus, proceedings against the vessel may commence and continue



without the corporate debtor or company even though they may be undergoing winding up proceedings.

- Declaration of moratorium under Section 14 of the IBC will not prohibit the institution of an action *in rem* or continuation of a pending action *in rem*. However, in the event a moratorium is declared under Section 14 of the IBC, then an action *in rem*, if instituted prior to the declaration of the moratorium, will not be continued during the CIRP as this would defeat the very purpose of insolvency resolution under the IBC. Institution of an action *in rem* even after a moratorium is declared would also be permitted as the action *in rem* is not against the corporate debtor. However, the action will not be allowed to proceed after the arrest of the ship so as to allow for the CIRP to be effective.
- Under the Admiralty Act, both maritime liens and statutory rights *in rem* entail the accrual of security by way of a charge. An order of liquidation under Section 33 of the IBC and appointment of Liquidator would not bar institution or continuation of *in rem* proceedings against the vessel as it would not amount to a suit instituted against the corporate debtor which is barred under Section 33(5) of the IBC.
- The Plaintiff would be a secured creditor and will be entitled to realise its security interest as per Section 52(4) of the IBC. In such a case it will be open to the Liquidator, to defend the suit relying on Section 35(1)(k) of the IBC. The Court held that the law to be applied to the proceedings under Section 52(4) of IBC before the High Court would be the Admiralty Act.
- In view of the objective of the IBC *i.e.* to reorganise corporate debtors and help stressed companies the Admiralty Court will not order the sale of the vessel in order to allow the insolvency resolution process to fructify. In special circumstances the High Court held that it could exercise its discretion and proceed to sell the vessel if the vessel is not being manned, equipped and maintained by the Resolution Professional during the moratorium and all charges including port charges, supply of bunker, fuel, and other necessary supplies for the same are not being paid by the Resolution Professional or if the vessel becomes a navigational hazard.
- Plaintiff could approach the Admiralty Court for sale of the vessel. The Court observed that such a sale would in fact realize maximum value due to the inherent benefits of a judicial sale by an Admiralty Court and would be in the interest of all concerned since a sale of the vessel by the Liquidator cannot extinguish maritime liens and therefore the vessel may not attract any bidders.
- The Court held that Section 53 of the IBC, which does not take into account maritime claimants, will not be applicable on priorities inter se maritime claimants and distribution of sale proceeds.



2. Whether leave under Section 446(1)[3] of the Companies Act is required for continuation of an Admiralty action where a winding up order has been made or the Official Liquidator has been appointed?

- The Court held that the Admiralty Act is a comprehensive Code for arrest of vessels, maritime claims and determination of priorities. Hence, it is a subject specific provision relating to specific, defined and describable subjects and is therefore regarded as an exception to and will prevail over a general provision relating to a broad subject as found in the Companies Act. The Admiralty Act will thus be held to prevail over the Companies Act.
- The stay of proceedings under Section 446(1) of the Companies Act would not operate against pending Admiralty proceedings or which Admiralty proceedings may be sought to be commenced before a High Court.
- The Court further held that leave under Section 446(1) is not required for the commencement of an action *in rem* or continuation of the action against the vessel where a winding up order has been made or if the Official Liquidator is appointed as Provisional Liquidator of the company which owns the vessel.
- After an interpretation of Section 3 of the Admiralty Act the Court held that the Company Court would not have jurisdiction to entertain or dispose of a suit *in rem* against a vessel by taking recourse to the provisions of Section 446(2) of the Companies Act.
- It was held that there is no conflict between Section 529A of the Companies Act and Section 10 of the Admiralty Act and that the scheme of priorities under Section 10 of the Admiralty Act takes care of payments due to workmen under Section 529A of the Companies Act.

The Bombay High Court upheld the rights of maritime claimants in Admiralty proceedings and ruled in favour of the Admiralty jurisdiction of the High Courts under the Admiralty Act. The Court's finding of the action *in rem* being independent of the personal liability of the vessel owner, is wholly contrary to Section 5 of the Admiralty Court Act, 2017, which permits an arrest of a vessel, only if the owner is liable for the maritime claim. There are also difficulties with the Court's reasoning that an admiralty action *in rem* is not a 'suit' or an 'action' whose commencement or continuation is barred under Section 14 of the IBC.

Conclusion

The Hon'ble Bombay High Court has tried to analyze and explain the scope of the Admiralty Act and the IBC. Since the legislations were fairly recent, there was a significant overlap and difference of opinion pertaining to their applicability and scope as well as the jurisdictions of the Admiralty courts and insolvency tribunals. The



Hon'ble Court saw the intention of both the legislatures and has tried to harmoniously interpret and construct their provisions.

However, there still remain a lot of grey areas and blind spots when it comes to interpretation of both the laws together. Shipping has had 100 per cent Foreign Direct Investment for over two decades but this is yet to translate in to major investment. Since the maritime industry in India is going through a phase of restructuring and privatization but with a lack of international investors and there is excess capacity in the market and ship demolition has not been very large for replacement, it is necessary to bring harmony between the biggest restructuring laws that the country has seen with the Admiralty law that specifically applies to the industry.