

CLAIMS RELATING TO CARGO

The Admiralty jurisdiction of the High Court in respect of cargo claims and contracts of affreightment is statutory. Section 4 (1) (d), (f), (g), (i) and (q) of the Admiralty Act (2017) deals with the above subject maritime claims.

The High Court has Admiralty jurisdiction over any claim arising out of loss or damage caused by the operation of a vessel; loss or damage to or in connection with any goods; agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise; salvage services, including, if applicable, special compensation relating to salvage services in respect of a vessel which by itself or its cargo threatens damage to the environment; particular average or general average.

The maritime law of India relating to the carriage of goods by sea is governed primarily by the Carriage of Goods by Sea Act, 1925 as amended in 1993, the Indian Bills of Lading Act, 1856 and the Multimodal Transportation of Goods Act, 1993.

The statutes and legislations which apply by force of Indian law govern goods loaded in India. Other legislations that could be applicable in India in relation to cargo include (Indian) Merchant Shipping Act, 1958, Major Port Trusts Act, 1963, Indian Ports Act, 1908, Marine Insurance Act, 1963, Contract Act, 1872, Sale of Goods Act, 1930, The Indian Ports Act, 1908 and the Major Port Trusts Act, 1963 deal with the administration of the ports and the jurisdiction over ships in ports. The Customs Act, 1962, contains various regulatory measures in relation to ships, goods and persons, in connection with importation or exportation. It also applies to clearance of goods for home consumption, exports, duty due on goods, prohibitions, etc.

Procedural aspects of claims are covered in the Civil Procedure Code, 1908 and the Evidence Act, 1872.

Apart from these legislations, judgements of various courts in India lay down general principles of maritime law for dealing with cargo claims and other matters.

The Indian Carriage of Goods by Sea Act, 1925 (was amended in 1993) or COGSA is based on the Hague Rules 1924 was enacted to recognise and give effect to the Hague Rules 1924 as they would apply in India, and it substantially follows the Hague Rules. The Act applies to carriage of goods by sea under bills of lading or similar documents of title issued in India, from

a port in India, to any other port whether in or outside India (Section 2). The Act is similar to the Hague Rules, and as in the Hague Rules' Articles, it imposes responsibilities and liabilities, and confers rights and immunities, upon the carrier. The Act applies equally to foreign merchant ships as well as to Indian merchant ships. COGSA is the substantive law in India on the subject of carriage of goods by sea and would apply compulsorily when the carrier is sued by his shipper based in India. For inbound cargo, the rights, liabilities

and obligations of the carrier and the cargo interests are governed by the relevant contract of affreightment. This relates to the applicable law of the relevant contract (if the contract provides for application of a foreign law and/or convention), the general principles of law as applicable in India and Judge-made precedents.

The Schedule to COGSA, referred to in Article IV provides for certain rights and immunities to the carrier and the ship from liabilities for loss or damage to the cargo. If the ship or carrier is able to set up any of these defences and offer evidence concerning the same, then such defences would be complete answers to cargo claims. The carrier may also rely on statutory defences such

as the right of the plaintiff to bring the claim, privity of contract and jurisdiction. Factual defences such as short loading, weight, quality or quantity loaded unknown or not matching the description in the claused bill of lading are available. Cargo pilfered or missing post-discharge, or where the loss has occurred in spite of the carrier having complied fully with the customs or practice at the port also applies.

The Multimodal Transportation of Goods Act was introduced in India in 1993. This Act applies to all cases where two or more modes of transport are used in the course of transportation. The Act recognises multimodal transportation of goods under a single transport document, which covers all the modes of transport. The multimodal transport operator remains liable and responsible to the cargo owner. The MTOG Act provides for the multimodal transport operator to be liable when the goods are damaged while they are in his charge.

The package limitation under Indian law is 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher. If the Claimant can prove that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly with knowledge that damage would probably result, then this package limitation defense will not be available.

Some of the important changes and amendments to COGSA were brought about by the MTOG Act:

- a. It allows parties to agree an extension of the one-year period to bring suit for cargo claims.
- b. It increased the per package limitation in India to 666.67 SDRs per package or unit or 2 SDRs per kilogram of gross weight of the goods lost or damaged, whichever is higher.

- c. Indian law now expressly provides that neither the carrier nor the ship shall be entitled to benefit from the package limitation. That is, if it is proven that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Article III, rule 6 of COGSA lays down that the limitation period for filing a suit under COGSA in India is one year from the date on which the goods were delivered (or ought to have been delivered.)The one year time period can be extended by agreement between the parties after the cause of action has arisen.

Rule 6, however, also contains the following provision:

“Provided that a suit may be brought after the expiry of the period of one year referred to in this sub-paragraph within a further period of not more than three months as allowed by the court.”

This means that a suit may be brought after the expiry of the one year period referred to above, but within a further period of no more than three months (“time specified”), if allowed by the court. Therefore, after the 1993 amendment, the period of limitation for filing a suit under Indian COGSA may be up to a maximum of one year and three months. But only if permission is granted by the court or for a period agreed between the parties after the cause of action has arisen.

Indian law on cargo claims matters recognises that the quoted provision in Article III rule 6 above is not that a suit shall be brought within one year from a specified date or that no suit shall be brought after the expiry of one year, but that if the suit is not brought within the time specified, the carrier and the ship would be discharged from all liability.

This is in respect of loss or damage, i.e. that there will be no cause of action surviving against the ship or carrier.

The limitation period for claims by carrier or lines for indemnity, recovery of dues, etc. against the cargo interests or merchant is three years from the date of accrual of the cause of action.

Under the MTOG Act, however, a Multimodal Transport Operator will not be liable unless action is brought within nine months of the date of delivery of the goods, the date when the goods should have been delivered, or the date on and from which the party entitled to delivery of the goods has the right to treat the goods as lost.

For claims by the carrier (or lines for indemnity, recovery of dues, etc.) against cargo interests or merchant, the limitation period is three years from the date of accrual of the cause of action. Procedures and Burden of Proof To bring a cargo claim in India, all that the Claimant has to establish is that goods of a certain quantity in good and sound condition were handed over to the ship or carrier for carriage. Also that the same was discharged and received by the consignee not in the like quantity or order and condition. It would then be for the ship or carrier to establish beyond reasonable doubt with evidence that the loss and damage complained of was not caused by the ship or carrier or that the ship or carrier is exempt from any liability on account of the statutory defences available. Depending upon the facts of each case, the burden of proof required could be onerous and the defence expensive to run. This is especially so due to the time it takes for litigations to come for trial in India.

Due to the backlogs in court, suits take anywhere between eight to ten years to come up for trial at the first instance. Then there are appeals to the Division Bench of the same court, and then to the Supreme Court, all of which make litigation in India a long, expensive process.

It is advisable that appropriate investigations into any damage and loss are conducted thoroughly, reports obtained, and relevant documents retained for future use to defend claims.

Also, the Indian Evidence Act requires originals of all documents to be produced and marked as evidence. Consequently, whenever it is expected that claims may have to be made and defended, it has to be ensured that all original documents are collected and filed away safely, to be used in any trial in due course.

Indian law recognises and gives full effect to the terms of contracts between parties and acknowledges exclusive jurisdiction clauses in bills of lading, providing they give full effect to the terms of the relevant bills. If the contract of affreightment provides for a particular law or for a particular jurisdiction to apply to claims and disputes arising from the contract, Indian courts give full effect to such clauses, subject to expert evidence of the foreign law being provided. Of course, it should be absolutely clear from the wordings of such clauses that the law and jurisdiction of a particular place or country shall apply to the exclusion of all other courts or jurisdictions.

More often than not the ship or its owner is not the contractual carrier, and does not have a contract with the actual shipper or merchant. Instead, the ship or its owner contracts with the actual shipper or merchant. Instead, the ship and its owner contracts with a multimodal transport operator, a non vessel operating common carrier (“NVOCC”), a freight forwarder or a cargo consolidator or such other parties with whom the ship enters into contracts of affreightment. The shipper or merchant is not a party to this contract of affreightment. The multimodal transport operator, the NVOCC, the freight forwarder, the cargo consolidator or such parties, enter into separate contracts of affreightment with the shipper or merchant and issue their own documents. As far as the merchant is concerned, this party would be his

contractual carrier and contractual claims, if any, in relation to the said contract and the cargo ought to be directed against this party only.

There is an increasing trend by Indian traders also to bring contractual claims against the carrying ship and to seek the ship's arrest. Actions including criminal complaints are often filed against agents of the carrying ship in relation to contractual claims, in spite of the law being clear that an agent of a disclosed principal is not liable for any act, omission or breach of contract by his principal. Therefore, in relation to the issues being discussed, not only is an agent not liable for its principals' contracts or breach of the same, but when the principals themselves do not even have a contract with the merchant, the agent is definitely not liable or responsible. Such criminal actions are only being resorted to by the trade to put pressure on a local party to pay up and for obtaining security for the claim from the carrying ship or her sister ship. Such actions lead to the ship interests suffering prejudice: i.e. their ships being arrested for claims not of their concern and also having to furnish and maintain securities until the suits are disposed of which could be many years. There are no real protective measures that carriers can adopt against such tactics other than ensure that all proper precautionary steps are taken. This will ensure they eventually succeed in these non-meritorious actions and suits.

The Claimants fail to appreciate that by resorting to such actions, they may be prejudicing their own rights. By failing or omitting to sue the proper party, their claim may thereafter become barred by limitation. They may be unable to disclose any cause of action against the ship, be unable to sustain the claim against the ship because of no privity of contract, improper jurisdiction for bringing the claim or other similar issues. Eventually, they may be unable to recover anything in relation to their contractual claim, even in cases where their contractual carrier would definitely have been liable for the claim had they focused their action on him instead.

Criminal cases for offences under sections 407, 420, 424 and 120B of the Indian Penal Code are often sought to be filed against the carrier, its agents, its directors and principle officers. This is to put pressure on the earner in relation to cargo claims. You will see from below that these sections of the Indian Penal Code would only apply to a carrier on very exceptional sets of facts.