

## Convention on arrest of ships: applicability in India

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Through the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the more recent International Convention of Arrest of Ships, 1999, (the Geneva convention) the United Nations has strived to bring about parity between the opposing interests of maritime claimants and ship owners.

As such, while the right to arrest a ship is the single most valuable tool in enforcing maritime claims and recovering debts against ship owners and operators, it is essential that a wrongful arrest, attachment, or injunction does not interrupt legitimate trading. The following case exemplifies the dichotomy between these two opposing groups.

### The specifics

Gujarat High Court, after initially issuing orders for the arrest of a vessel, MV Basil (the available ship), which was lying at anchorage at Alang – a shipyard on the Gujarati coast, dismissed the admiralty suit filed by the claimant M/s Croft Sales and Distribution Limited Division.

The consequent appeal before the division bench of the high court considered the following issues: 1) Is the Geneva convention applicable and if so, does it limit the jurisdiction of the court? 2) Can the available ship be arrested even if the Geneva convention is to apply? 3) Can the available ship be termed a sister-ship by lifting the corporate veil? 4) Is there a right in rem over the available ship, and can a suit be maintained for invoking admiralty jurisdiction?

### The ruling

The court observed that in *Liverpool and London SP&I Association Limited*

*v MV Sea Success I and Another*, the Supreme Court had held that the application of the convention would be subject to the domestic law enacted by parliament and that it could be applied only for the enforcement of a contract with public law character. This implies that both the conditions are to be observed while applying the Geneva convention.

### Does it apply?

The claim on the available ship involved a contract for the sale of a vessel between two private parties. The court held this was a commercial transaction and did not have a public law character. It might have been otherwise if the state or instrumentality of the state was connected in its enforcement or implementation, or if the contract involved questions of larger public interest, such as the sovereignty of the nation, environment or pollution.

On the second issue, the court was of the opinion that the order of arrest of the ship may fall within the provisions of order 38 rule 5 of the Civil Procedure Code (CPC), which provides for attachment before judgment. This order is attracted when a defendant seeks to defeat the post-judgment execution of a suit that is allowed against him. The court held that since the relief sought by the claimant does not satisfy the precedent for the exercise of power for attachment before judgment, the order for the arrest of ship cannot be made.

### Lifting the veil

On the issue of lifting the corporate veil by arresting a sister ship the court held that the Geneva convention

provides that the ship must be owned by the person who is liable for the maritime claim. The appellants attempt to contend that the word “owned” should be interpreted to include the subsidiary company and also other companies is without merit as none of the conditions laid out by the Supreme Court in *Liverpool and London SP&I Association* have been made out.

On the last issue, the court held that at the relevant time the option open to the appellant was not a right in rem but a right in personam. As such, the portals of admiralty jurisdiction would be closed to the appellant.

### Was the court right?

The high court was correct in stipulating that the Geneva convention would apply in India subject to it being in line with domestic law, and applied for enforcement of contracts with public law character.

On the issue relating to lifting of the corporate veil it may be said that for this to happen in common law, it has to be established that the corporate structure is a “mere façade, involving an element of fraud or impropriety, or that there is failure to maintain the separate identity of the company from that of its shareholders.” The appellant failed to do this.

Finally, it is appropriate that the portals of admiralty jurisdiction would be closed to anyone seeking to enforce a right in personam.

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