

Shipping & International Trade

Recoverability of Wage Payments Made to Seafarers by a P&I Club as Sheriff's Expenses – A Landmark Decision in India

Introduction

The status of crew wages incurred post-arrest and a Protection & Indemnity Club's ("P&I Club") correlative right of recovery of crew wages disbursed, and sustenance provisions it supplies pursuant to the Maritime Labour Convention ("MLC"), has been the subject of limited judicial enunciation in a number of jurisdictions over the years. The Indian courts, in the recent decision of the Bombay High Court in *The Swedish Club v V8 Pool Inc. and Other*. (Commercial Appeal Nos. 108 and 111 of 2021), were recently accorded the opportunity to pronounce upon whether crew wages incurred post-arrest could be ranked as Sheriff's (or marshal's) expenses. Additionally, the judgment also considered whether recoupment of such wages and MLC expenditure by a P & I club, in this case The Swedish Club ("Club"), are also to be treated as Sheriff's expenses by virtue of subrogation to all "top-drawer" recovery.

The judgment provides greater clarity on the treatment of such wages, as well as guidance on the actions that should be taken by the relevant parties post-arrest in the event of an abandonment. These principles may also be applicable and of relevance to other Commonwealth jurisdictions.

Rajah & Tann Singapore LLP ("R&T") was heartened by the opportunity to act alongside the Club's Hong Kong offices, and to formulate legal submissions in conjunction with its Bombay counsel team. The Club was advised by Kendall Tan and Yip Li Ming from the Shipping & International Trade Practice.

Brief Facts

The background to this appeal relates to the arrest of the vessel, MT GP ASPHALT I ("Vessel") on 22 December 2020 pursuant to an order of the Bombay High Court. The Club was the former P & I insurer of the Vessel, and the MLC insurer.

On 7 January 2021, the crew of the Vessel addressed an email to the Club alerting it to the developing crisis on board, in that the salaries for November and December were overdue and that arrangements would have to be made for food and water which were fast running out.

On 21 January 2021, to facilitate timely humanitarian intervention, the Club applied for relief to the Admiralty Division of the Bombay High Court ("**Bombay Admiralty Court**") in Interim Application No. 2062 of 2021, averring that the Vessel had been abandoned and, relying on the MLC, sought leave to

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make certain payments in respect of maintenance of the Vessel and crew. In the relevant application, the Club also sought relief on the basis that all payments in respect of the crew were to be treated as Sheriff's expenses. The crew members aboard the Vessel had themselves also concurrently filed another application in Interim Application No. 1395 of 2021, asking that their wages accrued post-arrest be treated as Sheriff's expenses. Both Interim Application No. 2062 of 2021 and Interim Application No. 1395 of 2021 were initially disallowed by the Bombay Admiralty Court.

The Court's Holding

Both the Club and the crew members appealed against the Bombay Admiralty Court's decision. In a landmark judgment, the Bombay High Court (Commercial Appeal Division) ("**Bombay Appellate Court**") allowed the appeals brought by the Club and the crew. The Club was thereby successful in recovering the payment of wages it made and provisions supplied to the crew as Sheriff's expenses, a sterling outcome and a product of the unstinting efforts put in by the Club's MLC team.

Relevance

In allowing the appeals, the Bombay Appellate Court found that the Swedish Club had at all times acted reasonably and expeditiously. The court took a pragmatic approach to the treatment of crew wages paid post-arrest in the event of a vessel being abandoned. The court recognised that crew members aboard a vessel, many of whom are foreigners to the jurisdiction, cannot be expected to expeditiously approach the Sheriff. Likewise, it is unrealistic to expect the Sheriff to file reports on its own accord in every such case. Importantly, the Bombay Appellate Court held that the paramount consideration, in determining whether a Sheriff's report to the Admiralty Court was required for wages to be classified as Sheriff's expenses, is the well-being of the crew members and the safety and/or preservation of the vessel which should enure for the benefit of all creditors who have a maritime claim against the vessel and/or her sale proceeds (at [45] of the judgment).

Jurisprudentially, the decision significantly concluded that crew wages accrued post-arrest could be recovered as Sheriff's expenses without putting the crew or the MLC insurer to the trouble of filing a suit and proving their claims. It is gratifying that the Bombay Appellate Court expressly adopted the Singapore High Court decisions in *The "Aquarius III"* [2002] SGHC 138 and drew guidance from *Credit Suisse v Brightoil Lion* ("**Brightoil Lion**") (HC/ADM 156/2018 (unreported)). In *The "Aquarius III"*, the Singapore High Court found that the crew were entitled to recover post-arrest wages and disbursements as Sheriff's expenses. *Brightoil Lion* was a more recent case where R&T successfully represented another International Group P&I Club to recover the payment of wages made by the P&I Club to the crew of the "Brightoil Lion" that had been under arrest in Singapore, as well as repatriation costs, as Sheriff's expenses in an unreported Singapore High Court decision.

The Singapore courts have earlier taken a similar pragmatic approach to assessing whether crew wages paid post-arrest could be classified as Sheriff's expenses and this decision by the Bombay Appellate Court endorses that approach as being commercially and judicially sound.

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The Bombay Appellate Court further considered the nature of the Club's obligations under the MLC and whether such obligations enabled payments for crew wages post-arrest to be classified as Sheriff's expenses. The court pertinently noted that the obligation placed by the MLC on the Club was a humanitarian one and gave the Club the right to stand in the shoes of the crew by subrogation / assignment and/or any other mode of transfer and claim any amounts paid for wages post-arrest. Relevantly, the court made the astute observation that this was in accordance with international practice (at [48] of the judgment).

This landmark judgment was only possible because the Club recognised and made good on its humanitarian obligations in this scenario and acted swiftly in seeking leave from the Bombay courts to defray the outstanding wages of the crew in a timely manner for the crew's welfare and within the framework of the MLC.

From a practical perspective, by discharging the outstanding wages of the crew, the Club was not only acting in accordance with the MLC, but in effect also assisted the general body of creditors in at least three ways:

- (a) Putting to an end any further incurrence of wages of the crew.
- (b) By discharging the wages of the crew, paving the way for their sign-off and potential repatriation, which would allow the Sheriff to bring on board a skeletal crew.
- (c) The crew could not have been expected to leave the Vessel until their outstanding wages were paid.

Concluding Words

The Bombay Appellate Court's decision will be of immense benefit to MLC insurers and seafarers alike, in the India context, should the vessels on which they serve be arrested. The principles espoused by the Bombay Appellate Court will hopefully offer guidance elsewhere to this familiar predicament to stranded seafarers in other Commonwealth jurisdictions.

The decision is also invaluable in its enunciation of a set of judicial guidelines that should be adopted in the event that a vessel and those on board are neglected or otherwise abandoned by the vessel owner in an arrest scenario. The substance of these guidelines is as follows:

Deemed abandonment occurs when: -

- a. *After the arrest of the vessel, the crew addresses a communication to the owner with a copy to the P&I club, the demise/bareboat charterer (if any), the arresting party and the Sheriff of Mumbai stating that the vessel requires supplies (food/ provisions/ bunkers/ other*

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necessaries) and/or one or more of the crew's wages remain unpaid for at least two months, with details of when the supplies are expected to run out and of the outstanding wages; and

- b. The owner and the demise/bareboat charterer (if any) fails to make the necessary supplies to the vessel and make payment of the said outstanding wages within ten days thereof or responds stating its inability to maintain the vessel and crew.*

Thereafter, the following steps should be taken: -

- c. The arresting party shall bring the crew's communication to the attention of the Admiralty Court within 4 days of such communication if (a) the owner of the arrested vessel has not entered appearance the Admiralty Court shall pass an order calling upon the owner and such demise/bareboat charterer (both) to remain present in court within 3 days. The order shall be communicated to the owner by the arresting party. If the owner remains absent, the Admiralty court shall record that the vessel and crew have been abandoned; or (b) If the owner or demise/bareboat charterer (if any) of the arrested vessel has entered appearance in the suit or appears pursuant to the order above specified, the Admiralty Court shall direct the owner and such demise/bareboat charterer (both) to make the necessary supplies to the vessel and make payment of the said outstanding wages within a further 3 days, failing which the vessel and crew shall be considered abandoned.*
- d. The arresting party shall also take steps for the expeditious sale of the vessel as soon as the order recording abandonment is passed.*
- e. If a vessel is so abandoned, and pending the sale of the vessel, any party (including a P&I club which has humanitarian obligations to the crew on board the vessel at the time of abandonment) desirous of rendering supplies or funding expenses for the safety and/or preservation of such vessel and/or subsistence of the crew and/or payment of wages and/or repatriation of crew and/ or reducing the crew on board to a skeleton crew and claiming the same as Sheriff's expenses is required to do either of the following:*
- (i) Approach the office of the Sheriff of Mumbai to urgently file a report to seek directions from the Admiralty Court for such steps to be taken as may be required and for leave of the Admiralty Court to permit that party to put the office of the Sheriff in funds for such steps and for such expenses to be Sheriff's expenses. The office of the Sheriff shall immediately file a report before the Admiralty Court. All expenses and payments shall be routed through the Sheriff's office; or*
 - (ii) Approach the Admiralty Court directly with prior notice to the arresting party concerned as well as the office of the Sheriff of Mumbai seeking leave to do any of the above for the safety and/or preservation of the vessel and/or subsistence of the crew and/or payment of wages. In such case all expenses and payments shall be routed through the office of the Sheriff of Mumbai.*

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- f. *If such an application is made, the Admiralty Court shall hear the same on an urgent basis and pass necessary orders. Unless there are serious doubts about the expenses, in the interests of the well-being of the abandoned crew members on board the arrested vessel, leave shall generally be granted for such expenses to be Sheriff's Expenses and recoverable from the sale proceeds on an immediate basis; and*
- g. *Once the vessel has been sold and the sale proceeds have been deposited in court, the Sheriff of Mumbai shall file a report detailing the expenses routed through his/ her office.*

These guidelines will be useful for future vessel arrests in India and potentially other Commonwealth jurisdictions that adopt similar guidelines. In particular, the court's guidance on the actions a P & I club should take post-arrest in the event of an abandonment and pending sale of a vessel (at [55] of the judgment) serves as a model for future cases and is testament to the significance of the work undertaken by the team at the Club.

For further queries, please feel free to contact our team below.

Contacts



Kendall Tan
Head, Shipping & International
Trade

T +65 6232 0634

kendall.tan@rajahtann.com



Yip Li Ming
Partner, Shipping &
International Trade

T +65 6232 0647

li.ming.yip@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP Shanghai Representative Office

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office

T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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