THE ARREST news

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IN THIS QUARTERLY ISSUE

The Identification of the "Fuel Supplier" Entitled to Claim a Maritime Lien in an in rem claim

In Rem file 45897 02 12 M/V Bunker Malta Limited v M/V Emmanuel Tomasos Maritime Court & Civil Appeal File 2675/14 (Supreme Court)

At the first instance, in the Maritime Court, the plaintiff, a fuel supply company, claimed that it supplied fuel to the M/V Emmanuel Tomasos ("the vessel") in Lome Port, Togo via a local supplier, Stena Oil A.B. (Stena) without receiving consideration for the supply of this fuel. Together with filing the claim, the plaintiff applied for a ship arrest and an order was granted which was later lifted after the ship owners filed appropriate guarantees. However, the defendant, the owner of the vessel, Tomasos Brothers Company, who did not concern themselves whether fuel was supplied but only with the question of the identity of the supplier entitled to consideration.

The question around which the decision turned was then, "who supplied the fuel?" in respect of whom a maritime lien is applied on the vessel, or for whose benefit there is an in rem claim. The importance of the decision lied in its authoritative interpretation of the scope of maritime liens and the right to claim which derives therefrom.

The scheme of supply

As it turned out, the owner of the vessel did not order the fuel directly from the plaintiff, but entered into a fuel supply agreement with a different company, called Mediterranean Bunker Services (MBS) and also paid MBS the full consideration for the supply of the fuel. MBS for its part entered into an arrangement with the plaintiff for the supply of the fuel while the plaintiff entered into an arrangement with yet another company, Wrist Worldwide Trading GmbH, for the purchase of fuel. The latter company supplied the fuel via an arrangement with Stena. However, the plaintiff paid the full consideration for the fuel to Stena.

Therefore, this meant that the vessel paid the amount for the fuel to MBS although MBS did not pay the plaintiff, while the plaintiff for its part did pay Stena.

Who is entitled of the maritime lien?

The plaintiff claimed that it had a right of claim since it was the party which supplied the fuel to the vessel and MBS was involved only as a broker and acted on behalf of the owners of the vessel when ordering the fuel. The vessel and its owners, by contrast, claimed that they ordered the fuel from MBS. Insofar as any entity had a right to a maritime lien, this right belonged to MBS and this lapsed upon payment of the consideration. All the other entities were in effect sub-contractors of MBS and they do not themselves have a claim against the vessel and/or its owners.

The interpretation of the court in light of the legal definition of the maritime lien

The Maritime Court mentioned that the supply of fuel is included in the definition of a maritime lien under Section 41(8) of the Israeli Ships (Vessels) Law, 5720 – 1960. It was also held that the supply of fuel is included in the definition of supply of necessities, as defined in Section 5 of the Admiralty Law 1861: "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs."

The legislature, as the court opined, did not grant a maritime lien to any supplier, but only to a person who supplied goods and services under an agreement or transaction with the parties authorized to oblige the vessel. The language of the section, as interpreted by the court, teaches that the intention of the legislature was to grant the right to sue to realize the lien

only to those who were a direct party to the arrangement with the vessel, and so the agreement between the vessel and MBS granted the latter the right to claim and a maritime lien. However, this right ceased upon payment for the goods which it supplied.

The identification of the principal supplier

The fact that the supplier contracted with sub-contractors in order to supply the goods [the fuel] does not damage the supplier's right to enjoy a maritime lien, whether it supplied the goods itself or whether it did so via sub-contractors. The purpose which justifies the grant of the right to realize the maritime lien indicates that the right is to be granted only to that supplier which entered into an arrangement with the vessel and not to any sub-contractors.

The principle underlying the distinction between the supplier of the goods and sub-contractors is that the supplier has collateral to secure the payment for the goods. This collateral, in the form of the vessel itself, is there in order to secure the regular voyage of the vessel without the supplier needing to wait for other collateral and thereby delaying the voyage of the vessel and interfering with the works at the various ports of call. By comparison with the supplier, the sub-contractor does not have a direct arrangement with the vessel. The sub-contractor will receive its money from the party ordering the goods and not the vessel, its owners or crew. The grant of security [over the vessel] to a sub-contractor is not required in order to secure the mobility of the vessel.

The court also mentioned that the recognition of the right of each one in the chain of sub-contractor suppliers to realize a maritime lien is likely to bring about a situation whereby the vessel will be required to pay a number of various entities for the same supply. At the time of entering into the arrangement with the supplier, the vessel and its owners have an expectation that the same supplier will fulfill its part of the deal and that if they pay such supplier the agreed consideration, they will be released from all debts with respect to the supply.

No right to a claim in rem nor a maritime lien

In light of all the above, and in light of the fact that no agreement between the plaintiff and the defendant was provided to the court, the court held that the plaintiff was not the 'supplier' of the vessel and therefore the plaintiff had no right to a claim in rem an no right to a maritime lien.

Recently, the plaintiff filed an appeal to the Supreme Court. Since maritime law cases rarely arrive at the doorsteps of the Israeli Supreme Court, it will be interesting to see how the court will deal with the ruling of the Maritime Court..

The argumentation of the parties before the Appeal Court

Whilst the detailed arguments of the parties remain to be seen (as the appeal is still ongoing), the plaintiff did submit a request to withhold the guarantees filed by the owners of the vessel in the previous instance. In his request, the plaintiff had to show that the chances of the appeal being accepted were good by arguing that the evidence brought before the Maritime Court showed that he was, de facto, the entity that purchased the supply of fuel which was later supplied to the vessel, and that no consideration for this supply was received. The plaintiff also argued that the ruling of the Maritime Court is in contrast to the current state of law, according to which the entity that supplies the vessel is entitled to use the vessel as collateral, and as long as no consideration for the supplies was received, the supplier had an in rem claim against the vessel.

The plaintiff continued in arguing that if the guarantees will be returned to the owners of the vessel, it will have real objective difficulties in collecting any monies that might be ruled in his favor, since the vessel travels around the world and might call at a port where an Israeli judgment might not be honored or enforced.

The defendants [the vessel], on the other hand, argued that although the claim was in rem against the vessel, the claim in its essence must still have merits brought against the owners of the vessel or its operators, and no such merits were evident at the previous instance.

The petition was eventually granted by the Supreme Court, while the court conditioned the withholding of the guarantee with the plaintiff filing a sum of its own, to assure the expected damages of the defendants that might be caused due to the withholding of the guarantee in case the appeal is rejected.

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m/v Rhosus - Arrest and Personal Freedom of the Crew

On 23/9/2013, m/v Rhosus, flying the Moldovian flag, sailed from Batumi Port, Georgia heading to Biera in Mozambique carrying 2,750 tons of Ammonium Nitrate in bulk.

En route, the vessel faced technical problems forcing the Master to enter Beirut Port. Upon inspection of the vessel by Port State Control, the vessel was forbidden from sailing. Most crew except the Master and four crew members were repatriated and shortly afterwards the vessel was abandoned by her owners after charterers and cargo concern lost interest in the cargo. The vessel quickly ran out of stores, bunker and provisions.

Various creditors came forward with claims against her. Our firm acting on instruction of these creditors obtained three arrest orders against the vessel. Efforts to get in touch with the owners, charterers and cargo owners to obtain payment failed.

In the meantime, the Master and crew remaining on board were in jeopardy due to the shortage of stores and provisions. To make things worse, the crew were restrained on board the vessel owing to immigration restrictions. Diplomatic efforts were attempted to have the crew repatriated but without success. The crew subsequently approached us for assistance. Acting on compassionate grounds, we applied to the Judge "Of Urgent Matters" in Beirut for an order authorizing the crew to disembark and return home. Our application was based on the breach of the right to personal freedom which is protected under the Constitution of Lebanon and the International Convention of Human Rights and Personal Freedoms. Emphasis was placed on the imminent danger the crew was facing given the "dangerous" nature of the cargo still stored in ship's holds.

The port authorities and the vessel's agents were invited by the Judge to comment on our application. Our application eventually succeeded and the Judge ordered that necessary permits be issued for the crew to disembark and return home. The decision rendered by the Judge is considered of landmark importance because as it has established the principles that personal freedoms ought to be protected regardless of any administrative considerations and that the Judge "Of Urgent Matters" can intervene to ensure protection of these rights.

Owing to the risks associated with retaining the Ammonium Nitrate on board the vessel, the port authorities discharged the cargo onto the port's warehouses. The vessel and cargo remain to date in port awaiting auctioning and/or proper disposal.

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THE PHANTOM OF THE OPERA. The P&I Club Correspondent

In the field of Maritime Law, there are many important protagonists. There is the Owner of the vessel, the Charterers (Demise, Voyage, Time), the Crew of the vessel, the Marine Surveyors, whether acting for the Vessel interests or Cargo interests, the maritime lawyers and, behind the scenes as phantoms, there is the P&I Club correspondent.

In fact P&I Clubs usually appoint the same lawyers to act for their interests at a given port, but, in addition, we all know that behind these lawyers, there is the P&I Club correspondent. In the last couple of years, I have had the pleasure to deal with these P&I Club correspondents, giving rise to excellent results which in the long run decreased expenses and enabled the solution of claims which otherwise would be dragged through the courts ad vitam aeternam with basically the same result or worse.

In the case of the ZEALAND BEATRIX, dealing with the flooding of Hold No. 3 containing cocoa beans from Abidjan, Ivory Coast and Lagos, Nigeria to the Port of Trois-Rivières in the Province of Quebec, Canada, once we were seized of the matter for cargo interests, we immediately contacted the P&I Club correspondent. It would have been easy to arrest the vessel, but

not to inconvenience the Master, mobilize the Bailiff, notify the Pilotage and Customs Authorities, we directed our communications directly to the P&I Club correspondent in the City of Montreal, Quebec, Canada.

The wording of the Letter of Undertaking preventing from a Warrant of Arrest

This particular correspondent on behalf of the Club that it represented started to negotiate the Letter of Undertaking whilst the ZEALAND BEATRIX was in the Port of Trois-Rivières. Special emphasis was placed in the introductory words of the Letter of Undertaking, namely: "In consideration of your agreeing to REFRAIN FROM SEIZING, ARRESTING OR OTHERWISE DETAINING THE SHIP". These words enabled the P&I correspondent to issue the Letter of Undertaking without touching the vessel with a Warrant of Arrest.

In addition, it was agreed between our client, the cargo claimant, and the P&I Club correspondent that the marine surveyors of each side would work hand in hand and come up with a joint survey. Once this was achieved, without the necessity of hiring lawyers, the P&I Club correspondent sat with us, and after two days of negotiations, the claim was settled. This meant that the P&I Club correspondent resolved the claim with a minimum of expense and without the necessity to hire the usual P&I Club lawyers.

Trust and credibility are key elements..

Obviously, there must be a relationship of complete trust between the claimant lawyers and the P&I Club correspondent, as well as impeccable cooperation between the marine surveyors acting for their respective interests. This trust relationship often comes after several years of dealing with the P&I correspondent, where each side has realized that negotiations can take place in a congenial manner avoiding any double dealing.

In the case of the M.V. WHISTLER, dealing with the damage to a crane, building, pier and other installations caused by the vessel, the same cooperation was established with the P&I Club correspondent.

The adaptability of the Letter of Undertaking

One important clause was negotiated, whereby in consideration of the issuance of the Letter of Undertaking, the beneficiaries of the Letter of Undertaking and its Underwriters agreed to surrender the Letter of Undertaking for replacement by a new Letter of Undertaking with the same wording except for a lesser amount as agreed between the P&I Club and the beneficiaries of the Letter of Undertaking. This clause is very important in situations where the vessel is in the jurisdiction of the claimant, but no amount of the claim or quantum has as yet been established. This clause allows the claimant to claim the higher estimate of the loss or the reserve that an Underwriter might set up for a claim, but subject to a decrease with a new Letter of Undertaking once the quantum of the claim has been adequately established.

In the case of the WHISTLER this reduction and replacement of the Letter of Undertaking for one of a lesser amount was negotiated between ourselves, as claimants, and the P&I Club correspondent.

As in the ZEALAND BEATRIX case, no arrest proceedings were instituted as the agreement to refrain from seizing and arresting clause of the Letter of Undertaking was invoked, and the claim was settled, after the P&I Club correspondent retained the P&I Club lawyers to negotiate with us the quantum of damages, which led to an expeditious settlement of the claim.

Negotiability of the Letter of Undertaking

Lately, the same approach was taken in relation to the M.V. PACIFIC HURON. She discharged galvanized steel coils pursuant to ten bills of lading from Ravena, Italy to the Port of Hamilton, Ontario, Canada. There was condensation/sweat and water damage after a prolonged voyage. In this claim, the P&I Club correspondent was instrumental in reducing somewhat the amount necessary to establish the Letter of Undertaking.

The above illustrates that the P&I Club correspondent carries out a very important function in the ship arrest process. The relationship of trust between claimant and the P&I Club correspondent is critical. If this exists, many steps in the arrest process and subsequently to arrive at a settlement of the claim may be eliminated. Arrests may be avoided, joint surveys may be introduced which would simplify and clarify the cause of the loss and the quantum of the loss. Finally, the P&I Club correspondent could be instrumental in arriving at a fair settlement with the claimant.

The P&I Club correspondent: a facilitator, negotiator and a strategic player

Generally, the P&I Club correspondent is not a member of the legal profession, but in many ways it acts in a more expeditious manner than the lawyer. It can avoid procedural delays and reach results sooner and with less expense than those achieved by lawyers. The P&I Club correspondent is really the Phantom behind every arrest claim, and deserves respect. It carries out a fundamental role in the recovery of claims that may be subjected to arrest proceedings.

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