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THE EFFECTIVENESS OF THE MARITIME LABOUR CONVENTION'S FINANCIAL SECURITY CERTIFICATES IN RESOLVING CLAIMS FOR UNPAID SEAFARERS' WAGES

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The effectiveness of the Maritime Labour Convention's financial security certificates in resolving claims for unpaid seafarers' wages

Eugene Cheng Jiankai[*]

The 2014 amendments to the Maritime Labour Convention entered into force on 18 January 2017. The primary drive of the amendments was to introduce a financial security certificate which would guarantee payment of seafarers' wages and repatriation costs in the event of abandonment by shipowners. This paper seeks to provide a critical analysis of the effectiveness of financial security certificates in resolving claims for unpaid seafarers' wages.

Keywords: Maritime employment, seafarer's wages, Maritime Labour Convention, financial security certificates, P&I clubs, subrogation, assignment, maritime lien.

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1 Introduction

Since antiquity, seafaring has always been an arduous occupation. A seafarer working on a ship is constantly exposed to the perils of the sea and is plucked from all creature comforts offered by the land. Seafarers have also been known to be exploited by their employers due to the disparity of bargaining power between them.[1] As such, the courts have always had sympathy towards a seafarer's cause and are of the view that they are particularly deserving of protection.[2] The policy of protecting seafarers has become so ingrained that since the early nineteenth century, the courts have recognised that a wage claim for services to a ship attracts a maritime lien.[3] This doctrine is now firmly entrenched in most Common Law jurisdictions.[4]

The protection of seafarers does not stop at the assistance rendered by the admiralty courts. On 7 February 2006, the International Labour Organisation (ILO), the International Shipping Federation, the International Transport Workers Federation (ITF) as well as other stakeholders collaborated and established the Maritime Labour Convention 2006 (MLC).[5] Broadly speaking, the MLC sets out minimum standards and fair working conditions for seafarers worldwide.[6] It has been widely acclaimed as the 'fourth pillar' of international regulatory regime for quality shipping, complementing three other key maritime

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1 *The ANL Progress (formerly 'Starship')* [2003] 1 Lloyd's Rep 423, 426.

2 *The Ever Success* [1999] 1 Lloyd's Rep 824, 835. See also *The Juliana* (1822) 2 Dods 504, 165 ER 1560; *The Minerva* (1825) 1 Hagg Adm 347, 166 ER 123.

3 Sir William Scott in *The Madonna D'Idra* (1811) 1 Dods 37, 40; 165 ER 1224, 1225 went so far as to describe seafarers' wage liens as 'sacred liens'. See generally DC Jackson, *Enforcement of Maritime Claims* (4th edn, LLP 2005) para 18.70ff; Nigel Meeson and John A Kimbell, *Admiralty Jurisdiction and Practice* (5th edn, Informa Law from Routledge 2018) para 1.43ff; Toh Kian Sing SC, *Admiralty Law and Practice* (3rd edn, LexisNexis 2017) 294.

4 See *The Halcyon Skies* [1976] 1 Lloyd's Rep 461; See also *The Daien Maru No 18* [1984] SGHC 43, [1983-1984] SLR(R) 787 [17]–[19].

5 See Preamble of the Maritime Labour Convention 2006. See also Maritime and Port Authority of Singapore (MPA), 'Singapore Plays Host to International Labour Organisation to Mark Launch of Maritime Labour Convention 2006' (20 August 2013) <https://www.mpa.gov.sg/web/portal/home/media-centre/news-releases/detail/3d11e47b-b27e-4baf-9a5d-7bf1db70b3b3> accessed 14 February 2020.

6 See Ministry of Manpower Singapore, 'Singapore is first Asian country to ratify the Maritime Labour Convention, 2006 (MLC, 2006)' (19 July 2019) <https://www.mom.gov.sg/newsroom/press-releases/2011/singapore-is-first-asian-country-to-ratify-the-maritime-labour-convention-2006-mlc-2006> accessed 14 February 2020.

Conventions[7] of the International Maritime Organisation (IMO).[8] In recent times, more than 70 countries[9] have ratified the MLC. Amongst these, the MLC has also been ratified by most Common Law countries. For example, Singapore was the first Asian country to accede to the MLC in 2011.[10] The United Kingdom ratified the MLC on 7 August 2013.[11]

The MLC, however, has not proved to be a silver bullet solving the primary problems faced by seafarers in their claims for unpaid wages. The problem of abandonment of seafarers by shipowners facing financial difficulties persists. Statistics from the IMO and ILO Joint Database on Reported Incidents of Abandonment of Seafarers (Database) show that from 2004–2018 there were close to 370 incidents of abandonment affecting a total of 4,866 seafarers.[12] There is no simple solution to the problem of abandonment. Abandonment is a potentially complex concept because there is no accepted legal definition of the constitutive elements of abandonment.[13] The MLC itself does not provide a definition of abandonment.[14] There are also conflicting definitions of abandonment, where some refer to the 'loss of link' between

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7 The other three Conventions are the International Convention for the Safety of Life at Sea 1974; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978; and the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978.

8 See MPA (n 5).

9 ILO, 'Ratifications of MLC, 2006 — Maritime Labour Convention, 2006 (MLC, 2006)' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_ INSTRUMENT_ID:312331> accessed 14 February 2020.

10 Singapore, being a leading maritime centre and home to the world's busiest port by vessel arrival tonnage, had to set a good example to the international community. To demonstrate Singapore's commitment to ensuring safe shipping and good employment conditions for all seafarers, Singapore was the first Asian country to accede to the MLC in 2011. Accordingly, the Merchant Shipping (Maritime Labour Convention) Act 2014 (No 6 of 2014) was passed by the Singapore Parliament on 21 January 2014 and the new law came into effect on 1 April 2014. See *Singapore Parliamentary Debates, Official Report* (21 January 2014) vol 91 (Josephine Teo, Senior Minister of State for Transport); See also *Singapore Parliamentary Debates, Official Report* (10 November 2016) vol 94 (Josephine Teo, Senior Minister of State for Transport).

11 See ILO, 'United Kingdom ratifies the Maritime Labour Convention, 2006 (MLC, 2006)' <https://www.ilo.org/global/standards/information-resources-and-publications/news/WCMS_218778/lang--en/index.htm> accessed 14 February 2020.

12 See IMO, 'Seafarer Abandonment' <http://www.imo.org/en/OurWork/ Legal/Pages/Seafarer-abandonment.aspx> accessed 14 February 2020. See also ILO, 'Database on reported incidents of abandonment of seafarers' <https://www.ilo.org/dyn/seafarers/ seafarersbrowse.home> accessed 14 February 2020, where of the incidents in 2018, 175 cases were resolved, 77 cases were disputed, 52 cases were inactive, and 52 cases were unresolved.

13 ILO, 'Report of the Second Session of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers' (March 2001) (GB.280/STM/5) 8.

14 A definition of abandonment was subsequently incorporated into the 2014 Amendments to the Maritime Labour Convention 2006 at I(A)(3), 'Standard A2.5.2 – Financial Security'.

the worker and the employer,[15] while others refer to distressed seafarers who are literally left behind.[16] Having a proper definition is important because it ensures that the right solution to the problem can be found. Some may argue that embarking on legal proceedings is the most direct way to recover unpaid seafarers' wages in cases of abandonment. However, it has been pointed out by the IMO and the ILO that litigation in a foreign forum by seafarers is often not a viable option to recover remuneration. First, the costs of litigation are prohibitive and there may be a lack of legal aid. Second, there are practical obstacles facing seafarers who choose to litigate in a foreign court. For example, foreign litigants may be obliged to post a bond or security in order to bring an action.[17] A court may also decline jurisdictional competence because the employment agreement calls for the dispute to be resolved by another court or tribunal.[18] Third, the foreign legal system may require the physical presence of the seafarer during court proceedings and this may be complicated by the immigration status of the seafarer.[19]

The plight of abandoned seafarers is well illustrated by the collapse of the large shipowner Adriatic Tankers.[20] At its peak, Adriatic Tankers commanded over 100 vessels and employed over 2,000 seafarers.[21] Spurred on by ambitious goals, the company underwent excessive growth and unchecked borrowing, which created an overstretched organisation unable to cope with its obligations.[22] A falling market led to financial difficulties which resulted in the company's inability to pay its seafaring employees' wages and to properly maintain its vessels. Ships were delisted from class and their insurance covers cancelled, which led to these ships

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15 For the 'loss of link' between the worker and the employer, a further question arises as to whether it is a loss of a contractual link in the sense of a repudiatory breach of a contract or a mere loss of a link in communication in the sense of an unresponsive employer. See ILO (n 13) 8.

16 As for seafarers who are 'left behind', there is some confusion as to whether abandonment refers to the collective concept of abandonment of crew and ship as opposed to physically leaving behind an individual.

17 See *The Alkyon* [2019] EWCA Civ 2760, [2019] 1 Lloyd's Rep 406 where the English Court of Appeal upheld the Admiralty Court's decision not to order an arresting party to provide cross-undertaking in damages, thereby confirming that counter-security is not required in the arrest of a ship.

18 ILO (n 13) 8. See also *Bautista v Star Cruises and Norwegian Cruise Line*, *Ltd,* 396 F 3d 1289; *Bautista v Star Cruises and Norwegian Cruise Line, Ltd*, 286 F Supp 2d 1352.

19 For example, in Common Law jurisdictions like the United Kingdom and Singapore, unless judgment in default of appearance is obtained against the ship, oral evidence from witnesses is required to prove facts in order to obtain judgment for any claim.

20 Denis Nifontov et al, 'Seafarer abandonment insurance: a system of financial security for seafarers' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law from Routledge 2014) para 6.6.

21 Ibid paras 6.7 and 6.11.

22 Ibid para 6.8.

falling into a state of disrepair. It was not long before banks and creditors begin instigating repossessions which led to the final collapse of the company.[23] In the wake of its collapse, Adriatic Tankers' ships were often in faraway ports and its seafaring employees were left to starve for extended durations because ship agents refused to resupply the ships as the owners were not paying. The seafarers only survived because of local charities and diplomatic efforts by the crew's home countries.[24]

Seafarers will inevitably suffer severe hardship and face issues of abandonment if there is a downturn in the shipping market. In the face of such a problem, the IMO and the ILO decided to act decisively. In recognising the complementary roles which the IMO and the ILO perform in tackling the problem of abandonment, the IMO Legal Committee indicated its support for the establishment of a joint IMO and ILO Ad Hoc Expert Working Group (JWG) to co-ordinate consultations between both organisations in order to find a solution to this problem.[25] Over the course of a number of working sessions, the JWG acknowledged the difficulties surrounding the issue of abandonment and noted that notwithstanding numerous Conventions and recommendations which were enacted over the years to assist in the repatriation of seafarers, seafarers were still subject to considerable hardship should they be stranded without recourse.[26] Such cases of abandonment have placed a strain on the already stretched resources of voluntary agencies and charities in support of seafarers.[27] It was also acknowledged that assistance to alleviate abandonment may not be forthcoming from flag States or port States because of bureaucratic delays or because of the absence of ratification of the relevant ILO Conventions.[28] Port States may also not feel compelled to intervene because the abandonment of seafarers is essentially a labour dispute on foreign vessels in which the port State authorities may have little interest.[29]

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23 Ibid paras 6.9 and 6.10.

24 Ibid para 6.11.

25 Ibid para 6.13. See also ILO, 'Report of the Director-General on developments in the maritime sector' (International Labour Convention Conference, 94th (Maritime) Session, 2006) para 109.

26 Ibid paras 108, 112.

27 Ibid para 108.

28 Ibid.

29 ILO (n 13) 8.

The JWG then analysed abandonment laws as well as practices and arrived at several conclusions. First, the most effective method of securing payment of unpaid wages and alleviating immediate need caused by abandonment would be to institute subrogation arrangements via a designated legal entity which would indemnify the seafarer in exchange for the assignment of the debt owed to the seafarer. This form of financial security would result in the seafarer being indemnified and repatriated quickly, leaving recovery to the designated legal entity to pursue the claim against the errant shipowner. Second, the most meaningful way of implementing such assistance and to safeguard seafarers' interests would be via legislative or regulatory means.[30] The legislative requirement would carry a strong obligatory element and if shipowners could be legally compelled to organise financial security as a condition for ship registration, the benefits of such financial security could then be enjoyed by seafarers.

Bearing in mind the above matters, the JWG proposed a two-step approach to tackle the problem of abandonment. The first step, or short-term approach, would be the development of one or more IMO or ILO resolutions which comprise of guidelines concerning the provision of financial security in cases of abandonment. On this point, the IMO in 2001 adopted Resolution A.930(22) entitled 'Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers'. [31] This resolution sets out a framework for providing seafarers with basic financial security if shipowners were unable to fulfil their obligations.[32] Such financial security was intended to cover, among other things, all outstanding wages and costs of repatriation.[33] The second step, or longer-term approach, would include the possible development of mandatory instruments to be adopted by both organisations.[34]

The JWG's fruits of labour eventually ripened into the Amendments of 2014 to the Maritime Labour Convention 2006 (MLCA). The MLCA's intention was for shipowners to procure

30 Ibid.

31 Nifontov (n 20) para 6.15.

32 IMO, Resolution A.930(22) Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers (17 December 2001) para 5.2.

33 Ibid para 5.1.3.

34 ILO (n 26) para 114.

insurance or other financial security to provide support for abandoned seafarers.[35] Such support would take the form of a financial security certificate (FSC) issued by financial institutions such as insurance companies, social security schemes or a national fund.[36] The international community's response to the MLCA has been positive, with more than 60 countries accepting the amendments.[37] For instance, the MLCA came into force in the United Kingdom on 18 January 2017[38] and it was also incorporated into Singapore's legislation as the Merchant Shipping (Maritime Labour Convention) (Financial Security) Regulations 2017.[39]

Although the reception to the MLC and the MLCA has been positive, a question arises as to how effective an FSC is in resolving claims for unpaid seafarers' wages and to alleviate seafarers' needs when they are abandoned. It is argued that to a large extent FSCs are still ineffective. This paper seeks to set out the problems with using FSCs under the MLCA. In doing so, the paper will first explain how FSCs are issued, the coverage they provide, the claims process, as well as the problems which the FSCs are supposed to rectify. Next, the paper will highlight five drawbacks of FSCs and describe how these drawbacks do not solve the problems which FSCs are supposed to rectify. Finally, the paper will conclude with suggested solutions to make the MLC and MLCA more effective in resolving claims for unpaid seafarers' wages.

2 How FSCs work under the MLCA — issuance, coverage and claims process

The mechanism of how FSCs function is prescribed under Standard A2.5.2 of the MLCA. An FSC is simply an undertaking that a financial service provider will guarantee payment of the seafarers' wages and repatriation costs in the event of abandonment. FSCs are to be issued by a social security scheme, an insurance company, a national fund or any other similar

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35 *Singapore Parliamentary Debates, Official Report* (10 November 2016) vol 94 (Josephine Teo, Senior Minister of State for Transport).

36 Amendments of 2014 to the Maritime Labour Convention 2006 (11 June 2014), Standard A2.5.2.3.

37 See ILO, 'Acceptance of amendments of 2014 to the MLC, 2006' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11301:::NO:RP,11301:P11301_INSTRUMENT_AMENDMENT_ID,P11301_INSTRUMENT_ID:3256971,312331> accessed 14 February 2020.

38 See ILO, 'Ratifications for United Kingdom' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102651> accessed 14 February 2020.

39 S25/2017 (Singapore). See also ILO, 'Ratifications for Singapore' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103163> accessed 14 February 2020.

entity.[40] It is compulsory for the ship to carry a copy of the FSC on board and to post it in a conspicuous place on board where it is available to seafarers.[41] Most FSCs are found in the dining quarters or rest areas for the seafarers. The FSCs are to contain the name and address of the financial service provider as well as the contact details of the person or entity responsible for handling the seafarers' request for assistance.[42] This envisages a situation where in the event of an abandonment, the seafarers can simply pick up the FSC and contact the relevant financial service provider to seek relief. Under the MLCA, a seafarer is deemed abandoned if the shipowner fails to cover the costs of the seafarers' repatriation or has failed to pay the seafarers' contractual wages for a period of at least two months.[43]

Although the MLCA provides that FSCs can be issued by a variety of financial institutions, FSCs are usually issued by marine insurers known as Protection & Indemnity (P&I) Clubs. The 13 biggest P&I Clubs in the world have banded together to form the International Group of P&I Clubs (IG Group). The IG Group provides marine insurance cover for approximately 90 per cent of the world's ocean-going tonnage.[44] By covering virtually every type of vessel on the globe, the IG Group provides a single effective voice for P&I Clubs and their shipowners to engage with governments, legislators and maritime regulators on matters relating to shipowners' liability.[45]

With the advent of the MLCA, the IG Group has developed a uniform approach to the freshly mandated financial security requirements for its shipowning members.[46] Unlike insurance certificates issued by the flag State to cover liabilities under IMO Conventions in relation to maritime safety, security and pollution,[47] FSCs are issued directly by P&I Clubs where

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40 See Amendments of 2014 to the Maritime Labour Convention 2006 (11 June 2014), Standard A2.5.2.

41 Ibid.

42 Ibid.

43 Ibid.

44 See IG of P&I Clubs, 'About the International Group' <https://www.igpandi.org/about> accessed 14 February 2020.

45 Ibid.

46 See 'Maritime Labour Convention 2006 as Amended (MLC), Financial Security Requirements, International Group FAQs for Members' (1 April 2019).

47 International Convention on Civil Liability for Bunker Oil Pollution Damage 2001; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, as amended by the Protocol of 2010 to the Convention; Nairobi International Convention on the Removal of Wrecks 2007; and the International Convention on Civil Liability for Oil Pollution Damage 1992, as amended.

shipowners have to submit an application form to the P&I Club.[48] Such application forms are usually offered to the P&I Club's own members as the P&I Club would be able to judge the financial health of its members. For new shipowning members, the application form includes an undertaking that they will enter the ship in the P&I Club for the coming financial year.[49]

The IG Group dictates that the coverage of FSCs will include:[50]

(i) shipowners' liabilities for repatriation of crew, essential needs such as food, accommodation and medical care and up to four months' outstanding contractual wages and entitlements in the event of abandonment.[51]

(ii) contractual payments for death or long-term disability due to an occupational injury, illness or hazard set out in the employment agreement or collective agreement.[52]

For the purposes of this paper, the focus is on the coverage FSCs provide for unpaid seafarers' wages under (i) above.

In the event that there is a requirement for cover under the FSCs to be engaged, seafarers are encouraged to contact their employers and union representatives to attempt to seek an early resolution, failing which the seafarer should contact the P&I Club who issued the FSC to obtain assistance.[53] In contacting the P&I Club for assistance, seafarers are encouraged to provide as much documentation as possible to substantiate their claim, including but not limited to copies of their seafarer's employment agreement, collective bargaining agreements,

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48 See The West of England Ship Owners Mutual Insurance Association (Luxembourg), 'Notice to Members No. 19 2016/2017 — Maritime Labour Convention 2006 as amended (MLC) Application Process for MLC Certificates' (November 2016) <https://www.westpandi.com/publications/notice-to-members/2016-2017/notice-to-members-no-19-20162017/> accessed 14 February 2020.

49 For an example of the application form, see ibid.

50 See FAQs (n 46) para 1.

51 See Amendments of 2014 to the Maritime Labour Convention 2006 (11 June 2014), Standards A2.5.2(5), A2.5.2(9).

52 Ibid Standard A4.2.1(1b).

53 See FAQs (n 46) para 29.

seafarers' book and portage bills.[54] The P&I Club's claims handlers will then acknowledge receipt of the claim, check the validity of the FSC and investigate whether the shipowners have defaulted on the wages due to the seafarers. Should the P&I Club be satisfied that the FSCs are valid and there was indeed a failure of the shipowner to pay wages, the P&I Club will take immediate steps to remit the unpaid wages and to repatriate the affected seafarers. Usually local correspondents or representatives will be contacted to oversee the repatriation process and to provide any further assistance to the seafarers.[55] It is noteworthy that the P&I Clubs' claims handling services have been standardised as there is a memorandum of understanding between the ITF and IG Group on the management and handling of seafarers' wage claims.

3 The problems which FSCs are supposed to rectify

It is obvious that the purpose of having FSCs is to ensure that seafarers do not suffer at the hands of errant shipowners and to ensure that seafarers' wages are fully paid up. However, as highlighted above, the problem of abandonment is complex and to truly understand the drawbacks of FSCs and whether they can resolve the problem of abandonment, it would be helpful to take a closer look at the statistics in relation to abandonment as compiled in the Database.[56]

[54] A portage bill is a spreadsheet maintained and drafted by the master which documents the total earnings of each seafarer for the voyage. It may include additional salary for overtime and remuneration for certain chores like tank cleaning. It also includes advancements made to the seafarers for daily expenses which may be used during shore leave.

[55] See FAQs (n 46) para 29.

[56] See ILO (n 12). See also IMO (n 12).

Year	Total number of cases of abandonment reported	Number of resolved cases[57]	Number of disputed active cases	Number of undisputed active cases	Number of inactive cases
2004	23	21 (91%)	1	0	1
2005	10	4 (40%)	4	0	2
2006	10	5 (50%)	1	0	4
2007	12	9 (75%)	0	0	3
2008	16	9 (56.3%)	4	1	16
2009	65	38 (58.5%)	10	1	16
2010	17	10 (58.8%)	4	0	3
2011	18	4 (22.2%)	6	1	7
2012	17	5 (29.4%)	3	2	7
2013	18	11 (61%)	5	0	2
2014	12	7 (58.3%)	4	1	0
2015	18	4 (22.2%)	7	5	2
2016	21	12 (57.1%)	6	3	0
2017	64	26 (40%)	13	25	0
2018	44	14 (31.8%)	3	27	0
2019	15	0 (0%)	0	15	0

A quick review of the table above leads to the following observations. First, since 2004, there were only two years (2004 and 2007, before FSCs were introduced) where there was more than a 75 per cent resolution of abandonment cases. Second, for most years, the percentage of resolved cases ranges from 22.2 per cent to 61 per cent. Third, for the years after the MLCA was introduced (2014 onwards), the average percentage of resolved cases is about 40 per cent and a large percentage of unresolved cases remains. Fourth, there does not appear to

[57] A case is resolved only if the ILO receives clear information that the totality of the crew has been successfully repatriated and the totality of all outstanding remuneration and contractual entitlements have been paid and duly received by all the crew members. See ILO, 'General procedure to be followed for the operation of the database on reported incidents of abandonment of seafarers and fishers (document IMO/ILO/WGLLCCS6/6, paragraphs 3.91–3.113)' <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/genericdocument/wcms_614370.pdf> accessed 14 February 2020.

be any drop in the number of notified cases every year since the introduction of the MLCA and FSCs. In fact, 2017 and 2018 both had a high number of notified cases.

While the JWG concluded that the subrogation arrangements provided by FSCs would be the most effective method of securing payment of unpaid wages and alleviating immediate need caused by abandonment,[58] the above statistics and observations highlight three problems that persist notwithstanding the introduction of FSCs. First, the significant percentage of unresolved cases that were reported well before 2019 suggests that seafarers may have been abandoned for a long period of time and that they are therefore owed considerably more than four months of wages. This is crucial because, as will be discussed below, the coverage of four months of wages is insufficient. Second, FSCs have not resolved wage claims or alleviated the needs of abandoned seafarers quickly enough because there is clearly still a significant number of unresolved cases each year. Third, the presence of disputed[59] cases suggests that P&I Clubs may have difficulties in recovering the assigned wage claims against errant shipowners.

Bearing in mind the above problems, it is now time to look more closely at the drawbacks associated with FSCs.

4 Drawbacks associated with FSCs

4.1 Covering four months of crew wages is insufficient

This drawback relates to the first problem highlighted above. The coverage provided by the FSCs is limited to only four months of outstanding wages.[60] In theory, this may seem sufficient

58 See ILO (n 13) 8.

59 See ILO (n 57) where there is no definition of a 'disputed' case.

60 See Amendments of 2014 to the Maritime Labour Convention 2006 (11 June 2014), Standard A 2.5.2(9) which states among other things that 'assistance provided by the financial security system shall be sufficient to cover the following … outstanding wages and other entitlements due from the shipowner to the seafarer under their employment agreement … limited to four months of such outstanding wages and four months of any such outstanding entitlement.'

to adequately cover any outstanding crew wages. However, in reality, because seafarers are deemed abandoned by shipowners only if they have not been paid wages for at least two months,[61] by the time the seafarers contact the P&I Club for assistance, the accrued outstanding wages would already be in excess of four months. It would also mean that by the time seafarers seek external assistance, at least half of the guaranteed four months coverage would have been 'utilised'. Such a trend is very apparent from a number of international cases. In the United Arab Emirates, there was a case of seafarers being abandoned for 18 months before they were paid their wages.[62] In Singapore, there were a number of unpaid seafarers' claims which were filed in the Singapore courts over the past seven years.[63] For some of these cases, the accrued outstanding wages at the time assistance was rendered to the seafarers were astonishing.[64] Even in more recent times after the adoption of the MLCA and its FSC regime, cases continue to show that at the commencement of legal proceedings, unpaid wages due to seafarers are in excess of four months of wages.[65] Such a trend is not limited to cases within the Singapore courts.[66] In the New Zealand case of *Sajo Oyang Corp of Korea v Ministry for Primary Industries*,[67] 24 seafarers who worked on board the *Oyang 77* were owed NZD 4,727,317.80 for unpaid wages while two who worked on board the *Oyang 70* claimed NZD 453,726.72 in unpaid wages.[68] The staggering quantum of the unpaid wages suggests that the officers and crew of the *Oyang 77* and the *Oyang 70* were likely owed more than four months of their wages. Further, the Database's statistics as set out in the table above indicate

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61 Ibid Standard A2.5.2.

62 See The Guardian, 'Seafarer abandoned for three years off UAE will be home in time for Christmas' (December 2019) <https://www.theguardian.com/global-development/2019/dec/20/seafarer-abandoned-for-three-years-off-uae-will-be-home-in-time-for-christmas> accessed 14 February 2020.

63 In *The Ao Hong Ma* (HC/ADM 55/2016) (Singapore), 23 out of the 42 plaintiffs were owed more than four months of wages before the crew finally decided to obtain assistance to arrest the ship. The sixth plaintiff in *The Ao Hong Ma* was owed a total 12 months of wages at the time the ship was arrested. In *The Imbak* (HC/ADM 85/2015) (Singapore) 14 out of 22 plaintiffs were owed more than four months of wages with the longest accrued being seven months of unpaid wages at the time of arrest. Next, in *The Ambassador* (HC/ADM 17/2017) (Singapore), 23 out of 24 plaintiffs were owed more than four months of wages with the longest accrued being eight months at the time of arrest. Finally, in *The Amba Bhargavi* (HC/ADM 23/2014) (Singapore) and *The Fortune Elephant* (HC/ADM 124/2013) (Singapore), all of the plaintiffs were owed more than four months of wages when the respective ships were arrested.

64 See *The Ao Hong Ma* (n 63) where the sixth plaintiff was owed a total of 12 months of wages.

65 See *The Long Bright* [2018] SGHC 216, [2018] 5 SLR 1397 [2] where 10 seafarers' claim for unpaid wages amounted to approximately USD 295,000.00. See also *The Ambassador* (n 63).

66 See ITF, 'Freedom and wages returned after seven years of hell' (4 January 2019) <https://www.itfglobal.org/en/news/freedom-and-wages-returned-after-seven-years-of-hell> accessed 14 February 2020, where a group of Ghanaian seafarers were abandoned for more than five years.

67 [2015] NZDC 6726.

68 Ibid [6]–[7].

a significant number of unresolved[69] cases since 2014. This means that the affected seafarers in such cases have not been repatriated and their wages have not been fully received. Assuming the seafarers have not been repatriated from the vessel, it would also mean that their wages would continue to accrue well beyond the four months coverage of the FSCs.

In light of the above, there is empirical evidence to show that seafarers are usually owed more than four months of their wages when they are abandoned by their shipowners. P&I Clubs and the financial institutions which provide the FSCs have no obligation to pay any wages in excess of four months. The coverage by FSCs is therefore insufficient to tackle the realities of the problem faced by abandoned seafarers.

One may ask why do seafarers allow their outstanding wages to accumulate over such an extended period? Seafarers are technically entitled to bring the ship to an arrest-friendly jurisdiction to pursue a claim for their unpaid wages.[70] It is submitted that seafarers' reluctance may stem from two possible reasons.

First, seafarers may be emotionally reluctant to sue their employers because they have been working and sailing with their employers for a long time.[71] In working for the same shipowner and serving on board a familiar fleet of ships over a course of time, it is not unnatural for seafarers to develop a sense of loyalty for their employers. Seafarers would usually be aware of the financial woes plaguing their employers and would be mindful that the charter hire earned during the voyage is an important fiscal lifeline for their employers. It is ingrained in seafarers to ensure that all aspects of the maritime adventure happen like clockwork and that there should be no delays to the voyage. As such, seafarers may be disinclined to suspend

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69 See ILO (n 12); IMO (n 12).

70 The commencement of a wage claim or the arrest of a ship does not terminate the contract of employment. See *The Ever Success* (n 2) 832: crew's wages continued to accrue even after the commencement of the claim and the arrest of the ship.

71 See Nifontov (n 20) paras 6.6–6.12 where the case study of Adriatic Tankers is discussed. Despite delays in payment of wages to Adriatic seafaring employees, many still stayed on and relied on the ITF's assistance to negotiate with their employer rather than to rely on legal action. It was only till many months of non-payments and many more broken promises that the seafarers became increasingly desperate and started to arrest ships. See also *Singapore Parliamentary Debates, Official Report* (10 November 2016) vol 94 (Dennis Tan Lip Fong, Non-Constituency Member) where the speaker explained how seafarers were reluctant to sue their employers which were former state-owned enterprises of the Soviet Union, especially since the seafarers had been sailing with such companies since the golden age of the Communist era.

service or to arrest the ship because the very voyage which they disrupt may spell the end of their employers. In this regard, an arrest of a ship is a very drastic remedy[72] because such an arrest will not only prevent the ship from trading, thereby resulting in a shipowner losing hire,[73] but it will also expose a shipowner to a variety of consequential damages.[74] Seafarers are keenly aware of the potential losses which their employers can suffer if they arrest the ship and are reluctant to do so by reason of a misplaced sense of allegiance developed after working with their employers for an extended period of time. Further, it is not uncommon for seafarers' trust and loyalty to be abused by their employers. In times of financial difficulty, errant shipowners often give empty promises to seafarers that their wages will be paid within a certain number of days and that the seafarers need to support the shipowners by ensuring that the voyage is duly completed so that the owners can receive hire to pay the seafarers. The typical but unfortunate tale that follows is that the seafarers are never paid despite fulfilling their end of the bargain. By the time the seafarers realise that they have been duped, their outstanding wages have accumulated beyond four months.

Second, seafarers have a fear that the commencement of any legal proceedings against their employers to recover unpaid wages may spell grave repercussions for themselves and their families. Many seafarers from developing nations hail from towns and villages. Embarking on a seafaring occupation entails leaving their families behind. These families rely on the seafarers' wages as a lifeline and are particularly vulnerable because they are susceptible to much hardship if the seafarers' wages do not reach them.[75] Within the maritime industry, errant employers are known to have taken advantage of seafarer's families' plight by threatening violence against the families in the event that the seafarers adopt a belligerent

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72 See *The Vasiliy Golovnin* [2008] SGCA 39, [2008] 4 SLR(R) 994 [22], [84], [149]. See also *The Rainbow Spring* [2003] SGCA 31, [2003] 3 SLR(R) 362 [37].

73 See New York Produce Exchange Form (NYPE) 2015, cl 17 and NYPE 1993, cl 17. Although the off-hire clause (cl 15) of the NYPE 1946 does not provide for the off-hire of the vessel in the event of detention by arrest, most charter parties using the NYPE 1946 as a base form would amend or include a provision in the riders stipulating that detention by arrest is an off-hire event.

74 See *Compania Financiera 'Soleada' SA v Hamoor Tanker Corporation Inc (The Borag)* [1981] 1 WLR 274, 281 where the Court held that the owner's expenditure to obtain the release of the ship was to be regarded as damages, though the Court decided that the heavy bank interest charges for a guarantee sought by owners were too remote to be recovered as damages.

75 See Nifontov (n 20) para 6.9 where it is mentioned that the families of seafarers would suffer great hardship from the lack of remittances from their seafaring kin. See also *Singapore Parliamentary Debates, Official Report* (10 November 2016) vol 94 (Dennis Tan Lip Fong, Non-Constituency Member).

attitude towards their employers. Having few resources or abilities to counter such threats, seafarers are often at the mercy of their employers. They would be compelled to toe the line and would refrain from contemplating legal proceedings against the ship or their employers. In light of the above, it is undeniable that the seafarers' reluctance to take legal action against the ship or its owners is a real problem faced in the maritime industry which is likely to lead to seafarers being owed more than four months of their wages in the event of abandonment.

4.2 FSCs do not guarantee replacement seafarers signing on board

While the FCSs and the MLCA clearly cover all reasonable expenses of repatriating seafarers, they remain silent on who should bear the responsibility and costs of arranging replacement seafarers to replace the repatriated ones. This is especially problematic because all ships have a minimum manning requirement.

The minimum manning requirement is determined by the laws of the ship's flag State as well as Resolutions A.890(21)[76] and A.955(23)[77] of the IMO. For example, in the case of Singapore-flagged ships, the minimum number of officers is prescribed by the Merchant Shipping (Training, Certification and Manning) Regulations.[78] Blue water Singapore-flagged ships larger than 3,000 GRT require at least one master, one chief officer and three deck officers on board.[79] As for the number of ratings required, the Regulations[80] state that the number of certified ratings has to be in compliance with IMO Resolutions A.890(21) and A.955(23). These resolutions set out many guidelines and principles for shipowners to consider before they determine how many ratings are required on board. Broadly speaking, there should be enough ratings on board a ship to ensure that the required watchkeeping standards and crewing duties can be fulfilled without compromising the safety of the ship[81] as well as the seafarers' rest time.[82] Shipowners are to apply all recommendations and guidelines contained

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76 IMO Resolution A.890(21), Adopted on 25 November 1999, Principles of Safe Manning (4 February 2000).

77 IMO Resolution A.955(23), Adopted on 5 December 2003, Amendments to the Principles of Safe Manning (Resolution A.890(21)) (26 February 2004).

78 (Cap 179, Rg 1, 2001 Rev Ed) (Singapore).

79 Ibid s 13, Second Sch.

80 Ibid s 18.

81 See IMO (n 76) Annex 2 s 2.1.

82 Ibid Annex 1 s 1.1.1; Annex 2 s 3.3.

in the Resolutions and submit to the flag State a plan setting out the proposed number of officers and ratings on board the ship.[83] Upon being satisfied with the proposed manning numbers, the flag State will issue a safe manning document[84] to the shipowner. This document states the precise minimum manning requirement of the ship.

A minimum manning requirement (albeit on a different scale) also applies to ships laid up in port.[85] Although the officers and ratings of a laid-up ship have fewer duties than a trading ship, ports are known to impose a skeletal manning requirement for laid-up ships. It is important for laid-up ships to be adequately manned just in case they need to execute any evasive manoeuvres in times of emergency.[86]

Hence, regardless of whether a ship is trading, it is apparent that shipowners must comply with one form of minimum manning requirement or another. If seafarers are repatriated, they have to be replaced to ensure that the requisite manning requirement is still fulfilled. Herein lies a problem with the MLCA and its FSCs. They only create an obligation on the shipowner and the P&I Club to repatriate the seafarer, but do not identify which party should bear the responsibility or costs of bringing on board replacement seafarers. Bearing in mind that shipowners who fail to pay seafarer's wages are usually mired in financial difficulties,[87] they are unlikely to be able to pay and arrange for replacement seafarers to be signed on board. As P&I Clubs also have no obligation under the FSCs or the MLCA to pay and arrange for replacement seafarers to be signed on board, there is clearly a lacuna in the procedure of replacing seafarers and ensuring that the ship meets its minimum manning requirement. This

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83 Ibid.

84 See MPA, 'Application for Safe Manning Document (For use after 01 Jan 2014)' <https://www.mpa.gov.sg/web/portal/home/finance-e-services/forms/singapore-registry-of-ships/manning> accessed 14 February 2020.

85 See Maritime and Port Authority of Singapore (Port) Regulations (Cap 170A, Rg 7, 2000 Rev Ed) (Singapore), s 2, which defines a 'laid-up' vessel as a vessel which is not under repair or actively employed

86 See MPA, 'Laying Up of a Vessel in Port' <https://www.mpa.gov.sg/web/portal/home/port-of-singapore/craft-licensing-and-port-clearance/launching-laying-up-breaking-up-of-vessel/laying-up-of-a-vessel-in-port> accessed 14 February 2020, where the minimum manning requirement of vessels laid up in Singapore is set out.

87 Based on the cases cited in part 4.1 above which show that seafarers can be owed more than four months of salary, it is reasonable to conclude that shipowners who fail to pay seafarers their wages are facing financial difficulties.

in turn could lead to potentially disastrous consequences because the safety of the ship may be compromised by a lack of manpower.

4.3 FSCs do not solve a vicious cycle where shipowners fail to pay the wages of replacement seafarers

Even if replacement seafarers are successfully brought on board the ship, the FSCs have not solved the root of the problem, ie the shipowners' poor financial status which prevents them from paying the seafarers' wages.[88] Cash-strapped shipowners may therefore end up failing to pay the wages of the replacement seafarers as well. Although it may be argued that the FSCs on board will come into play to assist the replacement seafarers like their predecessors who were repatriated, this will however create a vicious cycle where batches upon batches of replacement seafarers are signed on board only to find that their wages will be unpaid and that they will be signed off and replaced.

Shipowners are technically able to maintain this vicious cycle if they continue to pay their premiums and outstanding debts owed to their P&I Clubs.[89] Such shipowners may obtain indulgence from their debtors by way of a favourable relationship with their P&I Club or insurance brokers, thereby ensuring that their FSCs' coverage is still intact notwithstanding their difficult financial situation. Hence, while all may be well on shore, this would not bode well for the seafarers or their replacements.

Bearing in mind that the purpose of the MLC is to protect seafarers, it is submitted that the creation of the above vicious cycle does not sit well with the spirit of the MLC, the MLCA or the FSCs, and that more can be done to help preserve the interests of seafarers.

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88 See Nifontov (n 20) para 6.31, where it is identified that the proximate cause of seafarer abandonment is a shipowner's financial hardship or insolvency.

89 See Maritime Labour Convention Extension Clause 2016, para 2. See also FAQs (n 46) paras 11, 12.

4.4 FSCs can be easily terminated by P&I Clubs

Against the backdrop of financially troubled shipowners, the coverage provided by FSCs may prove to be illusory. To better appreciate this point, one must understand the fact that the cover provided by FSCs for unpaid seafarers' wages due to financial default of shipowners is, strictly speaking, outside of the scope of traditional P&I cover[90] as these risks are not poolable by the IG P&I Clubs[91] and they do not attract an insurance deductible.[92] It was only due to the will of the shipping community that P&I Clubs took up the mantle of FSC issuers to protect seafarers.[93] Notwithstanding the above, in the event that FSCs are utilised, shipowners are expected to reimburse their P&I Clubs for any sums paid out to cover seafarers' wages.[94] If shipowners fail to reimburse the sums paid out under the FSCs to their P&I Clubs, or if shipowners fail to pay their basic premiums to their P&I Club, P&I cover can be withdrawn[95] and the P&I Clubs are entitled to terminate FSCs. In this regard, the process of terminating the FSCs is straightforward. P&I Clubs simply need to give at least 30 days of notice to the competent authority of the flag State, following which the FSCs are deemed terminated and the P&I Club no longer has any liability to cover any unpaid seafarers' wages.[96]

In light of the above, the perennial problem of shipowners facing financial difficulties coupled with the fact that FSCs are easily terminated suggest that the financial security provided by FSCs may be more apparent than real. In a situation where shipowners have defaulted on payment of seafarers' wages, it seems equally likely that they will have difficulties paying their premiums to their P&I Clubs. The time when FSCs are most needed is when the seafarers' wages are unpaid due to the shipowners' financial default. However, the irony is that it is the shipowners' very financial default that will also cause the FSCs to be terminated due to their non-payment of P&I premiums. The supposed helping hand extended by the MLCA and the

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90 See FAQs (n 46) para 10.

91 Ibid para 14.

92 Ibid para 19.

93 IMO, 'Circular Letter No. 3464, Annex — Guidelines for Accepting Insurance Companies, Financial Security Providers and the International Group of Protection and Indemnity Associations (P&I Clubs)' (2 July 2014).

94 See FAQs (n 46) paras 11, 12.

95 See eg The West of England Ship Owners Mutual Insurance Association (Luxembourg), *The Rules of Class 1 & 2* (2019), r 32. See also Nifontov (n 20) para 6.31.

96 See Amendments of 2014 to the Maritime Labour Convention 2006 (11 June 2014), Standards A2.5.2.11, A4.2.12. See also FAQs (n 46) para 28.

FSCs to seafarers is in fact very easily withdrawn by reason of the shipowners' financial situation.

4.5 P&I Clubs' difficulty in recovery

In the event that P&I Clubs pay out any sums under FSCs, shipowners are obliged to reimburse such sums in full to their P&I Clubs.[97] However, the shipowners' financial predicament which led to their default in paying the seafarers' wages may also hamper their ability to repay their P&I Clubs the sums paid out under the FSCs. In such circumstances, P&I Clubs may have to resort to legal action such as arresting and selling the errant shipowners' ships to recover the seafarers' wages. It is argued that for FSCs to function, legal action is inevitable because the genesis of FSCs was based on a subrogation arrangement in exchange for the assignment of the shipowners' debt[98] to the P&I Club so that the P&I Club can sue upon such debt.

As with all in rem actions and judicial sales of arrested ships, the critical question which determines whether a claimant obtains any form of recovery is the issue of priority. Traditionally, a claim for seafarers' wages attracts a maritime lien which places the claimant almost at the top of the priority list.[99] A claim which does not enjoy the benefits of the seafarers' maritime lien will rank below a mortgagee's claim. Realistically, in a situation where a P&I club has to make a recovery for unpaid seafarers' wages against the shipowner, such a shipowner is likely to be facing financial problems and would have had its P&I cover withdrawn due to non-payment of premiums. As a corollary to the above, such financial woes would also mean that the shipowner would have defaulted on its mortgage repayments,[100] therefore resulting in the mortgagee bank pursuing an action against the ship. Unless the P&I Club enjoys the priority afforded by the seafarers' maritime lien, any recovery would be minimal because the mortgagee's claim may wipe out the sale proceeds of the ship.[101]

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97 See Maritime Labour Convention Extension Clause 2016, para 2.

98 ILO (n 13) 8.

99 *The Euroexpress* [1988] SGCA 7, [1988] 2 SLR(R) 232; *The Sparti* [2000] 3 HKC 323, [2000] 2 Lloyd's Rep 618.

100 See eg *Anton Durbeck GmbH v Den Norske Bank ASA* [2005] EWHC 2497 (Comm), [2006] 1 Lloyd's Rep 93 [68] where a shipowner was unable to pay premiums and mortgage instalments due to financial difficulties which resulted in P&I cover being withdrawn and the shipowner's ship being arrested.

101 See eg *The Reina (No 2)* [1963] 2 Lloyd's Rep 513 where the plaintiff mortgagees' claim amounted to GBP 59,424.00 whereas the sale value of the ship was only GBP 68,835.00.

Against the above backdrop, the pertinent question that ensues is whether a P&I Club is entitled to enjoy the benefits of the priority afforded by a maritime lien. In other words, can the rights and benefits of a maritime lien be transferred from seafarers to a P&I Club in the event that the P&I Club makes payment of the seafarers' unpaid wages under the FSCs? The MLCA and the FSCs clearly envisage this question to be answered in the affirmative, as Standard 2.5.2.12 provides as follows:[102]

> If the provider of insurance or any other financial security has made any payment to any seafarer in accordance with this Standard, such provider shall, up to the amount it has paid and in accordance with the applicable law, acquire by subrogation, assignment or otherwise, the rights which the seafarer would have enjoyed.

The effect of this clause is that P&I Clubs who make payments pursuant to FSCs would, subject to the applicable law, acquire by subrogation, assignment or otherwise the rights which seafarers would have enjoyed. Theoretically, such rights enjoyed by seafarers would include the right of superior priority afforded by the maritime lien, thereby allowing a P&I Club's claim to trump a mortgagee's claim. However, in reality, this may not be as straightforward as it seems for the following reasons.

First, the ambiguity of the words 'subject to the applicable law' creates confusion as it is uncertain which law would apply to the transfer of rights enjoyed by the seafarer. This is further complicated as there is no international unanimity on the judicial characterisation of maritime liens as to whether they are procedural or substantive in nature.[103] A theoretical question therefore arises as to whether a foreign law, with respect to its maritime liens, rights and claims, can be recognised in a forum when the aforementioned aspects of the foreign law are dissimilar to corresponding aspects of the lex fori.[104] In Canada[105] and the United

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102 See Amendments of 2014 to the Maritime Labour Convention 2006 (11 June 2014), Standard A2.5.2.12.

103 See Toh Kian Sing (n 3) 277.

104 William Tetley, 'Maritime Liens, Mortgages and Conflict of Laws' (1993) 6 USF Mar LJ 1, 7.

105 *The Ioannis Daskalelis* [1974] 1 Lloyd's Rep 174; *The Strandhill* [1926] SCR 680, [1926] 4 DLR 801; *Marlex Petroleum Inc v The Ship, Har Rai* [1984] 2 FC 345, [1984] 4 DLR (4th) 739; *Sembawang Reefer Lines (Bahamas) Ltd v Lina Erre* [1989] FCJ 552, [1990] 30 FTR 31.

States,[106] this question is answered in the affirmative as the courts in these jurisdictions would apply the lex causae and declare that they have jurisdiction to recognise foreign liens, without distinguishing whether they are similar or dissimilar to liens in the forum.[107] However, in the United Kingdom, the Privy Council in *The Halcyon Isle*[108] held that the right to proceed in rem against a ship (with respect to a foreign maritime lien) falls to be determined by the lex fori because a maritime lien is of a procedural character. Which law should therefore apply to determine whether the rights enjoyed by seafarers can be transferred to P&I Clubs after the FSCs have been engaged?

Second, assuming one follows the majority of the Privy Council's decision in *The Halcyon Isle* and decides that the applicable law has to be that of a local procedural law enacted to recognise and reflect such transferability from the seafarer to a P&I Club, a further problem arises because even though a country may ratify the MLC or the MLCA, the wording of the Convention may not be fully adopted in the local legislation. This is in fact the case for most Common Law countries. For example, in Singapore, the transferability of the seafarers' rights and benefits to P&I Clubs was not immediately enshrined under the Merchant Shipping (Maritime Labour Convention) Act 2014 and its subsidiary legislation.[109] In Australia, although the MLCA is in force,[110] its relevant legislation[111] does not preserve the transferability of the seafarers' rights and benefits in cases of abandonment. The same can be said for New Zealand,[112] Canada,[113] and Hong Kong[114] where an express provision on the transferability of the seafarers' rights is absent in their respective local legislation. As will be seen below, the absence of an explicit legislative provision to ensure the transferability of the seafarers' rights can be potentially problematic because the Common Law position on the transferability of maritime liens is unclear.

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106 *The Maggie Hammond* (1869) 76 US 435.

107 Tetley (n 104) 8–9.

108 [1981] AC 221.

109 (No 6 of 2014) (Singapore). There are clear intentions to incorporate the transferability of seafarers' rights into Singapore's legislation in 2020.

110 ILO, 'Ratifications for Australia' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102544> accessed 14 February 2020.

111 See Marine Order 11 (Living and working conditions on vessels) 2015 (Australia), s 34A.

112 See Maritime Rules Part 52: Maritime Labour Convention (9 March 2017) (New Zealand).

113 See Marine Personal Regulations (SOR/2007-115) (Canada).

114 See Merchant Shipping (Seafarers) (Working and Living Conditions) Regulation (Cap 478 sub leg AF) (Hong Kong).

Third, even for Common Law countries like the United Kingdom where the issue of transferability of seafarers' rights and benefits has been explicitly addressed by domestic legislation, the effect of such legislation is questionable because the wording effecting such transferability may be unclear.[115] For example, the UK legislation provides that any rights which the seafarer has against the shipowner as a result of being abandoned are 'transferred to and vested in' the abandonment service provider. Unlike the wording of Standard 2.5.2.12 of the MLCA, such legislation is vague as it omits reference to the method as to how the seafarers' rights are transferred, namely 'by subrogation, assignment or otherwise'.

Pausing here, it would be useful to provide a brief exposition on the background of maritime liens under the common law and why it is important for the transferability of maritime liens to not only be reflected in local legislation but for such transferability to be reflected as clearly as possible.

Traditionally, maritime liens are seen as a privilege which exists solely to benefit the lienee and are therefore incapable of any form of transfer.[116] To legal historians and anthropologists, this may seem surprising, bearing in mind that the English maritime lien law has its origins in Civil Law,[117] and French civil law, for example, does allow for the assignment and subrogation of privileges under a maritime lien.[118]

However, in the United Kingdom as well as most Common Law countries,[119] the courts have reached a diametrically different conclusion from their Civil Law counterparts. The Common Law realm's position is that the privileges of a wage lien can only be transferred when leave

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115 See Merchant Shipping (Maritime Labour Convention) (Compulsory Financial Security) (Amendment) Regulations 2018 (2018 No 667) (UK), s 53(P)(2).

116 See DR Thomas, *British Shipping Laws, Volume 14: Maritime Liens,* (Stevens & Sons 1980) para 472. See also *Anonymous* [1696] Fort 230, 92 ER 830, *Holland v The Money Arising from the Sale of The Royal Charlotte* (1768) Burrell 76, 167 ER 479; *The Louisa* (1848) 3 W Rob 99, 166 ER 900; William Tetley, 'Assignment and Transfer of Maritime Liens: Is There Subrogation of the Privilege' (1984) 15 J Mar L & Com 393, 403.

117 Tetley (n 116) 396. See also Arthur Browne, *A Compendious View of the Civil Law and of the Law of Admiralty, Volume 2* (J Butterworth 1802) 507.

118 Tetley (n 116) 398–400.

119 Including Singapore, Hong Kong, Canada and South Africa.

of court is sought and given.[120] A slew of modern decisions[121] has further cemented the practice that courts will only unambiguously recognise the transfer of a wage maritime lien's privileges if prior consent of the court is obtained.[122]

Apart from a court-sanctioned transfer, there has been no outright support within Common Law jurisdictions for the transfer of maritime liens via assignment or subrogation. With regard to an assignment, it is important to note that the claim itself may be assignable as a chose in action,[123] but this does not mean that the ancillary rights in rem can be similarly assigned.[124] As the Court noted in *The Sparti*,[125] there are strong historical and policy considerations that maritime liens are created for the sole benefit and protection of a certain class of people and that the rights bestowed are incapable of being assigned.[126] However, there has also been indirect support for the view that a lien may be assigned along with its underlying claim. In *The Wasp*,[127] the plaintiffs brought a suit against a ship in respect of its building and equipping. At the time the suit was brought, the ship was already under arrest in another matter. The plaintiffs then assigned their cause of action to a bank. The defendants argued that the plaintiffs' lien did not crystallise until the arrest of the vessel and the plaintiff had no interest capable of being assigned before that time. The Court held that the plaintiffs' assignment to the bank would carry with it all rights of action, including those which were inchoate and had not yet crystallised.[128] This holding paved the way for an argument that the rights under a lien (albeit an inchoate statutory lien) can be assigned.

Although the decision in *The Wasp* represents a strong precedent on which to build a thesis of assignability, the decision was delivered by a court of first instance and has not since been

120 See *The Cornelia Henrietta* (1866) LR 1 A & E 51, 14 WR 502 and *The Janet Wilson* (1857) Sw 261, 166 ER 1127, where Dr Lushington laid down the rule that payments made with the sanction of the Court give priority to the claim.

121 *The Leoborg (No 2)* [1964] 1 Lloyd's Rep 380; *The Berostar* [1970] 2 Lloyd's Rep 403; *The Vasilia* [1972] 1 Lloyd's Rep 51; *The Sparti* (n 99).

122 Thomas (n 116) para 476.

123 *Trendtex Trading Corp v Credit Suisse* [1982] AC 679.

124 Thomas (n 116) para 479.

125 (n 99).

126 *The Sparti* (n 99). See also Thomas (n 116) para 479; Toh Kian Sing (n 3) 301.

127 (1867) LR 1 A & E 367, 16 LT 854.

128 Ibid 368, 369; 854.

developed or endorsed by an appellate court.[129] Further, while *The Wasp* appears to accept the notion that an underlying chose in action may be assigned with an inchoate statutory lien, it remains to be seen whether such reasoning can be extended to maritime liens.[130] These issues, coupled with the dissenting conclusion in *The Sparti*,[131] strongly suggests that the Common Law realm does not endorse the assignability of privileges under a maritime lien. If a jurisdiction's local legislation is silent on the transferability of maritime liens, or if it does not clearly provide that maritime liens can be transferred, it is questionable whether P&I Clubs can obtain the rights of a seafarer's maritime lien under common law via an assignment if payment is made under FSCs.

Turning to the doctrine of subrogation, there has also been resistance against the application of this doctrine to justify the transfer of maritime liens. A line of decisions[132] culminating in *The Petone*[133] ruled that a third party who pays a seafarer's wages is not subrogated by law to the maritime lien for such wages.[134] While there is some suggestion that the doctrine of subrogation is the legal basis for the transfer of rights from a discharged lienee to a voluntary payor in the event that leave of court is granted,[135] such a position is incorrect because there is a difference between subrogation and 'payment with judicial consent'.[136] Subrogation does not arise following a mere voluntary payment, but instead requires payment to be made pursuant to a contract of indemnity.[137] For example, the right of subrogation of a marine insurer, as set out in the Marine Insurance Act 1906 (UK) (MIA), states that a marine insurer is only subrogated to an assured's rights and remedies if payment for a loss suffered is made pursuant to a marine insurance contract.[138] In this regard, it is questionable whether FSCs fall

129 Thomas (n 116) para 480.
130 Toh Kian Sing (n 3) 306.
131 (n 99).
132 *The Lyons* (1887) 6 Asp MLC 199, 57 LT 818; *The New Eagle* (1846) 4 Notes of Cases 426, 166 ER 822; *The Neptune* (1834) 3 Hagg Adm 129, 166 ER 354, *The Louisa* (1848) 3 W Rob 99, 166 ER 900.
133 [1917] P 198, 119 LT 124.
134 Tetley (n 116) 404; Thomas (n 116) paras 476–481.
135 Thomas (n 116) paras 474–475. *The William F Safford* (1860) Lush 69, 167 ER 37 and *The St Lawrence* (1880) 5 PD 250, 49 LJ P 82 discussed the existence of a 'quasi-subrogatory doctrine' to explain that a payor enjoys the same rights in rem as the discharged payee by stepping into its shoes. See also *The Eastern Lotus* [1980] SGCA 1, [1979-1980] SLR(R) 389 and *Keppel Corporation v Chemical Bank* [1994] SGCA 3, [1994] 1 SLR(R) 54 [7] where the Court used the word 'subrogation' to describe the right of the paying party to step into the discharged lienee's shoes.
136 See Thomas (n 116) para 481.
137 Ibid. See also *John Edwards & Co v Motor Union Insurance Co Ltd* (1923) 128 LT 276, 278.
138 See Thomas (n 116) paras 1, 79.

within the definition of marine insurance, thereby attracting the right of subrogation as set out in the MIA. This is because 'marine insurance' is defined as a contract where the insurer undertakes to indemnify the assured against marine losses, which are losses incident to a marine adventure.[139] The failure to pay seafarers' wages is neither a marine loss nor a loss incident to a marine adventure. It is instead a 'loss' due to fiscal reasons plaguing the shipowner which has nothing to do with the marine aspect of the voyage. The arrangement under the FSCs is also between shipowners and P&I Clubs for shipowners to have financial security for liabilities in relation to abandonment. Strictly speaking, seafarers are not the named assureds under FSCs.[140] P&I Clubs are not indemnifying the seafarers in any way for their losses but are instead stepping in to pay wages in the event that shipowners are unable to do so. It is therefore arguable that the right of subrogation as set out in the MIA does not apply to FSCs because FSCs are not strictly speaking a marine insurance contract.

Moreover, subrogation also does not necessarily allow the privileges under a maritime lien to be transferred because of policy considerations that are similar to those barring the assignment of a maritime lien. It is argued that this is precisely the reason why leave of court is required, because the court's sanction is necessary to protect seafarers, who are of a vulnerable and improvident class, from being deceived into giving up their rights.[141] In light of the above, it is uncertain whether the doctrine of subrogation will effectively transfer the rights of seafarers to P&I Clubs who have made payment under FSCs.

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139 Marine Insurance Act 1906 (UK), s 1.

140 See 'Annex 1 Certificate of Insurance or Other Financial Security In Respect of Shipowners' Liability As Required Under Regulation 4.2 Standard A4.2 Paragraph 1 (b) of the Maritime Labour Convention 2006 As Amended' <https://www.westpandi.com/globalassets/notices/2016-2017/161010-tp-mlc-circular-annex.pdf> accessed 14 February 2020, for the form and wording of FSCs which do not specifically name seafarers as assureds. FSCs are arguably different from other crew insurance such as CrewSEACURE where cover is provided to a specific vessel covering all persons on board. Although the shipowner is the one who takes out and pays for the policy, it is the seafarers who will be specifically named as the assureds. See Nifontov (n 20) paras 6.62–6.64; See also CrewSEACURE, 'Products' (2020) <https://crewseacure.com/products/#option1> accessed 14 February 2020.

141 See *Rankin v The Ship, Eliza Fisher* (1895) 4 ExCR 461, 469 where the court observed that 'it has always been contrary to the policy of maritime law to invest [a seafarer] with any capacity to transfer this remedy against the res to a third person … . Mariners are proverbially an improvident class; they are easily imposed upon, and, returning from a voyage, would readily become victims of sharpers and usurers, did the right exist to them to readily dispose of their claims earned on the voyage.' See also Toh Kian Sing (n 3) 303.

Bearing in mind the above considerations, it is important that Common Law jurisdictions must not only enact local legislation which gives effect to the transferability of maritime liens under Standard 2.5.2.12 of the MLCA but must also enact this legislation in clear words. As mentioned above, a number of Common Law countries have not enacted any legislation to give effect to the transferability under Standard 2.5.2.12 of the MLCA. The wording in the UK legislation is also arguably unclear because it does not specify the legal method by which the seafarers' rights are to be transferred pursuant to payment under FSCs. Due to the limitations of the common law doctrines of subrogation and assignment as analysed above, it is argued that any such wording has to be couched broadly. In particular, the words 'by subrogation, assignment *or otherwise*' (as suggested under Standard 2.5.2.12 of the MLCA) should be utilised to ensure that the method of transferring rights under a maritime lien is not restricted to subrogation or assignment. It may, however, be argued that in light of modern circumstances where P&I Clubs are intervening with FSCs to alleviate the needs of seafarers, Common Law courts may give less weight to the policy consideration[142] that seafarers' rights ought not to be transferred just because they may be deceived into giving up their rights for returns that may be less than their full accrued wages.[143] That said, this policy consideration may still be relevant because FSCs only cover four months of wages and seafarers may have been abandoned for a longer period of time. Hence, in exchange for repatriation and assistance, seafarers may still be persuaded by P&I Clubs to settle for a smaller sum as opposed to their full accrued wages.

Even if there are no local procedural hurdles in transferring the rights of maritime liens, the common law requirement for leave of court to be obtained before seafarers can be paid their due wages also poses a significant problem for FSCs. In the event that any recovery action against an errant shipowner is to be carried out in a Common Law jurisdiction like the United Kingdom, the lex fori would apply and P&I Clubs would need to commence legal proceedings and obtain judicial consent before the FSCs can be activated to pay the seafarers, failing which the P&I Clubs would be unable to enjoy the privileges of higher priority bestowed by the wage

142 See *Soon Aik Marine & Engineering Pte Ltd v Hoesheng* [1987] SGHC 8, [1987] SLR 247 [26], where it was suggested that there should be no policy objection to the assignment of a wage maritime lien together with the underlying claim.

143 See *Rankin v The Ship, Eliza Fisher* (n 141) 469. See also Toh Kian Sing (n 3) 303.

lien. This in turn defeats the purpose of FSCs, which are to resolve wage claims and to alleviate the needs of abandoned seafarers *quickly*. If there are delays or challenges in the legal proceedings to obtain the court's sanction, seafarers will not be able to receive their wages because P&I Clubs will only pay such wages if their recovery against the shipowner is secured by the court's sanction. Under such circumstances, FSCs will fail to alleviate the hardship of seafarers, and the seafarers' expectations for a speedy resolution of matters and quick payment under the FSCs will be frustrated.

5 Solutions

While there is no easy solution for the above shortcomings of FSCs, it is suggested that the IMO and ILO should consider the following points.

First, the coverage of FSCs should be increased to more than four months to ensure that all or most of any abandoned seafarers' wages are fully covered. The maximum coverage of FSCs is, however, debatable. On the one hand, P&I Clubs and their members should not be overly burdened with the costs associated with abandonment because such risks fall outside of the scope of traditional P&I cover and are not poolable by the IG P&I Clubs.[144] This would also go against the concept of mutuality where 'good' shipowners will subsidise 'bad' shipowners.[145]

On the other hand, it has been suggested that if sufficient profit could be obtained within the IG P&I Clubs, the market would be willing to provide insurance cover for abandonment and such insurance need not be limited to mutual insurance under P&I cover.[146] It is argued that the latter position is more persuasive, and that IG P&I Clubs should play a bigger role in resolving seafarers' woes. In reality, the IG P&I Clubs have done well in modern times as their free reserves continue to grow and their total mutual tonnage currently exceeds 1.2 billion

144 See FAQs (n 46) paras 10, 14. See also Nifontov (n 20) paras 6.29–6.35 which highlights the difficulties for P&I Clubs to provide financial security to cover abandonment.

145 ILO (n 13) 19; See also Nifontov (n 20) para 6.30.

146 ILO (n 13) 14.

GT.[147] Most IG P&I clubs have also expanded their business outside the scope of traditional P&I risks and have diversified their products to non-mutual elements.[148] P&I Clubs would therefore be in a good position to shoulder the responsibility of solving the abandonment problem faced by seafarers because of their financial reliability and their nexus with virtually the entire world fleet.

The question that follows is whether the coverage should be for an extended fixed period or for an indefinite amount of time up to and until the seafarer is repatriated from the vessel?[149] As of now, there are limited statistics on how quickly seafarers are repatriated but it is suggested that the latter position should be adopted. If P&I Clubs know that their liability includes wages that continue to accrue from the time that seafarers are abandoned to the time that they are repatriated, P&I Clubs would have a much greater incentive to ensure that seafarers will be repatriated quickly, thus limiting the size of the wage claim and the P&I Clubs' exposure. The expediency in ensuring repatriation would to a certain extent resolve the abandonment issue because this guarantees a quick alleviation of misery suffered by abandoned seafarers.

Second, it is suggested that the issuance of FSCs should be additionally verified by the flag State of the shipowner and not merely its P&I Club. Currently, the issuance of FSCs is a single-step procedure where shipowners apply to the P&I Club for the FSCs to be issued. It is suggested that the two-step verification process used by flag States for the issuance of insurance certificates to cover liabilities under IMO Conventions in relation to maritime safety, security and pollution[150] be used. The first step comprises of internal checks by P&I Clubs before blue cards are issued.[151] The blue cards are then presented to the flag State in

147 See IG of P&I Clubs, 'Annual Review 2018/2019' (14 January 2020) <https://www.igpandi.org/annual-reviews/> accessed 14 February 2020

148 All IG P&I Clubs offer a variety of fixed premium products such as charterers' comprehensive cover, extended cargo liability cover, deviation cover etc. The Scandinavian IG P&I Clubs like Skuld, The Swedish Club and Gard all offer a wide range of fixed premium products like hull and machinery insurance for shipowners.

149 It can be argued that the initial intention of the IMO and ILO was for all outstanding wages to be paid. See IMO, Resolution A.930(22) Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers (17 December 2001) para 5.1.3. See also Nifontov (n 20) para 6.16.

150 See n 47 above.

151 IMO, 'Legal Committee, 101st session' (28 April 2014–1 May 2014) <http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-101.aspx> accessed 14 February 2020.

exchange for the insurance certificates certifying that there is coverage for liabilities in relation to maritime safety, security and pollution. It is argued that the additional verification procedure can be used to properly ascertain and monitor the financial health of shipowners. Currently, P&I Clubs are only able to track the financial health of their members by checking whether premiums, calls and deductibles are duly paid. If the flag State is involved, its resources can be utilised to verify the financial health of shipowners. For example, if the flag State is aware that a large number of judgments have been entered against a shipowner in the local courts, this can be a sign to conduct further investigations or seek clarification before making a recommendation to the P&I Club to withhold the issuance of FSCs. At first glance, it may seem draconian for the flag State to intervene in such matters. However, it is not suggested that the flag State has an unfettered right to prevent the issuance of FSCs. Instead, what is suggested is a two-step process where the flag State will use its resources to ascertain the financial health of the shipowner and make recommendations to the P&I Clubs regarding whether FSCs should be issued. It is argued that this would in turn reduce the number of abandonment cases because this suggestion prevents shipowners in financial difficulties from putting their ships to sea.

Third, the IMO and ILO should consider amending the MLCA to specify that leave of court is not required before payments can be made by P&I Clubs pursuant to the FSCs and that such payments would simply allow the privileges of the maritime lien to be transferred to the payor. However, it is recognised that it may not be practical to have such a specific amendment in relation to procedural law at an international level because procedural regimes in each jurisdiction may differ. If such amendment to the MLCA is not possible, countries which ratify the MLCA have to enact clear legislation to the above effect. With such local legislation in place, this solution would circumvent the lex fori problem faced in most Common Law jurisdictions where the transferability of a wage lien's benefit is prohibited without the court's prior permission. This is desirable as it would allow an expeditious activation of the FSCs thereby ensuring swift payment and repatriation for affected seafarers. One may ask whether such an intervention by an international Convention may be too drastic for a Common Law jurisdiction to bear, especially since maritime liens have evolved under the common law to their current status today. In this regard, it is useful to remember that maritime liens have their origins in Civil Law and are very much closer to the concept of a 'privilege' under Civil

Law.[152] Under the Civil Law, the benefits of a privilege automatically follow the subrogation or assignment of the claim.[153] Bearing in mind that English maritime law itself has its origins in the Civil Law and that the development of the rules surrounding the maritime lien were made by Civil Law specialists like Stowell, Lushington and Phillimore, it is argued that there is nothing objectionable in enacting legislation to dispense with judicial consent before payments are made under the FSCs. This would allow the rights and benefits of a maritime wage lien to be easily assigned and transferred to P&I Clubs for a recovery against the errant shipowners, thereby ensuring timely assistance for abandoned seafarers.

6 Conclusion

Over the past decade, the international maritime community has invested much time in improving the MLC so that it can serve as a more effective instrument to alleviate the needs of seafarers. In particular, the efforts of the IMO and the ILO should be lauded, especially since the MLCA represents a significant advancement in labour efforts to achieve the current framework of using FSCs to resolve abandonment issues.

Notwithstanding the above, the new features of the MLCA in relation to financial security for seafarers are still nascent and the use of FSCs has resulted in certain problems surfacing. These problems include the insufficient coverage which is limited to four months of wages, the ineffectiveness in resolving and preventing the root cause of abandonment of seafarers, the inability to deter errant shipowners mired in financial difficulty from putting seafarers to sea, the fact that FSCs are easily terminable by P&I Clubs, as well as the difficulties faced by P&I Clubs in recovering sums paid out under FSCs. Solutions in the form of extended coverage, further intervention by port States as well as amendments to the MLCA to remove any legal hurdles against the transfer of privileges under maritime liens to a payor would arguably shape the MLCA into a more effective tool against the problem of abandonment.

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152 Tetley (n 116) 394; See also *The Bold Buccleugh* [1852] 7 Moo PCC 267, 13 ER 884, *The Ripon City* [1897] P 226, [1895–9] All ER Rep 487, *The Tolten* [1946] P 135, [1946] 2 All ER 372, where the courts constantly referred to the maritime lien as a 'privilege'.

153 Tetley (n 116) 398–400.

However, it is recognised that any further improvements to the MLCA will take time,[154] because sufficient feedback on the effectiveness of the MLCA has to be gathered from stakeholders of the maritime industry, especially the P&I Clubs and seafarers' unions. The relevant working committees within the IMO and ILO will then need to sieve through such information and plot further developments for the MLCA. Provided the international maritime community continues to engage with all constituents in constant dialogue, feedback and research, it is certain that the MLCA and FSCs can be better refined to eventually resolve the problem of abandonment.

[154] It took eight years (2006–2014) for the MLCA to be finalised and adopted.