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## Ensuring the Rights of Ship-Owners - Maritime Lien and Cesser Clause -

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### Abstract

Both by the common law or express contractual provision, the ship owner enjoys the right to retain the goods in the port of discharge as a security for the payment of freight or other charges. The article aims at analyzing the characteristics of common law and contractual liens: their legal nature, enforceability, effectiveness and conditions for the exercise of a contractual lien when cargo is owned by a third party. Closely related to the existence of lien is the cesser clause. Its purpose is to terminate the charterer's personal liability for specified payments on shipment of the cargo and at the same time to allow the ship owner to exercise a privilege as he might have at common law plus additional liens (typically for dead freight, demurrage and damages for detention). The conditions that enable the existence of a cesser clause are also analyzed thereby.

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### 1. Introduction

A lien operates as a defence available to one in possession of a claimant's goods who is entitled at common law or by contract to retain possession until he is paid what he is owed. (The *Chrysovalandou Dyo* [1981]). The lien clause in the charterparty is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner, as where goods are carried on a sub-charter without any bill of lading. In such a case the owner could only become entitled to the sub-freight by virtue of the lien clause, and it would be too late to

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exercise this lien after the debt had been paid to and received by the charterer or through his agent (Molthes Rederi Akt v Ellerman's Wilson Line Ltd [1927]). The essence of the exercise of a lien is the denial of possession of the cargo to someone who wants it. (The Mihaios Xilas [1978])

Cesser clauses mean namely, not that the charterer's liability shall cease as soon as the cargo is on board. Instead, in the absence of special wording ..., they mean that the charterer's liability shall cease if, and to the extent that, the owners have an alternative remedy by way of lien on the cargo. (The Sinoe [1971])

## **2. Lien in common law**

In common law, the ship-owner has the right to retain the cargo as security for freight, assuming that the payment and delivery are occurring at the same time, for general average contribution and for the money spent in protecting the cargo (Carr, 2010). These are possessory liens depending on the possession of the cargo (Eder, Foxton, Berry, Smith, & Bennett, 2011). In contrast to contractual liens, the common law liens bind the third parties (Baughen, 2009).

### *2.1. Lien for the general average contributions*

The ship-owner has the right to retain the cargo for the general average contribution. Furthermore, the ship-owner has the duty to exercise the lien in favour of those who are entitled to pretend the contribution (Jackson, 2013). Where general average contribution due to the cargo is recovered, the ship-owner shall release the goods to the consignee in return for the signing of a general average bond or some other form of security provisions (Wilson, 2010). In the situation of a particular average, lien shall be exercised in respect to the paid sums determined by the salvage of cargoes owned by several owners or by just a single one (Jackson, 2013). The idea behind the existence of the lien for general average applies to situations where action is less than the whole. The lien extends in favour of the agent (Jackson, 2013).

### *2.2. Lien for the freight*

Lien for the freight may be exercised where the cargo is shipped under the bill of lading or a charterparty contract. The lien shall not be exercised in relation to other sums due under the contract such as demurrage, damages for detention or dead freight (Singh, 2011). The common law lien shall apply to all cargoes coming to the same consignee on the same voyage for the freight due or only for a part of them but not for goods on different voyages shipped under different contracts (Eder et al., 2011). Where a single contract is involved, the ship owner is entitled to exercise the lien on all cargoes consigned to the same person on the same voyage even where goods are shipped under different bills (Wilson, 2010). If the bills of lading were endorsed to different assignees, the exercise of ship owner's right of lien is confined to those bills on which the freight is due (Wilson, 2010). Similarly, when goods are delivered in installments because there is an interdependent obligation to pay the freight to the delivery of each installment, the exercise of the lien shall be confined to the specific installment on which the freight is due (Wilson, 2010). Where a lien clause is found in the bill of lading, the ship owner cannot exercise, as against the holder of the bill of lading other than the charterer or his agent, a lien for freight payable under the charterparty in respect of the same goods or other property, or difference, if any, between the freight due under the bill of lading and freight payable under the charter, or dead freight or demurrage at the port of discharge (Carr, 2010). The only possibility to reach such a result lies in the way the bills of lading clause is construed to extend the ship owner's right (Carr, 2010).

The lien extends only on unpaid freight. It ceases when the freight is paid and there is no right under which the amounts can be followed in the hands of the charterer or a third party (Jackson, 2013).

The ship owner's right to exercise the lien may be waived in the following circumstances: by accepting a bill for the freight, by making the freight payable after the delivery of the goods or by delivery without requiring payment unless such a delivery was due to fraud (Eder et al., 2011). At common law, the lien does not confer the right for the ship owner to resale the cargo not even when their retention involves certain expenses (Wilson, 2010).

### 3. Contractual lien

Unlike common law liens, the charterparties may offer security for the refund of other expenses or losses incurred by the ship owner (Wilson, 2010). Thus, provisions can be made for a lien on cargo for: dead freight, demurrage or damages for detention, advance freight, freight due under a charterparty as against the bill of lading holder, “all charges whatsoever” (is confined to expenses specifically mentioned in the charterparty), “all moneys becoming in any way due to the ship owners under the provisions of bill of lading”, “all fines and expenses and losses by detention of or damage to vessel or cargo, caused by incorrect description of goods or shipment of dangerous cargo without notice”, “all previously unsatisfied freight and charges on other goods due in respect of any shipment by any steamer or steamers of this line from either shipper or consignee, such lien to be made available at ship owners option by sale otherwise ” (Eder et al., 2011).

The lien on cargo is a possessory right that gives the ship owner the possibility to retain cargo until the freight is paid (Baatz, 2008; Baughen, 2009). Being contractual in nature, it is enforceable only against a party belonging to the contract of carriage (Wilson, 2010). When the cargo is owned by the charterer, the ship owner is entitled to lien the goods under the express terms of the charterparty (Baatz, 2008). The situation is different when the cargo is owned by a third party because the possibility of exercising the lien depends on the existence of a lien clause in the bill of lading (Baatz, 2008; Baughen, 2009) or on the incorporation in the bill of lading, issued to a third party, of the charterparty terms (Wilson, 2010). Before looking closer into such a question, it is worth reminding ourselves that there is a difference in nature between the lien in the case of a demise charter and a voyage charterparty lien. The ship owner is not in the position to prevent the delivery of goods and a lien clause has more the nature of an equitable lien (similar to the one in the time charter contracts) because possession belongs to the charterer (Jackson, 2013). On the other side, where the bill of lading does not contain provisions on lien, nor incorporates the lien clause from the charterparty, there are conflicting dicta (Baatz, 2008). They stem from the different interpretation of Clause 18 of the NYPE: “The Owners shall have a lien upon all cargoes, and all sub-freights and/or sub-hire for any amounts due under this Charter Party ...”

One of the established views about Clause 18 is that “where the charterparty provided for a contractual lien on all cargoes, this could not give the owner the right to lien the cargo which did not belong to the charterer and the owner was in breach of the charterparty when it instructed the master to refuse discharge” (Baatz, 2008). The other established view concerning this subject must be accepted under the special circumstances of that particular case and does not undermine the principle laid down by the previous decision (Wilson, 2010). In its very essence it is stated that: “if the cargo is owned by a third party and not by the charterer, the latter is obliged to make sure that there is a contractual lien in favour of the owner. If the charterer did not do this, the owner can still exercise the lien against him which cannot rely on his own breach of contract. The charterer would remain liable for hire during the period that the lien had been exercised. The bill of lading holder, however, would have a claim against the owner” (Baatz, 2008).

The lien will be excluded by the doctrine of estoppel where the bill is claused “freight prepaid” (Baughen, 2009). The ship owner is not entitled to protect his lien by refusing to issue such a bill of lading unless it incorporates the lien clause from the charterparty, because the refusal to issue the bill of lading in the form chosen by the charterer means that he is in repudiatory breach of the contract (Baatz, 2008; Wilson, 2010).

The lien on cargo will be enforceable at the port of discharge or while the ship is off the port (Baatz, 2008). Exercising the lien by halting the ship in a bunkering port en route is strictly forbidden except where the lien is not enforceable at the port of discharge (Wilson, 2010).

There is a range of arbitral decisions about the fact that enforcing lien followed by the delay of the ship during transport voyage could give rise to a claim for detention during the period of detention of the ship (Schofield, 2013). This seems to suggest that enforcing the lien before the arrival at the port where the cargo is to be unloaded is possible if it can be demonstrated that the exercise of the lien in the port of discharge would not be desirable both from a practical or even legal point of view, although legally conceivable (Schofield, 2013).

Because retaining the cargo could affect the interests of the ship owner who wants to enter a new agreement, he is allowed to unload and store the cargo using his own agents at the port of discharge (Baatz, 2008). The ship owner is entitled to recover the costs of exercising the lien only if they are covered by express terms within the lien clause or

as prejudice resulted from the charterer as his failure to pay the due sums (Batz, 2008). The costs of exercising the lien will not give rise to an independent right of recovery from the charterer (Baughen, 2009). Thus, although the valid exercise of the lien will not interrupt demurrage, it should not give rise to a right to damages for detention if the ship is idle off the port of discharge (Baughen, 2009). Nonetheless, the storage expenses are recoverable if it can be shown that the ship owner acted reasonable by warehousing the cargo, thus reducing the costs that would have otherwise increased, by way of demurrage, if the goods had remained on the ship (Baughen, 2009).

There are multiple reasons for which a lien theoretically valid should lack efficiency in practice. One of the common reasons is that authorities at the port of discharge do not recognize the existence of the lien either as a matter of law or as a matter of decisional authority (Schofield, 2013). Another possible reason is where the value of the goods is less than the total sum for which the lien is exercised (Schofield, 2013). Finally, there is also the possibility when enforcing the lien is limited by the operation of an alternative security (NUVOY-84, cl.42).

#### 4. Lien on sub-freights

The ship owner's right to an express contractual lien on sub-freights can include freight earned by the charterers under a bill of lading or freight due from the sub-freighters under a voyage charter (Singh, 2011). It does not include hire due under a sub-time charter (Singh, 2011; Batz 2008). The clause existing in many charters (BPTIME3, clause 14; NYPE, clause 23; Baltime, clause 18), only gives the ship owner the right to intercept due sub-freights before they are paid to the charterer (Wilson, 2010). In practice, intercepting freight payment will often be delayed or prevented by contractual provisions providing freight paid in advance. In the event that the time charterer pays the first month's hire, he will not be in default until the next month when the hire is due and at the moment he fails to pay the second month's hire, if the freight is payable in advance, it will be too late for the ship owner to intercept it (Todd, 2010). The right is exercised by giving notice to sub-charterer or other subsequent charterers. The ship owner may use the lien only to pretend the amounts due under the head contract when the notice is given (Baughen, 2009). It is impossible to follow the freight once it is paid to the charterer or his agent (Wilson, 2010; Baughen, 2009; Treitel & Reynolds, 2005). Instead, lien on sub freights remains effective when a bill of lading stamped "freight prepaid" is issued provided that the freight has not been paid at the date of the notice (Baughen, 2009). If the party receiving the notice from the ship owner is not sure to whom the freight should be paid, to the ship owner or to the charterer, it could interplead and pay in court (Batz, 2008).

Lien on sub-freights is not a possessory right akin to lien on cargo and therefore its legal nature is subject to debate (Treitel & Reynolds, 2005). It is accepted that the term lien is a misnomer in this context since the sub-freights can never be regarded as being in the possession of the ship owner (Wilson, 2010). That's why the lien on sub-freights was described as an equitable assignment (being equitable and not statutory because it is an assignment by way of charge or a security for the charterers' performance of obligations under the charter party) (Treitel & Reynolds, 2005). In the vast majority of situations it is better to describe the lien clauses on sub-freights as an agreement to assign the freight since the bill of lading freights will generally be considered as future options when the charter party is concluded, the bills of lading contract being made after that time (Treitel & Reynolds, 2005).

Although the lien on sub-freights is not a possessory right, a rule relating to possessory lien is applicable by analogy; namely a person is not entitled to exercise a right lien over his own goods (Treitel & Reynolds, 2005). It is important in the present context to define cases where the bills of lading are issued by the charterer against those issued by the ship owner (Wilson, 2010). When bills of lading are issued by the charterer they are signed on their own behalf or by the master as agent in the name of the charterer, the contract of carriage is between the shipper and the charterer and the legal right to freight is in the charterer (Wilson, 2010). The ship owner will claim a lien over the freight (Singh, 2011). In the alternative case, when the bills of lading issued by the charterer are signed by the master as agent on behalf of the ship owner, the contract of carriage is between the shipper and the ship owner and the bills are ship owner's bills of lading (Wilson, 2010; Singh, 2011). In this latter case the ship owner has an *ab initio* right over the freight coming from the bill of lading and apparently it is no longer necessary to give notice to the debtor (Treitel & Reynolds, 2005).

Liens already in the hands of the charterer can no longer be intercepted and so the ship owner must exercise the lien before this moment (Wilson, 2010). In the event of the charterer appointing an agent to collect the freight under these circumstances, such an agent will be considered by the law as a common agent for the ship owner and for the

charterer and can be asked by the ship owner to collect any outstanding freight in his name or to hand over any already collected freight (Wilson, 2010). If the sub-charterer, despite notification, makes the payment to the charterer, he is at risk to make a double payment to the ship owner, if the ship owner later manages to substantiate his claims against the head charterer (Baughen, 2009).

When lien is exercised by the ship owner to recover the hire under the charterparty, it can only be enforced in respect of the due hire accrued before the sub-hire came into the hands of the agent and not in respect of the hire accruing after this date even though important amounts are still held by the agent (Wilson, 2010; Singh, 2011).

## 5. The cesser clause

A lien and exemption clause, known also as the cesser clause, is often incorporated in charterparties. Its purpose is to allow the personal liability of the charterer to cease for specified payments and at the same time to grant the ship owner the exercise of a lien as he might have at the common law plus additional liens (typically for dead freight, demurrage and damages for detention) (Treitel & Reynolds, 2005). The clause is retrospective in effect and covers responsibilities already incurred before loading is completed (*i.e.* dead freight or demurrage at the loading port) (Wilson, 2010).

The principle that rules the cesser clause is that the charterer is relieved from liability only if and to the extent that the ship owners are granted an alternative compensation by means of the lien on cargo (Wilson, 2010). Esher LJ stated in *Clink v Radford & Co.* [1891] 1 QB 625: “In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charterparty, is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the ship owner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the ship owner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract. If that be true, then the question in this particular case, as in every other case, will depend upon this, whether if we apply the cesser clause to the particular breach complained of, and so hold the charterer to be free, the ship owner has any remedy for his loss. If he has, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if we find that, by so construing it, the ship owner would be left without any remedy whatever for the breach, then we should say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach.”

Under both cesser clause and lien clauses, the liability of the charterer will not simply cease in respect of any issue for which a lien is not created such as damages for detention, if the lien is just for the demurrage in the common sense of the term (Jackson, 2013).

The lien charterparty clause must be effectively incorporated in the bill of lading and the wording of the clauses must adequately cover the relevant charges (Wilson, 2010). If through default of the charterers, the bill of lading does not confer a lien, the ship owner has an independent cause of action against them for failing to incorporate an appropriate provision in the bill of lading (Eder et al., 2011). Where the charterer is also the consignee he will be relieved from liability under such a clause except the case when he is a consignee under a bill of lading that incorporates and reaffirms the liabilities of the charterparty, in which case, the cesser clause will be held inapplicable to the new contract as regard liabilities accruing after the consignment of cargo *i.e.* demurrage at the port of discharge (Eder et al., 2011).

The ship owner's rights under a bill of lading must be as effective as those he had given up in favour of the charterer (Baughen, 2009). If a bill of lading allows a lien for a lesser amount than that freight due under charterparty, in this respect the bill of lading, as a contract, will be less useful than the charterparty (Baughen, 2009).

In the absence of a contrary, clearly stated, agreement, the cesser clause will be ineffective to the extent that the lien is not enforceable (Jackson, 2013; Baughen, 2009). The lack of the lien effectiveness must not come from any ship deficiency (Jackson, 2013). It is, though, possible that the terms of the contract of carriage or the conditions at the port of discharge to prevent the lien to be enforceable (Wilson, 2010).

There are conflicting dicta on the assignment of the burden of proof for the lack of effectiveness of the lien, either to the ship owner or to the charterer, but the correct view would be that it lies on the charterer because the cesser clause seeks to exempt or to limit his liability (Baatz, 2008). In fact, the charterers are the only true beneficiaries of

these clauses. Cesser clauses are less valued in the commercial world and they are not generally accepted in transactions involving commercial credits (Wilson, 2010). The ship owners can successfully replace them with an action *in personam* against the charterer (Wilson, 2010). That is the reason why provisions relating to cesser clause are not to be found in the *Rotterdam Rules* (Sturley, 2011).

## Conclusions

Lien on cargo is a common law possessory lien. Unlike the contractual lien, the common law liens bind the third parties. The contractual lien has instead the advantage of being more extended thus enabling the recovery of other charges or losses. It is enforceable both on cargo and on sub-freight. When exercised on sub-freights, its nature is not a possessory one; it is rather described as being more an equitable assignment. It is believed that it is more adequate to describe the lien clauses on sub-freights as an agreement to assign the freight since the bill of lading freights will generally be future options when the charterparty is concluded, the bills of lading contract being made after that time. As a way to guarantee the ship owner's rights, lien is also found as an alternative security to the cease of the charterer's liability, named *cesser clause*. The cesser clause may be replaced by an action *in personam* against the charterer.

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