

LUMEN 2014

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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Selection and peer-review under responsibility of the Organizing Committee of LUMEN 2014.

Keywords: common law lien; contractual lien; bill of lading; charter parties; cesser clause;

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).

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