

A SHIPOWNER'S LIEN: BALANCING ON A KNIFE'S EDGE OF LEGALITY AND LAWFULNESS

Most Charterparties are carried out successfully in that the freight payment is made with due diligence and the cargo gets delivered in a reasonable time. However, this is not always the case. Whether the issue arises from a subsequent subcharterer, monetary problems or the contracting parties' pure incompetence, the freight payment could not be made in compliance with the stipulations within the freight clause of the Charterparty. As such, it is crucial that the contracting parties provide security for the payment of freight and other charges within the Charterparty in benefit of the shipowner. This security comes in the form of a lien clause.

Lien Clause:

Owners shall have a lien on the cargo for freight, dead-freight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading. Charterers shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.

A lien has been defined 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 whatever he is owed...*”¹

COMMON LAW LIEN

At common law, there is an implied right to lien for freight and general average.² The shipowner's right to exercise a common law lien arises independently of contract and is based

¹ Per Mocatta J. in *Santiren Shipping Ltd v. Unimarine S.A. (The Chrysovalandou Dyo)* [1981] 1 Lloyd's Rep. 159

² Baughen, Simon. *Shipping Law: Fourth Edition*, Abingdon: Routledge-Cavendish, 2009, p. 232

exclusively on the ability of the shipowner to retain possession of the goods.³ This right of lien is restricted and only available in three cases only:

- For the recovery of a general average contribution due from cargo.⁴
- For expenses incurred by the shipowner in protecting the cargo.⁵
- To recover the freight due on delivery of the cargo under either the charter or bill of lading contract of carriage. No lien will, however, arise at common law for the recovery of other charges arising under the contract of carriage such as dead freight, demurrage or damages for detention.

Certain requirements must be met in order for a shipowner to exercise this common law lien for freight:

- The shipowner must retain possession of the goods. Thus, the right of lien will be lost as soon as the cargo is delivered to the consignee or his agent.
- The payment of freight and delivery of cargo must be treated as concurrent obligations. There will be no entitlement to lien where the contract of carriage provides freight to be paid at a date later than the fixed delivery of cargo, or if the contract provides the freight to be made in advance⁶

EXPRESS CONTRACTUAL LIEN

Within a contractual lien, rather than having to rely on an implied right of lien parties can provide for a right to lien with express provisions including other charges, for example, advance freight, deadfreight or demurrage.⁷ Similar to the common law lien, the shipowner must retain possession of the goods in order to enforce its right of lien. Being a contractual lien, however, it is only enforceable against a party to the contract of carriage.⁸ Thus, a shipowner cannot enforce its right of lien over cargo belonging to a third party. For example, a shipowner cannot enforce its right of lien where the cargo is owned by a third-party shipper under a Bill of Lading.

³ *Op cit*, p. 303

⁴ *Hain SS Co v Tate & Lyle* (1936) 41 Com Cas 350.

⁵ *Hingston v Wendt* (1876) 1 QBD 367

⁶ *Kitchener v Venus* (1859) 12 Moo PC 361.

⁷ Baughen, Simon. *Shipping Law: Fourth Edition*, Abingdon: Routledge-Cavendish, 2009, p. 232

⁸ Wilson, John. *Carriage of Goods by Sea*, Essex: Pearson Education Limited, 2010, p. 305

LOCATION OF LIEN

Another important aspect that must be taken into account when exercising a right of lien over cargo is *where* to exercise the lien itself. If a shipowner is to exercise the lien at the disport there must support from the domestic law. The shipowner may not be able to exercise his lien if the domestic law at the disport does not recognize his right to exercise the lien, or if he has not satisfied local formalities.⁹

However, exceptions in that the shipowner is allowed to exercise its lien on board in certain circumstances where:

- The shipowner does not want to risk losing possession of the cargo if he were to proceed to the discharge port.¹⁰
- Proceeding to the discharge port has been proven to be economically impractical and would cause more costs.¹¹

⁹ *The Sinoe* (1972) 1 Lloyd's Rep 201

¹⁰ *The Chrysovalandou Dyo* (1981) 1 Lloyd's Rep. 159

¹¹ *London Arbitration 13/87* LMLN 205.