Exercise of Lien for Sums Due from Charterers - Time and Voyage Charters

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Liens over cargo.

Where shipowners are granted a right of lien over cargo carried on board their ship in respect of a sum or sums due under the charterparty, they are entitled to retain possession of the cargo as security for the outstanding sums. Unless the charterparty expressly allows this, the shipowners cannot sell the cargo to obtain satisfaction of the debt, although sale of goods which have been liened may be permitted by the law of the place where the lien is exercised. Indeed, the shipowners are required to exercise the appropriate degree of care for the cargo which is subject to the lien under pain of being answerable for any loss or damage to the party entitled to the cargo should they fail to do so.

Where shipowners are considering whether to exercise a lien over the goods on board their vessel, they must ensure that the charterparty grants them a lien over the cargo for the debt which is due to them. For example, a lien given in a voyage charterparty for unpaid freight will not entitle the owners to lien the cargo for unpaid demurrage. Nor can a lien be exercised over cargo carried under one charterparty for a debt due under an earlier charterparty between the same parties unless this is expressly agreed. It is also essential that the debt in question is one which is presently due and payable since a lien cannot be exercised for debts which are not yet payable.

The shipowners must also consider the provisions of the law of the place where the lien is to be exercised over the cargo to determine whether that law i) recognises the right to lien and ii) if it requires specific formalities to be followed when exercising the lien. In addition, the shipowners must remember that the existence of the right of lien over cargo in the charterparty will not entitle them to exercise a lien under the bill of lading contract unless a) the charterer is the owner of the cargo or b) the bill of lading gives the owners a specific contractual right of lien over the cargo as against the consignees for sums due under the charterparty (the “Agios Georgios”). Should the owners exercise a lien over cargo under the charterparty without exercising a corresponding right under the bill of lading contract, they may be acting properly under the charterparty but would be in breach of the bill of lading contract and be exposed to an action at the suit of the consignees.

a) Where should a lien be exercised?

Having established that a lien can be exercised over the cargo on board the vessel, the owners must then consider where the lien can be exercised. Under English law, it is not usually possible for owners to exercise a lien by halting a laden ship on route to the port of discharge. In the "Mihalios Xirias", the owners halted the ship at a bunkering port mid-voyage. It was held that it is only possible for owners to validly exercise a lien on cargo before completing the voyage in exceptional circumstances: i.e., where it is impossible or commercially impracticable to exercise the lien at or off the discharge port.

In the "Chryssouloudou Dyo", it was held that owners may validly exercise their lien once the vessel has anchored off the discharge port named in the bills of lading. It is not necessary for the lien to be exercised at the berth since this may not only cause unnecessary expense and cause congestion at the port, but may also endanger the owners’ right to retain possession of the cargo as they may be forced to discharge against their wishes in some jurisdictions.

b) Exercise of a lien after discharge

Since a lien is a right to retain possession, the right is extinguished when the shipowners part with possession of the cargo. Thus, if the shipowners are to lien cargo after it crosses the ship's rail, they must take steps to ensure that possession does not pass to the consignees and/or their agents. This means that the shipowners must either arrange warehousing for the goods at their own risk and expense or lose the right of lien. In some ports, there are no storage facilities or those which are available are either prohibitively expensive or too insecure. In such circumstances, the owners' only real option is to lien the cargo on board if this is possible.

The case of the “Fort Kip” illustrates some of the difficulties which can be faced in seeking to exercise a lien over cargo where the debt only falls due after completion of discharge and so the shipowners’ lien must be exercised off the ship. The case involved a fixture on the Bpeedeevoy II form which provided that freight was payable "immediately after* completion of discharge and granted the owners a lien upon cargo for all outstanding freight. The vessel was discharging cargo into a barge when the owners interrupted the discharge and purported to exercise a lien over the cargo remaining on board the vessel for outstanding freight. After a delay of some days, the balance of cargo was discharged into another barge and the owners purported to exercise a lien over it on the board barge. The Court ruled that the charterers’ obligation to pay freight arose only after completion of discharge as there was nothing in the charter to suggest that freight was payable on a piecemeal basis as the discharge progressed. The owners were thus not entitled to lien any of the cargo whilst it remained on board the vessel. However, once all the cargo had been discharged, the freight was due and payable and so the owners were then entitled to exercise their lien over any part of the cargo which they could intercept before it was delivered to the consignees and/or their agents. This example illustrates the point that, if the shipowners’ lien only arises on discharge of the cargo, they must find alternative storage facilities outside the vessel for any cargo over which they intend to exercise their lien.

c) Can a lien be validly exercised on an excessive quantity of cargo?

In London arbitration No. 5/91 (LMLN 299 page 3) a vessel had been chartered to the same charterers for three successive periods under three separate charterparties. The charterers failed to make prompt payment of sums due under each charterparty. During the term of the third charter, the owners exercised a lien over the cargo remaining on board by ordering the vessel to stop discharging until all outstanding sums were paid. The charterers contended that the owners’ exercise of their lien was wrongful because i) the owners could not exercise a lien under the third charterparty for sums due under the earlier charterparties and/or ii) the value of the cargo withheld was excessive in comparison with the amount owed. The Tribunal agreed that the owners could not exercise their lien under the third charterparty to secure sums due under the two earlier charterparties. However, the Tribunal rejected the charterers’ contention that a lien over an excessive quantity of cargo was invalid. The Tribunal added, however, that whilst the owners’ exercise of their lien may have been valid, the charterers could claim damages if they suffered loss as a consequence of the owners’ lien exercising an excessive quantity of cargo. The Tribunal also stressed that, to exercise a lien properly, the owners must provide the charterers with sufficient information to allow them to determine what must be paid to discharge the lien.

d) Exercise of a lien in a reasonable manner

In London arbitration No. 5992 (LMLN 321, page 4), the Tribunal considered the principle that a lien must be exercised in a reasonable manner. In this case, the master exercised a lien over the cargo on board the vessel at the discharge port because the receivers refused to sign general
average bonds (the owners having declared general average during the voyage). The owners sought to recover demurrage from the charterers for the period during which the cargo was lened. The charterers resisted the owners' claim on the grounds that demurrage was not due because the master had acted unreasonably in exercising the lien on board the vessel.

The Tribunal ruled that a lien must be exercised in a reasonable manner and that the costs of the various alternative methods of exercising the lien must be taken into account when determining whether it has been exercised reasonably. The Tribunal held that the owners must show, or at least raise a prima facie case, that they acted reasonably. The owners had not argued that it would have been impossible and/or impracticable to exercise the lien astore. Nor had they argued that this option was as or more expensive than the option of lening the cargo on board the vessel. The Tribunal held, therefore, that the owners had failed to raise even a prima facie case that they had acted reasonably and so were not entitled to recover demurrage during the period in question.

e) What type of notification must the owners give to the charterers?

The consequences of owners failing to properly notify their charterers of their exercise of a lien over cargo are clearly demonstrated by the award in London Arbitration No. 16/91 (LMNL 307, page 3). In this case, the charterparty gave the owners a lien over the cargo for any amounts due under it. On arrival at the discharge port, the charterers owed three days hire. The master refused to permit discharge of the cargo as of 0636 hours, although the owners only notified the charterers of this fact at 0448 hours the same day. The Tribunal held that, although the owners had the right to exercise a lien, they had not validly exercised that right until they had given notice of their exercise of it to the charterers together with sufficient information to allow them to ascertain the amount of their indebtedness to the owners. The owners were, therefore, in breach of charter by simply refusing to discharge cargo and, since a lien cannot be imposed retroactively, it had only taken effect when the charterers were properly notified. The upshot was that the charterers were excused from paying hire for the period between 0636 and 1048 hours as they had been deprived of the use of the vessel by virtue of the owners' breach.

Lien on sub-hire and/or sub-freights

The nature of a lien upon sub-hire and sub-freights has always created considerable problems. As mentioned above, a lien is exercised by one party retaining possession of another party's property pending payment of sums due from that party. Although sub-hire and sub-freights may arguably be classified as being the property of the charterers, they will never be in the possession of the owners. In reality a lien on sub-hire and/or sub-freights is an assignment in favour of the owners of the contractual right to sums which are payable to the charterers by third parties to the charterer as opposed to being a lien in the true sense of the word. In order for the assignment to bind a third party, the owners must place the third party on notice that payment should be made to them and not the charterers because the charterers have agreed that the owners are entitled to receive the payment from the third party if the charterers do not settle their indebtedness under the charterparty. Liens over sub-hire and/or sub-freights can provide owners with an invaluable remedy where charterers cease to pay hire during the currency of a time charter.

a) "Sub-freights" and "sub-hire"

In considering whether they can exercise a lien on sub-freights within the meaning of a charterparty lien provision, owners need to ascertain the type of remuneration which the charterers can expect to receive from the shippers or any sub-charterers. Generally speaking, the term "sub-freights" includes any bill of lading freight payable by the shippers of cargo and/or any voyage charter freight payable by the charterer's sub-charterer.

It is not clear whether the lien can be exercised in respect of other remuneration earned by the charterers from the employment of the vessel. In the "Cebu", it was held in the context of the New York Produce Exchange 1946 form that the term "sub-freights" encompasses all sub-freights, including sub-freight and sub-hire. The Court also opined that the term may be wide enough to include any other remuneration earned by the charterers from the employment of the vessel. However, a divergent judgment was handed down in the "Cebu" (No. 2). Faced with almost identical facts, the Court held that the term "sub-freights" merely covered bill of lading and voyage charter freights and not sub-hires. In view of these conflicting authorities, owners would be well advised to ensure that their charterparties expressly extend the lien on sub-freights to include sub-hires.

b) Sub-freights payable to owners

Where owners are a party to the bill of lading, they do not have to rely on any right of lien as they are in any event entitled to receive the bill of lading freight, albeit they are obliged to account for it to the charterers. In practice, however, the bill of lading freight is usually received by the charterers' agents in the first instance. So, the owners must notify the charterers' agents of their claim to the bill of lading freight in order to compel them to collect it for the owners as opposed to the charterers. Since the owners are only entitled to the amount due from them to their charterers, they must account to the charterers for any balance left over.

c) Sub-freights payable to the charterers

Where the bill of lading freight is receivable by the charterers as opposed to the owners where sub-freights are payable to the charterers under a sub-charter, the owners must rely on their right of lien. The owners must act to intercept the payment before it reaches the charterers and/or their agents (the "Nanth")..

d) Sub-freights payable to sub-charterers

Essentially, the owners' rights will depend on whether the sub-charterers have given themselves similar rights of lien over those freights which are payable to them as i) the charterers and ii) the owners have given to themselves over the freights payable to them respectively. If similar rights of lien have been granted down the contractual chain, the owners will have a right to lien sub-freights payable to sub-charterers.

e) A lien on sub-freights is an equitable assignment by way of security

An unfortunate complication of exercising a lien on sub-hires and/or sub-freights was identified in the "Upland Trailer" and the "Anagel Glory". In the "Anagel Glory", the Court considered the question of whether a charterparty lien over sub-freights constituted a registrable charge under the Companies Act 1985. The facts of the case were straightforward: the charterers went into liquidation and so the owners sought to lien sub-freights in the hands of the charterers' voyage sub-charterers and to obtain priority over claims by the charterers' liquidator. It was held that the clear intention of the charterparty clause was to confer a right to exercise a lien on sub-freights which may fall due in the future on the owners in order to provide them with security for sums which may become due from them to the charterers. Since this security took the form of a right to payment at some future stage, the lien provision created a floating security which was equitable, the lien being assigned to the owners. This posed a potential problem under the Companies Act 1985. Sections 399 and 410 of this Act provide that certain charges must be registered within twenty one days of their creation, failing which they are void as against the liquidator or other creditors of the company.

The Court held that the charterparty sub-freight lien clause created a floating charge over the charterers' property and that this floating charge came into existence when the charterparty was concluded and not at some later date when the right to enforce the security arose by virtue of the charterers' default. The Court went on to hold that, if the charterers were a company incorporated in England or Wales and/or the sub-freights were payable in England to a chartering company with a place of business in England, the sub-freight lien must indeed be registered as a floating charge within twenty one days of the signing of the charterparty in the Companies Act 1985 or be void against the liquidator or creditors of the charterers.
The situation may be the same or similar in countries with legislation similar to that in place in England and Wales.

f) Priority of claims where the charterers assign sub-freights to a third party

In the "Attika Hope"¹, some time charterers were indebted to the plaintiffs. In order to reduce their indebtedness to the plaintiffs, the charterers assigned to the plaintiffs the sub-freights due to them under their voyage sub-charter party. The plaintiffs gave notice to the defendant sub-charterers of the assignment in December 1983. On 13th January 1984, the plaintiffs claimed the sub-freights under the assignment. However, on 28th April 1984, the sub-charterers paid the sub-freights to the owners in disregard of the plaintiffs' communications because the owners had subsequently notified them that they were exercising a lien over sub-freights granted to them in the head charterparty which pre-dated the plaintiffs' assignment. The plaintiffs sued the defendant sub-charterers, claiming payment of the sub-freights by virtue of their assignment and notification.

It was held that the charterers had properly assigned their right to sub-freights to the plaintiffs and that the assignment had been made known to the sub-charterers. The defendant sub-charterers argued that, since i) the head charter party containing a lien over sub-freights in favour of the owners was concluded before the assignment was granted to the plaintiffs and ii) the owners had claimed the sub-freights before payment was due, the owners' lien should take priority. The Court ruled that neither the time at which the lien or assignment was agreed nor the date upon which payment of sub-freights fell due was relevant to the question of priority between the competing claims of the owners and the plaintiff assignees. The Court observed that it had already been decided in earlier cases that a sub-freight lien could only be effective if notice of its existence and exercise was given to the sub-charterers before they made payment to their charterers. Thus, the Court ruled that service of the proper notice on the sub-charterers was the only way the owners could preserve priority of their sub-freight lien over any subsequent assignment of the sub-freights. As the plaintiffs had served proper notice of their assignment to the sub-charterers before the owners had served proper notice of their sub-freight lien, the plaintiffs were entitled to payment of the sub-freights. The sub-charterers had acted at their peril in paying the sub-freights to the owners and were obliged to pay a second time to the plaintiffs. It is clear from this judgment that owners should immediately serve the notice on the appropriate parties if they have reason to believe that they will need to exercise a lien over sub-freights.

¹ [1976] 2 Lloyd's Rep 192
² [1978] 2 Lloyd's Rep 186
³ [1981] 1 Lloyd's Rep 159
⁴ [1985] 2 Lloyd's Rep 168
⁵ [1983] 1 Lloyd's Rep 302
⁶ [1990] 2 Lloyd's Rep 316
⁷ [1979] 1 Lloyd's Rep 201
⁸ [1985] 2 Lloyd's Rep 372
⁹ [1968] 1 Lloyd's Rep 45
¹⁰ [1988] 1 Lloyd's Rep 349