In previous articles published on the Club's website and in Sea Venture, there have been overviews of the types of maritime and statutory liens available in other jurisdictions. This article discusses the position of maritime and statutory liens under United States law. As United States law recognizes a more extensive array of maritime liens than the laws of other nations, the United States is a preferred jurisdiction in which to enforce maritime liens. This article will provide a summary of how different types of maritime and statutory liens arise under United States law and offer some practical guidance in relation to the enforcement of those liens.

Proceed with Caution!

A few preliminary words of caution are needed when discussing maritime and statutory liens under United States law.

First, for certain aspects of maritime liens, there are divergent legal precedents which apply in different judicial districts within the United States. By way of explanation, the doctrine of stare decisis (being the common law doctrine by which legal precedents are authoritative, binding and must be followed) applies in the United States such that decisions of the United States Supreme Court are binding on all twelve United States Circuit Courts of Appeals and all United States District Courts (being the federal courts of first instance which exclusively exercise admiralty jurisdiction). However, where there are no Supreme Court decisions on a legal issue, decisions of the individual United States Circuit Courts of Appeals are binding on all the United States District Courts within their judicial circuit. As you may appreciate, this system has allowed for the development of legal precedents, particularly with respect to determining the existence of maritime and statutory liens, which differ from one judicial district to another within the United States. Accordingly, local law advice will invariably be necessary before any attempt is made to enforce a maritime or statutory lien in the United States. Moreover, the principles discussed below should be considered to be merely a general summary of United States maritime lien law.

Second, under United States law, maritime liens arise by operation of law and cannot be created by contractual provision. Accordingly, irrespective of whether a contract specifies a choice of law which governs maritime liens, determining the applicable choice of law is often vigorously contested as it is usually determinative of whether a maritime lien exists. Although, as discussed above, certain legal precedents regarding the choice of law differ between the judicial circuits within the United States, three general principles apply: (a) if a foreign law applies and that foreign law would confer a maritime lien for the asserted claim (being something more than merely a right to in rem enforcement), United States law will recognize that maritime lien regardless of whether there is any connection between the claim and the United States; (b) if a foreign law applies but does not confer a maritime lien for the asserted claim, there must be a sufficient connection between the claim and the United States for United States maritime lien law apply; and (c) if United States law is specified in a contract as the law governing maritime liens, there must still be a sufficient connection between the claim and the United States for United States maritime lien law apply.

Nature and Creation

The fundamental characteristics of maritime liens under United States law are very similar to those from other common law jurisdictions.

Under United States law, a maritime lien is a privileged claim upon maritime property (i.e. a vessel) which arises by operation of law out of services rendered to, or injuries caused by, that maritime property. A maritime lien does not require any form of consent to be granted before it can arise, nor is it required to be filed or recorded for perfection. Rather, the maritime lien attaches simultaneously with the cause of action and adheres to the maritime property until it has either been enforced through an in rem proceeding in admiralty (i.e. by arresting a vessel) or discharged or extinguished. The maritime lien is thus a non-presenti proprietary interest in the res. This non-presenti interest remains with the res even if there is a transfer of ownership to a good faith purchaser.

A maritime lien is only available if the actions or omissions which give rise to the claim falls within admiralty jurisdiction. While most maritime liens arise by operation of law, some are created by statute under the Commercial Instruments and Maritime Liens Act ("CIMLA") 46 U.S.C. §§ 31301 – 31343. That said, United States law generally construes the doctrines and facts claimed to give rise to maritime liens narrowly, against lien status.

There is one important limitation on the enforcement of a maritime lien, being that it only attaches to the specific maritime property which gives rise to the claim. This limitation precludes a maritime lien being enforced against sister vessels or other beneficially owned maritime property. The specific maritime property upon which a lien can attach includes a vessel, a vessel's equipment, cargo, freights and subfreights.

Traditional Maritime Liens

Under United States law, traditional maritime liens are recognized for the following claims:

1. Maritime torts, including personal injury, death, collision, pollution and conversion;
2. Master and crew wages;
3. Salvage;
4. General Average;
5. Breach of charterparty;
6. Damage or loss of cargo; and
7. Unpaid freight and demurrage.

As is immediately evident from this list of claims, the vast majority of maritime torts and/or breach of maritime contracts give rise to maritime liens under the United States law.

Statutory Maritime Liens

Certain maritime liens are created by statute under United States law, the most common being the preferred ship mortgage and a lien for "necessaries" under CIMLA.
Accordingly, the enforcement of a purported maritime lien for "necessaries" is an extremely common claim in the United States and has been utilized extensively in the recent collapse of the O.W. Bunker Group by various entities seeking payment of bunkers delivered to vessels.

Assuming United States law applies (and we would reiterate the difficult choice of law issues discussed above which often arise in the context of asserting a statutory maritime lien for "necessaries" under CMLA), to assert a valid maritime lien for "necessaries" under CMLA, a claimant will need to meet all of the requirements set out in 46 U.S.C. section 31342. Specifically, section 31342 provides that:

"...a person providing necessaries to a Vessel on the order of the owner or person authorized by the owner;
(1) has a maritime lien on the Vessel;
(2) may bring a civil action in rem to enforce the lien; and
(3) is not required to allege or prove an action that credit was given to the Vessel."

Accordingly, for claimant to have a maritime lien, they must be a person who is "providing", "necessaries", to the Vessel "on the order of the owner or person authorized by the owner."

"Providing"
The "necessaries" must be provided to the vessel by the person claiming a maritime lien under CMLA. While this requirement may be simply stated, difficulties often arise satisfying this requirement.

In some instances, the person claiming the maritime lien may not have physically provided the "necessaries," but may have merely arranged for the provision of "necessaries." Under United States law, a party need not be the physical supplier or deliverer to have "provided" necessaries within the meaning of CMLA and remain eligible for a maritime lien. However, particular attention is needed in these circumstances to ascertain the precise contractual arrangements between all parties involved in the provision of "necessaries," including any and all intermediary traders and brokers.

This is crucial to ascertain the manner in which all parties involved in the provision were originally retained, how they were compensated and/or derived a profit, and, perhaps most importantly, whether payment has been made by the person claiming a maritime lien. This analysis is important to ensure that the person claiming the maritime lien is, in fact, "providing" the "necessaries" to the Vessel as contemplated by CMLA.

Another difficulty arises due to the fact that maritime liens are freely assignable under United States law. Accordingly, particular attention is needed to determine whether the person claiming the maritime lien actually provided the "necessaries" to the vessel, whether the party from whom they may have taken an assignment of the maritime lien actually provided the "necessaries" to the vessel, whether they have given any consideration for the assignment, and whether the terms of any written assignment actually convey rights to exercise a maritime lien.

"Necessaries"
"Necessaries" is defined in CMLA to include "repairs, supplies, towage, and the use of a dry dock or marine railway." In addition, "necessaries" has been broadly interpreted under United States law to mean any goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Examples of valid "necessaries" include stevedoring services, pilotage services, provisions for crew and passengers, warehousing and dockage, towage, advertising and, of course, bunkers and lubricating oil.

"On the Order of the Owner or Person Authorized by the Owner"
Section 31341(a) of CMLA provides that:

"...the following persons are presumed to have authority to procure necessaries for a vessel:
(1) the owner;
(2) the master;
(3) a person entrusted with the management of the vessel at the port or supply; or
(4) an officer or agent appointed by
(A) the owner;
(B) the chartered;
(C) an owner pro hac vice; or
(D) an agreed buyer in possession of the vessel."

As evident from the clear language Section 31341(a) of CMLA, various persons, including a charterer, are presumed to have authority to order such necessaries and thus bind the vessel in rem through the creation of a maritime lien. Notwithstanding section 31341(a) of CMLA, this general presumption of authority can be rebutted if there is evidence that the supplier of "necessaries" had actual or constructive notice of relevant person's (including a charterer's) inability to create a lien on the vessel. While the burden of proof on owners to rebut this presumption is a heavy one, owners usually rely upon prohibition of lien clauses in two circumstances.

First, it is common for owners to preclude a charterer from having actual authority to incur any maritime liens against the vessel by inserting a prohibition of lien clause (commonly referred to as a "non-lien" clause) in the charter party. Such clauses are valid and enforceable as between owners and charterers. Furthermore, such clauses will be effective against suppliers of "necessaries", but only if they have actual knowledge of the clause at or before the time the "necessaries" are provided to the vessel. Thus, for example, to prevent a bunker supplier engaged by a time charterer from obtaining a maritime lien against the vessel for the value of the bunkers, notice of the prohibition of lien clause in the charter party must be provided to the physical supplier before the bunkers are pumped on board the vessel. Notice of the prohibition of lien clause given after the bunkers are pumped on board will be ineffective to prevent a maritime lien arising. Should owners have any reservations about the charterers willingness and/or ability to provide such advance notice, they can of course take independent action to provide physical suppliers with actual notice of the prohibition of lien clause in the charterparty (and that any provision of "necessaries" is not being made on the credit of the vessel). This can be done by the Master providing a letter to the physical supplier confirming that the charterer has no authority to create a lien over the vessel before the bunkers are stemmed. If advance notice of the prohibition of lien clause is given in the correct form to the physical supplier before the provision of "necessaries," no maritime lien will arise.

Second, it is common practice for crew to stamp a prohibition of lien clause on the bunker delivery receipt. However, the stamping of a bunker delivery receipt with a notice of the prohibition of lien clause will only be effective if it is done before the bunkers are pumped on board the vessel. Bunker delivery receipts stamped after the bunkers are pumped on board will be ineffective to prevent a maritime lien from arising.

Enforcement
Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions under the Federal Rules of Civil Procedure provides the mechanism by which maritime liens can be enforced against vessels and/or other maritime property. A Rule C arrest can be utilized to either (a) acquire jurisdiction over a defendant, (b) seize property to obtain security for a claim and/or (c) seize property in connection with the enforcement of a judgment. Rule C is an in rem arrest of a vessel or other maritime property which is brought directly against the vessel and/or
other maritime property itself as the defendant. A Rule C in rem action may be brought only by a plaintiff who possess a maritime lien and thus the in rem process may be asserted only against the specific property that is the subject of the maritime lien.

Priorities

Should it be necessary to enforce maritime liens and/or preferred ship mortgages against maritime property through a judicial sale, there is predetermined priority of claims under United States law. Determining the priorities to any sale proceeds involves a two-step process: ranking and classifying the different classes of liens and/or mortgages and then determining what claims come first within each class.

With respect to ranking classes of claims, the following order is adopted:

1. Expenses of justice incurred during an arrest (not regarded as a lien but given first priority);
2. Master and Crew wage liens;
3. Salvage and general average liens;
4. Tort liens, including personal injuries and death;
5. Pre-mortgage statutory maritime liens for necessaries;
6. Preferred ship mortgage liens;
7. Statutory maritime liens for necessaries;
8. State law created maritime liens;
9. Lien for violations of federal statutes;
10. Preferred non-maritime liens, including tax liens;
11. Attachment liens (i.e. Supplemental Admiralty Rule B Attachment claims); and

With respect to determining priority within each class of maritime liens, the usual maritime rule of "last-in-time, first-in-right" applies (different rules apply for preferred ship mortgages). The rationale behind this rule is that the providers of later necessaries have benefited their predecessors by keeping the vessel in operation longer, thereby increasing the chance that the vessel could earn profits to pay off earlier liens.

Discharge and Extinguishment

While maritime liens are non-consensual and arise by operation of law, there is no specific statute of limitations for asserting a maritime lien under United States law. Rather, maritime liens can be discharged and/or extinguished in a variety of ways including waiver, laches, destruction of the res and, of course, payment of the claim.

A maritime lien can be waived by agreement or by implication. However, for a maritime lien to be waived, the courts will require clear evidence of intent to waive the lien in favor of another security. Disputes over the waiver of maritime liens often arise in the context of a supplier providing materials or services to a vessel. The supplier usually seeks to rely upon the rebuttable presumption that they are relying upon the credit of the vessel, whereas the vessel owner challenges this presumption by asserting that the supplier relied solely on the personal credit of someone other than the vessel (perhaps the vessel owner or charterer) and thus purposefully intended to waive the maritime lien.

A maritime lien can also be extinguished through the equitable doctrine of laches. Under this doctrine, a maritime lien is extinguished when a lienholder has unreasonably delayed asserting their lien to the prejudice of the other party. The doctrine of laches will not be applied where there is no proof of both "inexcusable delay" and "prejudice". For "inexcusable delay", the courts usually look to the analogous statutes of limitation to determine what is an unreasonable delay in commencing the action, beyond which time unreasonable delay is presumed. For "prejudice", actual prejudice must be proven and prejudice is not presumed from the mere passage of time, even if the delay is unreasonable. Such prejudice could include the unavailability of witnesses and/or loss of documents/records. Accordingly, whether a laches defense is available is determined on a case-by-case basis and will depend upon the length of time that has passed from when the maritime lien arose and what circumstances exist at the time of enforcing the maritime lien to argue that the delay has been prejudicial.

Finally, contractual time bars, such as those found within contracts of carriage, also extinguish maritime liens. Accordingly, the running of the one year time bar under the United States Carriage of Goods by Sea Act, 46 U.S.C.A § 30701 et seq., will extinguish any maritime lien cargo interests may have on a vessel for breach of charter and/or cargo damage.

Comment

This article can only provide a general summary of United States maritime lien law. However, the key points to remember regarding the enforcement of maritime liens in the United States are: (a) consult with local United States counsel in the anticipated jurisdiction of enforcement to determine the validity of the purported maritime lien; (b) determine what choice of law governs the purported maritime lien; (c) determine whether all the requirements of the purported maritime lien have been met, in particular all the requirements of the USCG for statutory maritime liens; (d) determine the priority of the purported maritime lien; and (e) ascertain that the purported maritime lien has not been discharged or extinguished.

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