

A Study on Carriers' Lien on Marine Cargo under Chinese Maritime Law

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Chapter 1 Introduction

In drafting the Maritime Code of China, the Chinese legislature decided to keep in line with the development of international maritime law, which can be seen from the fact that it nearly incorporates all major international conventions regarding commercial shipping into the relevant parts of "the Code". There are substantial areas of international shipping law regulated by international conventions which were incorporated into "the Code". However, this topic, carriers' lien on marine cargo, is one where there is very little international uniformity. The varying laws of individual countries still govern this important aspect with little consistency. Furthermore, with regard to the legal interpretation of "carriers' lien on marine cargo", there are many disputes arising from it in Chinese legal practice. In sum, it is an interesting question to ask: How should the relevant provisions regarding carriers' lien on marine cargo be interpreted?

Therefore, the purpose of this Thesis is to make, as exhaustive as possible, analysis about "carriers' lien on marine cargo" in accordance with relevant provisions of "the Code", drawing from other relevant laws and legal practice. It is hereby hoped that the Thesis will contribute to the development of Chinese maritime law in general but more particularly, to reduce conflict in interpreting carriers' lien on marine cargo as provided in the Chinese maritime law.

Chapter 2 Basis of Carriers' Lien on Marine Cargo

2.1 Legal Ideas of Lien

2.1.1 Meaning of "lien" under English law

It is a very complex legal system of "lien" in English law, since liens may arise under the rules of common law or of equity or under a statute, which are called "common law liens", "equitable liens" and "statutory liens" respectively.

"Common law liens" (or "Common law possessory liens") as a concept is rooted in

judicial creativity in the common law and well established at the beginning of the 19th century. It was based on the enforceability of a claim through retention of chattel of the person against the claim was to be made. It is a common law right conferring by contract, usage or statute, a right of retention of chattel already in the lien holder's possession. The common law divides such right of retention into (a) general and (b) particular liens. A general lien gives a claimant the right to retain any chattel of the person against whom the claim is made until the claim is met, there being no necessary connection between claim and chattel. A particular lien is a right to retain a chattel until all claims made in respect of it are met.

2.1.2 Meaning of "lien" under Chinese law

Under Chinese law, the meaning of the word "lien" is a more restricted one in contrast to it under English Law. This term is first introduced in "the Civil Law" Article 89 s 4. From the provision and the interpretation, it can be found that "lien" under Chinese law is not only the right of possession but also a right of satisfying claims by sale of the property. It can be defined as follows:

"Lien is a legal right by which if the creditor has possession of the debtor's property according to the contract and the debt can not be paid off in time, the creditor may possess such property and satisfy his claims by sale of it."

2.1.3 Meaning of "lien" in the context of this Thesis

In the English version of "the Code" and "the Civil Law", only the label "lien" is used and there are not any substitute words. Therefore, the meaning of "lien" in the context of this Thesis is the specified meaning under Chinese law, , it is a kind of right similar to the "particular lien" under English law, unless there are some other restrictions.

2.2 Legal Requirements of "Lien" under Chinese Law

In the normal case, "lien" is based upon the following four legal requirements:

- (1) Possession of the debtor's property
- (2) Possessor's claim secured by lien
- (3) Commercial connection between the claim and the property possessed
- (4) Expiration of the time limit regarding the performance of the debt

2.3 Creation of Carriers' Lien on Marine Cargo

2.3.1 Under English Law

Under English law, shipowner's lien on marine cargo can arise in two ways, i.e., at Common Law and by express agreement.

2.3.2 Under Chinese Maritime Law

With regard to carriers' lien on marine cargo, it is created by the express provisions in "the Code", i.e., Article 87 and Article 141. The lien created by Article 87 can be only exercised for the claims under a contract of carriage of goods by sea. By contrast, the lien created by Article 141 shall be only enforced for the claims under a time charterparty.

2.4 Nature of Carriers' Lien on Marine Cargo

"Lien" in "the Civil Law" is just provided as one of the methods to secure certain claims, in principle, however, it is a kind of real right granted by way of security. Since carriers lien on marine cargo is just a special security system of civil law lien, its basic theory shall be in conformity with civil law lien. As a result, the nature of carriers' lien on marine cargo under the current legal system can be recognised as a statutory method (although it is a kind of real right granted by way of security in principle) entitled to the carriers for the specific claims under a contract of carriage by sea.

2.5 Claims Secured by Carriers' Lien on Marine Cargo

2.5.1 "Freight"

In respect of "freight" in the provisions of "the Code", there are not any restrictions on that word. In a sense, its meaning is as same as it used in a lien clause of charterparty or bill of lading. Therefore, carriers' lien under "the Code" can cover all freight, provided that it satisfies the relevant conditions of precedent.

2.5.2 "Hire"

In accordance with Chinese maritime law, the shipowner may have a lien for unpaid "hire" under a time charterparty. That means the word "hire" used there only refers to "a sum of money to be paid to the shipowner by a charterer under a time charterparty for the use of the vessel".

2.5.3 "General average contribution"

General average, as a legal system peculiar to maritime law, is expressly provided in "the Code" Chapter X "General Average". In accordance with "the Code" Article 199, "the contribution in general average shall be made in proportion to the contributory values of the respective beneficiaries." Therefore, it is no doubt that the obligation to make a general average contribution is created by legal provisions and not by the clause of a contract, and then general average contribution is a debt created by legal obligation in China. Since the carrier can only exercise a lien on cargo for general

average contribution due to him in accordance with "the Code" Article 87, the damages or charges suffered by the cargo owner, which is treated as general average expenditure or sacrifice, can not be secured by the provisions of "the Code" either lien or in other way.

2.5.4 "Necessary charges"

Since "necessary charges" are paid for the benefit of the cargo owner and the carrier (or shipowner) is by reason of the bill of lading or charterparty under no original liability for them, it is an implied legal obligation for the cargo owner to repay this sum of money to the carrier (or shipowner), even if such obligation is not provided in the contract. From the reasons above, it is easy to see that the claim of "necessary charges" is not agreed upon in the charterparty or bill of lading, but is a claim created by specific legal obligation.

2.5.5 "Demurrage"

The term "demurrage" is used to describe "a sum named in a charterparty to be paid e.g. by the charterer as liquidated damages for delay beyond the lay days." With regard to carriers' lien for demurrage, it is expressly provided in "the Code".

2.5.6 "Other charges to be paid to the carrier"

It is reasonable to interpret such term by the general principles of "lien" in "the Civil Law", in the absence of any express provisions in "the Code". In the spirit of "the Civil Law", the claims secured by "lien" should be "a required sum of money (by the contract)". Therefore, the true test of interpretation of "other charges" should be that, whether such claims can be treated as "a required sum of money by the contract".

"Dead freight" is not the express claim secured by carriers' lien under "the Code", whether or not it can be covered by carriers' lien depends on the interpretation of "other charges". It is just unliquidated damages for breach of contract, and it is not "a required sum of money by the contract" unless there are any other express terms in the charterparty to the contrary. Thus in the normal charterparty or bill of lading forms, "dead freight" does not fall within the scope of the term "other charges" used in "the Code" Article 87.

Since "demurrage" and "damages for detention" are the terms to describe two different damages either in the shipping practice or in the legal practice, the term "demurrage" in "the Code" Article 87 can not be construed to include "damages for detention". On the other hand, it is also impossible to construe that "damages for detention" is a payment as "a required sum of money by a contract" unless special clause as the same as the stipulation for "demurrage" is provided. Therefore, the carrier

can not invoke "the Code" Article 87 to have a lien on cargo for "damages for detention" under normal cases.

2.5.7 Costs of lien

Costs of lien is not the express claim secured by lien, nor does it acquire the legal incidents of the express claims, e.g., priority in satisfying. Furthermore, such costs must be limited to a reasonable extent which we can consult from English legal theory on this issue, namely, it depends upon whether the carrier exercised his lien in a reasonable manner.

Chapter 3 Lienor of Carriers' Lien on Marine Cargo

3.1 Lienor of Carriers' Lien in General

3.1.1 Two kinds of lienor under "the Code"

In accordance with "the Code", "carrier" may have a lien on cargo under Article 87 and "shipowner" may have a lien on cargo under Article 141. That means the lienor under a contract of carriage of goods by sea or a time charter, is "carrier" or "shipowner" respectively.

3.1.2 Two requirements regard to lienor under Article 87

- (1) Lienor should be the "carrier" defined in "the Code"
- (2) Possession of cargo

3.2 Identification of Carrier under Different Types of Charterparties

3.2.1 Under a demise charter

It is self-evident that the shipowner in a demise charter can not become "carrier" defined in "the Code", since he does not use his ship to engage in carriage of goods by sea by himself. On the other hand, the demise charterer is entitled the same rights over the ship of engagement and operation as his own ones, so, the interpretation of the shipowner in the following contents can be consulted.

3.2.2 Under a voyage charter

It is sure that the shipowner is the carrier under that contract, since a voyage charter is treated as a contract of carriage of goods by sea in China. On the other hand, a voyage charterer can also become "carrier" as defined in "the Code", while he sublets the chartered ship to the sub-charterer.

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3.2.3 Under a time Charter

On the mere face of the nature of the contract, the shipowner can not invoke Article 87 to assert a lien on cargo consequently. But it is a difficult question to answer that: who is the carrier, the time charterer or the shipowner, under the bill of lading issued therefrom?

3.3 Identification of Carrier under Bill of Lading

3.3.1 Test of identification of carrier under bill of lading

- (1) the chartered ship is under whose control or in whose possession;
- (2) the bill of lading is used by whose form or in whose title;
- (3) the bill of lading is signed by whom.

3.3.2 Legal practice about identification of carrier

3.4 Possession of Cargo

3.4.1 Meaning of Possession

The law, in general, recognises two kinds of possession: actual possession and constructive possession. Whether the cargo on board is in the actual possession or constructive possession of one person, in the legal sense, it can be that the cargo is in the possession of them.

3.4.2 Difficult question arising from determining possession

It is a very difficult question to be answered that whether the time charterer does take possession of the cargo on board if he can be treated as the carrier. On the one hand, the time charterer is not as the same as the shipowner, who is obviously in possession of the cargo; on the other hand, in contradistinction from the voyage charterer, the time charterer is in charge of the operation of the ship, he has the right entitled by the charter to give orders to the master.

3.4.3 Possession of cargo by time charterer

The test, of whether the charterer is in possession of the cargo through the master, is decided by that whether he is the carrier under that bill of lading.

3.5 Problem of Article 87

In accordance with the relevant provisions in "the Code" Chapter 4, the actual carrier is not as same as the carrier to have a lien on cargo for the payments which should be paid to him by the cargo owner. Obviously, it is inconsistent with the original intent of legislature. Therefore, Article 87 should be revised as follows:

Article 87 If the freight, contribution in general average, demurrage to be paid to the carrier or the actual carrier and other necessary charges paid by them on behalf of the goods as well as other charges to be paid to them have not been paid in full, nor has appropriate security been given, the carrier or the actual carrier may have a lien, to a reasonable extent, on his goods.

Chapter 4 Lien on Third Party's Cargo

4.1 In General

On the basis of Chinese law, the lien can only be asserted on the debtor's property. Therefore, the carrier may assert a lien on the third party's cargo only when the latter becomes the debtor of him.

4.2 Incorporation of Charterparty into Bill of Lading

In the normal sense, the third party, who is a stranger to the charterparty, cannot be bound by the clauses in the charterparty. Nevertheless, in the case that the charterparty is incorporated into the bill of lading, the rights or obligations in the charterparty may be transferred to the third party. The link between the charterparty and bill of lading is the incorporation clause in the bill of lading. Since the incorporation clause may transfer heavy obligation to the third party, it is necessary for the court to interpret the incorporation clause strictly, esp. the substantive obligations imposed on the third party by such clause. In this sense, the principle established in The "Miramar" shall be adopted by the Chinese maritime courts.

4.3 Lien and Cesser Clause

The voyage charterparty often contains a "lien and cesser clause" which purports to relieve the charterer from paying freight and other claims under the charterparty, and entitles the shipowner a lien on cargo for them, but in each case it is a question of construction whether it does relieve him in fact.

It is no doubt that "coextensive principle" has become the basic norm with regard to construction of "lien and cesser clause" after a long term practice and development. So that Chinese court should take this principle as reference in dealing with the cases.

Nevertheless, in order to be in line with Chinese legal practice, it is necessary to do some manipulations when the courts apply "coextensive principle".

4.4 Lien under Time Charterparty

It is very difficult for the shipowner to assert a lien on the third party's cargo under Chinese law. Firstly, the shipowner can not invoke "the Code" Article 141, under which only the charterer's cargo can be enforced, to exercise a lien over the third party's cargo. Secondly, although the shipowner who may be treated as the carrier under the bill of lading may invoke "the Code" Article 87 to have a lien, such kind of lien can only be asserted for the claims created by law for which the third party is responsible and not the claims under the time charterparty. If the shipowner wants to assert a lien for the liabilities stipulated in the time charterparty, such as time charter hire, under "the Code" Article 87, he will face an impassable barrier that the third party shall be liable for the above liabilities.

4.5 Discussion on Lien on Third Party's Cargo

In summary, it is my considered opinion that the most important requirement of "lien on third party's cargo" shall be that the third party must be the debtor of the carrier's claim, since it is in conformity with the tendency of shipping law, the necessity of international trade and the principle of justice. The relevant provision in "the Code" is no doubt the latest development of the issue, it reflects the needs of the times. Therefore, it is reasonable to believe that the traditional theory of "lien on third party's cargo" will be changed fundamentally in the not too distant future.

Chapter 5 Legal Effect of Carriers' Lien on Marine Cargo

5.1 Lienor's Rights, Obligations and Responsibility

5.1.1 Rights of lienor

- (1) Retaining physical possession of the cargo
- (2) Obtaining payment or security
- (3) Sale of cargo and priority in satisfying

5.1.2 Obligations on lienor

- (1) Obligation of notification
- (2) Care for cargo lienor

- (3) No disposition of the cargo liened without authority
- (4) Being not in conflict with carrier's basic obligations

5.1.3. *Lienor's responsibility for his misconduct*

The lienor's misconduct of enforcing a lien on cargo includes two aspects, i.e., "enforcing a wrongful lien" and "enforcing a lien improperly". The former one emphasizes on the lien itself which is illegal since it has not satisfied all the legal requirements of enforcing a lien; the latter one emphasizes on the ways or means of enforcing a lien which are illegal since they are in breach of the relevant provisions or violate the other's lawful rights and interests. In each case above, the lienor is responsible for the loss or damage suffered by the receiver therefrom. Nevertheless, the basis of responsibility and the scope of compensation are different in the above two cases.

5.2 Preservation of Lien

5.2.1 *Chief obstacle of preservation of lien*

Since "lien" is a right based on possession, in order to maintain his lien the carrier must keep possession of the goods. Nevertheless, ships are expensive; their owners' time is money; use them as floating warehouse for goods the carrier is exercising lien over, rather than for profitable carriage of other cargoes, simply does not make economic sense. In sum, the chief obstacle to be overcome by the carrier in this situation is, of course, the maintaining possession of cargo liened after discharge.

5.2.2 *Extending lien by contract*

The first idea to solve the problem is to enlarge carrier's right of lien by stipulating some clauses in the contract.

Nevertheless, in order to be in line with Chinese legal practice, it is necessary to do some manipulations when the courts apply "coextensive principle".

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5.2.2 *Extending lien by contract*

The first idea to solve the problem is to enlarge carrier's right of lien by stipulating some clauses in the contract or the bill of lading. However, "attempts to extend the shipowner's lien for his charges to goods that he has surrendered to the consignee merely by inserting a term in the contract of carriage that the lien is to continue are unlikely to be successful." It can be found therefore that the so-called "lien" in the relevant clause is not within the scope of the concept "lien" under Chinese law and it is an ineffective lien.

5.2.3 *Warehousing the cargo in carrier's name*

It is a lawful way for the carrier to preserve his lien by this way. However, it will come across some problems in the practice, such as the port authority may forbid the carrier's exercising lien on cargo in the port warehouse owing to the restriction of the port.

5.2.4 *"Property conservation" — a good way instead of lien*

To adopt "property conservation" has the following advantages :

(1) Such method will avoid the disadvantage in exercising lien on board, i.e., influencing the operation of the ship.

(2) It is not necessary for the carrier to keep the control of the cargo which is the condition precedent of lien on cargo.

(3) The carrier is exempted the liability of caring of cargo.

(4) The carrier may avoid his misconduct of arresting cargo.

On the other hand, the carrier may entitle the similar rights as lien by adopting "property conservation". As a result, it is a good method to avoid many problems arising from asserting a lien, although in certain area "property conservation" is not as easy as "enforcement of lien".

Chapter 6 Conclusion

6.1 Definition of "Carriers' Lien on Marine Cargo"

Although it is quite difficult to define a legal term exactly, this Thesis tries to give a draft about the definition of "carriers' lien on marine cargo" based upon Chinese maritime law, which has not been defined yet as follows:

"Carriers' lien on marine cargo" is a legal right of carriers, which is entitled by the Chinese maritime law, to refuse delivery, keep possession of the marine cargo and satisfy the claims by sale of the cargo, as a security against the specific debts due to them under a contract of carriage by sea.

6.2 Special Restrictions Provided in "the Code"

(1) *Subject of carrier's lien*

Since the term "carrier" shall be limited to the scope defined by Article 42, the actual carrier can not invoke Article 87 to have a lien on cargo for his claims even though the cargo owner is liable for them. As discussed in 3.5, such provision will lead to an unfair result to the actual carrier.

(2) *Subject-matter of carrier's lien*

The subject-matter of carrier's lien --- cargo, is limited to the debtor's cargo under "the Code". In a sense, this change is the fundamental one on the theory of lien on cargo, since it has broken the traditional theory under which the innocent party's cargo can be liened. Owing to this strict legal requirement, it is difficult for the carrier to have a lien on the third party's cargo for the claims originally stipulated in the charterparty in most cases.

(3) *Claims secured by carrier's lien*

Lien is a kind of statutory right in China, therefore, the substantive content of it can

not be changed by agreement unless such agreement limits the right of lien. As a result, some common claims such as "damages for detention" and "dead freight", which can be found in the lien clause in the charterparty or bill of lading, are not the claims secured by carrier's lien under "the Code" normally.

6.3 Special Provisions Relating to Enforcement of Lien

(1) Right of satisfying claims by sale

The right of satisfying claims by sale is one of the important contents of lien under Chinese law, and it is different from the traditional theory of lien. In this aspect, the carrier has a wider protection given by "the Code" or other relevant provisions.

(2) Procedure of sale and satisfying

"The Code" Article 88 has provided detailed procedure with regard to the sale of cargo and satisfying claims. This provisions reflect the purpose of law on the basis of which the lawful interest of all parties concerned shall be protected.

(3) Costs of lien

It is debatable question that whether the costs of lien can be protected by the lien. No express provisions have been provided in "the Code" and "the Civil Law". However, in the legal practice, the Chinese maritime courts has ratified that it can be recovered by the debtor. Nevertheless, those costs can not acquire the legal incidents of the express claims protected by carriers', such as the priority in satisfying.

