

RESEARCH THE PROBLEM OF MARITIME LIENS IN MARITIME TRANSPORTATION

Nguyen Le Kim Phuc^a

Nguyen Thi Loan^b

^{a,b} Vietnam Maritime University, Haiphong City, Vietnam

e-mail: kimphuc3696@gmail.com

Abstract. Maritime lien goes back a long time in Maritime Law. It is rich in content, which makes it the most compelling research topics in the theory and practice of the world maritime laws. Countries develop their own system of maritime lien suited for them according to their national conditions. In order to eliminate the contradictions and conflicts of national laws on maritime liens, the international community has developed a three International Convention on maritime liens, which are International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926, International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1967, and International Convention on Maritime Liens and Mortgages of 1993.

Vietnam's system of maritime lien refers to the 1993 convention, and is basically consistent with the convention. Moreover, in 1990 Vietnam published Maritime Code of Vietnam, in which regulated in procedures the exercise of maritime liens.

However, the implementation is still difficult. In addition, the absence of a separate law relating to maritime liens also needs to be considered. This study compares the maritime liens in Vietnam and some other countries in the world, thereby providing solutions to problems of maritime liens in Vietnam.

Keywords: International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926; International Maritime Organization (IMO).

1. Introduction

Some changes to maritime liens have taken effect in Vietnam, affecting owners and their donors around the world. The Supreme People's Court of Vietnam has clarified the provisions on arrest of seagoing ships in the Vietnam Maritime Code effective July 1, 2017 and supersedes all previous provisions of law relating to the arrest of seagoing ships. Concerned with maritime liens.

Vietnam is not a party to the International Convention for the Unification of the General Rules Relating to Maritime Liens and Mortgages, 1926, as well as to the International Convention for the Unification of General Rules relating to Maritime liens and mortgages, 1967. However, Vietnam's maritime liens are simulated by the 1993 Convention.

The International Convention on Maritime Liens and Mortgages of 1993 have rules for maritime liens at article 4:

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:
 - (a) Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
 - (b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
 - (c) Claims for reward for the salvage of the vessel;
 - (d) Claims for port, canal, and other waterway dues and pilotage dues;
 - (e) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.
2. No maritime lien shall attach to a vessel to secure claims as set out in subparagraphs (b) and (e) of paragraph 1 which arise out of or result from:

- (a) Damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or
- (b) The radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

And also at article 5 about Priority of maritime liens:

1. The maritime liens set out in article 4 shall take priority over registered mortgages, "hypothèques" and charges, and no other claim shall take priority over such maritime liens or over such mortgages, "hypothèques" or charges which comply with the requirements of article 1, except as provided in paragraphs 3 and 4 of article 12.
2. The maritime liens set out in article 4 shall rank in the order listed, provided however that maritime liens securing claims for reward for the salvage of the vessel shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.
3. The maritime liens set out in each of subparagraphs (a), (b), (d) and (e) of paragraph 1 of article 4 shall rank *pari passu* as between themselves.
4. The maritime liens securing claims for reward for the salvage of the vessel shall rank in the inverse order of the time when the claims secured thereby accrued. Such claims shall be deemed to have accrued on the date on which each salvage operation was terminated.

2. Maritime Liens in Vietnam Maritime Code:

Basically, maritime liens were defined by Vietnam in the 1990 maritime law in Articles 30, 33 and 34 but there was no particular section on maritime lien, not to mention the definition of maritime liens, no priority order for maritime liens. Then, by 2005, Vietnam maritime code was modified, divided into clearer sections and titles. In particular, the maritime liens set out in Sections 7, 36 to 39 specifying what the maritime lien is, the priority order of the right to hold, the claims arising and the statute of limitations. In brief, it can be said that the 2005 VML was finalized and match with the international convention on maritime liens and mortgages 1993.

Therefore, following a process of amendment and addition to the 2005 Civil Code, maritime liens are the same as those in VRS 2005, Section 6, Articles 40 to 43 as follows:

Article 40. Maritime liens

1. A maritime lien is the right of the claimant who make claims listed in Article 41 of this Code, to take priority in compensation against shipowners, demise charterer, manager or operator of the ship, with respect to the ship which give rise to the said claim. Maritime claim is a claim made by one party to request the other party to implement his obligations relating to maritime activities.
2. The maritime claims secured by a maritime lien on the ship set out in Article 41 of this Code shall take priority over the claims secured by registered mortgages, or other charges.
3. A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.
4. The claimants has the claims as stipulated in Article 41 of this Code shall be secured by a maritime lien on the ship even the ship has been mortgaged or the shipowner has used the ship as security to conduct other transaction based on a contract.
5. Maritime lien shall not be extinguished by virtue of the change of the shipowner, the demise charterer, the operator of the ship whether the buyer of the ship has the knowledge of or without the knowledge of the ship in connection to a maritime claim secured by a maritime lien.

Article 41. The maritime claims secured by a maritime lien on the ship

1. Claims for wages and other sums due to Master, officers and other members of the ship's complement, including costs of repatriation and social insurance contribution payable on their behalf
2. Claims in respect of loss or personal injury occurring in the operation of the ship
3. Claims for ship's tonnage dues, maritime safety fees, pilotage dues, harbour dues and other port charges.
4. Claims for reward for the salvage of the ship
5. Claims based on tort arising out of loss or damage caused by the operation of the ship.

Article 42. Priority ranking of maritime liens

1. The maritime liens set out in Article 41 of this Code shall rank in the order listed, provided that maritime liens securing claims for reward for the salvage of the ship shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed.

2. The maritime liens set out in each paragraph of Article 41 of this Code shall rank *pari passu* as between themselves. Where they could not be paid in full, the debts in the same paragraph shall be paid in proportion.
3. Claims arising from one and the same occurrence are deemed to have come into existence at the same time.
4. Maritime lien on sea-going ship arising from the last voyage has priority over that from previous voyages.
5. Claims arising from a contract of labour relating to several voyages are settled simultaneously with the claims arising from the last voyage.
6. The maritime liens securing claims for reward for the salvage of the ship listed in paragraph 4 Article 41 of this Code shall rank in the inverse order of the time when the claims secured thereby accrued.

Article 43. Extinction of maritime liens by lapse of time

1. The maritime liens shall be extinguished after a period of one year since the time such maritime lien come into existence.
2. The time when maritime lien comes to existence shall be determined as follows:
 - a. For claims relating to salvage remuneration: from the day of termination of the salvage operation;
 - b. For claims relating to compensation for damage caused by collision of ship or by other marine accident: from the day when such damage was caused;
 - c. For claims relating to debt: from the day when they fell due.
3. The maritime lien shall be extinguished when debts giving rise to maritime lien are fully paid by the shipowner, charterer or ship operator. But such maritime lien remains in force as long as the sum of money paid is still in the hand of the Master or other person who is authorized on behalf of the owner, charterer or operator of the ship to pay debts in connection to maritime claims.
4. When courts fail to effect the arrest of the ship in Vietnamese internal waters or in territorial waters to protect the interests of a creditor having its residence or principal place in Viet Nam the time limits defined in paragraph 1 of this Article shall be terminated after thirty days from the date of arrival of the ship at the first Vietnamese port, and maximum not later than two years from the date when such maritime lien comes into existence.

Claimant	Type of Claim
Tower	Unpaid towage Damage to towboat Unpaid freight Breach of charter Demurrage
Barge Owner	Damage to barge Demurrage Breach of charter Unpaid freight
Cargo Owner	Cargo damage Breach of charter Breach of contract of affreightment
Supplier	Unpaid fuel, lube, oil and other necessities
Fleeter	Unpaid fleet charges Damage to fleet property
Stevedore	Certain stevedoring services
Insurer	Unpaid insurance premiums
Repair facility	Unpaid repairs, dry dock

3. Compare the maritime lien's state of Vietnam to others in the world

Maritime liens are only carried out when:

+ The debt is money, charges or other amounts of the shipments are aboard.

+ To retain the goods are on board, or they have to be unloaded at the port warehouse, but still within the control of the carrier. Circumstances beyond the 2 conditions above are not applied ship-owners terms seizure of whether the contract or bill of lading clauses mentioned the restaurant holds or not.

Comparison

➤ Philippines list of maritime liens more extensive

• Application of priority Straight forward

- wages does not include emoluments, repatriation and social contribution
- Recognize Foreign maritime liens
 - Australia only 4 maritime liens
- Prima facie ranking guiding principles maybe displaced by equity
- Wages includes emoluments, repatriation and social contribution
- Does not recognize

In summary, the implementation liens goods, must be based on the specific situation in places of detention in order to carry out the treatment. Each country has rules, different procedures, which can therefore be done to hold relatively simple goods easy but there are places that can not be done, or done but must be passed court procedures more complex. When in trouble on the issue of detention of goods, should first consult the Association sponsored the ship-owner (P & I Club) for Association P & I often have expert understanding of the issues related to the procedure Meeting holds the world's ports

4. The reality of maritime liens

Vietnam's detentions have not been fully implemented. Vietnam does not have a specialized court to handle maritime lawsuits, and there are no specialized maritime magistrates. Although Vietnam's maritime code is built in line with international maritime conventions, implementation is still difficult. In addition to the Vietnam law, Vietnam does not have many other legal documents providing more detailed guidance on maritime liens. Arrest procedures are not clearly defined. Evidence is that in the five years from now, from 2012 to 2016, the number of seizure cases based on maritime liens is minimal, because of insufficient authority and evidence of arrest.

Countries develop their own system of maritime lien suited for them according to their national conditions. In order to eliminate the contradictions and conflicts of national laws on maritime liens, the international community has developed a three International Convention on maritime liens, which are International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926, International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1967, and International Convention on Maritime Liens and Mortgages of 1993. It created ra conflicts about the law, and the choice of the choice are very difficult.

“Proper law” is the decision as to which territorial law is to govern the contract, defines the obligations of the contractual parties and determines whether the contract is valid and legal. It also determinates the effects and conditions of discharge. Selection of the “proper law” to adjudicate the marine contract is a difficult task in Admiralty Jurisdiction because the issue of whether enforcement of the maritime lien is allowed by international law may turn on interpretation of the law of the country where the litigation is. So, the question is over the priority of the law where the lien was created (*lex loci*), as opposed to the law of where the court exercising jurisdiction (*lex fori*).

The answer is found in the application of a multiplicity of contract analysis process. The court will weight and analyze all related factors between the transaction and the respective legal systems by a case-by-case analysis. The factors may include: (a)the need of the international system; (b)the protection of justified expectation; (c)ease in determination and application of the law to be applied; (d)relevant policies of other interested states; (e)the place of the wrong; (f)the law of flag; (g)the allegiance or domicile of the injured party; (h)the law of forum; (i)the place of the contract; (j)the allegiance of the defendant ship-owner and so on. The prefect decision will result from a balance between the relevant factors.

5. Conclusion:

The first part of this paper described a wide variety of ways to exercise a maritime lien, so it is likely to cause unnecessary confusion. With a maritime lien case, depending on the degree of progress, there are two ways of executing the maritime lien. One is separating exercise, meaning that during the exercise of maritime lien, the maritime claimant applies for court seizure of the ship that caused the maritime claim. If the parties provide guarantees, the maritime claimant gets the repayment based on the guaranteed funds. If there is no sufficient and satisfactory guarantee made by anyone, the maritime claimant applies for court auction of the ship, and gets compensated from the auction proceedings in accordance with the legal order. The other one is joint exercise, meaning when the ship is applied for auction, the registration of rights is applied as well.

Related behaviors are followed in chronological order: arrest, litigation, auction, registration of rights, and action for affirming rights. In judicial practice, generally, it is not accepted to re-seize the ship after it has already been applied for seizing by someone else.

Therefore, for the executing the maritime lien independently, if the debtor does not provide guarantees, after that the lien holder can bring up the litigation or court arbitration, and then apply for the auction. The problem is that when jointly exercise the maritime lien, the lien holder cannot apply again for arresting the ship, thus the concept of “maritime lien shall be exercised through the court seizes the ship causing the maritime lien” is fundamental. The crux of the problem is whether or not the lien holder has to personally initiate the seizure procedure when the ship has been seized by the application of others.

Overall the Convention is a very good development and therefore should be ratified or at least national law should be enacted similar to it and do away with the less desirable provisions because it:

- Promotes uniformity
- Careful regulation in the registration and more better protection to security holders
- Add more protection to seamen
- Logical order of priority in ranking liens especially on salvage
- Resolve the problem relating to oil, nuclear and other hazardous substances

However, to resolve maritime disputes which arise in the various claims, the Vietnam Courts have necessarily to rely on laws which are developed internationally, particularly the Judgments of English Courts for deciding various disputes before it, in as much as, a substantial part of the Maritime Law requires to be interpreted by reference to these foreign judgments. If the shipping and maritime law is passed in the Indian Parliament then the Vietnam Admiralty Law and Practice will be more or less on par, with the Admiralty Law practiced internationally by all major States in the world.

REFERENCES

1. P270 , William Tetley, Stevedores and maritime liens, the maritime lawyer,Vol.8, 1983.
2. Neil Hutton ,The Origin, Development, and Future of Maritime Liens and the Action In Rem, Tulane Maritime Law Journal, Vol. 28, 2003.
3. Institute of Maritime Law, Southampton on Shipping Law, Informa, London 2008, p 362.
4. Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 20-21.
5. Caterpillar Financial Services v. 1178 Crab Pots, 2001 AMC 1605 (D.Ak 1999)
6. Vestoil, Ltd. v M/V M Pioneer, 2005 AMC 2404 (11th Cir. 2005)
7. M/V Harmony, 518 F.3d. 1120 (9th Cir. 2008)
8. P9, The university of Pennsylvania law review 1852-1891 (vols.1-39),1857.
9. P456, D. R. Thomas, Maritime liens, Journal of Maritime Law and Commerce, Vol.14, No.3, July, 1983.
10. Ren, Yi. The Conflict and Contrast of Maritime Lien and Limited Liability of Maritime. Compensation System. 2007 Master Essay. Shanghai Maritime University
11. 6 Hills Dry Docks & Engineering Company, ltd. v. Colorado [1923] P. 102, (1923) 14 Ll. L. Re. 251 (C.A.).
12. [1974] 2 Lloyd's Rep. 188, at p. 193
13. Tetley, William, Maritime Liens and Claims, Second Edition, International Shipping Publications, Canada
14. "The Ruta" [2000] 1 Lloyd's Reports p. 359
15. The Vietnam Maritime Code 2005
16. The Vietnam Maritime Code 2015
17. The Arrest of Ships: Comprehensive View on the English Law, Omar Mohammed Faraj.
18. Seafarer Payment Protection through Maritime Liens: Law and Practice in China, Zhu Qingsha.