

Unpaid Freight and Shipowners Right for Maritime Lien: Bangladesh Perspective

Dispute in respect of Charter Party is quite frequent in Maritime Industry. Shipowners, Charterer, P&I Underwriters or even brokers also experience this type of problem at Chittagong and Mongla. This is an effort to give a brief overview of problems ship owners occasionally experience in Bangladesh with freight issue. Discussion came on Charter Party and Bill of Lading terms & clauses analysis, issues to be considered as checklist prior exercising successful Lien, Dispute Resolution, Arbitration, Bangladesh Jurisdiction and recognition procedure of Foreign Arbitration in Bangladesh.

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Each charter party brings with it a separate set of obligations and rights, with some favoring owners and others the charterer. Late and Non-Payment of Hire is one of the most commonly encountered problem faced by an owner in time charter or voyage charter of their vessel. Circumstances leading disputes between Owners and Charterers often compel owners to prefer to explore option for lien on cargo especially when the charterer's liquidity position becomes in prime consideration. At the outset Shipowners need to consider BL, charterparty and the local legal entitlement carefully whether those allows them to exercise lien over the cargo, on possession, for the debt amount which is due to them.

Bangladesh Perspective

Foreign trade is of vital importance to the economic development of *Bangladesh*. The country's import needs are large where both the private and public sectors participate actively. Though private sector mostly prefer to follow the international trading practices, however, in case of public sector there are set policies to be governed and usually cargo vessels owned by foreign owners and/or charterers call at the maritime ports with cargo owned by third party, and not even by charterers. Chain charter party are quite frequently noticed here with existence of sub-charterer/sub-sub-charterer, who maintain parents or sister or shadow company to do the charter or sub-charterer with the owners or disponent owners and simultaneously maintain contact with the cargo receiver to receive freight payment through their respective agents in Bangladesh. When the cargo receiver is any state organ like Bangladesh Chemical Industries and Corporation (BCIC), Trading Corporation of Bangladesh (TCB) or any of the parent ministries of such corporations such as Ministry of Food etc. it has been observed that sub-charterers enter into agreement with such receivers through participating in international tender schedule under which the receivers are obliged to and indeed make payment of

80% to 90% of full freight payment the shipment at designated bank, just after commencement of cargo discharge, at their designated bank under letter of credit terms, opened by receiver. In case of non-payment of hire by head charterer, this type of chain CP creates more commercial problem for ship owners when the bills of lading neither contain provisions of lien, nor fails to legally incorporate the lien clause from the charter party. In several cases in recent times, it has been observed that the sub charterers deliberately stop hire payment to vessel owners the moment ship docks at Port and commence cargo discharge with LOI. Impression was such like that the head charterers totally become silent upon receiving repeated instruction from vessel owners to clear due payments and the vessel owners end up having to exercise their lien rights over the remaining cargo. This type of scenario is repeating more frequently and gets worsen scenario where the discharge port experiences congestion problem or discharge rate becomes severely slow due to lack of logistics facilities (lighter or carrying truck shortage or warehouse space crisis) which ultimately increases vessel's stay period at port and consequently the hire amount.

Nevertheless, Admiralty cases on the line that in order for ship owners to exercise their lien right on *freight, sub-freight, dead-freight, demurrage and damages for detention*, it must be have been expressly reserved in the charter party with clause similar to Clause 18 of the NYPE which provides that the ship owners will have a lien on all cargoes and all sub freight for hire under the charter. In order to be well protected, while executing CP shipowners also need to consider the relevant clause as stated in the Gencon. 1976, which combines the lien clause with a cesser element ensure similar effect as above. Clause 8 of Gencon 1976 reads as "*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."

Charter Party and Bill of Lading Terms and Clauses: Analysis

Exercising lien on freight, sub-freight, dead-freight, bunker and demurrage etc. it requires details general analysis on Charter party and bill of lading clauses. With several other regular issues, it appears that in many cases the Bank or consignee, neither of whom are a party to the head charter, is the named consignee in the bill of lading, and hence a party to the bill of lading contract. Under English law, in case of straight bill of lading, Bank or consignee is the only party to which delivery of the cargo can be made. The lien in the head charter only allows the Owners to deny delivery to Bank or consignee if the lien clause is incorporated into the bill of lading contract. When the bill of lading is on the Gencon 94 form, stating "freight payable as per charter party", and no charterparty date has been entered on the front of BL, as also observed here. In such like case, the wording on the reverse of the bill will state that all term, conditions etc of the charterparty "dated as overleaf" are incorporated. Even if no date is entered, as per English law it will assume that the parties intended to incorporate a charter party and will be identified.

If the bill of lading is marked as "freight prepaid" but in fact freight or full or partial sub freight is pending till the notice is served, owners will be able to exercise line. In cases of Bangladesh public sector, where cargo receiver transfer balance 10% to 20% of LC freight to charterer/ sub-charterer (80% to 90% are transferred earlier after commencement of cargo discharge as discussed earlier) after completion of cargo discharge. The ship owner's right to an express contractual lien on sub-freights can include this part of freight earned by the sub-charterers under a bill

of lading or freight due under the voyage charter. Many charters clause, such as BPTIME3, clause 14; NYPE, clause 23; Baltime, clause 18 etc. gives the ship owner the right to intercept due sub-freights before they are paid to the charterer. But in case of the contractual provision for “freight paid in advance” intercepting freight payment will often be delayed or prevented. Again, lien on sub freights remains effective when a bill of lading stamped “freight prepaid” and that the freight has not been paid at the date of the notice. The owners also to have lien over bunkers on board and have fair liberty to withdraw the vessel as per the provisions of the charter party withdrawal clause which will allow owners to obtain ownership of the bunkers remaining on board the vessel and will be considered as credit A/C time charterer for the sums due to owners considering the applicable provisions of the charter party bunkers clauses applicable on redelivery. The lien on freight and demurrage entitles the Owner to require all parties to the bill of lading contract to pay freight and demurrage direct to the Owners. This is only effective if notice of lien is given to the paying party before payment is made. Hence it is important to serve these notices as soon as any non-payment of hire (or other sums due under the head charter) arises.

Checklist Prior Exercising Lien

Shipowners need to consider the following:

01. Notification to interested parties for exercising lien
02. Possibility to retain effective possession of cargo after discharge
03. Incorporation of lien clause in BL and CP
04. Incorporation of CP clause into the BL
05. Relevancy of BL date in relation to executed CP
06. Condition/ restrictions imposed by local law and port Authority
07. Nature of cargo to assess the risk of quality deterioration
08. Storage facility into bonded warehouse and cost benefit analysis for the same
09. Loss of time to the ship resulting from exercise of lien
10. Freight terms, such as “Freight Payable as per Charter Party” or “Freight Prepaid”
11. Ownership of cargo on board vessel
Prospect of selling cargo according to the provision of local law
12. BL signed by master or logistics company, with due authorization
13. Existence of Chain CP

14. Existence of single contract and single consignee on the same voyage.

15. Arbitration clause, jurisdiction clause and choice of law clauses.

Dispute Resolution, Arbitration and Bangladesh Jurisdiction

Arbitration, results in a final resolution without appeal, utilized when contracting parties agree to use it for a dispute. When any CP contain London seated arbitration clause and the applicable law is specified as English Law, the procedure to be followed for resolution of material dispute will be the London Arbitration procedure.

When the vessel is in territorial waters of Bangladesh and they have actionable claim under Admiralty Act. There are conflicting judgements from both the High Court as well as Supreme Court of Bangladesh, both on favour or against such cases but in recent case appellate division has allowed admiralty suit despite the charter party having arbitration clause. Informatively, The High Court division of the Supreme Court is vested with Admiralty jurisdiction. Section 3(1) of the Bangladesh Admiralty Court Act, 2000 proclaims that the High Court Division of the Supreme Court shall be the Court of Admiralty. Article 103 of the Constitution

of the People’s Republic of Bangladesh, any one aggrieved by the decision of the admiralty court may file an appeal before the Appellate division of the Supreme Court. According to the order XIII of the provision of the Supreme Court of Bangladesh Rules, 1988, the period of limitation for preferring an appeal to the Appellate Division is within 60 days from the date of passing of the judgement, excluding the time of obtaining certified copy of the judgement.

Indeed the ship owners don’t need to go to court to exercise lien to retain cargo at own possession, but if the validity of the lien is in any doubt the shipowner may wish to consider obtaining a court order as this will provide at least some protection against a claim for wrongful exercise of the lien. Shipowners need to be equipped with the following documents in original (preferred) for submission at Court to file application for Lien permission-

01. Signed CP between Owners and Charterer. In case of non-availability of signed Charter Party, correspondence exchanged among all parties in support of applicable CP and related documents.
02. Load port information (SOF)

03. BL copies, CP and Sub CP (if applicable)

04. Hire Statement (updated), evidence of last hire payment by charterer in case of non-availability of signed CP

05. Notice of Lien if served

06. Receiver’s LC details if available

07. Banking details of charterer and sub-charterer (if possible)

08. Power of Attorney (POA) to authorize OPA or correspondents for court purpose

09. Owners company board resolution in favour above POA.

Recognition Procedure of Foreign Arbitration in Bangladesh

Bangladeshi law recognises and provides for recognition procedure of foreign arbitration award in order for same to be enforceable locally. Once an arbitration proceeding in a foreign country is completed, the Arbitral Award, on an application by any party, will be enforced by a court of this country under the Civil Procedure Code in the same manner as if it were a decree of court. For the arbitral award to be recognised and enforced in Bangladesh, one of the parties will have to make an application to the Court of the District Judge, Dhaka under the Code of Civil Procedure of Bangladesh. While making that application seeking the recognition and the enforcement, the party will have to supply:

- a) The original arbitral award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;
- b) The original agreement for arbitration or a duly certified copy thereof; and
- c) Such evidence as may be necessary to prove that the award is a foreign award.

For an arbitration award given in London to be enforceable in Bangladesh depends upon several factors such as whether the other party against whom such award was made applies for refusal of recognition or execution of foreign arbitral award under section 46 of the Arbitration Act, 2001. Besides, it is to be taken into account that for the recognition and enforcement of the arbitration award, application is to be made in District Court which does not appear to operate expeditiously.

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