

Insight Article

Demurrage – Lien and cesser clauses

A lien is the right to hold the property of another as security for the performance of an obligation. A carrier can for example retain possession of the cargo on board the ship until freight or other sums due have been paid. Therefore in many cases the right to exercise a lien will be an efficient weapon to protect or to enforce a claim. Under English law liens may be granted by common law, by statute or by contract. This article will consider contractual liens, in particular liens for demurrage.

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Clause 35 of the North American Grain Charterparty (Norgrain 89) has an example of a lien clause: *"The Owners shall have a lien on the cargo for freight, deadfreight, demurrage and average contribution due to them under this charterparty"*.

A cesser clause provides that the charterer's liability for specified payments shall cease at a particular time, usually after shipment of the cargo. This type of clause is usually agreed in exchange of the shipowner's lien on the cargo. Clause 35 of the Norgrain 89 continues with a cesser clause: *"Charterers' liability under this Charterparty is to cease on cargo being shipped except for payment of freight, deadfreight, and demurrage at loading, and except for all other matters provided for in this Charterparty where the Charterers' responsibility is specified."*

The Gencon 1976 combines the lien clause with a cesser element. Clause 8 reads: 1 *"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."*

Note that the above clauses are intended to reduce or exclude the charterer's liability at the port of discharge but not at the port of loading. Some cesser clauses are also designed to exclude the charterer's liability at the port of loading.

In THE "SINOE" 2 cesser clauses were described in the following manner: *"Cesser clauses are curious animals because it is now well established that they do not mean what they appear to say, namely that the charterers' liability shall cease as soon as the cargo is on board. Instead, in the absence of special wording they mean that the charterers' liability shall cease if and to the extent that the owners have an alternative remedy by way of lien on the cargo."*

In most cases a shipowner will prefer to turn to the charterer for payment of demurrage instead of some other third party. However, in some cases charterers are unable to pay and in those cases it is obviously to the shipowner's advantage if he is able to recover unpaid demurrage from the receiver under the terms of a lien/cesser clause.

Nevertheless, from a shipowner's point of view a cesser clause is by definition unfavourable, as it limits the charterer's liability and makes it necessary for the shipowner to look to other parties for payment of those amounts excluded by the cesser clause. Instead of the charterer he knows, the shipowner is referred to an unknown person or company, often from a distant country where collection of demurrage may not be easy. In some cases the shipowner's only remedy to obtain payment might actually be the drastic step of retaining possession of the cargo by closing the hatches or storing the cargo in a warehouse. This is sometimes the only option if a bill of lading has no clauses creating liability for the receiver to pay those sums excluded by the cesser clause, or if the terms of the charterparty have not been properly incorporated into the bill of lading. In this case it may not be possible for the shipowner to argue that the receiver has a contractual liability for the sums for which the charterer is no longer liable. Then, if no lien is exercised, the shipowner may find himself out of pocket and with no valid claim against the charterer or the receiver.

A lien clause without cessation of liability is clearly more favourable to the shipowner. Thus, the shipowner should treat cesser clauses with caution and if possible limit their scope. If a charterparty contains a cesser clause, then the shipowner should make sure that the receiver actually takes over the charterer's liability. This can be achieved by ensuring that the charterparty provides for the inclusion of a clause in the bill of lading making the receiver liable for those sums mentioned in the cesser clause. ³ A more common approach is to incorporate the terms of the charterparty into the bill of lading, but in that case the demurrage clause in the charterparty must be worded so that it can also be enforced against the receiver. If the charterparty clause only provides that the "charterer" is to pay demurrage, then the receiver cannot be held liable. Therefore, the demurrage clause in the charterparty should also contain a reference to the "receiver", alternatively no particular reference at all (as in the Conlinebill).

If demurrage is payable day by day, but not paid, then the shipowner must at some stage decide whether to withhold the rest of the cargo until the demurrage has been paid. In a situation where demurrage is only payable some time after discharge, the situation is less complicated: as a main rule there can be no lien for sums not due at the time of discharge. If demurrage is payable 30 days after discharge, then no lien is exercisable. The charterer will therefore usually remain liable for the demurrage because there is no lien available to the shipowner.

As mentioned above, the cesser clause is usually agreed in exchange of the shipowner's right to lien the cargo. The main principle under English law is that the cesser clause will be inoperative to the extent the lien is ineffective. In the "CUNARD CARRIER 4" the judge commented: *"The mere presence of a lien clause in the charter is not enough; the lien must be effective"*.

Whether or not a lien can actually be exercised will depend on the law and practice of the port of discharge. In some situations local law or regulations make it impossible to exercise a lien no matter how clearly the contractual right has been stated. This can for example be the case when the cargo receiver is a an official or quasi-official authority. The burden of establishing that a lien is not effective in a given port of discharge rests upon the shipowner. 5

The cesser element has been removed in the revised Gencon 1994. Clause 8 now provides that "The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same".
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The "SINOE" [1971] Lloyd's Rep. 514.

For example, the Conlinebill bill of lading form used in liner trades provides in additional clause A that "The carrier shall be paid demurrage at the daily rate".

The "CUNARD CARRIER" [1979] 2 Lloyd's Rep. 261.

The "SINOE" [1972] 1 Lloyd's Rep. 201, Court of Appeal.

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