
Notes and Commentaries



Maritime Liens: How to Protect the Innocent Purchaser

Peter Heathcote*

The Nature of the Beast

Maritime liens represent a legal charge against a ship for a debt unpaid by the owner for services rendered to the ship, or a tortious act occurring on, or committed by a ship. For example, a ship that left port without paying port dues or pilotage fees would be subject to a maritime lien in respect of those unpaid charges. Although the request for payment should be made to the owner, if unpaid, the claim may be enforced against the ship. There are several categories of liens against ships: maritime liens, possessory liens and statutory liens, the differences between them being their priority and their legal characteristics. A possessory lien, for instance, is that held by a shipyard against the ship for the payment of the sum owing for repairs done to the ship. The shipyard can retain possession of the ship until the bill is paid, in much the same way as a service station has a mechanic's lien against the vehicle it has repaired until the owner of the vehicle pays the bill. A possessory lien is evident inasmuch as the ship is held on the premises of the lien holder.

Maritime and statutory liens are less evident. Take for example a situation where a ship has received bunkers (fuel oil) in Singapore and the owner has not paid the bill. The ship sails for Tonga and on arrival the owner sells the ship to an unsuspecting third party, known as a "*bona fide* purchaser for value without notice". The original owner, the vendor, endorses the Bill of Sale to the effect that there are no outstanding encumbrances or maritime liens against the ship. But indeed there are because the supplier of bunkers in Singapore has a lien against the ship for providing "necessaries" for which he has not been paid. In addition to the claim against the former owner, the supplier has a lien against the ship itself, the *res*, which travels with the ship and is not extinguished by transfer of ownership. But the new owner is not aware of this, and there is usually no way for him to find out before he purchases the ship.

Maritime liens are like a cloud hanging over a ship. It is a black cloud that both the debtor and lien holder can see, but to the innocent purchaser it is a colourless, odourless and invisible vapour, that only turns into a visible black cloud when the lien holder

* Peter Heathcote spent 15 years at sea, serving in general cargo ships and bulk carriers. He was promoted to Master in Command at age 28. He then obtained a Bachelor of Commerce (cum laude), a Bachelor of Laws and a Master of Business Administration from Dalhousie University in Canada and then joined Marine Atlantic, which operated 22 ferries and coastal vessels, becoming Vice-President, Marine Services. He then returned to private practice, specialising in Maritime Law, before being appointed Regional Maritime Legal Advisor at the Secretariat of the Pacific Community, based in Fiji, where he provides advice on maritime legal matters to the governments of 14 Pacific Island Countries. He was awarded a Doctor of Philosophy in Marine Studies in 1997. For the past nine years he has taught, part-time, a variety of maritime subjects at the University of the South Pacific. Dr. Heathcote is a Fellow of the Nautical Institute.

arrests the ship and makes his lien known to the purchaser. If the purchaser wishes to release his ship, he must pay the amount of the vendor's debt into court as security against the lien holder's claim against the debtor and the debtor's former ship. This is inequitable.

The Unscrupulous and the Innocent

Although the purchaser has a right of action against the unscrupulous vendor to regain the amount of money he has to pay the lien holder, the process is all wrong. The innocent purchaser should not have to satisfy the lien, which had nothing to do with him in the first place. The vendor appears to get off without penalty. The lien holder would normally bring a personal action against the debtor/owner for recovery of the money owing, but if he cannot find the debtor or the debtor does not pay, if he can find the ship he can exercise his lien against the ship even though it has been sold. Although the purchaser can later claim against the vendor, this new owner of the ship against which the lien attaches has to take on the vendor's legal responsibilities in the first instance, if he wants to release his ship from the grip of the lien.

When a potential purchaser seeks to buy a ship, he can determine whether the vendor has good title to the ship by searching the records at the Registry of Ships. A potential purchaser can take note of any mortgages outstanding against the ship, which he may require be discharged before he hands over his money in exchange for the vessel and Bill of Sale. However, he will not, under the present regime, find any evidence of a maritime lien in the registry where the ship is registered. He may find some indication in the court records in Singapore, but the purchaser cannot be expected to check the records of all the courts in ports where the ship has visited within the last 12 months. The search would have to cover the previous 12 month period, because if the lien holder had not pursued his right of action against the ship within that time, a maritime lien, if still unsatisfied, is usually only self-extinguishing one year after the events giving rise to it.

Registration - a Solution?

It would appear that the purchaser should have some protection against this potential situation where he becomes, initially, responsible for the vendor's debts and liabilities. It is difficult for the vendor to protect himself from such an eventuality, since he cannot take the normal precautions of searching the register and he cannot always rely on the representations of the vendor. The vendor is aware of the existence of the lien, as is the unpaid supplier of necessities to the ship, but these are the only two parties who are aware of the invisible cloud. The rest of the world cannot see it until it attaches to the ship and becomes a black cloud, by which time it is too late for the purchaser to repudiate his purchase. He could always stipulate that the vendor indemnify him in the event that a maritime lien attaches against his new ship, but if the vendor misrepresented the existence of a maritime lien, what good would the indemnification clause do in the short term? The purchaser has to satisfy the vendor's debt and then seek recourse against the vendor.

The other party who is aware of the existence of the lien is the creditor/supplier or victim/plaintiff who must know of the existence of the debt or claim and the fact that he has a right against the ship. Would it be too onerous to require the lien holder to register this lien in the ship register in the vessel's home port so that potential purchasers could make themselves aware of any otherwise invisible encumbrances? Such a requirement would not only protect an innocent purchaser, it would also encourage the

vendor to pay his debts, since the debt which gives rise to a maritime lien is now registered on the public record for all to note. This would operate in much the same way as one can, in some jurisdictions, register a default judgement against a debtor's real property which forces the debtor to pay the amount of the judgement before he can sell his property with free and clear title.

The International Convention

There is an international convention on maritime liens. A United Nations/IMO conference was held in Geneva from 19 April to 6 May 1993, the result of its deliberations being the *Convention on Maritime Liens and Mortgages*, 1993. The Convention does not provide a definition of "maritime lien", but it means a type of privileged security for preferred claims against a ship for services rendered to it or damage done by it, to be put into effect by legal proceedings against the ship, such as its arrest or sale, in order to satisfy the claim as a matter of priority.¹

The Convention recognises only five types of claims against the owner, the demise charterer, manager or operator of the vessel to be secured by a maritime lien on the vessel, which take priority over a registered mortgage, which is traditionally the main source of ship financing. These claims, set forth in Article 4, relate to:

- (a) wages and other sums due to the crew;
- (b) loss of life and personal injury in connection with the operation of the vessel;
- (c) reward for the salvage of the vessel;
- (d) port, canal and other waterways' dues and pilotage dues; and
- (e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than that of cargo, containers and passengers' effects.

Article 6 of the Convention allows a State Party to create other maritime liens under its national law (statutory liens) that have only a life span of six months. Such liens only rank after maritime liens provided for in Article 4 and mortgages. Maritime liens follow the vessel, notwithstanding any change of ownership, registration or flag (Article 8). However, nowhere in the Convention is there provision for the registration of maritime or statutory liens.²

An International Registry?

Maritime liens usually secure short-term debts for small amounts of money relative to the cost of a vessel or its outstanding mortgage over which they take priority.³ Furthermore they have the propensity to cause delay and disruption. Any claimant with a maritime lien can, by arresting the vessel, interrupt its employment or effectively prevent it from being sold privately. Costly litigation may follow and, if no alternative security is provided by the owner, the vessel may be sold through the court. In a distress sale the vessel will often realise less than its market value. It is against this background that an international register of liens and mortgages has been proposed.⁴

¹Librando, Gaetano, Senior Legal Officer, International Maritime Organization "The International Convention on Maritime Liens And Mortgages, 1993", a paper prepared for the *Regional Seminar on Charter Parties and Ship Finance*, organized by ESCAP, UNCTAD and BIMCO, Bangkok, 30 October - 3 November 1995.

² Ibid.

³ In many jurisdictions, mortgagees rank below all maritime lien holders in the division of sale proceeds.

⁴ J.R. James, Partner, Norton Rose, Hong Kong, "International Register of Maritime Liens and Mortgages", a paper prepared for the *Regional Seminar on Charter Parties and Ship Finance*, organized by ESCAP, UNCTAD and BIMCO, Bangkok, 30 October - 3 November 1995.

A similar scheme called "Seadocs" was set up in 1983 for registering bills of lading. The concept was a good one. A bill of lading would be lodged with the registry immediately it was issued and each transfer of the bill would be recorded so that when the vessel arrived at the port of discharge the master could, simply by conducting a search at the registry, ascertain the identity of the party entitled to take delivery of the cargo. This was supposed to eliminate the need for letters of indemnity; reduce the call on credit facilities and eliminate delay. The scheme failed.⁵ It is submitted a similar international registry for maritime liens would fail for the same reasons.

It is believed that there is no need for a new international registry. Every vessel of any size is registered in a port in the jurisdiction of the State whose flag it is entitled to fly. This is where the bill of sale is registered and where a mortgage may be registered. It is the place to which people go to inspect the documents related to the ownership of a vessel. It is a place where one would conduct a search for a mortgage. Why should it not be the place to which one would come to learn of the existence of a maritime or statutory lien against a vessel registered in that place?

The Easy Way

An amendment to the present Shipping Act in various jurisdictions within the region could effect this change to protect the purchasers of ships by means of the following language.

Notwithstanding anything contained in this Act or the International Convention on Maritime Liens and Mortgages, 1993, a maritime lien is not enforceable against a ship owned by a bona fide purchaser for value without notice unless such lien has been registered in the ship register at the port in which the ship is registered, but it is enforceable against the owner and vendor who has incurred the debt from which the maritime lien arises, irrespective of registration.

Fees for registration of liens would be so structured as to encourage registration of liens. The Registrar of Ships would be instructed to circulate the new legislation to Registrars within the region.

It is submitted that such a provision is necessary for a number of reasons:

1. Maritime liens usually take precedence over mortgages.
2. Compared to the value of mortgages, maritime liens usually only secure relatively minor sums.
3. One can check for the existence of a mortgage by a search of the Ship Register but not for a maritime lien.
4. Debtors will be more inclined to satisfy their debt as it will be a matter of public record.
5. Interest of mortgages will be better protected if maritime liens are to be registered.
6. The lien is still enforceable by the lien holder against the original owner/debtor, irrespective of registration.

⁵ Ibid.

Suggested Legislation

It is usually preferable for the legislation to spell out exactly what is meant by the technical terms, so therefore a definition should be added:

Interpretation -

"Maritime lien" means a claim against the owner, demise charterer, manager or operator of the vessel secured by a maritime lien on the vessel as described in the International Convention on Maritime Liens and Mortgages, 1993.

The duties of the Registrar of Ships in relation to registration of maritime liens should be clearly stated, as should the information to be recorded in the Register:

Maritime Liens and mortgages -

(4) *The Registrar shall, at the request of the holder of a maritime lien, register the maritime lien by making an entry in the register -*

(a) *describing the claim against the owner, demise charterer, manager or operator of the vessel secured by the maritime lien on the vessel; and*

(b) *the date of the event which gave rise to the maritime lien against the vessel; and*

(c) *the name and address of the lien holder for service of notice or documents.*

(5) *Subject to Article 9 of the International Convention on Maritime Liens and Mortgages, 1993, a maritime lien shall be extinguished after a period of one year.*

It is believed that the Registrar of Ships should not exercise any discretion in respect of the validity of any lien requested to be registered. It is suggested that the duties of the Registrar be contained in "Instructions to Registrars" and these should be followed implicitly. So, if the request for the registration of a maritime lien is received and the information required in the legislation is provided, the lien should be registered, irrespective of its merits. The merits may be determined by the *bona fide* purchaser contesting the merits in the Court with Admiralty jurisdiction in the State of Registry.

It will be necessary to set forth the priorities of maritime liens and mortgages as between themselves in each category and as between categories. The legislation could be thus:

Priority of maritime liens and mortgages -

(1) *Where there is more than one mortgage registered in respect of the same vessel under this Act, the mortgagees are, notwithstanding any express, implied, or constructive notice, entitled in priority one over the other according to the date and time at which each mortgage is produced to the Registrar and recorded in the Register, and not according to the date of each mortgage itself.*

(2) *A registered mortgage shall not be affected by any act of bankruptcy or insolvency committed by the mortgagor after the date of registration of the mortgage, notwithstanding that the mortgagor, where he is adjudicated to be bankrupt or insolvent, at the commencement of his insolvency had the vessel in his possession, order or disposition, or was the reputed owner of the vessel, and the mortgage shall be preferred to any right, claim, or interest in the vessel of the other creditors of the bankrupt or any trustee or assignee on their behalf.*

(3) *A maritime lien registered under this Act shall rank in priority as against other maritime liens and registered mortgages in accordance with the provisions of the International Convention on Maritime Liens and Mortgages, 1993.*

The provisions of the Convention are to be incorporated into national legislation by words appropriate to the jurisdiction, and some of these central provisions of the Convention may be included as was drafted for the Cook Islands. If it is determined

that other types of liens should be created, these statutory liens should be identified, possibly in the manner illustrated below:

Application of International Convention on Maritime Liens and Mortgages -

- (1) *Subject to this Act and to any other law, and subject to any such reservations as the Cook Islands may make, the International Convention on Maritime Liens and Mortgages, 1993, is approved and has the force of law in the Cook Islands, from and after the day that the Cook Islands deposits instruments of accession with the Secretary General of the United Nations.*
- (2) *This Convention shall apply to all sea-going vessels registered in the Cook Islands and registered in States which are parties to the Convention.*
- (3) *Each of the claims listed in Article 4 of the International Convention on Maritime Liens and Mortgages 1993 shall be secured by a maritime lien on the vessel.*
- (4) *The priority of maritime liens shall be in accordance with Article 5 of the International Convention on Maritime Liens and Mortgages, 1993.*
- (5) *Where it is alleged that the owners of a vessel have incurred any liability to pay any sum in respect of the following items, a maritime lien will be created which will take priority in accordance with Article 6 of the International Convention on Maritime Liens and Mortgages, 1993 -*
 - (a) *Work carried out at any port, harbour, roadstead or anchorage in the Cook Islands in connection with the loading or discharging of cargo or fuel or the embarkation or disembarkation of passengers on or from that vessel; or*
 - (b) *Victualling, fuelling, repair and maintenance of that vessel or any part thereof or of the equipment thereof or any other services rendered in connection therewith; or*
 - (c) *The provision of machinery, equipment, ship's stores or parts.*
- (6) *If at any time a vessel is found within the limits of the Cook Islands, the Court, upon being shown that there are grounds on which the owners may be found liable, and that the owners are not residents of the Cook Islands and intend to depart therefrom, may, at its discretion, order the detention of the vessel.*

Conclusion

It is believed necessary to afford some protection to *bona fide* purchasers for value without notice who purchase ships that are subject to maritime liens. Registration of maritime liens in the registry in which the ship was registered would provide a similar type of protection to potential purchasers. The registration of ship mortgages puts potential purchasers on notice of the existence of any mortgages. Registration would afford the same type of notice of the existence of maritime liens. Registration on the public record would deter unscrupulous vendors from making untrue declarations that no encumbrances exist in respect of the subject vessel, and would in fact expedite the recovery of sums due.

There is no need for the establishment of an international registry of maritime liens. The international convention provides greater certainty in respect of the priority of liens as between themselves and as between liens and mortgages, but is lacking in providing a mechanism for making such liens more visible. Registration in the Register of Ships at the port of registry of the vessel provides a simple mechanism to rectify the problem that has haunted, for decades if not centuries, maritime lawyers acting for a purchaser of a vessel.