

Study on Carrier's Lien and Its Realization -- Comment on "Fujian Quanzhou Lida Shipping Co., Ltd. and Shanghai Hongshen International Freight Forwarding Co., Ltd., Liu Bing and He Libao to Realize the Ownership Disputes"

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Abstract

With the vigorous development of China's shipping industry, in the case of sea cargo transportation, the carrier's lien is still a problem with more disputes. Therefore, how to ensure the correct exercise of the lien on the sea cargo is extremely important for the carrier's vital interests. This paper mainly discusses the necessity, establishment and exercise of the lien on the sea cargo, and hopes to protect the legitimate rights and interests of the carrier as much as possible, so as to better promote the healthy and stable development of the shipping industry and improve the sea Legal system for the lien of goods).

Keywords

Sea cargo transportation, carrier, carrier's lien.

1. Introduction

On the legal level, the lien means that the creditor possesses the movable property that belongs to the debtor but is closely related to the debt. The creditor reserves the right to hold the movable property as a guarantee before the debtor pays off the debt.¹ The essence of the lien is "a self-reliance method that is recognized by law based on possession and is directly derived from the principle of fairness."² The lien on the sea cargo, that is, the carrier's lien, is the right of the carrier to retain, auction, discount or sell the goods and to receive priority compensation from the proceeds of the carriage of goods by sea, when the cargo party does not pay the freight, demurrage and general average apportionment expenses during the carriage of goods by sea according to the law or the contract of carriage of goods by sea.³ At present, the main legal basis for the exercise of the lien on the carriage of goods by sea in China is Articles 87 and 88 of the Maritime Law of the People's Republic of China. Article 87 stipulates that the freight and general average shall be paid to the carrier. The demurrage fee and the carrier's necessary expenses for the advancement of the goods and other expenses that should be paid to the carrier are not paid, and the appropriate guarantee is not provided, the carrier may retain the goods within reasonable limits. Article 88 stipulates that the goods retained by the carrier in accordance with Article 87 of this Law has not been withdrawn on the sixtieth day following the arrival of the ship at the port of discharge, the carrier may apply to the court for an auction order; the goods are perishable. Or if the storage cost of the goods may exceed its value, you can apply for an early auction. The proceeds from the auction shall be used to settle the expenses and freight charges for the safekeeping and auction of the goods and other relevant expenses that shall be paid to the carrier; the insufficient amount shall be paid to the carrier by the shipper; the remaining amount shall be refunded to the shipper; If it has not been received for one year from the date of the auction, it will be turned over to the state treasury. At present, China's Maritime law is transplanted from international conventions and international practices. China's

Maritime law has not yet established a complete system of lien on sea cargo, and some problems encountered in practice are facing difficulties. The following discussion combines Fujian Quanzhou Lida Shipping Co., Ltd. (hereinafter referred to as Lida Shipping) with Shanghai Hongshen International Freight Forwarding Co., Ltd. (hereinafter referred to as Shanghai Hongshen), Liu Bing and He Libao to discuss the necessity and realization of lien on goods by sea.

2. Brief Description of The Carrier'S Lien and the Court'S Referee

2.1. Overview of the Carrier'S Lien

On July 1, 2015, the applicant Lida Shipping and the respondent Shanghai Hongshen signed a "voyage chartering contract", stipulating that Shanghai Hongsheng rented the applicant's "Lida 8" wheel to carry 13,500 tons of yellow sand from Changshu Port. Sand to the port of Xiuyu in Putian, the freight rate is 22 yuan / ton, the loading period is 2 days, the unloading is 3 days, the demurrage rate is ton * 1 yuan / day, freight and demurrage charges shall be paid at one time before the vessel arrives at the port of discharge and open its warehouse at the wharf, the lessee fails to pay the freight, demurrage on time, the lessor has the right to stop loading and unloading operations and detain the goods, auction, offset the expenses owed, and the other losses caused by the lessor are the responsibility of the lessee. On July 13, 2015, the applicant issued the Waterway Freight Waybill with the number 20150713. The bill of lading stated that the shipper Liu Bing, the consignee Liu Bing, the ship name "Lida 8", the arrival time of 201507071900, loading Date 20150708, the shipment expires 20150720, the cargo name is Huangsha, the weight is 13,500 tons, it is shipped from Changshu Port and arrives at Xiuyu Port. On July 16, 2015, the ship arrived at Xiuyu Port, and the respondent Liu Bing entrusted He Libao to handle the port operations related procedures and goods handling procedures for the goods. Since the applicant did not receive the freight and demurrage fees, the cargo was closed after unloading and delivering of about 2,600 tons of cargo. On the same day, the applicant sent a notice to Shanghai Hongshen, saying that "If your company did not remit the expenses owed to us by 1430 on July 16, 2015, we will implement the relevant terms of the contract, such as auction of goods after re-berthing. the demurrage fee will be calculated at 2 yuan/ton." On July 17 and July 20, the applicant sent a notice to Shanghai Hongshen and Liu Bing, saying that if the relevant freight and stagnation were not received. The fee will seek legal means to process the goods. Shanghai Hongshen reported the applicant on July 17, July 18 and July 23 respectively, saying that it could not pay the applicant because it did not receive the relevant fees, and asked the applicant to dispose of the goods by himself. The proceeds were used to recover the cost of the voyage shipping and all lost costs. On July 23, 2015, the applicant signed a "Single Ship Port Loading and Unloading Contract" with Quanzhou Shag Port Co., Ltd., and unloaded the goods at the Shagang Terminal in Quangang. The applicant paid a handling fee of RMB 163,500. At this point, the "Lida 8" round generated a total demurrage fee of 15,6937.5 yuan, and was owed 267,000 yuan. In order to prevent the loss from expanding, Lida Shipping submitted an application for the realization of the lien to the Xiamen Maritime Court, requesting the auction of 10,900 tons of yellow sand in accordance with the law. The proceeds were 5,874,375 yuan (267,000 yuan for freight, 156937.5 for demurrage, and 163,500 for loading and unloading). Priority is paid.

2.2. Examination and Referee of the Case By the People's Court

The Xiamen Maritime Court held that the case of realizing a lien on board cargo should be specifically administered by the maritime court. As the court where the property is retained, our court has jurisdiction over the case. The "voyage chartering contract" signed by Lida Shipping and Shanghai Hongshen is the true meaning of both parties. It does not violate the law and is a legal and valid contract. Lida Shipping completed the contractual obligations in

accordance with the contract. According to the contract, Shanghai Hongshen should pay the freight and demurrage fees before the ship is opened to the unloading port, that is, on July 16, 2015, but its failure to perform its contractual obligations has constituted a breach of contract. According to Article 315 of the Contract Law of the People's Republic of China, "if the shipper or the consignee does not pay the freight, custodial fees and other transportation expenses, the carrier shall have a lien on the corresponding transported goods, but the other party except as agreed." Article 84 of the Guarantee Law of the People's Republic of China stipulates that "when the debtor does not perform the debt due to the custodian contract, the contract of carriage, or the processing contract, the creditor has a lien." As a carrier of the contract of carriage, the carrier shall be entitled to a lien on the corresponding transported goods in accordance with the law without receiving the freight and demurrage charges. Article 87 of the Guarantee Law of the People's Republic of China stipulates that "the creditor and the debtor shall stipulate in the contract that after the creditor retains the property, the debtor shall perform the debt within a period of not less than two months. The creditor and the debtor are in the contract. If it is not agreed, after the creditor retains the debtor's property, it shall determine the time limit of more than two months and notify the debtor to perform the debt within the time limit. If the debtor fails to perform the debt overdue, the creditor may agree with the debtor to discount the deposit, or auction lien or sell lien according to law." Lida Shipping has repeatedly notified Shanghai Hongshen on July 16, 2015, July 17, July 20, 2015, and urged it to fulfill its debts. Shanghai Hongshen clearly stated that it could not fulfill its debts. Lida shipping is required to handle the goods by itself. Therefore, Lida Shipping can auction and sell the retained goods according to law, and the proceeds will be preferentially compensated within the scope of the loss. In summary, the applicant's application for lien's realization of the lien is in compliance with the law and should be permitted. In accordance with Article 315 of the Contract Law of the People's Republic of China, Articles 82, 83, 84, paragraph 1, and Article 87 of the Guarantee Law of the People's Republic of China The second paragraph, Article 196 ,197 of the Civil Procedure Law of the People's Republic of China, and the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China The provisions of Articles 161 and 163 are as follows:

- 1). Applicant for the application of Quanzhou Lida Shipping Co., Ltd.;
- 2). The auction and sale of Quanzhou Lida Shipping Co., Ltd., the case of the voyage chartering contract, is now stored in the Huangsha of the Shagang Wharf in Quangang (the number of yellow sand is stated as 10,900 tons according to the applicant), Quanzhou Lida Shipping Co., Ltd. gives priority to the payment of the price in the range of 587,437.5 yuan.

3. The Necessity of the Carrier'S Lien

According to the maritime law of most countries, the freight payment and the delivery of goods are mutually causal. If the shipper fails to pay the freight and related expenses, the carrier has the right to refuse to deliver the goods, that is, to temporarily retain or possess the goods under its control. The goods responsible for delivery shall be delivered to the consignee until the fee is paid. This right is called the carrier's lien. The civil law countries such as Germany, Japan and the Nordic countries, as well as the Anglo-American legal system, have established the carrier's lien. To protect the rights of the carrier (creditor) to a greater extent. The German Commercial Code has a right that is different from the credit lien and is related to ,it is called the legal pledge. There is a special provision for the lien on sea cargo, namely Article 614 of the German Commercial Code. Under the premise that the lien has only the defense effect, Japan has set up a "first privilege system", that is, the carrier has priority under the conditions of possession.⁴ The United Kingdom is a typical representative country in the Anglo-American legal system concerning the lien on sea cargo. The types of lien are broadly divided into three categories, namely the common law lien, the equitable lien and the maritime lien. British scholars have a

description of the lien on sea cargo: "Give the shipowner the continued possession of the goods at the port of unloading as a guarantee for the settlement of freight and other expenses. In some cases, this right may be directly generated under the common law or be prescribed by explicit terms."⁵

The reason for the carrier to have a lien is that the consignee or the holder of the bill of lading is not selected by the sea carrier, and the ability to pay and credit, whether there is a willingness to pay the freight or other fees is difficult to know, so cargo lien is granted to protect the carrier at sea, through the priority protection of the carrier's specific claims, to maintain the balance of interests of the parties to the ship and the fairness of the transaction. The principle of fairness is the basis of the lien system. When the possessor of another person has a claim on the property, it refuses to return the property until it is paid off. The effectiveness of the creditor's rights is in line with the principle of fairness.⁶ It should be noted that the carrier's lien on the goods does not mean that the carrier has ownership of the retained goods, it is only a requirement against the delivery of goods, and it is given possession and can be disposed of under certain conditions. The right to repay their claims in priority is a means of compensation and legal remedies for the loss suffered by the carrier who has provided labor and expenditure for the maritime transport contract due to the failure of the contract.

In this case, the applicant Lida Shipping and the respondent Shanghai Hongshen signed a "voyage chartering contract", stipulating that Shanghai Hongsheng rented the applicant's "Lida 8" round from Changshu Port to carry 13500 tons of yellow sand to Putian Xiu Port. After the goods arrived at Xiuyu Port, the applicant did not receive the freight and demurrage fees. In order to protect its legitimate rights and interests, the applicant retained the yellow sand carried by the respondent to ensure the effective performance of the contract for the carriage of goods by sea.

4. The Conditions of Carrier's Cargo Lien Exercise

The carrier's lien on the goods is a form of security interest and is a complete security interest⁷. The carrier wishing to exercise the lien on the goods shall meet the following requirements.

4.1. There Is A Creditor-Debtor Relationship Between the Carrier and the Debtor

The carrier's lien is due to the debtor's obligation not to perform its payables in the transportation of the goods, and the creditor is given a right to retain the goods. Therefore, there should be a transport contract between the carrier and the debtor, from this contractual relationship ,contract debt arises. The carrier is a creditor and has the right to claim the freight, demurrage and other related expenses to the debtor. The debtor has a corresponding payment obligation to the carrier. Obviously, the creditor-debtor relationship caused by the contract is the premise of the carrier's lien.

4.2. The Debtor Did Not Perform the Payment Obligation on Time and Did Not Provide An Appropriate Guarantee

The nature of the carrier's lien on hold is a security interest, so the carrier can exercise it only if the debtor fails to perform the payment obligation. If the debtor fails to perform the obligation to pay according to the contract, but provides a guarantee, for example the debtor, financial institution or other third party provides the property as a mortgage or pledge, or the relevant financial institution or other third party is willing to provide the debtor with a guarantee, and if the secured property is equal to the value of the secured claim, the carrier shall not retain the goods.

4.3. Creditors Must Legally Possess the Retained Goods

The carrier's lien on the goods is premised on the carrier's possession. If there is no possession of the retained goods, the lien will not exist. Here, we must also emphasize the problem of legal possession. The so-called legal possession, also known as appropriate possession, refers to the carrier's possession in legal form. Legal refers to the relevant provisions of the law and the relevant transportation contract. If the carrier is illegally possessed, no lien will be established. In addition, the goods retained by the carrier must be movable property that is related to its claims.⁸ Only goods, not other property, can be possessed. As for the form of possession, it can be direct possession or indirect possession. There is no particular limitation. It is only legal. "If we have an interpretation of the lien on the goods that ultimately renders the carrier unable to exercise the lien, or the carrier does not dare to exercise the lien, it is certain that this interpretation is improper."⁹

4.4. Prohibition Against the Carrier'S Obligations

From the perspective of the nature of the contract, the contract for the carriage of goods by sea is a double contract, and both parties have their own rights and obligations. In the contract, the carrier undertakes the obligation to transport the goods to the destination, and the creditor's rights are based on fulfilling the corresponding obligations stipulated in the contract, and are not directly related to whether the debtor fulfills its obligations.¹⁰ The carrier must deliver the goods to the port of destination, and the carrier must exercise its lien without violating its obligations.¹¹ Therefore, the carrier shall not perform its obligations due to the exercise of the lien.

In the present case, the applicant Lida Shipping exercised the lien in full compliance with the exercise requirements: First, the applicant Lida Shipping and the respondent Shanghai Hongshen signed a "voyage chartering contract" with a creditor-debt relationship. Secondly, the respondent did not perform the payment obligation according to the contract and did not provide appropriate guarantee. After the goods arrived at Xiuyu Port, the respondent did not pay the freight and demurrage fees in time after the reminder, and did not provide proper guarantee. Again, the applicant has legally possessed the retained goods. The applicant signed a "Single Ship Port Loading and Unloading Contract" with Quanzhou Shag Port Co., Ltd., and unloaded the goods at the Shagang Terminal in Quangang, and paid the loading and unloading fees. Finally, the carrier assumed the obligation stipulated in the contract of carriage and successfully delivered the goods to Xiuyu Port and unloaded some of the goods.

5. Carrier's Cargo Lien Realization Procedures

Under the Anglo-American law, the lien, except as otherwise stipulated in the statutory law, only has the right to maintain possession and does not have the direct price-reward priority function, unless the contract or the law has expressly stated. Under the traditional common law of the United States, the lien holder has only the right to retain the subject matter, and does not sell the lien, and uses the proceeds from the sale to give priority to paying his or her claims, unless the parties have the opposite agreement; The states all give the lien the right to realize the lien by statutory law. When the lien holder realizes the lien, he must first give the necessary notice to the detainee. If the remuneration or the fee is not paid after the notification, the lien will be entitled to sell the subject matter and pay preferentially with the price of the sale.¹² In the civil law system, the lien holder not only has the effectiveness of the first layer, but also the effectiveness of the second layer, that is, the lien holder has the right to sell the retained object and the priority of compensation for sale price.

Article 88, paragraph 1, of the Maritime Law of the People's Republic of China states: "the goods retained by the carrier in accordance with Article 87 of this Law has not been withdrawn on the sixtieth day following the arrival of the ship at the port of discharge, the carrier may apply

to the court for an auction order; if the goods are perishable or the cost of the goods may exceed their value, you can apply for an early auction."It can be seen that in China, the carrier's lien is a legal security right, and its exercise includes continue the two levels of effectiveness of possession and price change.In order to enable the parties to achieve their respective expectations and purposes for the performance of the contract in accordance with the intention at the time of signing, it must be that the debtor has not fulfilled the contractual debt and provided no debt guarantee after the statutory grace period, that is, the creditor has exhausted everything can ensure that both parties fulfill the means of realizing the benefits, and still have not realized the creditor's rights. The carrier can change the price of the goods and receive priority in the compensation, that is, the second effect of the lien.This shows that the law balances the rights and interests of the debtor with the creditor's means of realizing priority claims, avoiding abuse of rights and expanding losses.

Judging from the provisions of Article 88 of the Maritime Law, "The carrier may apply to the court for the determination of the auctioned goods", it should be inferred that the Maritime Law is an authorized carrier to exercise its rights by applying to the court for the purpose of retaining the goods.It is not "should" apply to the court for an auction, so the clause should be a non-mandatory clause and the carrier has the option to apply for a court order.Therefore, the carrier has a stipulation on how to change the price of the goods. Since the Maritime Law is arbitrary, you can refer to the general legal provisions on the price change of the retention.China's Guarantee Law and Property Law stipulate the implementation of the lien, which can be negotiated with the debtor to discount the deposit, and can also be auctioned or sold in accordance with the law, but no specific procedures are provide for.China's Civil Procedure Law stipulates the special procedures for realizing security interests. The security interest holders and other persons who have the right to request the realization of the security interest can submit to the local people's court of the place where the secured property is located or the place of the security interest registration in accordance with the law of property law..

In this case, the case of realizing the lien on board cargo shall be specifically administered by the maritime court. The Xiamen Maritime Court, as the court of the place where the property is retained, shall have jurisdiction over the case in accordance with the law.Therefore, the applicant Lida Shipping submitted an application for the realization of the lien to the Xiamen Maritime Court in accordance with the law. The Xiamen Maritime Court applied the special procedure for realizing the security interest as stipulated in the Civil Procedure Law, and granted permission to auction and sell the huang land for retention,under the "voyage chartering contract", which is now deposited in the Shag Wharf of Quangang, and the applicant's ruling on the preferential payment of the proceeds.

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