Forum Shopping Comes to Canada: The Recognition of Foreign Maritime Liens

Norman Letalik*

Introduction

Marine commerce is the lifeblood of international trade. Virtually all commodities shipped overseas are sent by ship and only the highest value finished products are sent by air transport. So close is the connection of shipping to international commerce that many economists use the Baltic Dry Index,\(^1\) which tracks dry bulk freight rates per ton, as a proxy for the state of international trade. Countries have long been interested in promoting shipping and having laws that would promote shipping.

An early problem that shipowners encountered was that once a ship travelled past the horizon, the owner could no longer communicate with it and the owner never knew when or whether the ‘ship would come in’, meaning when or whether the vessel would return to port with its traded goods. The degree of risk to which merchants engaged in marine commerce were subjected was captured in Western culture in Shakespeare’s classic The Merchant of Venice, where Antonio, a wealthy Venetian merchant, finds that he has to take a loan from the infamous loan shark, Shylock, because his ships are at sea and have not returned to replenish his wealth.

As the master of a vessel could not communicate with the owner, and international credit was not yet possible, a means had to develop to allow the master to raise funds to enable a ship to buy the goods necessary to complete the voyage, such as food and water and later coal and bunker oil. Cash could be raised against the ship itself through a bottomry bond, and where that was not possible, a merchant might be willing to provide supplies or fuel to a ship if it was recognized that the supplier of the ‘necessaries’ could arrest the ship and recover the cost of the goods if he was not repaid within

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* Partner, Borden Ladner Gervais LLP, Toronto, Canada.

\(^1\) The higher the index, the more trade there is. Conversely, if freight rates drop, it is an indicator that fewer commodities are being shipped and therefore trade is lessening.
a stipulated period. Many countries accept that their marine suppliers had a maritime lien for these so-called necessaries, which became known as a lien for necessaries.

Today's shipping world is very different. Advanced methods of shipbuilding combined with well-trained crews and sophisticated navigation techniques make shipping today far less risky than ever before. Moreover, communication is virtually instantaneous in most parts of the world as a result of telecommunications, the internet and satellite communication. Likewise, money can be transferred virtually instantaneously through electronic funds transfer by such methods as SWIFT. So, while the need for raising funds abroad or securing supplies against the ship are not as necessary today as they had been before the advent of the SWIFT transfer system, traditions die hard in the marine field and maritime liens persist.

The concept of a maritime lien was defined by Sir John Jervis in his classic judgment in The Bold Buccleugh: ²

A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, ’78) explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches;...a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.³

Thus, a maritime lien is a claim or a privilege that can be created against a ship and travels with the ship until it is crystallized by means of commencing an action in rem against the vessel. Because there is no central registry for the registration of charges against a vessel, no one may know of the existence of

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³ Ibid., 284–285.