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Can a Shipowner Exercise a Lien on Cargo for Demurrage Not Yet Due

The question of whether a lien can be exercised for unpaid demurrage can be broken down into the following three questions:

1. When is demurrage payable under a charterparty, and if due and unpaid, can the shipowner exercise a lien on the cargo?

2. If the demurrage is not yet due, can the shipowner exercise a lien on the cargo?

3. If the shipowner has no right to exercise the lien but forcibly detains the cargo, thereby compelling the charterer to sign a settlement agreement, will that settlement agreement be regarded as having been concluded under duress and therefore held invalid?

Under English law, case law holds that demurrage is a claim for breach of contract; once a breach occurs, a right of action exists. See the following cases (The "Dias" and The "Lips"). Absent any provision to the contrary, in cases of prolonged delay of the vessel or other special circumstances, the shipowner need not wait until the end of the voyage to bring a demurrage claim, but may bring a claim, or even arbitration, in respect of demurrage already due in order to obtain an interim award compelling the charterer to pay the demurrage already due.

The "Dias" (1978) 1 Lloyd's Rep. 325
"If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages. ... the breach by the charterer sounds in damages only. The charterer remains entitled to continue to complete the discharge of the cargo, while remaining liable in damages for the loss sustained by the shipowner during the period for which he is being wrongfully deprived of the opportunity of making profitable use of his ship. It is the almost invariable practice nowadays for these damages to be fixed by the charter-party at a liquidated sum per day and pro rata for part of a day (demurrage) which accrues throughout the period of time for which the breach continues."

The "Lips" ([1987] 2 Lloyd's Rep. 311
"In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues de die in diem from the moment when, after the lay days have expired, the detention of the ship by him begins."

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A voyage charterparty may contain various provisions as to the time for payment of demurrage:
1) Some directly provide in the main contract that demurrage shall fall due and be payable day by day;
2) Some do not so provide in the main contract, but the contract incorporates a standard form such as GENCON 1994 (as below), which generally also provides that demurrage shall be payable day by day;

Gencon 1994

7. Demurrage

...Demurrage shall fall due day by day and shall be payable upon receipt of the Owners' invoice....

3) Some contracts may contain no provision at all as to when demurrage falls due or is payable;
4) Some separately provide that payment shall be made within a certain number of days after the end of the voyage.

In addition, as regards the shipowner's lien on cargo, under English common law the shipowner enjoys only a few types of lien: 1) Freight payable on delivery; 2) General average contribution; 3) Reasonable expenses incurred by the shipowner or master in protecting and preserving the goods. Moreover, the prerequisite for exercising such a lien is that the relevant debt has fallen due; where the debt is not yet due, the shipowner cannot exercise that right. Beyond these circumstances, a lien must be expressly conferred on the shipowner by contract, for example where the charterparty incorporates a clause entitling the shipowner to a lien for demurrage, such as the lien clause under GENCON 1994 (which also provides for a lien in respect of relevant debts already due).

GENCON 1994

8. Lien Clause

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.

Of the four situations described above, the most unfavourable to the shipowner at present is situation 4).

Where a contract is concluded in the situation described in 4), the shipowner should, in principle, have anticipated when concluding the contract and making such a provision that the charterer is under no obligation, and in all likelihood will not, pay demurrage in advance; yet it is inevitable that during performance of the charterparty the shipowner may find the charterer difficult to deal with, that many disputes arise with the charterer during performance (such as disputes over laytime and demurrage calculations), or that the charterer's payment performance is poor or that various credit problems even arise.

In such circumstances, even if the charterparty provides that demurrage need only be paid within a few days after completion of the voyage, the shipowner may, during performance of the voyage or before completion of discharge, be concerned about how to recover demurrage already incurred at an earlier stage (such as demurrage already incurred at the loading port). The shipowner may wish

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to rely on the lien clause in the contract, but that clause applies only to demurrage already due and payable, and not to demurrage not yet due, i.e. the clause cannot be applied.

Some shipowners may, taking various factors into consideration and fearing that it may be difficult to pursue payment later if they do not obtain the money before the end of the voyage, forcibly detain the cargo without any contractual or legal basis, thereby forcing the charterer to pay demurrage or reach a settlement agreement. However, such conduct may subsequently be regarded as duress, so that the settlement or compensation agreement reached is invalid, and the shipowner will also be liable for the relevant losses of the charterer caused by the forced detention of the cargo. A London arbitration award, London arbitration 9/26, has recently published an award in a case with similar facts.

The relevant contract terms in that case were as follows:
13. DEMURRAGE/DESPATCH: USD45,000 PDPR DHD
DEMMURRAGE/DESPATCH, IF ANY, TOGETHER WITH A BALANCE FREIGHT TO BE SETTLED WITHIN 20 BANKING DAYS AFTER COMPLETION OF DISCHARGING AGAINST RELEVANT DOCS.
...
18. OTHERWISE AS PER GENCON94 WITH LOGICAL ALTERATIONS AND AMENDMENTS ACCORDING TO THE MAIN TERM AGREED AS ABOVE."

During performance of the contract, disputes arose between the shipowner and the charterer over laytime and demurrage calculations. After the vessel arrived at the discharge port, the shipowner instructed the agent on 20 December not to release the cargo, in order to exercise a lien on the cargo and compel the charterer to confirm the demurrage calculation at the loading port. The charterer claimed that it was forced to give the confirmation under the pressure of the cargo being detained and of pressure from the cargo owner.

The arbitral tribunal held:

According to the standard set out by the UK Supreme Court in Pakistan International Airlines v Times Travel, economic duress requires two elements: 1) one party applied an illegitimate threat or pressure; 2) that illegitimate threat caused the other party to enter into the contract; and the victim had no reasonable alternative.

Clause 13 of the charterparty expressly provided that demurrage should be settled within 20 banking days after completion of discharge. The shipowner exercised a lien on the cargo before discharge had even been completed, which was a clear breach of the charterparty and constituted an unlawful act.

The shipowner's claim that it was only requiring "confirmation" rather than "payment" did not change the unlawful and unreasonable nature of its conduct.

The tribunal ruled that the confirmation agreement was caused by economic duress and that the

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shipowner could not rely on it in the arbitration to enforce it; the demurrage at the loading port should be recalculated on the facts.

Therefore, shipowners need to note that if they attach importance to the time for payment of demurrage and to the lien, they should pay attention to the relevant charterparty wording. If unfavourable charterparty terms have already been agreed, they should not lightly breach the contract by exercising a lien, lest they suffer adverse consequences in return.

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