"Against the Ship" or "Rooted in Personal liability" - The Maritime Lien Vs. The Owners

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I. Introduction

"Springs into the existence the moment the circumstances give birth to it"[1] the Maritime Lien like an unseen demon, attaches itself to the res and subtracts from the Owner's property in the vessel[2]. Owners and other creditors might assume he lies somewhere, holding his possession on the vessel but they will not see him until he appears in a claim in rem carried into effect in a legal process.

At that point, in front of the Maritime Court the Knight of Personal Liability might step forward challenging the Maritime Lien and aiming to defeat it. Who of the two will prevail and remain standing at the end of the battle? This is the question we deal with in this article.

[1] D. R. Thomas "Maritime Liens", 1980, page 13; foot note 75 (Dr. Lushington in The Marry Ann (1865).

[2] Thomas, page 22; Foot note 35 The Veritas.

In order to have a better understanding on the duel of the Maritime Lien Vs. Owner's Liability, a short voyage to the history and the development of maritime liens must be taken.

II. The development and history of Maritime Liens

According to Prof. W. Tetley, the roots of maritime liens are starched back to "Rhodian Law" (a code of marine laws established by the people of Rhodes), further, the Byzantine Rhodian Sea-Law prepared at Byzantium contained provisions on maritime liens and ship mortgages[3]. Thereafter, customary sea law was present at the medieval European *lex maritima*, which, as part of the *lex mercatoria*, governed the relations of merchants who travelled by sea with their goods in the Middle Ages. Originally purely oral, this customary sea law came into writing in the medieval sea codes which were generally collections of judgements rendered by merchant judges, accompanied by some loosely formulated principles thought to be useful for the future.

Of these early codifications, the most important was the Roles of Oleron dating from the late twelfth century and composed on the Island of Oleron (off Bordeaux), then the center of wine trade between Aquitaine and England. Eleanor of Aquitaine spent two years in Jerusalem (1147 to 1149) and brought back a copy of a maritime code named the *Assozes of Jerusalem, Livre des Assies des Bourgeois* to Oleron in 1149 and ordered it to be incorporated into the laws of her Court, according to Neil Hutton[4] presenting William McFee's research[5].

In 1152 Eleanor married Henry Plantagenet - later King Henry II and later gave birth to Richard I. The marriage opened the wine trade between England, Flanders, and Aquitaine. The trade would have necessarily involved an increased understanding and application of maritime law.[6]

The Roles of Oleron describe what is now known as "bottomry" and "respondentia", an early form of ship mortgage and the pledge of cargo as security for a loan, respectively[7]. The influence of the Roles gradually extended along the Atlantic cost of Europe, southwards to Spain, northwards to England and Scotland and eastwards to the ports of Flanders and the Hanseatic League.

Two other important codifications are the Consolato del Mare, a collection of judgements rendered by consuls who dispensed maritime justice in the Western Mediterranean, and the Laws of Visby, which rely heavily on the laws of Oleron and were first printed in Copenhagen in 1505.[8] The Consolato del Mare for example, granted seaman a preference for wages on cargo and on the ship.

These three major Rules eventually influenced the drafting of the Ordonnance de La Marine of 1861 under Louis XIV and later the commercial codes of France and other civilian jurisdictions.

III. Maritime Liens in the civil-admiralty Law

The principles of civil-admiralty law can be viewed, for example, in the Brussels Convention of 1926.[9] Articles 2 (1) to (5) list the claims which give rise to maritime liens on a vessel and Article 13 states that "*the foregoing provisions apply to vessels under the management of a person who operates them without owning them or to the principal charter*." According to this set of rules, a claim for "light or harbor dues, and other public taxes and charges of the same character" will constitute a maritime lien even on a chartered vessel where under the charter party it was for the charterer to pay the port dues and not the Owner.

VI. Maritime Liens and the English Law

The European civil admiralty law penetrated to the English Law through the "Doctors' Commons" - doctors of civil law trained at Oxford and Cambridge decided maritime cases until the Doctor's commons was dissolved in 1858.[10]

Accordingly, in 1835 it was pleaded in *The Neptune 3*, that: *"By the civil law, and the laws of Oleron, which*

3 Prof William Tetley, Q. C. "MARITIME LIEN IN THE CONFLICT OF LAWS"; 2002, pages 1-7;

4 Neil Hutton, "The Origin, Development, and future of Maritime Liens and the Action in Rem, 28, Tul. Mar. L.J. 81, 112 (2003).

5 William McFee, The Law of The Sea 64 (1950).

6 Neil Hutton, page 84.

7 Tetley, page 5, foot note 11;

8 Tetley, page 4.

9 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926

10 Tetley, page 5.

have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand."[11] In 1851, the maritime lien was defined in *The Bold Buccleugh* as: *"Having its origins in this rule of Civil law, a maritime lien is well defined…to mean a claim or privilege upon a thing to be carried into effect by legal process…It is inchoate from the moment the claim or privilege attaches and when carried into effect by a legal process, by a proceeding in rem, relates back to the period when it first attaches"*[12]. In 1897, in the *Ripon City*, the maritime lien was described also as "*a subtraction from the absolute property of the owner in the thing"*[13]. In 1946, in *The Tolten*, the maritime lien was described as *"comes into existence automatically without any antecedent formality, and simultaneously with the cause of action"*[14].

However, although oriented and even rooted in the Civil Law and also recognized by the English Courts as a "inchoate from the moment the claim or privilege attaches" and as a "a subtraction from the absolute property of the owner in the thing", in *The Castelegate* (1893) it was held that *"a proper maritime lien must have its root in personal liability of the owner"*[15] and later, the major opinion in *The Halycon Isle*, viewed the nature of a maritime lien as procedural (rather than substantial), and as such it should be governed by the law of the jurisdiction in which proceedings are brought (the lex fori). On that basis, the majority declined to recognize maritime lien asserted by a ship repairer under a contract governed by the law of the United States, even though such a lien would have been recognized under Unites States Law.

Jackson in "The Enforcement of Maritime Claims" argues, "it is hardly arguable that a maritime lien remains mere procedure in the light of its diverse substantive characteristics"[16]. In his view, whether a personal liability of the ship owner is required for a maritime lien to exist is a matter of policy. In discussing the necessity of personal liabilities of the shipowner, English Courts tend to make a distinction between bottomry, wages and salvage claims which "*accrues independently of personal liability*"[17], "*lay against the ship*"[18] and "*may validly accrue not withstanding that there exists no personal liability on the res owner*"[19] and the remainder of claims attracting maritime liens.

It is also should be mentioned that, while the European-civil-maritime law recognizes maritime liens for a relatively large variety of claims (including damages resulting from collisions, damages to cargo, supply of necessaries), English law recognizes only five maritime liens (being wages, master's disbursements, salvage, damage caused by a ship, bottomry and respondentia).

Other maritime claims according to English Law do not give rise to traditional maritime liens but only to "statutory rights in rem". The latter do not arise with the claim and do not travel with the vessel in the sense that they will expire if the vessel is sold before the action in rem is commenced. This filing requires both the person liable on the claim at the cause of action to be the owner, the charterer, or a person in control of the ship and that when the action is brought to court that person be liable on the claim would be either the owner or the demise charterer of the vessel[20].

VI. The different principles relating to owners liability

In terms of owner's personal liability, European civil-maritime law will recognize a maritime lien even when the vessel is not operated by its owner. On the other hand, English law requires that the maritime lien be rooted in the owner's personal liability unless an exception to this rule takes place.

VII. The Differences as noticed by the Israeli legislators

The fact that English Law has differed from European civil-maritime law can also be evidenced from the Israeli

11 Tetley page 5, foot note 12.
12 Tetley, page 5. Foot note 13.
13 Tetley, page 6.
14 Tetley, page 6
15 D.C. Jackson, "ENFORCEMENT OF MARITIME CLAIMS", 2005, page 490 paragraph 18.70
16 Jackson, page 491, paragraph 18.57
17 Thomas, page 15, paragraph 14.
18 Jackson, page 495-496, paragraph 18.70.
19 Thomas, page 15, paragraph 14.
20 The supreme Court Act 1981, clause 21 (4); Jackson page 262-263, paragraph 10.27, 10.28;

legislator's explanations of the intended Israeli Shipping Act of 1960. There, the Israeli legislator explained that currently there are two systems of law relating to maritime liens. One is the continental system that has been included in the Brussels Convention of 1926 and the other is the English Admiralty system. The Israeli legislator further explained there that "after checking and comparing the two legal systems, it has found that the Continental system is preferable and that therefore, in the enacted Shipping Act of 1960, the articles relating to the maritime lien do not follow the principles of the English Maritime Law and are based on the articles of the Brussels Convention of 1926".

VIII. The two set of rules influencing the owner's personal liability in the Israeli Maritime Law

On the other hand, the other set of rules establishing the Israeli Maritime Court's authorities are the Admiralty Courts Acts of 1840 and 1861 which became part of Israeli Law through the establishment of the Maritime Court by a King's Order in Council dated 2nd February 1937 ordering that the Supreme Court in Jerusalem be constituted as a Maritime Court under the Colonial Court's of Admiralty Act 1890.

After the state of Israel was established in 1948, the only change in the above British legacy from the Mandate over Palestine-Israel was the transferring of the Maritime Court from the Supreme Court in Jerusalem to the Haifa District Court under a purely administrative Admiralty Court Act of 1952.

The result of the above was that on one hand, the Israeli Supreme Court in *The Nadia S* (1990)[21] held that the maritime lien is a substantial right, and as such it should be governed by the *LEX CAUSA* – resenting the majority opinion of *The Halycon Isle* that applied the "*LEX FORI*". On the other hand, while citing Lord Watson in The Castelgate ("*a proper maritime lien must have its root in personal liability of the owner*") The Haifa Maritime Court in The *Ellen Hudig* (2004)[22], denied a maritime lien for "indemnities for loss or damage to the cargo or baggage" as the alleged damage to the cargo (being additional expenses related to its discharge from the arrested vessel in Haifa, and additional freight paid to another vessel to compete its intended voyage to Singapore) was caused as a result of the vessel being arrested due to a claim filed by the crew for unpaid wages and the owners being within 10 days later, under bankruptcy proceedings before a Belgium Court, and not due personal liability on behalf of the owners.

Ever since, *The Ellen Hudig* matter is cited by the Haifa Maritime Court as an authority establishing the need to show owners liability in order to recognize in a maritime lien.

We ourselves were faced with a situation where amount due to the local agent in Haifa for port dues he paid in relation to calls of a chartered vessel at Haifa Port was recognized as a maritime lien by the Admiralty Court of Bari Italy[23] (thanks to our colleague Adv. Alberto Batini), although the charterer of the vessel and not its owner, was the one to pay these port dues[24]. But, at the same time, a similar claim filed on behalf of the same local port agent before the Haifa Maritime Court for the Haifa port dues paid by the agent for the calls of a vessel operated by the same charterer under a "Private Agreement" (which was not drafted as an common charter party) was denied, as the Haifa Maritime Court held that the owner of that vessel was not responsible for the payment the claimed port dues[25].

A narrow path for diversity might be found in *The Captain Hurry* (2016)[26] where the Haifa Maritime Court, while denying a claim for unpaid bunkers supplied to a chartered vessel (due to the fact that the owners were not the contracting party in the bunker supply agreement) the Court held that one should keep in mind that the maritime liens differ from each other, some secure contractual obligations and other secure

21 Civil Appeal 352/87 Greefin Corporation Vs. Kur Trade ltd.

22 Claim in rem 732.96 BEHRENS INTERNATIONAL LTD Vs. T. Van Dooselaere.

23 Tiran Shipping (1997) Ltd Vs. Adriatic Lines S.A. Folio No. 8811/2013 RG

24 The Court of Bari haled that the part ("goods or materials wherever supplied to a ship for her operation or maintenance" of Article 1 of Brussels Convention of 1952, is centered solely on the objective element of the beneficiary of the service (supplied to a ship) and that the legislative intent was to leave aside all connections of formal nature with the subject who make the expenses which could be the ship owner or the charterer.

25 Claim in rem 23499-05-13 Tiran Shipping (1997) Ltd Vs. The M/V Nissos Rodos.

26 Claim in rem 22358-02-14 PRAXIS ENERGY AGENTS SA Vs. M/V CAPTAIN HURRY

obligations according to law. The different kinds of maritime lien imply on the liability of the owners. For example it is obvious that a salvage debt is secured as a maritime lien even if the owner was not responsible for the vessel being in distress. Owners are responsible to third party for damages caused due to the acts of the vessel and such a debt is secured as a maritime lien for "indemnities for collision or other accidents of navigation".

It remains to be seen whether these obiter observations by the Haifa Maritime Court are to be followed in the future cases to come.

IX. Observation

At the end of day, the ability of the Personal Liability to overcome the emerging Maritime Lien depend on the jurisdiction in which this battle will take place and the nature of the maritime lien itself.


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