LIEN ON SUB-FREIGHT FOR UNPAID FREIGHT: THE PERSPECTIVE OF SINGAPORE LAW AND ITS APPLICABILITY IN INDONESIA*

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Abstract

Charter party chains are prevalent in shipping practices of today. Unfortunately, non-payment of freight - which is harmful to ship owners - is also a common occurrence. To accommodate this, ship owners need a robust protection scheme under charter parties, especially in the charter party chains situation. The protection for ship-owners under a charter party is necessary to create a safe environment for the shipping industries.

In tackling this unresolved problem of unpaid freight, the current ship-owners protection scheme under Indonesian law is considered archaic in light of the evolution of international shipping practice. To this note, Singaporean law on the other hand extensively protects the ship-owner from unpaid freight in a more specific, definitive way by acutely following the development of shipping practices.

One of the most popular remedies a ship-owner can resort to in the case of unpaid freight under a charter party chain is the application of lien on sub-freight. Such modern approach has led Singapore to become the world's maritime hub. Therefore, the Author finds it to be of interest to compare Indonesian law with Singaporean law in the application of lien on sub-freight for unpaid freight in a charter party.

Intisari

Rantai carter partai sangat umum dalam praktek perkapalan saat ini. Sayangnya, kegagalan pembayaran uang angkut juga merupakan kejadian umum. Sementara itu, kegagalan pembayaran uang angkut berbahaya bagi pemilik kapal. Dengan demikian, pemilik kapal perlu skema perlindungan yang kuat dalam carter partai, terutama dalam situasi rantai carter partai. Perlindungan bagi pemilik kapal di bawah carter partai diperlukan untuk menciptakan lingkungan yang aman bagi pelaku bisnis perkapalan..

Untuk mengatasi masalah kegagalan pembayaran uang angkut, skema perlindungan pemilik kapal di bawah hukum Indonesia dianggap kuno jika dibandingkan dengan praktik pengiriman yang terus berkembang. Sementara itu, Singapura, melindungi pemilik kapal dari kegagalan pembayaran uang angkut dengan cara yang lebih spesifik sesuai dengan perkembangan praktik perkapalan.

Salah satu upaya hukum paling populer yang dapat digunakan oleh pemilik kapal dalam kasus kegagalan pembayaran uang angkut dalam rantai carterpartai adalah penerapan hak menahan uang sub-angkut. Pendekatan modern seperti itu telah membawa Singapura menjadi pusat maritim dunia. Oleh karena itu, Penulis tertarik untuk membandingkan hukum Indonesia dengan hukum Singapura dalam penerapan hak menahan sub-uang angkut untuk kegagalan pembayaran uang angkut dalam carter partai.

Keywords: lien, charter party, sub-freight, Singapore, unpaid, maritime, shipping, default
Kata Kunci: *gadai, carter partai, sub-angkutan, Singapura, terhutang, maritim, perkapalan, kelalaian*

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A. Introduction

Vessel-chartering holds a pivotal role in the realm of international business transaction. When the activity of export-import increases, so does the demand for vessel-chartering. Vessel-chartering is especially important to carry goods in bulk from one port to another (Sudjatmiko, p. 129). It is therefore imperative to ensure a well-protected business environment for shipping companies in the chartering business. Accordingly, the protection of shipowner's rights under charter party is crucial as it provides security for the shipowner in chartering business (The Merlin; The Astra; Szczepanik, pp. 12-20). The higher protection of shipowners' rights may increase the number of ship-owning businesses which enhances the competition in the shipping industry (Iheduru, pp. 238-40; Greve, pp. 9-12). The enhanced competition in the shipping industry is expected to result in lower shipping cost and improved quality of shipping (Tongzon, pp. 485-486).

The protection for shipowners includes the remedy that the shipowners can resort to in the case of unpaid freight, which is commonly occurring in charter parties (Sze Kee). Notably, under charter party chain situations, where a charterer sub-charters its vessel, the practice of lien on sub-freight for unpaid freight has recently gained popularity (Laut, K.P.; Diablo Fortune). Where the charterer fails to fulfill its obligation to pay freight to the shipowner, the shipowner possessing the right of lien on sub-freight is entitled to intercept the payment of sub-freight from the sub-charterer. In that case, the charterer is not entitled to receive the payment of sub-freight until it fulfills its obligation to pay freight to the shipowner. This is a very beneficial remedy for shipowner because it prevents the defaulting charterer from obtaining profit while letting the shipowner sustain loss caused by the charterer's breach. This research, therefore, aims to compare Singapore and Indonesian law concerning the application of lien on sub-freight for unpaid freight.

Singaporean law is an effective benchmark for comparison as Singaporean shipping law has accomodated well to the global shipping industry (Leading International Maritime Centre), as can be seen from the fact that Singapore is home for over 4,000 international shipping companies. Further, Singapore has become Asia's hub for maritime law and arbitration (Harding, pp.1-7; Singapore Chamber of Maritime Arbitration). On the other hand, the development of shipping regulations in Indonesia is rudimentary at best, and the necessity to develop shipping regulations has become growingly apparent. As the biggest archipelagic nation in the world, Indonesia aspires to become the world's maritime axis, with one of the focal points being the development of its shipping industry (Indonesia Sebagai Pos Maritim Dunia). However, in in achieving such goal, there has been no definitive blueprint nor a proper strategic work plan (Kuwado), including the lack of regulatory framework reconstruction on existing shipping law and its commercial aspects. Currently, the commercial aspect regarding charter party is regulated under the Indonesian Commercial Code which has been enacted since 1847, and remains unchanged despite the development of global shipping laws and practices. Therefore, an unfulfilled agenda exists to update the Indonesian shipping law in order to keep up with the growth of shipping industry (Sudjatmitko, p. 181-4).

Singapore law extensively regulates the availability of the right of lien on sub-freight for unpaid freight as well as how it is exercised. The exercise of such right is a form of security given to the shipowner to intercept the funds moving from the third party to the defaulting charterer. In contrast, Indonesian law does not recognize the concept of lien on sub-freight for unpaid freight. Although Indonesian law does not necessarily prohibit the practice of lien on sub-freight, the lack of specific regulations in general, amidst the increased likelihood of unpaid freight evokes potential jeopardy to the shipowner (Sze Kee). Therefore, more detailed regulation regarding such issue is

necessary. Based on the background mentioned above, a comparative study on the application of lien on sub-freight between Indonesian and Singapore law is conducted.

B. The Concept of Lien on Sub-freight for Unpaid Freight

Lien is one of the forms of security interest. The concept of lien itself is more popular in common law jurisdiction. In general, the right of lien is a right which entitles a party to hold on to assets in its possession pending payment of a debt owed. It is stated in Singapore Law of Credits and Security that (Singapore Law of Credits and Security, s. 4.17), "*When possession of goods are transferred to another for some work to be done upon the goods, and the fees for work done is outstanding, the workman in possession of the goods (lienee) obtains, by operation of the law, the right to exercise a lien over the goods. At common law, the rights of the lienee are merely to retain possession of the goods until full payment is made. Unless contractually agreed, no other remedy is available. The lien is extinguished upon relinquishing possession of the goods.*"

A right of lien may arise either contractually, where it arises consensually if expressly provided for by the contract. On the other hand, the right of lien may also be imposed by statute. For instance, under the Sale of Goods Act (Singapore Sale of Goods Act (Cap. 393, 1999 Revised Ed)), an unpaid seller of goods may retain possession of goods until full payment is made.

This concept of lien is similar to the concept of retention right under Indonesian law. However, the two are different in nature. On the one hand, the similarity lies on the right of the creditor to demand payment from the debtor. In the case of the debtor's default, retention right allows the aggrieved creditor to demand payment through retaining the debtor's property that is already under the creditor's possession until the sum due is paid (Indonesian Civil Code, Arts. 575(2), 1364(2), 1576, 1616, 1729, 1812; Vollmar, p. 367). This may seem to resemble the characteristics of pledge. However, in retention right, the aggrieved creditor may not obtain enjoyment from the property nor transferring the retained property to another party (Hasbullah, p. 34).

On the other hand, the difference between lien and retention right lies within its nature as a security interest. Retention right is not vested by agreement or by law in order to recover the sum due from the proceed of a sale of the debtor's property. Instead, retention right merely aims to pressure the debtor to pay off its debts (Vollmar, pp. 368-70).Thus, in contrast with the right of lien, retention right under Indonesian law is not a type of security interest.

In the context of unpaid freight, under common law practice, there are two kinds of lien that shipowners commonly resort to, namely, lien over cargo and lien on sub-freight. When exercising the right of lien over cargo, the shipowner retains the cargo under its possession as the security for the unpaid freight. In such a case, the shipowner would not discharge the cargo until the freight payment is made. If the shipowner discharges the cargo, then the shipowner loses possession over the cargo and extinguishes its right of lien over the cargo. Hence, it can be concluded that lien over cargo is possessory.

In contrast, a lien on sub-freight is not possessory in nature. In order to understand the nature of lien on sub-freight, it is important to first understand how is the mechanism of lien on sub-freight. Lien on sub-freight is only relevant in the case of charter party chain, in the case of charter party chain until the level of sub-charter party. In such case, the charterer is entitled to receive the payment of charter fees from the sub-charterer, while is also obliged to pay charter fees to the shipowner. If the charterer fails to pay freight to the shipowner, lien over sub-freight gives the right to shipowner to intercept funds that are moving from the sub-charterer to the defaulting charterer (The Cebu). Hence, lien over sub-freight provides the shipowner the right to

demand payment directly from the sub-charterer. As such, under common law, it is considered as an equitable assignment by the charterer to the shipowner by way of security (The Cebu; Tradigraid v. King Diamond). It means that the charterer transfers its right of payment to the shipowner and is recognized as a charge (The SpirosC). The significance of which will be further explained in the next section.

C. Application of Lien on Sub-Freight for Unpaid Freight in Singapore

Under Singapore law, a lien on sub-freight arises only by virtue of the contract (Oana, p. 17). In recent years, it is very prevalent for the shipowner to incorporate lien on sub-freight clause. This is due to the global financial crisis where insolvencies by a party in the contractual chain have become common (Liens on Sub-Freight). The clause pertaining lien on sub-freight clause can be formulated as the following example of clause 8 of GENCON 1994 standard charter party: "*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*." Similar provision is also found in several standard charter parties such as clause 14 of BPTIME 3, clause 17 of BALTIME 1939, and clause 23 of NYPE 2015.

In exercising the right of lien on sub-freight, following the charterer's non-payment of freight, the exercise of lien on sub-freight for unpaid freight is simply through giving notice of lien to the charterer and sub-charterer (The Attika Hope). An example is the case of *Five Ocean Corporation v. Cingler Ship*, where the voyage commenced after the cargo loading was completed on 7 April 2015 at Samarinda, East Kalimantan. On 8 April 2015, the B/Ls were issued to CER as the shipper. Pursuant to the voyage charter party, Cingler was to pay freight to FOC in the amount of US$ 431,756 on 15 April 2015 and to nominate the discharge port. However, Cingler failed to do so on time. Consequently, on 29 April 2015, FOC sent notice of lien on sub-freight to Cingler and CER in order to intercept the payment from CER (The Cingler). As such, the lien on sub-freight is only discharged when the sub-charterer pays the freight to the shipowner and not to the charterer (The Attika Hope).

Unlike the right of lien over cargo, where the shipowner may retain the possession of something that is already in its possession, the nature of lien on sub-freight is a non-possessory one (The Cebu). In Singapore, it is considered as an equitable assignment by the charterer to the shipowner by way of security (ibid; The SpirosC). It means that the charterer transfers its right of payment to the shipowner and is recognized as a charge (ibid).

By default, a charge must be registered within thirty days after the creation of the charge, for it to be valid against third parties (Singapore Companies Act, s. 131). Otherwise, the charge is considered void against the liquidator or other creditors (The Ugland Trailer; The Annangel Glory; Diablo Fortune). Hence, in the event that the charterer company is liquidated, or a charge created on its assets, the lien over sub-freight will not be enforceable against the liquidator or secured creditor of the company.

In the recent development, the Singapore Parliament passes an amendment bill of this provision, that lien over sub-freight is no longer subject to registration under s. 131 of Singapore Companies Act (Singapore Companies (Amendment) Bill, No. 27/ 2018, Cl. 2). This is intended to answer the practical difficulty faced by the shipowner in the enforcement of lien over sub-freight. The difficulty in the registration of such lien is based on the practice that vessels are typically subject to continuous series of charter parties; each entered to as quickly as possible to ensure the vessel is employed maximally. The charter period itself can be as short as a few weeks or even days. It means that the charter party would be completed even before the thirty-day-registration period is up. Given the large number of charter parties

concluded every day, imposing a registration requirement means significant administrative costs for shipping companies. For that reason, it is common for shipowners in the industry not to register liens over sub-freight pursuant to s. 131 of Singapore Companies Act (Diablo Fortune; Rajah).

In the bill of amendment, despite the lien over sub-freight is exempted from registration, such lien remains a security in nature, yet will take priority over unsecured creditors and other secured creditors whose security was created after the relevant shipowner's lien was created (Singapore Companies (Amendment) Bill, Cl. 2). This amendment gives a significant impact for shipowners in enforcing their lien as security.

D. Applicability of Lien on Sub-freight for Unpaid Freight in Indonesia

Vessel sub-chartering is a common practice in Indonesia. The regulation pertaining to vessel sub-chartering already exists under the Indonesian Commercial Code (Indonesian Commercial Code, Art. 518). In order to protect shipowners' right for payment in such circumstance, the adoption of lien on sub-freight is deemed accommodative.

As mentioned, a lien on sub-freight gives shipowner the right to intercept the funds that are moving from a third party to the defaulting charterer. The Indonesian Civil Code recognizes this concept of assignment of accounts receivable known as *cessie* (Indonesian Commercial Code, Art. 613). A *cessie* is a transfer of legal title of account proceeds from an old creditor (*cedent*) to a new creditor (*cessionaris*) (Satrio, pp. 4-6). This is an *accessoir* agreement that arises out of a principal legal relationship between the *cedent* and *cessionaris (ibid, p. 24-8)*. *Cessie* is exercised through a deed or notice and acknowledgement by the account debtor (ibid, p. 29-31). In that case, the *cedent* transfers its claim rights to the *cessionaris* (Indonesian Civil Code, Art. 613). When the *cedent* breached its obligation to the *cessionaris*, the *cessionaris* then has the right to claim the accounts receivable from the main debtor.

Accordingly, the adoption of lien on sub-freight into Indonesian regulatory framework is possible through the implementation of *cessie*. The shipowner and the charterer may agree that in the case of the charterer's failure to pay charter fees, the charterer will transfer the accounts receivable that it has over the sub-charterer. In which, the accounts receivable in question is the sub-freight itself. This transfer of right over sub-freight requires notice and acknowledgement by the sub-charterer in order to protect the sub-charterer from double-payment. Subsequently, the sub-charterer knows that it has payment obligation to the shipowner which terminates its payment obligation to the charterer.

Therefore, the outcome of lien on sub-freight and *cessie* resemble each other. However, the difference between the two lies within the security characteristic in lien on sub-freight. As discussed above, lien on sub-freight under Singapore Companies Act is a type of security that, by default, should be registered as a charge (Singapore Companies Act, s. 131). Although in its development, a bill was passed to amend this regulation into allowing the exercise of lien on sub-freight without registration of lien as a charge (Singapore Companies (Amendment) Bill, Cl. 2).

In contrast, under Indonesian law, *cessie* indeed gives rise to propriety right on intangible property (Indonesian Civil Code, Art. 613 jo. 584). Despite the similar characteristics with pledge, it is improper to regard *cessie* as a pledge over the account receivables (Darrel, p. 4). This is because under Art. 1154 of Indonesian Civil Code, the creditor may not claim ownership over the pledged property (Indonesian Civil Code, Art. 1154). However, in the case of *cessie*, the account receivables already have certain value and price that the *cessionaris* can obtain enjoyment from. Therefore, the cessionaris may directly have title on the account receivables and execute the account proceeds without necessarily violating Art.

1154 of Indonesian Civil Code (Darrel, p. 4). Thus, a *cessie*, when put in the context of lien on sub-freight or sub-hire under charter party, cannot be considered as a security interest.

Regardless, the doctrine of *cessie* is sufficient to introduce the concept of lien on sub-freight or sub-hire under Indonesian regulatory framework (Hong Kong Companies Ordinance, Cap. 622, 2014, s. 334(4)). The adoption of such can be conducted through creating a provision complementing the "lien over cargo" provision, as both remedies share the same legal cause.

The provision can be formulated in a way where the legal cause being the event where carriage fees, general average contribution, demurrage, and/or other expenses are not paid to the carrier. Then, the legal consequence being where the charterer accepts to transfer the title over sub-freight or sub-hire to the shipowner.

Further, the formulation of such provision should guarantee that the transfer of right over sub-freight or sub-hire is exercised in a way that protects the sub-charterer from double payment (Subekti, pp. 59-60). For instance, the transfer should require notice to all sub-charterer that the accounts receivable is transferred to the shipowner (The Attika Hope). Therefore, the sub-charterer is aware that its payment obligation is addressed to the shipowner and is no longer required to pay the sub-freight or sub-hire to the charterer. This provision is expected to provide clarity in carrying out vessel-chartering businesses in Indonesia, especially to protect shipowners in charter party chain situations.

E. Conclusion

Lien on sub-freight is an exceedingly beneficial remedy for shipowners in the case of charterer's non-payment of freight under charter party chain as it allows the shipowner to intercept the funds that move from the sub-charterer to the charterer.

Singapore law highly regulates the exercise of lien on sub-freight for unpaid freight. It regards lien on sub-freight as an equitable assignment which arises under contractual obligation. In its development, Singapore law makes the implementation of lien on sub-freight more effective through exempting it from registration requirement.

Whilst Indonesian law does not prohibit the parties under charter party to agree on lien on sub-freight, Indonesian law does not specifically regulate such matter. Nevertheless, the practice of lien on sub-freight for unpaid freight is applicable in Indonesia through implementation of the doctrine of *cessie* as a legal basis, by way of incorporating the assignment of sub-freight clause into the charter party. Further, as the practice of lien on sub-freight is not incompatible with Indonesian law, it is advised that Indonesian law further regulate the specific implementation of lien on sub-freight for unpaid freight in its future regulatory framework.

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