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**Seafarer Payment Protection  
through Maritime Liens: Law and  
Practice in China**

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## Summary

China is one of the leading providers of seafarers in the world. Following it, cases involving violation of seafarer wages occur occasionally. As for the measurement in settling the disputes, a seafarer can choose from the following: reconciliation, mediation, labor arbitration, law suits, and etc. If a law suit is chosen by a seafarer, he has to know how to protect his rights and interests then.

Maritime lien is an ancient system specifically in Maritime Law. Under the uniform guidance of three international treaties, different countries have mostly reached unanimity on this system. Countries have special provisions regarding different states of countries though.

A seafarer must understand its provisions both on substantive law and procedural law, if one wants to safeguard one's right in a Chinese maritime court. Maritime lien is legal security interest of a seafarer's right, when claiming it a seafarer must clarify the acquisition of the maritime lien, and have whether or not transferred it to someone else. Additionally, one should proactively prevent oneself from losing the maritime lien. The ways a seafarer can realize the maritime lien include separate exercise and joint exercise, which both require seafarer must apply for seizure of the ship or apply for confirmation his rights. However, in exceptional cases of joint exercise, to fill the loopholes, specific treatments need to be considered.

A Chinese maritime court hears a relevant case, such a court shall try its best to protect seafarer' interests and to exercise the justice. In the meantime, it is important to handle the sequential conflict between labor arbitration and maritime court jurisdiction. When hearing such cases, they need to determine whether to strict if exercising the

maritime lien is clarified on the petition, and whether or not to combine different cases in trial.

This thesis also discusses the defects in legislation about maritime lien in China's maritime laws, and how to improve in legislation in the future, referring to intentional treaties and some foreign laws.

When discussing how a seafarer exercise maritime lien, it certainly touches upon seizure of the ship. Given that seizure itself is a general subject, hence this thesis only touches it in limited contents. Next, as to reference of international treaties and foreign laws, this thesis cannot state explicitly every different provision of different countries, but only talks about maritime liens of a few typical countries.

## Preface

During the process of studying for the Master's degree in Maritime Laws in Lund University, I came across with international, regional and domestic sources of law in Maritime Law. Nonetheless, when hearing any specific case, it eventually falls in some specific legal areas.

This thesis starts with actual cases in China, a country with abundant seafarer. One of the reasons is in 1992, China adopted the Chinese Maritime Code, in which provisions about maritime liens are based solely on the International Convention on Maritime Liens and Mortgages of 1993. Thus, choosing from perspective of Chinese law is actually discussing the subject from 1993 Convention. Meanwhile, we can also examine the tangible effects of the convention on legislative processes of various countries.

The fact that I choose this topic for my master thesis is based on my experience during the summer internship in Shanghai Maritime Court in China. I was assisting to a judge arrange final report for a case involving maritime liens. Aiming at various questions which arise from maritime liens, the priority of summary was to determine what questions shall be paid more attention when court hearing such kind a case. On the one hand, the plaintiff, namely the seafarer, should know how to claim; on the other hand, the defendant shall know better how to defend.

In legislative process, one of the most essential goals has always been seeking remedies for disadvantaged groups. Shanghai is seeking to build the World Shipping Center, if it fails to protect seafarers' legal rights and interests, no matter how advanced and

perfect its hardware technology is, no seafarer will be ever attracted to take initiatives in taking parts in. As a student who wants to engage in Chinese maritime legal business after graduation, I wish through the writing of this thesis, I could better serve my clients in the future career, dealing with similar conflicts in the trial process. Since most of the research was done during my internship in China, I have referred to Chinese sources on the subject.

I sincerely appreciate my thesis supervisor Mr. Abhinayan Basu Bal for the encouragement and tolerance on my studies, also for the greater help he offered in my abroad life.

The author is responsible for all the mistakes and errors in this thesis.



## List of Abbreviations

CWT	China Water Transport
CSC	Chinese State Council
ILO	International Labor Organization
RMB	Renminbi(Chinese Currency Unit)
PRC	People's Republic of China
SMC	Shanghai Maritime Court

# Chapter 1 Introduction

## 1.1 Purpose of the Thesis

China, a big marine power, accomplishes more than 93% of transportation for foreign trade by maritime shipping. Currently, there are 1,550,000 seafarers in China, amongst whom 650,000 are sailors. China is one of the countries which have the most number of sailors. Besides that, there are 53 maritime institutions in China, including colleges and technical secondary schools. They bring up 46,000 students every year. Additionally, China sends over 100,000 sailors overseas on assignment<sup>1</sup>. With the size of the number of sailors gradually increases, it is becoming more obvious that protecting sailors' interests of wages is urgent.

On April 14, 2009, CSC issued The State Council on the Promotion of Shanghai Accelerate the Development of the Modern Service Industry and Advanced Manufacturing Industry to Build an International Financial Center and an International Shipping Center.<sup>2</sup> Building the shipping center cannot be separated from the matching of a variety of hardware facilities, but must rely on the seafarer of the most human resources. One of conditions to acquire excellent seafarer resources depends on the working conditions of the seafarer career, and ways to safeguard rights and interests when they have been infringed.

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<sup>1</sup> See the website of CWT

<<http://www.zgsyb.com/GB/Article/ShowArticle.asp?ArticleID=97145>> accessed 7 April 2012.

<sup>2</sup> See the website of CSC [http://www.gov.cn/zwjk/2009-04/29/content\\_1299428.htm](http://www.gov.cn/zwjk/2009-04/29/content_1299428.htm) accessed 7 April 2012.

Maritime lien goes back a long time in Maritime Law. It is rich in content, which makes it the most compelling research topics in the theory and practice of the world maritime laws. Countries develop their own system of maritime lien suited for them according to their national conditions. In order to eliminate the contradictions and conflicts of national laws on maritime liens, the international community has developed a three International Convention on maritime liens, which are International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926, International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1967, and International Convention on Maritime Liens and Mortgages of 1993.

China's system of maritime lien refers to the 1993 convention, and is basically consistent with the convention. Moreover, in 2000 China published Special Maritime Procedure Law of the People's Republic of China, in which regulated in procedures the exercise of maritime liens.

Therefore, at the backdrop of Shanghai trying to building the world shipping center, every year there are seafarer wages dispute cases in China's maritime courts for trial. To protect seafarer interests through the maritime lien system becomes important. Thus, the main purpose of this paper is to look from the point of view of a lawyer during the rights litigation process for the seafarer, the role played by the maritime lien system, and how to make the seafarer to better protect the rights and interests in the process of their rights safeguarding.

In addition, this thesis also spends a certain amount of space discussing from the perspective of the maritime court, whether to join between different cases and the special nature of such cases during

the proceedings, in order to protect the utmost rights and interests of both parties.

During the hearing of such disputes, the court can resolve the disputes smoothly only focusing the main point, taking into account the social impact of efforts, and trying the best to safeguard the legitimate rights and interests; coupled with the attorneys of the parties of their grasp of substantive law and procedural law in the exercise of maritime liens.

Meanwhile, in the analysis process of a case, they will naturally find the shortcomings and defects of the existing law, hoping to learn from foreign legislations and international conventions to progress and improve in the process of the subsequent changes in the law.

This thesis is aimed to answer the following questions: (1) how a seafarer can claim in such a case, both in substantive and procedural law perspective; (2) how a defendant can defend; and (3) suggestions for current regime on maritime liens in protecting seafarer interests.

No discussion of any ILO or other international regulations will be mentioned in this thesis, on account of lots of them are not effective in China yet.

## **1.2 Research Methodology**

This paper mainly adopts analytical and comparative approach to discuss the Chinese law and practice of seafarer payment protection issue in the view of maritime lien. Thus, the Chinese maritime lien system main referred to 1993 International Convention during drafting becomes the emphasis of analyzing. In the later chapters of this paper, we will do a comparative study on the Chinese maritime lien

system and those of other advanced foreign countries, in order to offer a few reference ideas to perfection of legislation of China's maritime law in the future.

It is submitted that most of the literature perused are written by Chinese authors, although heading text books on this subject written by international experts have also been referred in Chapter two.

### **1.3 Structure of the Thesis**

This thesis consists of seven chapters. Chapter 1 is primarily related to the purpose, research methods and the structure of the article, in the hope of briefing this paper to the readers.

Chapter 2 mainly introduces the emergence and development of the maritime lien system, as well as the relationship between the system and protection of seafarer's rights and interests, in order to elicit the subject described.

Chapter 3 continues from the second chapter introducing the protection status of the Chinese seafarer, followed by introduction of substantive law system of China's maritime lien. The content includes how seafarer could obtain, transfer and lose the maritime lien. This chapter will brief how the seafarer could safeguard their rights and interests under different situations, including the labor contract has not been signed, the labor contract has expired, and the dilemma when the seafarer only has labor contract with the staffing firm. It also reminds the seafarer not to wait to realize the rights until after the limitation period of one year.

Chapter 4 introduces the protection of the procedural law that the seafarer in China realizes the maritime liens. For whether or not there

are others to exercise the maritime liens, the exercise of maritime liens can be divided into separate exercise and joint exercise. The seafarer in both cases can clear the measures taken in order to better protect their own rights and interests.

Chapter 5 describes the existing problems during the exercise of maritime liens in China. Such matters include the order conflicting problem of labor arbitration and maritime jurisdiction; the nature of declaratory action; whether or not to clarify to exercise the “lien” issue in the proceedings; and the Joinder-problem.

Chapter 6 focuses on the issues raised in Chapter 5 above, from the comparative study of the international conventions and foreign laws, proposing referential experience for the above problems, in order to play a role in the subsequent legislative changes.

Chapter 7 is a summary of this article, generalizing the current protection status of the rights and interests of the Chinese seafarer and the system to protect them with its defects in the maritime liens. It also makes some constructive comments.

## Chapter 2 Introduction to Maritime Liens

### 2.1 Emergence of Maritime Liens

A traditional maritime lien is a means of securing rights and is peculiar to maritime law<sup>3</sup>. The maritime lien is an ancient legal system uniquely existed in maritime law, originated from the Mediterranean coastal countries of the ancient Greece. The emergence is related to the birth of adventure loan system of ancient Europe, which is the ship mortgage loan system (Bottomry). It is a common maritime commercial practice.<sup>4</sup>

Due to limited funds, shipowners often needed to loan from bankers to support the operation of the ship. If the ship returned safely, aside from the principal, shipowners also needed to pay high interest rates. In addition, the shipping industry is at high risk because of the characteristics of the ocean, coupled with the backwardness of communication conditions. The captain sometimes had to sign the loan contract with others in order to successfully complete the voyage. Because of these two traditions, the ship became the guarantee of this specific claim, this shipping practice also eventually developed into the maritime lien system.

The phrase “maritime lien” was probably first used in the United States in *The Nestor*<sup>5</sup>. In 1851, Sir John Jervis, in the judgment of

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<sup>3</sup> P270, William Tetley, *Stevedores and maritime liens, the maritime lawyer*, Vol.8, 1983.

<sup>4</sup> Sheng, Ping. *View the Unity of Maritime Lien from its Properties*. 2008 Master Essay. Ocean University of China.

<sup>5</sup> Neil Hutton, *The Origin, Development, and Future of Maritime Liens and the Action In Rem*, *Tulane Maritime Law Journal*, Vol. 28, 2003.

"Bold Buccleugh", first used the concept of "maritime lien". The definition of a maritime lien in this case is something of a claim or privilege. The maritime lien conferred for seafarer wages is first introduced in the *Johnson v The Black Eagle* of 1957.

## 2.2 Development of Maritime Liens

With the development of the shipping industry, maritime lien has been accepted by countries as a legal system. the right of lien is one of the commercial regulations which are founded on manifest justice and comprehensive utility, and is a privilege which the law takes under its special protection<sup>6</sup>.

But after all, due to differences in national legal traditions, different rules naturally formed on the theory. In the all-important area of the priorities between secured claims against maritime property, Thomas correctly notes that “there is no conformity among the maritime nations of the world as to the ranking of rival maritime claims”<sup>7</sup>. This difference is mainly reflected in the provisions on the content of maritime liens of different countries, specifically and detailed including scope and subject matter of a maritime claim which could be listed under maritime lien, determining the principles of the compensation order, conditions for the maritime lien to exist and continue or eradicate, and so on.<sup>8</sup>

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<sup>6</sup> P9, *The university of Pennsylvania law review* 1852-1891 (vols.1-39),1857.

<sup>7</sup> P456, D. R. Thomas, *Maritime liens*, *Journal of Maritime Law and Commerce*, Vol.14, No.3, July, 1983.

<sup>8</sup> Ren, Yi. *The Conflict and Contrast of Maritime Lien and Limited Liability of Maritime Compensation System*. 2007 Master Essay. Shanghai Maritime University.



However, the shipping industry after all is an international industry. The legal differences between such countries bring some trouble for creditors of maritime claims in the practice of safeguarding their rights and interests. Thus, the first International Covenant on a maritime lien arrived in 1926, the International Convention for the Unification of Certain the Rules of Law Relating to the Maritime Liens and Mortgages, and entered into force in June 1931. Nevertheless, due to a number of the largest maritime countries did not actively participate, the influence of the Convention did not achieve the desired effect.

Subsequently, only four countries approved to join the 1967 International Convention for the Unification of Certain the Rules Relating to the Maritime Liens and Mortgages, resulting in the Convention has not yet entered into force.

In light of past experience, the 1993 International Convention on the Maritime Lien and Mortgage came out more like the product of compromises, thus inevitably there are some flaws in the content requirements.

Summarizing the development of the maritime lien system, the International Convention on the legislative trend is mainly reflected in the following aspects. The difference between maritime lien and the rights it guarantees gradually grows larger. The creditor feature of the request secured by the maritime lien becomes clearer. The range of credits could be secured by the maritime lien is getting smaller and smaller.<sup>9</sup>

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<sup>9</sup> Huang, Yongshen. *Legal Study on the Theory and Application of Maritime Liens*. 2003 Master Essay. Dalian Maritime University.

## 2.3 Relationship Between Maritime Liens and Seafarer Payment Protection

On the level of international conventions, the ILO consolidates and amends more than 60 international conventions and suggestion letters since the 1920s, and forms a consolidated maritime labor Convention – 2006 Maritime Labour Convention. This convention plays an essential role in the promotion of full employment of the seafarer and raises their living standards and improves working conditions, as well as the protection of the seafarer interests. Meanwhile, together with the International Convention for the Safety of Life at Sea (1974), International Convention for the Prevention of Pollution from Ships (1978/1983) and International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978), they become the four pillars of the international maritime laws and regulations. As for the international legislation on maritime liens, there are International Convention on Maritime Liens and Mortgages (1926), International Convention on Maritime Liens and Mortgages (1976) and the International Maritime Liens and Mortgages Convention (1993).

The maritime lien is a legal system of strong policy attributes. In a sense, it reflects a country's public policy.<sup>10</sup> Countries in the design of maritime liens consider compensation orders between different creditors based on public interest. Usually the seafarer wages are

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<sup>10</sup> Yang, Zhixiang. *Legal Study on Maritime Liens*. 2002 Master Essay. Shanghai Maritime University.

given special protection, usually ranked first in the order (but some countries put relief lien first, such as the United Kingdom).<sup>11</sup>

There are mainly two reasons to establish the principle for protection of the seafarer interests. First, to ensure social stability; and second, the labor of the seafarer has the role on the preservation of the value of the ship.<sup>12</sup>

In addition, the objective possibility and wage conversion costs of the supply and demand situation of the market, the bargaining position of the seafarer in signing the labor contract, and delayed payment of wage determines the situations including the seafarer's "personal attachment" to the industry are all theoretical basis to support seafarer to enjoy the maritime liens.<sup>13</sup>

For consideration of the social moral values, the seafarer directly engage in maritime operations, their labor has played a very important role in promoting the development of shipping industry. After all, the seafarer is an important resource of the industry. The wages of the seafarer are not only the conversion of the value of their labor, but also necessary for themselves and their families living. Moreover, shipping at the sea is a very hazardous and hard work, and the seafarer often stands in a relatively weak position.<sup>14</sup>

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<sup>11</sup> Wang, Guohua. *Study on International Private Maritime Law*. Lawpress China, 1999, pp48.

<sup>12</sup> Si, Yuzhuo. *Maritime Law*. Lawpress China, 2007, pp54.

<sup>13</sup> Li, Miao. *On Public Policy Basis of Maritime Lien in Our Country. Legal System and Society*, 2009, Col. 11.

<sup>14</sup> Feng, Hui. *On Maritime Liens*. 2006 Doctoral Dissertation. University of International Business and Economics.

Therefore, the seafarer wages protection issues are of social significance, and focused by different countries in maritime legislation.

# **Chapter 3 China's Maritime Lien Related Substantive Law System on Protection of Seafarer Interests**

## **3.1 Status Quo of Protection of Chinese Seafarers**

China as one of the founding members of the ILO, are equally committed to building a system of maritime laws and regulations in line with national conditions. Due to the rapid maritime development in recent years, China's international shipping fleet size expanded rapidly, has developed into one of the largest maritime countries in the world. To shift from a large maritime country to a major maritime power, it is necessary to integrate into the world rules. Legal system is the most fundamental and indispensable to ensure.

An important part is to effectively protect seafarer members' interests. China has been through the establishment of the Regulations of the People's Republic of China on Seafarers, made clear of seafarers' rights and obligations, coordinated the seafarers' labor relations, and protected seafarers' rights, to protect the development of China's maritime industry.

On the other hand, nonetheless, we have to focus on the status quo of seafarers' rights and interests. From 1960s to 1980s, due to lack of material, the high wages of the seafarer has been in hot pursuit of the society. With the improvement of living standards, seafarers' aura has gradually faded. The seafarer are wandering uncertainly away from society and family, and their work and life are concentrated on the boat, the environment is a difficult and very hazardous. Many

shipping companies do not have stable revenue, sometimes even events that seafarer wages unable to be paid occur. To protect labors is a basic task of modern society and a country under the rule of law.<sup>15</sup> Therefore, it is significant how to safeguard the seafarer interests from judicial and legislative point of view.

In 2002, China Guangzhou Maritime Court heard the "Oriental Princess" case, the involved is a luxury five-star cruise ship, had long arrears of wages, leading to the 58 seafarer of the ferry service to apply for arrest of ship, and finally auctioned the ship. The 58 seafarer members eventually got wages ranged from ¥20,000 to ¥100,000.

Such claims amount to little stake to other creditors, however, to the seafarers' families whose living depends on this, they are significant. Based on the concept of social legislation, to take account of the seafarers' physical and mental labor, and support of their families, and therefore compensate them first, to show the fairness.<sup>16</sup>

It can be seen from the case, seafarer claims relative to other maritime claims, involve large number of creditors of small amount. To utmost protect the seafarer interests is one of the important task of the marine judicial, and also the need to maintain social stability.

As for the other two cases involving the seafarer to the exercise of maritime liens mentioned in this article, they are Hu Hai Fa Shang Chu Zi No.118 (2010) and Hu Hai Fa Shang Chu Zi No.113 (2011). Two cases involve the same litigants, at the critical of the time the ships were detained (December 29, 2009), they claimed respectively, in the former case, the arrears of wages and advances for meals and

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<sup>15</sup> Wang, Zejian. *Civil Law and Case Studies*. San Min Book Co., Ltd. 1979, pp509.

<sup>16</sup> Wu, Zhi. *Maritime Law*. San Min Book Co., Ltd. 1976, pp53.

related interest, as well as arrears in the latter case care of detained ship fees and advances for meals and related interest.<sup>17</sup>

From the perspective of safeguarding the seafarer interests, how to trade-off between maximizing the interest claim and committing to protecting the scheduled period of the lien, whether in the plaintiffs' claims, the need to explicitly put forward the claims entitled to maritime liens, and Joinder-problem and others are the issues involved in this article.

### **3.2 Introduction of China's Maritime Liens System**

China's current maritime lien system in maritime law is drawn up referred to the 1993 Convention. In the first case of Chinese maritime court involving maritime liens, in fact, in the judgment it did not appear the word "maritime lien". The case involved a Chinese defendant acquired from Panama third party the M/V Bell Pe, the plaintiffs claimed they had provided a number of materials, and thus filed for exercise of the lien to the payments. In view of China had no maritime lien system at that time, the case was finally closed in mediation. The M/V Pomona, whose sale was ordered by the Shanghai Maritime Court in this case, was the first foreign-flag vessel sold at auction by judicial order in the People's Republic of China since the founding of the People's Republic in 1949<sup>18</sup>.

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<sup>17</sup> See Supplement A.

<sup>18</sup> P217, *Journal of Maritime Law and Commerce* Vol.20, 1989.

Due to the avoidances when China legislate maritime law, different views are put forward about the nature of maritime liens. It is commonly agreed on that maritime lien is a security interest. The main reasons are the following four points: (1) the establishment of a maritime lien serves the purpose of ensuring priority repayment of its guaranteed maritime claims; (2) the exchange value, instead of the use value, is involved in the maritime lien; (3) maritime lien is dependent with specific maritime claim, its existence, transfer and loss is accompanied by the maritime claim; <sup>19</sup>(4) When building the maritime lien system, China referred to the draft of the 1993 Convention. According to the provisions of the Convention, each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel. Maritime lien hence has the characteristic of security interest.

The judicial judgment of safeguarding seafarer interests must be at the basis of existing laws in China. As to realize the seafarer's maritime claims, Item 1, paragraph 1, Article 22 of the mentioned PRC Maritime Law of maritime lien system, along with Article 24 of "costs to be paid first", they play an essential role.

Maritime lien as a statutory security interest, in their security claims not only take precedence over unsecured claims, over the claims secured by voluntary security interest, and even over the claimed secured by the lien of ship which also a statutory security interest. "Costs to be paid first" is even paid before all maritime claims secured by maritime liens. In China's current maritime lien system, the repayment order is not in accordance with the order of voyage, but

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<sup>19</sup> Si, Yuzhuo and Li, Zhiwen. *Study On the Theories of Chinese Maritime Law*. Peking University Press. 2009, pp97.



according to the different types of maritime claims. In exception of the reversed order principle, a maritime claim entitled to the seafarer is repaid first.

### **3.2.1 Acquisition of Maritime Lien by the Seafarers**

Maritime lien is dependent, so to determine the seafarer whether to obtain a maritime lien is actually screening process to determine if the seafarer have the right to a maritime claim and clarify the main claims and priority relations. The maritime claims entitled to the seafarer are mainly based on wages.

The determination of wage scope has also a narrow and a broad explanation. The narrow sense, it includes the wage, sailing allowance, and meals in accordance with the general contract of employment income. The broad interpretation, in addition to the above-mentioned basic income, it also includes all incidental claims accordance with the law or the contract, such as injury treatment costs, payments, disability grants, pensions, funeral expenses, pension, additional wages and damages due to dismissal, and necessary cost of repatriation of the original port and social insurance costs after the termination of the employment relationship.<sup>20</sup>

Maritime liens come into being with the generation of the guarantee of a maritime claim, that the date of the maritime claim. This is determined by maritime lien's property. Seafarer wages are usually paid monthly, so there will be a period calculation problem of a year's

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<sup>20</sup> Feng, Hui. *On Maritime Liens*. 2006 Doctoral Dissertation. University of International Business and Economics.

scheduled period. This article will discuss the loss of lien in combination with No. 138 (2010) Shanghai Haifa Chu Zi (the former case).

### **3.2.1.1 Solving Limitations of Relativity of Contract and Predicament that Actual Labor Relationship Has Been Abandoned**

#### **3.2.1.1.1 Solving Limitations of Relativity of Contract – Seafarer has Labor Contract with the Staffing firm**

In real life, since the seafarer usually sign labor contracts with assignment companies, and no written agreements existed with shipping companies. A staffing firm is a company run business of providing seafarer for shipowners. Under the relativity principle of the contract, the employment agreement is between seafarer and the staffing firm, thus seafarer wages need to be paid by the staffing firm instead of the shipping company. However, according to section 21 of the Maritime Code, the obliged objects of the request of maritime liens can only be shipowners, bareboat charterers and ship operators.<sup>21</sup>

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<sup>21</sup> Wang, Sicheng. *Research on the Issue of the Maritime Lien*. 2005 Master Essay. Ocean University of China.

Identification of the principal debtor has a direct relationship with the generation of maritime liens, maritime liens as a statutory security interest in light of the above, does not base on the contract facts. Although the legal basis that the shipowner need to bear consequences of behaviors not conducted by themselves is from action in rem of the common law countries, but now the maritime sector default this imputation principle - the shipowner is responsible for, in addition to their personal acts, but also the behavior of the ship.<sup>22</sup> In reference to the legislation of other countries, some countries such as Norway, Sweden, limit seafarer and staff wages to “based on employment facts”, and others do not set any limits. The 1926 Convention provides that the occurrence of the request should be based on the contract. Both the 1967 Convention and the 1993 Convention canceled this limitation, but instead altered the content to “working on the ship”, which means the fact the labor service has been offered. Once served on board, that is legally entitled to maritime liens.

### **3.2.1.1.2 Predicament that Actual Labor Relationship Has Been Abandoned -- No Labor Contract or Expired Labor Contract**

If the seafarer did not sign a labor contract with the staffing firm, whether it can be directly identified the fact that labor relations between the seafarer and expatriate companies or shipping companies thereby making the seafarer to enjoy the maritime liens?

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<sup>22</sup> Wang, Wei. *Theory and Application of Maritime Lien*. 2004 Master Essay. Shanghai Maritime University.

Since the implement of the Labor Contract Law, China has stopped recognizing the actual labor relationship. Hence, whether or not the wages of seafarer captain, seafarer and other staff working on board generated due to “the labor laws, administrative regulations or labor contracts” lack of legal and contractual elements? The validity of the principle creditor’s right will be threatened? There is in fact a logical problem. It is generally believed that whether the seafarer could request the shipowner to pay wages is either based on “labor relations arose under the labor laws or administrative regulations”, or “the labor contract” bound, and then create “wage claim right” by either one mentioned above. Obviously, between the seafarer and the shipping companies there are labor contracts, the Labor Contract Law therefore denies the actual labor relations. Thus, it may be hastily inferred that the seafarer do not enjoy wage claim right to the shipping companies.

However, when lack of signed written contract, even if the fact that labor relations have been abandoned, under section 82 of the Labor Contract Law provides that the employer since the date of employment more than a month less than one year has not made a written employment contract with workers shall pay workers twice the amount of wages per month. The regulation fully meets the Maritime Law “according to labor laws, administrative regulations or the labor contract wage”.

Therefore the “actual labor relations” are not needed, and the only thing need to determine based on evidence whether the seafarer should bind a labor contract with the staffing firm or directly with the shipping company.

### 3.2.1.2 **Costs that Need to be Paid First**

These costs do not belong in the maritime lien, but they are closely related to the maritime lien. The Maritime Law regulates them under the provisions of maritime lien. Costs occur in the process from the arrest of the ship until the ship auction, and they are for the interests of all the creditors. They mainly include the following three. (1) Cost of litigation occurred in exercising the maritime lien; (2) costs occurred conserving and auctioning the ship and allocating in enforcement proceedings, including costs for caring of the ship, claims registration fees, notices of auction fees, the auction Committee costs; (3) costs paid for the common interest of maritime claimant, including the ship insurance premiums and the necessary supply and maintenance costs.

In the latter case mentioned above, No. 113 (2011) Shanghai Haifa Chu Zi, the plaintiff requested the defendant to pay for care costs and interests and advanced meals and interests after the ship was seized. Its jurisprudence is mainly voluntary service, because the plaintiff in the case has no statutory or agreed obligations, but offers voluntary service in order to avoid the shipowner's interests subject to loss.<sup>23</sup> It fully meets the three elements of voluntary service: manage things for others, for the benefit of others and there is no statutory or agreed obligation.

### 3.2.2 **Seafarers Transfer of Maritime Lien**

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<sup>23</sup> Guo, Mingrui. *Civil Law*. Higher Education Press. 2003, pp563.

The acquisition of maritime liens is divided into original acquisition and acquisition cession, so others can obtain the maritime lien transferred by the seafarer. Section 27 of China's Maritime Law regulates that the maritime lien is transferred when the maritime claim is transferred, so does the 1993 Convention.<sup>24</sup> They provide a basis for such classification. In accordance with such classification, maritime lien transferred after the generation is classified as maritime lien by acquisition cession, which the successor is entitled to claim to the debtor. This view is also held by some scholars in our country.

In this sense, the person who advanced costs or fulfilled obligation on behalf of the debtor can subrogate the rights of original maritime claimant.<sup>25</sup> In the practice of maritime private law in China, there were cases establishing that the seafarer wages and repatriation costs, and tax payments advanced by the shipowner has maritime liens.<sup>26</sup>

As for the transfer of maritime liens, it can be divided into the subrogation and transfer. The transfer of maritime lien refers to the subject changes of the rights of maritime liens, which the person holds the maritime lien transfer benefits to others. Maritime lien subrogation, different from transfer, refers to the party advancing or compensating the person holding maritime lien and then subrogate in the name of the original person, and in position of exercising the

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<sup>24</sup> Provided by Paragraph 1 of Article 10 of the 1993 Convention, transfer or subrogation of compensation secured by maritime lien will also result the transfer or subrogation of the maritime lien.

<sup>25</sup> Fu, Tinzhong. *Protection on Seafarer Interests Under Maritime Lien System. Global Law View*. Vol. 3, 2010.

<sup>26</sup> Xu, Xinming. *Maritime Lien*. Dalian Maritime University Press. 1995, pp99.

maritime lien.<sup>27</sup> First it needs to be clarified here that “subrogation” here is not what it is in Article 73 of Contract Law, because it lacks the necessary condition that “due to the creditor negligent of exercising its due creditor’s right”.

The advance payment is post-event based, not as like as prior insurance contracts and legal pre-set of insurance subrogation rights of insurers which are based on prior events, but in line with the characteristics of the transfer of rights, which does not change the contents of the contract, the creditor transfers the creditor’s rights in whole or in part by binding a contract with a third party.<sup>28</sup> This article argues there is no significant meaning of separating between subrogation and transfer, because both have the same legal consequences, which results in the transfer of the creditor’s rights. In addition, both are staggered.

### **3.2.3 Seafarers Losing Maritime Lien**

In view of no actual influence establishing a maritime compensation limited liability fund for the seafarer to exercise the maritime lien, the following reasons could result in the loss of the maritime lien: expiration of a year’s scheduled period, loss of the ship, expiration of the summon created when transfer of the ship, loss of the main claim guaranteed, acceptance of the seafarer to other forms of security, and expiration of right registration when court auctions the ship. However, the loss of maritime lien does not mean the loss of maritime claim the

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<sup>27</sup> Si, Yuzhuo and Li, Zhiwen. *Study On the Theories of Chinese Maritime Law*. Peking University Press. 2009, pp100.

<sup>28</sup> Ma, Junju and Yu, Yanman. *The Theory of Civil Law*. Law Press China. August 2007, pp596.

seafarer entitled to. This is determined by the property of the maritime lien, losing accessory rights does not lead to the loss of the main rights.

In combination with No. 138 (2010) Shanghai Haifa Chu Zi heard by SMC, the key is to determine the starting point of wages enjoyed the maritime lien, and how to trade off between maximizing wage interest claim and protecting he scheduled period of the maritime lien in the process of hearing.

### **3.2.3.1 Scheduled Period of One Year**

It has always been controversial whether one-year period is limitation of actions or scheduled period. This article believes that the one-year period shall be considered the scheduled period, mainly due to the following four points. First, at the expiration of one year, it is the lien itself gets eliminated. Second, this period cannot be interrupted or aborted. Again, according to the system explanation principle, that period is not listed in the Chapter 13 of Maritime Law which is about "limitation of actions", but provided in other places alone. Finally, the limitation of actions usually starts from the date that "knows or should know". Maritime lien starts from the date it generates, which is in line with the characteristics of the scheduled period.

### **3.2.3.2 Starting Point that Seafarer Enjoys Maritime Lien**

As to exercise time of the lien for seafarer wages, the following views are mainly held. First, it starts from the date of payment for labor



promised on the provisions of employment contracts. Secondly, it starts from the date when the seafarer departs the ship, or thirdly, from expiration of employment contract.<sup>29</sup>

Maritime lien generates in line with the main rights, thus the starting point of the maritime lien should be consistent with the dates wages occur. In the No. 138 (2010) Shanghai Haifa Chu Zi case, there was one demanding “defendant pay to the plaintiff unpaid wages and other remuneration totaling U.S. \$ 116,777, and the demands of a defendant to the plaintiff to pay the unpaid wages and other remuneration totaling U.S. \$ 116,777, and each phase of the wage and other labor remuneration payable until February 9, 2010 (prosecution date) \$ 846.79, interest rates for demand deposits by the People's Bank of China at the same time”. Although the demand maximizes the interest of wages, it is easy to speculate that the plaintiffs believe that wages should be due monthly, which results loss of maritime lien to some previous wages. In practice, there are cases backdates from the prosecution date to one year before, and include wages in this period in the protection scope of maritime liens.<sup>30</sup>

This paper agrees with the second point of view, that it starts from the separation of the seafarer from the ship. The view is also consistent with the provisions of the 1993 Convention. When working on a ship, the amounts of wages the seafarer get are often in an indeterminate state and inconvenient to calculate, it is fair both to the owner and the seafarer after explicitly stated.

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<sup>29</sup> Wang, Sicheng. *Research on the Issue of the Maritime Lien*. 2005 Master Essay. Ocean University of China.

<sup>30</sup> Zhao, Lujun. *Research on the Relationship of Preceding and One year Prescription of Maritime Lien*. *Annual of China Maritime Law*. Vol. 1, 2005.

## Chapter 4 Seafarer Procedural Protection of Maritime Liens in China

Maritime lien is a priority repayment right explicitly provided by the law, however, it does not provide the utmost protection against the debt without the creditor performing at all.

Article 9 of the 1993 Convention states that the maritime lien sets out in article 4 shall be extinguished after a period of one year unless, prior to the expiry of such period, the vessel has been arrested or seized leading to a forced sale. Also, on the procedural problem of exercising the lien, Article 28 of Maritime Law of the PRC regulates that a maritime lien needs to be enforced by the court arresting the ship, which gives rise to maritime lien.

Thus, the following views are brought up. Some views that the maritime lien can only be exercised through judicial auction.<sup>31</sup> Some views that the person who holds the maritime lien can also express the lien by registration of the claims.<sup>32</sup> There are three ways to exercise the maritime lien, which are to arrest the ship, exercise to sell the ship, and participate in the distribution.<sup>33</sup> It is commonly believed that exercise of the maritime lien must go through four main parts, including ship seizure, ship auction, registration of the claims and allocation of proceedings.<sup>34</sup> Some scholars proceed in

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<sup>31</sup> Li, Hai. *Research on Maritime Liens*. Lawpress China. 2002, pp192.

<sup>32</sup> Si, Yuzhuo and Li, Zhiwen. *Study On the Theories of Chinese Maritime Law*. Peking University Press. 2009, pp90.

<sup>33</sup> Chen, Haibo. *On the Exercise of Maritime Liens*. Annual of China Maritime Law. Vol. 10.

<sup>34</sup> Si, Yuzhuo. *Maritime Law*. Lawpress China, 2007, pp63.

accordance with the four areas of the need for a complete experience, including arrest of the ship, apply for the auction of the ship and participate in the distribution. They classify the ways of exercising the maritime lien in four categories. 1. Arrest of the ship (secured) - Litigation – repayment. 2. Arrest of the ship (not secured) - litigation - Auction - participation in the distribution. 3. Litigation - registration - participation in the distribution. 4. Registration - litigation - allocation.<sup>35</sup>

As for the procedural process during the seafarer exercising the maritime lien, we can summarize the questions associated with maritime liens as following. Primarily it needs to determine whether or not the maritime compensation limited liability fund has influence over the exercise of claiming the right. Secondly, if the ship is in the process of auction, how could the seafarer exercise the lien after the ship assignee exercises the notice procedure of maritime lien? In addition, it is questionable that whether or not a ship can be seized repeatedly. Last but not the least, the current law summarizes in regard to separate exercise and joint exercise.

#### **4.1 Maritime Compensation Limitedly Liability Fund Influence Over Seafarer Exercising the Maritime Lien**

The maritime lien can be exercised only through the courts to seize the ship. On the other hand, when a limitation fund has been constituted by a person who is liable, any person having made a claim

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<sup>35</sup> Li, Liang. *Realization Theory of Maritime Liens*. Guangxi Shehui Kexue. Vol. 7, 2005.

against the person liable may not exercise any right against any assets of the liable person. If any ship or other property belonging to the person constituting the fund has been arrested or attached, or, if a security has been provided by such person, the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided.<sup>36</sup>

Hence, the question falls into whether it can be concluded that, once maritime compensation limited liability fund is established, there would be adverse effect for the seafarer to exercise the maritime lien. According to China's current law, the provisions of maritime liens shall not affect the implementation of the limitation of liability for maritime claims provided for in Maritime Code. Thus, to exercise the maritime lien in the cases that the limited liability fund has already been set up, the provisions of the limitation of liability must be carried out first.

In provisions of the limitation of liability, the creditor's right is divided into restrictive right and non-restrictive right. The former is, after the establishment of the fund, not responsible for implementing of all properties seized or frozen. Seafarer wages and other requests are non-restrictive right. In other words, whether it is before or after the establishment of the fund, the seafarer can apply for court seizure of the ship.

And even though the fund is set up after the seafarer applies for the arrest of the ship, the provision of the limitation of liability "any person having made a claim" does not include the seafarer, because of his status of non-restrictive creditor, and his exercise of the lien cannot be affected by the limitation fund.

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<sup>36</sup> Provision 214, *Maritime Law* of China.

Moreover, the final fund allocation scheme for restrictive creditors does not impact the seafarer in exercising the maritime lien outside of the fund, since the ship has its value.

## **4.2 Maritime Lien Notice Procedure**

Additionally, while the seafarer is exercising the maritime lien, it should also be noticed whether the shipowner is transferring the ship. The behavior of transferring the ship though does not render the seafarer loss of the maritime lien, which still exists following the existence of the ship.

Nevertheless, the assignee of the ship can apply to the maritime court for the notice of the maritime lien, in order to achieve the clean property rights of recently purchased ship. Once the maritime court rules to agree to the request of the assignee, the announcements will be released through newspapers or other news media, urging the maritime lien holders advocate the maritime lien in the notice period. In China, the maritime lien notice period is 60 days.

During the maritime lien notice period, the maritime lien holder who advocates the rights should register with the maritime court, or otherwise they will be deemed to have waived the maritime lien.

## **4.3 Repeated Seizure of the Ship**

According to China's current law, the maritime claimant may not request to seize the seized ship due to the same maritime claim.<sup>37</sup>

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<sup>37</sup> See Article 24 of Special Maritime Procedure Law of the PRC: No maritime claimant may, on account of the same maritime claim, apply for arrest of a ship which was once arrested, except in any of the following circumstances: (1)the person against whom the claim is made fails to provide sufficient security; (2)it is likely that the surety cannot perform the obligations under the security in full or in part; or (3)the maritime claimant

This provision is generally understood that the same maritime claimant cannot repeatedly seize the ship, unless it is the proviso situation provided by the law.

Can the seafarer repeatedly seize a ship, if that ship has already been seized by other claimer? The 1999 Convention on Arrest of Ships and China's current law do not provide the reference. However, Article 94 of Civil Procedure Law of the PRC provides that the sealed up or frozen property shall not be seized or frozen repeatedly.

Thus, there are views that the arrest of the ship does not constitute the necessary condition for the exercise of the maritime lien. If the ship has been detained before the litigation, the time that the rights are registered should be regarded as the time of exercising the maritime lien.<sup>38</sup>

When the seafarer applies for the arrest of the ship, there are only two possibilities regarding the state of the ship, either it has not been seized or it has been seized due to application of others. If the ship has been seized, the question involved is whether it can be repeatedly seized after the seafarer applying for it.

Due to the lack of a system of China's current law, in practice, when the court agrees to repeat the seizure, how to calculate the implementation period of the seizure? The point is whether it should be cumulative or overlapping. That involves cumulative value, for example, all the seafarer of a ship apply for the arrest of the ship for

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agrees, on reasonable grounds, to release the arrested ship or to return the security provided; or the maritime claimant cannot, by reasonable means, stop the release of the arrested ship or the return of the security provided.

<sup>38</sup> Huang, Yongshen. *Legal Study on the Theory and Application of Maritime Liens*. 2003 Master Essay. Dalian Maritime University.

the arrears of wages separately, then does it mean the ship is permanently seized, and cannot be put into normal operation? If the court does not agree to repeated seizure the ship, after the release process of the ship by the previous applicant, should the court take the initiative to inform the next applicant that the ship can now be seized, or automatically the ship is seized in accordance with the first application?

What needs to be specifically pointed out is that if the seafarer cannot apply for the repeated seizure at the critical point of one year, meanwhile the previous seizure applicant did not dragged the ship into the auction process and finally went past one year's period, how to deal with this situation?

#### **4.4 Summary of China's Current Law On Separate and Joint Exercise of Seafarer's Maritime Lien**

The classification mentioned at the beginning of this chapter that describes a wide variety of ways to exercise a maritime lien is likely to cause unnecessary confusion. As to a maritime lien case, depending on the degree of progress, there are two ways of realizing the maritime lien. One is separate exercise, meaning that during the exercise of maritime lien, the maritime claimant applies for court seizure of the ship that caused the maritime claim. If the parties involved provide guarantees, the maritime claimant gets the repayment based on the guaranteed funds. If there is no sufficient and satisfactory guarantee made by anyone, the maritime claimant applies for court auction of the ship, and gets compensated from the

auction proceedings in accordance with the legal order. The other one is joint exercise, meaning when the ship is applied for auction, the registration of rights is applied as well.<sup>39</sup> Related behaviors are followed in chronological order: seizure, litigation, auction, registration of rights, and action for affirming rights.

In judicial practice, it is generally not accepted to re-seize the ship after the ship has already been applied for seizure by someone else. Therefore, for the separate exercise of the maritime lien, if the debtor does not provide guarantees, then lien holder can bring up the litigation or court arbitration, and then apply for the auction. The problem is that when jointly exercise the maritime lien, the lien holder cannot apply again for the arrest of the ship, thus the concept of “maritime lien shall be exercised through the court seizes the ship causing the maritime lien” is fundamental. The crux of the problem lies in whether the lien holder has to personally initiate the seizure procedure when the ship has been seized by the application of others. The lien holder exercises the maritime lien depending on the results of others seizing the ship. Eventually if entering the auction process, the seafarer only needs to register claims to exercise the lien. And if not, the seafarer has to apply for the arrest of the ship to separately exercise the maritime lien.

However, both scenarios are worth discussing based on circumstances. For the case of others applying for the arrest of the ship to enter the final auction process, if a year’s scheduled period is about to expire when the seafarer register the claims, the lien holder cannot re-seize the ship and the declaratory action cannot progress,

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<sup>39</sup> Wang, Mingdong. *Exploration of the Contrastive Method in Maritime Liens*. 2005 Master Essay. Shanghai Maritime University.



since the declaratory action is a means of the registration of claims. This causes an embarrassing situation for the lien holder. This article reckons that the lien holder should be allowed to bring up the litigation of payment, in order to keep the scheduled period. In addition, if the ship involved does not enter into the auction process, but the scheduled period is about to expire during the process of seizure, this time the action of the lien holder bringing up the litigation of payment shall be deemed to have exercised the maritime lien.<sup>40</sup>

Hence, this article argues that the initiation process that exercises the maritime lien through the arrest of the ship is only for the separate exercise of the lien. As for the circumstance that the ship has been applied for seizure by others, we shall offer the seafarer's original rights in accordance with the legal system, or otherwise the maritime lien will not be able to be exercised due to objectivity. The law cannot deprive rights of the lien holder simply because he cannot exercise the rights objectively.

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<sup>40</sup> Provision 89 of *On the Explanation of Several Questions Regarding PRC Maritime Special Litigation Procedural Law* by the Supreme People's Court clearly states, before the registration of rights, if the creditor has filed a lawsuit in another maritime court, the court shall transfer the case to the maritime court accepting the registration of rights, with the exception of the cases which has entered into the second instance.

## **Chapter 5 Related Issues on Seafarer**

### **Exercise Maritime Lien in China**

As for the No. 138 (2010) Shanghai Haifa Chu Zi case and No. 113 (2011) Shanghai Haifa Chu Zi case, this article still have four related questions. First, the order conflict problem between labor arbitration and maritime court jurisdiction should be solved. Second, from the latter case, the litigation claim and the court verdict seem to deviate from the declaratory action to the litigation of payment. Third, when the seafarer exercises the maritime lien, whether it should be clarified in the claim “exercising the lien”. At last, the question lies in whether or not the two cases could be merged.

#### **5.1 Order Conflict between Labor Arbitration and Maritime Court Jurisdiction**

An action arising from a dispute over the service contract of the seafarer of a sea-going ship shall be under the jurisdiction of the maritime court of the place where the domicile of the plaintiff is located, where the contract is signed, where the port of embarkation or disembarkation of the ship’s seafarer is located, or where the domicile of the defendant is located.

However, the seafarer’s labor contract dispute falls into labor dispute. According to the current legal system in China, the dispute has to go through demand requirements of labor arbitration, which makes the seafarer’s labor dispute going through four stages, including mediation, arbitration, litigation and appeal. This process of mediation,

arbitration and lawsuit is shown in the most of the labor dispute cases.<sup>41</sup>

Some scholars believe that the demand requirements of labor arbitration in China lacks legal basis.<sup>42</sup> In China, there are three laws and provisions relating to this regulation, the Labor Contract Law of the PRC, Law of the PRC on Employment Contracts and Law of the PRC on Mediation and arbitration of the Labor Disputes. In the first two legal provisions, in fact, there is no regulation that labor arbitration proceeding as demand requirements in the litigation process. There are only similar contents, providing that “Where the lawful rights and interests of the laborers are infringed, they shall have the right to request the handing by the relevant department in accordance with the law, or apply for arbitration or initiate litigation in accordance with the law.” Nonetheless, this is a provision reluctantly appearing to be demand procedure.<sup>43</sup>

This may though cause the waste of resources in relief procedure, since once entering the litigation process, the proceedings from the previous labor arbitration has to be re-refereed. The original intention of establishing labor arbitration is for the just and timely resolution of labor disputes, and to protect the legitimate rights and interests of workers as the weak side. The fact of wasting the resources deviates from its original intention, resulting in more complex procedures than the general civil disputes and longer period in the actual process, which is not conducive to the protection of the rights of the seafarer.

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<sup>41</sup> See Supplement B.

<sup>42</sup> Liu, Erxing. *Research on the Relationship of Preceding and One year Prescription of Maritime Lien*. Annual of China Maritime Law. Vol. 1, 2005.

<sup>43</sup> See Article 4 and Article 5 of *Law of the People’s Republic of China on Mediation and Arbitration of Labor Disputes*.

Meanwhile, some scholars point out the abuses of the labor arbitration demand requirements systems from the following four aspects. First, it artificially increases the cost of workers to protect their own interests. Second, the labor arbitration committee staffs lack professional knowledge in legal contents. Third, the labor arbitration committee lacks of independency. Finally, the labor arbitration committee lacks supervision.<sup>44</sup>

In connection with the special status of the seafarer as a party to the labor dispute, if the law requires the seafarer's labor contract disputes to proceed as labor arbitration first, it is bound to cause the embarrassing situation of not being able to register and seek repayment at the maritime court and in a timely manner even though the seafarer wages fall in the maritime lien. Moreover, labor arbitration demand requirements lacks of practical significance due to contrary to the mobility of the seafarer who has fulfilled the labor contract.<sup>45</sup>

## **5.2 Concerning Action to Confirm Seafarer's Rights During Registration Procedure in the Forced Auction**

Seafarer members to carry out the declaratory action, they shall file it within seven days after the registration of the creditor's rights. Primarily it needs to be clarified, for the declaratory action, whether it

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<sup>44</sup> Lai, Anjun. *On the Abuses of Labor Arbitration Demand Requirements Procedure. Legal System and Society*. Vol. 9, 2010.

<sup>45</sup> Zhang, Xianwei. *Domestic Seafarer Labor Contract Dispute Shall not Apply Labor Arbitration Demand Requirements Principle. Annual of China Maritime Law*. Vol. 11, 2000.

is the maritime lien or the maritime claim that needs to be declared. In accordance with the Provision 113 of Chapter 10 of Special Maritime Procedure Law, it should be the maritime claim which is regarded as the main creditor's right.

Based on the nature and content of litigations, they are classified as litigation of payment, confirmative litigation and formative litigation. In the confirmative litigation, the subject matter of litigation is the substantive legal relationship existed between the plaintiff and the defendant or the dominance enjoyed by the plaintiff, and the claim is to request the court to confirm the existence or non-existence of its claim of the substantive legal relationship.<sup>46</sup> The characteristics of the litigation of payment are that the court not only needs to confirm the civil legal relationship existed between the involved parties, but order the defendant to perform certain civil obligations.<sup>47</sup> The difference between the two lies in the implementation. The litigation of payment has executive power, but the confirmative litigation and formative litigation do not require performing. Thus, some scholars view the declaratory action to be the litigation of payment.<sup>48</sup>

However, according to the explanation and analysis of the system, the declaratory action acquires only "evidence of creditor's right claim", by itself it cannot be directly implemented without the combination of the ongoing auction process to finally get compensated. The litigation itself does not have the executive power. It is only a confirmation process following the auction of the ship before the allocation process. The seafarer cannot rely on the referee result to request the debtor to

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<sup>46</sup> Jiang, Wei. *Code of Civil Law*. China Renmin University Press. 2007, pp35.

<sup>47</sup> Chai, Fabang. *Newly Organized Civil Procedural Law*. Lawpress China. 1992, pp57.

<sup>48</sup> Xu, Junqiang. *Research on Legal Questions of Declaratory Action*. *National Judges Colleges Law Journal*. Vol. 1, 2006.

make separate payment. On the understanding of executive power, it should be whether the litigation is followed by a compact and coherent implementation process. If yes, it is the litigation of payment; or otherwise, it is the confirmative litigation. Although the two could be easily confused, this article argues that the confirmative litigation is the declaratory action.

This article considers that under current law, the parties “confirm the lien request” does not fall into the scope of so-called “declaratory action” defined by Provision 116 of Admiralty Suit Law. According to the terms before and after this provision, it is not difficult to see the provision defined “declaratory” refers to the maritime court to confirm the claims and the number of claims the parties advocate. It is though generally believed that the maritime lien is a statutory security interest, that “to confirm the lien request” is actually the confirmation of the parties request over their owned security guaranteed maritime claims.

In addition, It is noteworthy if that the seafarer before the registration of claims has already brought up a lawsuit in another maritime court, the maritime court which accepted the case should transfer the case to the maritime time where the claims are registered to be dealt with jointly, with the exception of the cases which has entered the second instance.

However, if at that time the previous trial of the seafarer’s has entered the implementation process, how should the seafarer protect the rights and interests?<sup>49</sup> Some view that it could be realized as long as the court that ordered implementation terminates the execution

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<sup>49</sup> Zhu, Zuoxian and Wang, Jingbing. *Exploration on Procedural Problems about Exercising Maritime Liens. Maritime China*. Vol. 8, 2002.

process, and informs the seafarer to file a separate declaratory action to the maritime court accepting the registration of claims based on evidence.

### **5.3 Whether to Clarify Exercising the “Lien” in Litigation**

In the first maritime lien case mentioned earlier in the article of China’s maritime court history, the M/V Bell Pe case, in fact the term “maritime lien” did not appear on the judgment.

In accordance with combinations of the main creditor’s right claim and the maritime lien request, it can be divided into the following three cases. First, the seafarer both advocate a maritime claim and also advocate a maritime lien, in the execution process or the registration of claims after the judgment went into force, both rights are explicitly addressed. Second, the lien holder only advocates a maritime claim, but not a maritime lien, but during the execution process or the rights registration process, brings up to also enjoy the maritime lien. However, “judgment content cannot exceed the scope of claim request”, the court can discuss the maritime lien in the “court suggested” section of the judgment, and not put it in the main content of the judgment.<sup>50</sup> Third, the lien holder does not advocate a maritime

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<sup>50</sup> No. 1 (2000) Ningbo Maritime Court Yonghaiwen Chu Zi civil judgment makes the same judgment in the “Zhejiang Yue Oil 17” seafarer labor dispute case. Similarly, it only needs to be brought up during execution, as in the case of Lin, Chun and etc. suit “Bao Du” series of Fujian Zhenbao Shipping (Group) Limited Corporation, Ningbo Maritime Court’s civil judgment and written verdict on allocation of creditors’ rights of “Bao Du” ship on the seafarer labor contract dispute issues.

claim but only advocates a maritime lien. This situation which plaintiff does not advocate a maritime claim is deemed waived.<sup>51</sup>

The complaint claim of No. 138 (2010) Shanghai Haifa Chu Zi and its judgments do not have the term “lien”, which falls in the second case mentioned above. Thus, as long as during the execution process or in the subsequent process when participating in the allocation the creditor’s right entitled to the maritime lien is brought up, it is deemed executable.

## **5.4 Objective Joinder of Causes of Action**

Objective joinder of causes of action occurs when in an action a plaintiff has more than one cause against a defendant.<sup>52</sup> In the merger, if there is more than one complaint or the subject of litigation mutually independent of each other, the plaintiff has several mutually independent claims against the defendant, the court shall referee and judge on each complaint that is merged.<sup>53</sup> Thus, as to the two cases heard by the SMC, can they be merged?

The objective merger of the litigations is from the perspective of the subject matter of litigations to regulate or inspect the Joinder form of litigations, which is the merger of the subject matters, meaning at the same time there are two or more subject matter of litigations existing in the same litigation process. The subject matter of litigation is between the parties in dispute, the plaintiff requests the court to judge

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<sup>51</sup> Li, Feng. *On Several Problems Regarding Exercising Maritime Liens*. 2005 Master Essay. Shanghai Maritime University.

<sup>52</sup> Li, Long. *Exploration on Joinder Problem on Civil Litigations*. *Modern Law Science*. Vol. 2, 2005.

<sup>53</sup> Guo, Yuanchi. *Joinder of Litigations*. *Legal System and Society*. Vol. 3, 2011.



the substantive rights or advocate the legal relations.<sup>54</sup> In order to realize joinder of litigations, the plaintiff must present in the litigation process that the merged several litigations or the subject matters of litigations apply the same proceedings. In addition, both cases are governed by the same court.<sup>55</sup>

Drawn from the above, we can conclude that both cases meet the three elements of objective merger of litigations.

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<sup>54</sup> Chang, Yi and Li, Long. *On Joinder of Objective Litigations in Civil Litigations*. *ZheJiangSheng ZhengFaGuanLi GanBuXueYuan XueBao*. Vol. 2, 1999.

<sup>55</sup> Jiang, Wei. *Code of Civil Law*. China Renmin University Press. 2007, pp43.

## **Chapter 6 Suggestions on Improving Defects of China's Current Regime on Maritime Liens in Protecting Seafarer Interests**

### **6.1 Problem on Expanding Subject of China's Maritime Lien**

Expanding the scope of the subject of maritime liens means, during the auction of the ship it will enhance the level of protection for all the claims of creditors. As for the current Chinese law, the object of a maritime lien is the ship,<sup>56</sup> which is stipulated in Article III of the Act referring to ships and other maritime mobile devices, in exception of ships that are for military or government service purpose, or small vessels weigh less than 20 tons. Ships referred to in the preceding paragraph shall include ship belongings. This is consistent with the provisions of the 1967 Convention and the 1993 Convention. To review the three conventions, only the 1926 Convention provides that the subjects of maritime liens are ship, freight, and its subsidiary rights.

Furthermore, let's look at legislation in some countries from the perspectives of different legal systems. The legislation examples of traditional countries of the civil law system include Germany, Japan and South Korea. In Germany, the subjects of maritime liens are ships, appurtenances, freight, proceedings of ships and cargo. In Japan, the subjects of a maritime lien are the ship, appurtenances and freight. In South Korea, the ship, ship appurtenances, freight and

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<sup>56</sup> See Article 21 of Chinese Maritime Code.

other ancillary rights belong to the range of maritime liens. As for the common law system, in England, the subjects of seafarer of wages maritime liens are the ship and freight. In the US, maritime lien arises from the ship and its appurtenances, cargo, remaining cargo, proceedings of the ship, and freight.<sup>57</sup>

On the issue of whether there is the need to expand the subject of maritime liens, in view of the extent of recognition of the Convention in the international community that, in fact, there is not much reference significance. Instead, the reference value of the domestic law of most countries is even more significant. Now that the protection of the weak is an important social goal of China's legislation, the subject of maritime liens for the seafarer to exercise should be expanded. Otherwise, for the cases prosecuted in China, due to the reason for applying the Chinese law, seafarer faces a lower degree of protection by the litigation than other countries.

This paper argues that it is necessary to include freight in the scope of the subject of the lien, or at least to make both the ship and freight in the scope of the subject of the lien and the compensation obtained by the shipowner for the above two.

## **6.2 Abrogation of Demand Requirements of Seafarer Labor Dispute**

As for the processing mode on the labor dispute, the legislation of different countries can be divided into the following four models. First, it is to settle the case before the courts rather than labor arbitration

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<sup>57</sup> Feng, Hui. *On Maritime Liens*. 2006 Doctoral Dissertation. University of International Business and Economics.

institutions involved in handling disputes. In Germany, Sweden and Italy, this approach has achieved certain effect because the court system through the establishment of an independent labor court or a labor tribunal set up in the court to simplify the labor dispute procedures in order to be better able to hear labor disputes. On the contrary, the second method is on the opposite side of the first one. It is only through the exclusive dealt with the way of the labor arbitration committee, without the court entering into the handling, but the specific operation leaves the distinction of “single and final ruling” and “two and final ruling”. The third method distinguishes the size of the amount of the subject between cases, if the amount is relatively large, in addition to the “two and final ruling”, it pluses the court's post-relief program. For the final legislative model, the parties may choose the solution of either labor arbitration or litigation. However, once one is chosen, you cannot turn to the alternative way of remedy.<sup>58</sup>

In fact, the above mentioned problems that involved mainly consider the following points. Primarily, whether there is sufficient professional level of the court or labor arbitration of labor disputes. Secondly, whether or not it causes the waste of relief resources shall be considered. Thirdly, the rights issues for the parties to select dispute settlement mode. The most critical one is the ability to facilitate the workers as the vulnerable party to safeguard their legitimate rights and interests in order to quickly resolve disputes.

The purpose of this article, from the point of view of how to protect the seafarer's interests under the system of maritime liens, the foothold of course, is to first be able to enable the seafarer to choose how to

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<sup>58</sup> Liu, Erxing. *Legal Thoughts on Abrogation of Labor Arbitration Demand Requirements. Legal and Economy*. Vol. 10, 2011.

exercise their rights. Nevertheless, if you had protected the program selection interest of the seafarer party, it is bound to protect the interests of the other party equivalently. If the seafarer has the right to choose arbitration or litigation, then, it means that the other party can so choose.

This article argues that, under the current system in China, during labor disputes of the seafarer class the labor arbitration demand requirements shall be abandoned. First of all, the labor dispute arbitration committee consists of representatives of labor administrative departments, union representatives and enterprise representatives. But in China, most of the seafarer are not members of the union, which is a real-world constraint for the composition procedure of the labor arbitration committee. In addition, during the exercise of maritime lien, the time urgency of the lien procedure does not allow the delay because of arbitration cases of a few seafarer members. Otherwise it will cause a delay in the proceedings of the ship auction, leading to potential damage of increased cost of care of the ship to the benefit of all creditors, including seafarer members.

Therefore, this article suggests that due to the particularity of the seafarer economic disputes, it should not apply to the demand requirements of the labor arbitration.

### **6.3 Conflict between Action in Rem and Action in Personam**

The rights conferred on the substantive law will eventually have to rely on the procedures to be realized. The procedures regulation of the seafarer in China to achieve the maritime lien has been introduced on the above. Since China has not implemented an in rem

action system, there have been discussions about whether to include it in the lawsuit range. The advantage of an in rem action system is that it can increase the range of options on the jurisdiction to protect the seafarer to exercise the lien, and avoid the embarrassment in the action in personam that the defendant might not be eligible. Although the development of the action in rem system up to today, if the property owner appears in the court and respond, he should take full responsibility for the judgment against him (the statutory limitation of liability excluded). However, the limitations of an in rem action cannot be ignored, when the property owner does not appear, an in rem action is limited to the value of the ship. Although there might be someone else after the plaintiff bringing up an action in personam, it will cause inconvenience for the plaintiff on the litigation relief program.

This paper argues that no matter the persons responsible appear in court and respond, due to the target amount of the subject of the maritime lien that the seafarer exercises would not be too great, and it could meet the seafarer's claim even limited to the value of the ship. Implementation of an in rem action clearly favors a seafarer to exercise the maritime lien.

## Chapter 7 Conclusion

Seafarer interest protection issues are not only related to the legislation spirit to relieve the weak embodied in the system of maritime legislation, but also it has great social significance for China, a country with a large number of seafarer, that guides how the seafarer exercise maritime lien to protect their own interests.

The lien legislation in China refers to the contents of the 1993 Convention, part of the substantive law and part of the procedural law are mainly embodied in two laws of the PRC Maritime Law and Maritime Actions special procedures of the Act. Of course, many ways closely related to the exercise of maritime liens and seafarer is also affected by the constraints of other legal systems.

Under current Chinese law system, for the seafarer members to exercise a maritime lien, they must first clarify that whether or not to obtain a maritime lien, the starting point of the amount and interests of the claims, and etc. Seafarer no matter signs labor contracts with the assignment companies or shipping companies can request for exercising the lien based on the fact of offering service for the ship. In the absence a signed labor contract, the workers can get double pay for the request. If the ship has been detained and the seafarer continues to guard the ship, it should be classified as the costs to be paid first provided by Article 24 of Maritime Law, and the fees shall be obtained in the first place in the auction allocation.

Meanwhile, when the seafarer exercises the maritime liens, wages advanced by the third party should be regarded as the transfer of

seafarer's creditor's right and thus the transfer of the lien to better protect the interests of the seafarer members.

At the same time, the seafarer shall be aware of and actively prevent the loss of a maritime lien with particular attention to the scheduled period of one year. Of course the starting point should be from the seafarer leaving the ship.

On the effect of the procedural law, maritime liability limitation fund does not have any impact on the seafarer exercising maritime lien. Seafarer members can apply for the arrest of the ship, and can also participate in the distribution in the way of registration of claims. However, whether you can repeatedly arrest the ship, this paper bases on the point of view from the protection of the seafarer interests as well as the need to fill the loopholes in the system, argues that if the ship has been detained by application of others when the seafarer exercises the maritime lien, it shall be deemed to that the seafarer have applied for exercise of the maritime lien.

As for whether or not there is need to go through labor arbitration first in relation to the seafarer exercise the maritime lien system, this paper holds the opposing view. Seafarer members in the exercise of maritime liens do not need to explicitly rise in the pleadings to exercise the maritime lien, but apply in subsequent proceedings to request for the arrest of the ship. In the declaratory action, the seafarer will need the evidence of debt request in order to achieve its lien.

In addition, for the contents that have not been regulated in the current Chinese law, this paper suggests that the subject of the



maritime lien in China should at least include the freight. The seafarer can bring up an action in rem to exercise the maritime lien.

## Supplement A

Critical point of the time of the arrest of the ship (Dec 29, 2009)	
Former Case: (2010) Hu Hai Fa Shang Chu Zi No. 118	Latter Case: (2011) Hu Hai Fa Shang Chu Zi No. 113
Lawsuit brought up on Feb 9, 2010	Lawsuit brought up on Jan 17, 2011
Began to work on Oct 14, 2008; Arrears of part of wages from Oct 14, 2008 to the end of November, 2008; Arrears of all wages from Dec 1, 2008 to Dec 29, 2009; Plaintiff advanced the meals from May 2009 to Dec 29, 2009.	Care cost from Dec 30, 2009 to Feb 28, 2010; Plaintiff advanced the meals from Dec 30, 2009 to Jan 26, 2011; New owner took over on Jan 26, 2011.
Litigation request: 1. Defendant pays the unpaid wages and other compensation totaled \$116,777 and the interests based on the same period People's Bank of China demand deposit rate totaled \$846.79, 2. Defendant pays the interest loss from Feb 10, 2010 to the judgment date of the unpaid wages and other compensation of \$116,777, 3. Defendant pays Plaintiff for the advanced meals of \$2,400 and the interest loss from Feb 10, 2010 to the	Litigation request: 1. Defendant pays the care cost of the ship "NORDSTAR" from Dec 30, 2009 to Feb 28, 2010 totaled \$18,323.07 and relative interests calculated from Mar 1, 2010 to the judgment date, 2. Defendant pays Plaintiff for the meals from Dec 30, 2009 to Jan 26, 2011 and relative interests calculated from Jan 27, 2011 to the judgment date, 3. Defendant covers the litigation cost.

<p>judgment date, 4. Defendant covers the litigation cost.</p>	
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## Supplement B<sup>59</sup>

The Disposal of Labor Disputes In China					
Year	2006	2007	2008	2009	2010
Number of the cases settled by mediation	104,435	119,436	221,284	251,463	250,131
Number of the cases settled by arbitration lawsuit	141,465	149,013	274,543	290,971	266,506
Number of the cases settled by other ways	64,880	71,581	126,892	147,280	117,404
Total number of the cases settled	310,780	340,030	622,719	689,714	634,041

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<sup>59</sup> See the websites of NBSC <<http://www.stats.gov.cn/tjsj/nds/2008/html/W2205e.htm>> and <<http://www.stats.gov.cn/tjsj/nds/2011/html/W2305e.htm>> accessed 7 April 2012. This is a data found in the official websites which is most related to the purpose of this thesis, even though this is a data of the all industries rather than only in maritime industry.

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