



Shipowners' Liens: Business As Usual, With An Ocean of Difference

The Companies (Amendment) Bill 2018 was passed in Parliament on 6 August 2018.¹ The Bill exempts Shipowners' Liens from registration under section 131 of the Companies Act (CA), while ensuring that these liens retain their fundamental nature as a security.

The 2nd reading speech on the Bill can be found at www.mof.gov.sg.²

This Note summarises the amendments and their significance.

Shipowners' Liens

Contracts for the hire of marine vessels (charterparties) and the ensuing freight are the lifeblood of the shipping industry. Charterparties ensure that the vessel's earning capacity is maximised, by chartering the vessel through a series of charterparties, either on a bareboat, time or voyage basis.

¹ www.parliament.gov.sg/parliamentary-business/bills-introduced

² www.mof.gov.sg/Newsroom/Speeches



Charterparties typically stipulate that in the event of default of payment by the charterer, a shipowner can recover payment of sub-hire or sub-freight due to the charterer from a third party sub-charterer down the chain. The shipowner is thereby assured of receiving payment under the charterparty. This is commonly referred to as a Shipowner's Lien and is a common feature in standard form charterparties.

The *Diablo Fortune* Case

Under the CA, charges have to be registered under section 131 of the CA, failing which, they are unenforceable against a liquidator in a winding up or any secured creditor of the company.³

In July 2017, the Singapore High Court (HC) in *Duncan, Cameron Lindsay v Diablo Fortune Inc*⁴ considered for the first time the issue of whether a Shipowner's Lien is a charge on the company's property and whether it is registrable under section 131 of the CA.

The HC decided that a Shipowner's Lien is a security in the form of a charge over the company's book debts or as a floating charge, and is therefore registrable under section 131 of the CA.

In May 2018, the Court of Appeal affirmed the HC decision.⁵

The decision in *Diablo Fortune* gave rise to several practical difficulties:

- Registering Shipowners' Liens is difficult from a practical perspective because vessels are typically subject to a continual series of charterparties, each entered into as quickly as possible to ensure the vessel is gainfully employed. As charter periods can be short

³ Creditor within the meaning of section 131 of the CA refers to any other creditor having a proprietary right or interest in the subject matter of the charge, as defined by the Court of Appeal in *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733.

⁴ *Duncan, Cameron Lindsay v Diablo Fortune Inc* [2017] SGHC 172.

⁵ *Diablo Fortune Inc v Cameron Lindsay Duncan and Anor* [2018] SGCA 26.

(e.g. a few days), it would mean that the charterparty could be completed even before the 30 day registration period is up.

- Given the large number of charterparties concluded every day, imposing a registration requirement will mean significant administrative burden and additional costs for shipping companies.
- It is also a long standing industry custom not to register Shipowners' Liens as charges.



A Statutory Carve Out

In light of the industry concerns and feedback, the government has moved quickly to address these concerns by amending the CA to exempt Shipowners' Liens from registration.

Carve outs for Shipowners' Liens are not without precedent. For example, section 334(4) of the Hong Kong Companies Ordinance excludes Shipowners' Liens from the requirement of registration by stipulating that such liens do not amount to a charge.

However, our exemption approach is different from Hong Kong's. The practical difference between the Hong Kong and Singapore position is this:

- a. Under the Hong Kong legislation, a Shipowner's Lien is not registrable because it is not even a security (charge) to begin with. This means that in a liquidation situation, the Shipowner's Lien will rank after secured claims and *pari passu* with other unsecured claims.
- b. In Singapore, under the amendments, a Shipowner's Lien is exempted from registration but still retains its essential nature as a security (charge). Therefore, notwithstanding that it is not registrable, it remains a security and will take priority over unsecured creditors and other secured creditors whose security was created after the relevant Shipowner's Lien was created.

Going forward, this will be the position for all Shipowners' Liens created on or after the effective date of these amendments.

With regard to Shipowners' Liens that are already in existence or which are created before the effective date of these amendments, new section 131(3AC) of the CA provides that these will only be considered registrable if, as at the effective date of the amendments, the company has been wound up, or a creditor has acquired a proprietary right or interest in the subject matter of the lien.

Hence for this category, the registrability of the Shipowners' Liens is contingent upon either liquidation or a creditor obtaining a proprietary

right or interest in the subject matter of the lien. In the event that the company is liquidated or a charge created on its assets before the commencement date of this amendment, these liens will not be enforceable against the liquidator or secured creditor of the company.

The government will endeavour to shorten this window of exposure by bringing the amendments into effect as soon as possible.

The amendments will keep the maritime environment in Singapore business friendly and enhance Singapore's attractiveness as a maritime and legal hub. ■