



Carrier's prerogative

When to use cargo liens and how to best use them

A carrier is given a special remedy by common law to assist it in the collection of freight charges. It's the carrier's lien, which gives a carrier the right to retain possession of the cargo carried until the freight charges attributable to that very cargo are paid.

Despite this rare legal gift, most carriers do not assert liens on cargo against their unpaid accounts.

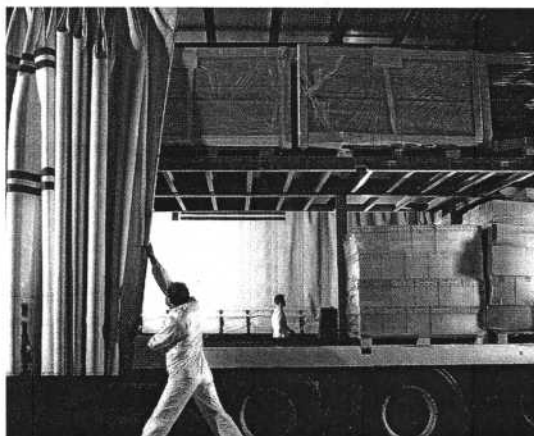
And of those carriers who do, many improperly lien cargo and thereby subject themselves to liability for both for breach of their contractual duty to deliver, and for damages for conversion of the goods.

Why don't more carriers exercise cargo lien rights? And why do some carriers, especially those in the trucking industry, improperly assert lien rights, thereby unlawfully holding cargo ransom?

The answers lie in the complicated nature and the restricted scope of the carrier's cargo lien.

only and it does not apply to storage, demurrage or any other lawful charges incurred by the carrier, for which possession of the cargo cannot be lawfully retained over and above the unpaid freight charges.

- Upon the tender of the proper amount due for the unpaid freight charges, the carrier's cargo lien is discharged and the cargo retained by the carrier must be released.
- While the cargo carrier has a common law right of possession, unless it is also a storer within the meaning of the *Ontario Repair and Storage Liens Act* or the *Warehouse Receipts Act*, or other similar legislation, it doesn't have a clear mechanism through which to realize on the security or to sell the cargo and transfer title therein to a third party in satisfaction of its unpaid freight account.



When properly understood and utilized, the carrier's common law cargo lien can be a useful tool to help a carrier satisfy its unpaid freight account.

To bolster this particular remedy, consideration should be given to broadening the rights of a carrier through explicit contractual language in the Bill of Lading, applicable carrier's tariffs and in other pertinent documentation, especially concerning the mechanics for a carrier, when endeavouring to realize on its lien, to sell the cargo and transfer title to a third party to satisfy its unpaid freight account.

In this way, the cargo carrier's lien will not only be a special remedy but one that is more frequently used as it was intended long ago by common law.

Lien principles

Some of the key principles of the carrier's common law lien on cargo include the following:

- The carrier has the right to retain possession of the cargo until the entire freight account referable to that specific cargo has been paid, even if part of the cargo has been released, since the whole of the cargo stands as security against payment of the full freight account.
- However, the cargo lien is lost when the carrier releases possession of the whole of the cargo, and the lien is not reactivated upon the re-possession of the cargo.
- In the absence of a contract, express or implied, a carrier's cargo lien does not extend to retaining cargo as security for earlier unpaid debts owing by the consignor in respect of the carriage of other cargo.
- The carrier's cargo lien, in the absence of a contractual provision (ie in a Bill of Lading) expanding its scope, is restricted to unpaid freight charges

The future of carrier's liens

Although carrier's liens have a long history in common law, and much tradition behind them, there have been efforts to update them for the modern era.

As Roger Watts of Broughton Law Corp of Vancouver reported to the 2011 CTLA Annual Conference, the most important modernization effort comes from the *Uniform Liens Act, 2000*. This was a draft uniform enactment considered by the Uniform Law Conference of Canada.

While the intent was to create a model for all provinces to adopt, that didn't happen. As Watts explains: "To date, only one Canadian province—Saskatchewan—has made wholesale steps to adopt the *ULA 2000* into law. The *Commercial Liens Act* incorporates most of the provisions of the *ULA 2000*, including the abolition of the common-law carrier's lien and defining lienable 'services' as including 'the storage of goods' and 'the transportation, carriage and towage of goods.'"

He further notes "legislation similarly based on the *ULA 2000* has also been enacted (but is as yet unproclaimed) in Nova Scotia, and other such legislation is under consideration in Alberta, New Brunswick and Newfoundland." MM&D

Marvin J. Huberman, LLM, is a Toronto lawyer, mediator and arbitrator. www.marvinhuberman.com