

In this series of FD&D Guides, developed by CJC, we provide brief notes on issues to address and practical steps to take in a situation where there is non-payment or short-payment of hire.

This third and final Guide (which follows on from the Guides on off-hire/equitable set-off and withdrawal/suspension) looks at the shipowner's other remedies instead of or in addition to withdrawal/suspension of performance when a wrongful deduction from hire or short-payment occurs.

Remedies for non-payment of hire: liens, interception of freight and other forms of security

We summarise in this Guide measures available to a shipowner to secure claims against the charterer when there has been non-payment or short-payment of hire.

To keep matters relatively simple, we base our Guide on the industry standard NYPE form of time charter and English law.

Liens on Cargo

A lien on cargo is a form of security which can in some circumstances put commercial pressure on the charterer to pay or secure the outstanding hire, particularly if there is a dispute about whether or not the withholding of hire was permissible.

The way a lien works is that the owner has the right to retain possession of goods until payment of the relevant debt or claim. At common law the scope of the shipowner's lien is very narrow; it is restricted to:

- freight payable at the time of delivery, but not for advance freight, not for freight payable after delivery, not for demurrage, nor for charter hire;
- general average;
- expenses necessary in order to preserve the goods.

A lien on cargo can also be created by contract, and this is the most useful type.

Under the NYPE 1946 Form clause 18:

"... the Owners shall have a lien upon all cargoes...for any amounts due under this Charter."

The lien is exercised by keeping possession of the cargo, usually by refusing to discharge it, and giving notice to the cargo owners, stating that the lien is being exercised and giving details of the amounts for which it is exercised. As the owner will often not be aware of who owns the cargo and who holds the bills of lading it is prudent to give notice to all parties who might be concerned including:

- the charterer
- the shipper
- any consignee named on the bill
- any notify party named on the bill
- the agents at the loading and discharge ports.

The lien is maintained by retaining the cargo on board the ship or retaining it under the shipowner's control in a warehouse ashore until payment has been made of all amounts "due" when the lien was exercised (or else security in an alternative form acceptable to the owner has been provided).

It is relatively straightforward if the cargo is owned by the charterer. If, however, the cargo is not owned by the charterer, and unless the lien is incorporated into the bill of lading contract, the contractual lien is not binding on the cargo owner and refusal to deliver the cargo will be wrongful. This does not place the owner in breach of charter as against the charterer, because clause 18 is a promise by the charterer that he will arrange for a contractual lien on all cargoes carried. If, however, the owner, knowing that the lien is not binding on the cargo owner, nevertheless refuses to deliver the cargo, the owner may not be entitled to an indemnity from the charterer in respect of liability to the cargo owner.

If the lien clause is incorporated into the bill of lading contract, then it will be binding on the holder of the bill (shipper or receiver) and the owner is entitled to refuse delivery of cargo until sums due under the time charter are paid. In the common case where the bill of lading is in the CONGEN form and the charterparty date is blank, and there is a chain of charters, then there may be a difficult question as to which charter is incorporated. If the head charter is a voyage charter then it is generally presumed that this is the charter intended. If the head charter is a time charter, and there is a sub-voyage charter, it is likely to be presumed that the voyage charter is the one intended, because the terms of a time charter are generally not very relevant or suitable to a bill of lading contract. The second principle above will often mean that the time charter lien clause is not incorporated into the bill of lading contract. A shipowner will obtain better protection if there is an express provision in the charter which requires the head time charter to be clearly identified as incorporated into any bills of lading signed by or on behalf of the master.

In the case of the common law lien, the owner is entitled to claim the cost of exercising the lien, including damages for detention and storage charges. It is less clear whether these can be added to the contractual lien unless the specific words of the lien clause cover these charges.

The lien does not entitle the shipowner to stop the ship in transit. Generally it must be exercised at the place of delivery. However, the vessel does not have to berth if in fact the cargo will not be discharged because of the lien. It is sufficient for the owner to proceed to a usual waiting place in or off the port. In some cases, the lien may be lost if the vessel enters the port, generally because it is not recognised by the local law. In this case the owner does not have to proceed further than the point at which possession would be likely to be lost if the vessel proceeded further. In order to exercise the lien the vessel can be directed to the nearest reasonably convenient port at which the lien can be exercised.

A lien in itself does not carry with it a power of sale. The English court has power to order sale of the cargo in specified circumstances, under **the Torts (Interference with Goods) Act 1979 and CPR 25.1**.

The result of an order for sale is that if a buyer is found, the proceeds are paid into court. Liability must then be established against the charterer for the sum due under the charterparty, usually by an arbitration award, and an application made to the court to release the amount of the sale proceeds corresponding to the award.

Interception of freight

Where bills of lading are issued under which the owner is the carrier, the owner has the right to claim any freight due under the bills directly from the parties liable under the bills of lading. The owner does not need a lien clause, either in the charterparty, or the bill, or elsewhere, to do this. The bill of lading is a direct contract between the owner and the shipper/holder of the bill, and the owner is entitled to enforce its terms. This is because where a ship is on time charter, the owner impliedly agrees, and permits, the bill of lading freight to be paid to the charterer or in accordance with the direction of the charterer. However, if the charterer is in default the owner has the right to withdraw this permission and require the freight to be paid to himself. This is done simply by giving notice to the shipper and bill of lading holder that they must pay the freight to the owner. The shipper and bill of lading holder is then obliged to pay the full freight to the owner. The owner is then entitled to deduct from the freight all sums owed to him by the charterer, and must pay the balance of freight to the charterer.

In some cases, if the owner's claim against the charterer is contested by the charterer, then the shipper or bill of lading holder will be unsure of which party to pay, and will consequently be unwilling to pay either. It may be possible to reach agreement for the freight to be paid into an escrow account until the underlying dispute is resolved. This may well be a good solution for the owner because it secures the sum in dispute.

It is important to consider who is liable under the bill of lading contract. In the case of a transferable (or "negotiable") bill, **under COGSA 92:**

- the shipper is always liable under the bill even after the bill has been endorsed and delivered to a new holder; and
- the new holder is only subject to liability under the bill if he makes a claim under the bill, or takes or demands delivery of the cargo to which the bill relates. That said, most receivers will in fact wish to take or demand delivery.

In the case of a straight bill of lading or Sea Waybill:

- the shipper always remains liable; and
- the party named as consignee is subject to liability if he makes a claim under the straight bill/ SeaWaybill, or takes or demands delivery of the cargo to which it relates.

If bills of lading are marked "freight pre-paid" then that may, but does not necessarily, prevent the owner from claiming freight. In the case of the shipper, if the shipper is in fact aware that freight has not been paid, then the owner is entitled to claim the freight from the shipper. But if the bill is transferred to a third party acting in good faith who is not aware of the fact that freight is unpaid, and who takes up the bill of lading in reliance on the "freight pre-paid" notation in the belief that freight has been paid, then the owner is not entitled to claim payment of freight from such a party.

Liens on freight and sub-freight

Clause 18 of the NYPE 1946 form provides as follows:

“That the Owners shall have a lien upon all cargoes, and all sub-freights for all amounts due under this Charter...”.

This clause gives the owner the right, in order to secure the payment of sums due from the charterer, to lay claim to freight which is owed to the charterer, or in some circumstances, freight which is owed to a sub-charterer. It is important to keep in mind the distinction between the interception of freight, which has been discussed above, and the lien on sub-freight which is created by clause 18 and similar clauses.

The distinction is as follows:

- a. by the interception of freight, the owner is enforcing the contract contained in an owner’s bill of lading, by requiring the freight under that contract to be paid to himself, as the contracting carrier, and not to the charterer; no lien clause is required to do this (it is nothing other than the owner enforcing his own contractual rights);
- b. by contrast, in exercising a lien on sub-freight the owner is intervening in a contract between the charterer and a third party cargo interest - typically this will be a contract contained in a sub-charter, or in a charterer’s bill of lading; the owner is claiming that the sub-freight which was originally payable to the charterer, as the disponent owner/carrier under this contract, is now payable instead to the owner.

The lien on sub-freight does not arise at common law. It requires a lien clause to create it. Therefore its existence, and its boundaries, inevitably depends on the wording of the clause, and on the interpretation that law has given to that wording. This makes it necessary to consider a number of questions that have arisen on the NYPE wording.

- a. First, does the lien on “sub-freight” include sub-hire? If the time charterer has himself sub-time-chartered the ship, can the owner claim the hire payable under that sub-time charter in reliance on clause 18? There are conflicting cases on this issue, both involving the same ship, *The Cebu*. In 1983, *Lloyd J* decided that “sub-freight” did include sub-hire; but in 1991 *Steyn J* decided the opposite. The editors of *Time Charters* (30.30) agree with *Steyn J*. If possible owners should amend clause 18 to add the words “and sub-hire”. Indeed it is tempting to go further and add a lien on sub-demurrage as well. The amended clause would read as follows:

“That the Owners shall have a lien upon all cargoes, and all sub-freights, sub-hires and sub-demurrages, for all amounts due under this Charter...”.

- b. Second, it is also unclear whether the word “due” means that the lien can only be exercised in respect of claims for debt, or whether it can also extend to claims for damages – such as a claim for stevedore damage to the vessel. Again, the best way to deal with this uncertainty is to amend the clause during negotiations, so that it now reads:

“That the Owners shall have a lien upon all cargoes, and all sub-freights, sub-hires and sub-demurrages, for all amounts due under this Charter including claims for damages...”.

c. Then we have to consider how and when the lien on sub-freight is exercised. The answer to the question “how?” is that it is exercised by giving notice to the debtor – that is, to the person who owes the sub-freight (or hire, or demurrage, as the case may be). For example:

- if there is a sub-charter, notice is given to the sub-charterer
- if there are charterer’s bills of lading, it is best to give notice to all bill of lading parties, including the shipper, consignee, notify party and any known bill of lading holder.

There is no particular form of notice required, as long as the debtor is notified of the fact of the lien and the fact that the owner is exercising it. The best approach is to:

- a. set out the lien clause;
- b. set out the nature of the claim against the charterer as far as it is known or quantified;
- c. state that the lien is being exercised and that the freight (hire or demurrage) in question must now be paid to the owner;
- d. provide payment instructions;
- e. warn the debtor that following receipt of the notice of lien only payment to the owner is a valid discharge of the debt, and payment to the charterer will not discharge the debt but will result in the debtor having to make payment a second time, to the owner.

When can the lien be exercised?

It can only be exercised if the charterer is in default. There must be something “due” under the head charter before the owner can exercise the lien. It need not be hire - it could be additional war risk premium, for example. In addition, the lien can only be exercised by notice to the debtor before the sub-freight (hire, etc.) is paid. Once the sub-freight is paid to the charterer, or to an agent of the charterer, the debt ceases to exist. A notice of lien given after the debt is paid is too late. In particular, the owner does not have the right to follow the money once it has come into the charterer’s bank account. The lien is on the debt – it is not a claim to the money used to pay the debt. Once the debt is paid, it is too late. It is therefore important to act quickly to exercise this right, and to ensure that all parties who might be debtors are given notice, because the lien is not effective until the notice is received by the debtor.

There are a couple of particular situations in which the lien may not be effective. First, the charterer may already have assigned the sub-freight to another party, such as a bank. In this case, there is a question of priority – whose interest in the sub-freight takes priority, the owner’s or the bank’s. The answer is that it depends on priority of notice; i.e. who gives notice to the debtor first. This is another reason for giving notice of lien immediately, without any delay, when a situation arises in which a lien needs to be exercised. (It should be noted that priority does not depend on the date of the document creating the lien or assignment of freight. The bank’s security documents may have been executed years before the charterparty; but if the owner gives notice to the debtor first, then his claim takes priority over the bank’s.)

Under English company law, the lien is not effective against any liquidator, administrator or creditor of the charterer, unless particulars of the lien are registered (as a charge) under Section 860 of the Companies Act 2006, within 21 days of the charge being created. The date of creation of the charge is likely to be regarded as the date of the charterparty.

This makes the remedy of lien impracticable if the charterer is a UK company, and is insolvent. Fortunately

(from this point of view) most charterers are not UK companies. But in some cases it would be sensible to consider whether there are any similar requirements in the company law which governs the charterer.

Arrest of a ship or bunkers

Some charterers are also shipowners, or are companies in common control with companies that are shipowners. This creates opportunities for securing claims for unpaid hire and other claims against charterers. A right to arrest a ship needs to be distinguished from a maritime lien. Maritime liens are rights that arise automatically upon certain events, and that attach to the ship and “follow” the ship even in the event of a bona fide change of ownership. But in English law the categories of maritime lien are very limited and do not include claims for unpaid hire.

The statutory right to arrest a ship is much wider. Under English law, a ship can be arrested for a “maritime claim” as defined in section 20 of the Senior Courts Act 1981. Maritime claims include: **“any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship”**. This would clearly include a claim for non-payment of hire, and any other claim arising out of a time charter.

Having identified that a claim is a “maritime claim”, the next stage is to identify which ship(s) can be arrested to secure the claim. This requires a careful reading of section 21 of the 1981 Act. For unpaid hire claims the statutory requirements are:

- (a) “the claim arises in connection with a ship; and*
- (b) the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,*

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against –

- that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
- any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

The issue of an in rem claim form crystallises the right to arrest at the date of issue, and ensures that the right to arrest is not then defeated by a change of ownership of the vessel – although the right would be defeated by a judicial sale under the order of the court. This is why the statutory right to arrest is sometimes called a statutory lien, because once the claim form is issued it behaves in some ways like a maritime lien, by following the vessel into new ownership.

As is well known, the scope of arrest is wider in some jurisdictions – notably South Africa. Local advice will be needed here, but as a general guide, a vessel owned by a company in common ownership or control may be amenable to arrest in South Africa as an associated ship.

The most important problem for associated ship arrest is proving the fact of common ownership or control. Some possible approaches are:

- collating details of bank accounts and personnel across companies;
- carrying out a corporate search;
- checking the addresses of business premises used by the companies;
- considering email addresses and websites;
- obtaining information from brokers or even other shipowners;
- using information published in the trade press.

The arrest of bunkers is also a possibility. If the defaulting time charterer has several other ships on charter then they may own the bunkers on board one or more of these ships. In the United States and some other jurisdictions, bunkers belonging to the alleged debtor can be arrested in order to secure a maritime claim. This is not the case in English law however. The arrest of bunkers does suffer from a number of practical limitations.

- It is not generally effective for the owner to arrest the charterer's bunkers on board his own vessel, as this will put the owner in breach of contract by preventing the continuance of the voyage.
- There are difficulties in establishing the ownership of bunkers. Unless you have very good inside information, it is often necessary to serve the arrest papers first and find out the facts afterwards, thereby, in some jurisdictions, creating a risk of liability for wrongful arrest. Even if there is good information that the debtor has a vessel on time charter, it does not necessarily follow that they will own the bunkers on board because:
 - there may be a sub time charter, or the bunkers may still be owned by the bunker supplier under a retention of title clause;
 - some time charters are drafted so that the bunkers are always owned by the owners, although the time charterer has to bear the cost of the bunkers.
- Even if bunkers are successfully arrested, the owner of the vessel on which they are located may be able to insist that they are removed from the vessel. Then the cost of storage needs to be incurred, and this is expensive. Furthermore removal of bunkers from a vessel is likely to destroy their value because other shipowners will obviously be wary of purchasing bunkers that have been on and off another ship.