



July 2018

Defence class cover

Liens on cargo

Introduction: a failure to pay

When a charterer has failed to pay an owner for hire or freight due under the time or voyage charter, the owner may wish to explore its options and take steps to secure its claim, especially if there are reasons to be concerned about the charterer's liquidity. Such options include: liens on (sub)hire or (sub)freight and bunker or ship arrests, amongst others. The aim of this article is to focus on the option of exercising a lien on cargo.

Liens on cargo

Liens on cargo are possessory in nature. An owner can only exercise such a lien (akin to a 'right' or 'entitlement') if it still has possession or control over the cargo in question.

This means that for an owner to exercise a lien over cargo, the cargo must still be on board its vessel or be safely stored in a warehouse that the owner has control over. As soon as the owner releases the cargo to the consignee or its authorised agent/representative, the owner is no longer able to exercise such a lien.

Whether or not an owner has the contractual right, or the local legal entitlement, to exercise a lien over cargo is not a straightforward issue. Members are advised to always consult with the club and/or their preferred lawyer for advice before attempting to exercise such a lien.

Each case will depend heavily on its own facts and what follows is a checklist of issues that need careful consideration before a lien is to be exercised.

Subject to contract

- The relevant charterparty between the owner and charterer must have a lien clause within it. Clause 18 of the New York Produce Exchange (NYPE) form is a good example of this.
- The debt in question must be 'due' and 'payable' at the time the lien is to be exercised. It cannot be exercised for a future debt.
- Where the debt only becomes due once discharge has completed, the lien must be exercised off the ship. The case of *Fort Kip*¹ considered this issue and it was held here that the owner was entitled to a lien over cargo only after discharge had occurred, by intercepting the cargo before it was delivered to the consignees/their agents. Practically, this can be very difficult.
- A lien cannot be exercised for cargo carried under one charterparty, for a debt due under an earlier or alternate charterparty, unless this has been expressly agreed between the parties. This is very rare.
- An owner cannot sell the cargo in question so as to obtain the outstanding debt amount, if the charterparty does not expressly allow this. Again, such a provision would be rare. Instead, the owner must exercise reasonable care for the cargo while this is under its lien and the owner could potentially be liable for any loss or damage to the receiver if damage does occur.
- In the absence of any specific wording, a lien for non-payment of freight will not cover a claim for demurrage or any other outstanding debts (other than freight).
- In a time charterparty, the ship shall remain on hire during the time in which a lien is validly exercised. In a voyage charterparty, laytime, demurrage and detention will continue to run if validly exercised.
- A lien must be exercised in a reasonable manner and the costs of the various alternative methods of exercising the lien must be taken into account when determining whether it has been exercised reasonably².



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Incorporation into the bill of lading

- A lien clause must be incorporated into the relevant bill of lading (BL), expressly or by reference, for an owner to be entitled to lien cargo that belongs to a third-party BL holder, rather than the charterer. This is essential to avoid an unlawful lien against receivers under the BL.
- If the BL does not expressly incorporate the head time charterparty, it is usually presumed (in a charterparty chain) that the terms of the voyage charter under which the BL is being fulfilled will be incorporated, not the head time charter.
- As such, for a head time charterparty lien clause (say, clause 18 of the NYPE form) to be incorporated into the relevant BL in these circumstances, a lien clause would be required in each and every charterparty in the contractual chain.
- A disponent owner (say, an intermediate time charterer) cannot exercise a lien over cargo under a BL if they are not party to the BL (because, for example, the head owner is the contractual carrier.)
- The position under English law is unclear whether a disponent owner can legitimately order their head owner to exercise a lien on this basis.

Location of the lien

- The lien should be exercised when the vessel is at, or anchored off, the discharge port. The lien cannot be exercised when the vessel is elsewhere, although there may be exceptional circumstances whereby an owner can prove that a lien at the discharge port would be impossible and the lien would be lost if the vessel proceeded to the port, as evidenced in the *Mihalios Xilas*³ where the owners halted the ship at a bunkering port mid-voyage. In this instance, it was deemed acceptable for the owner to halt the vessel outside the port, as it was impossible and commercially impracticable to exercise the lien at, or off, the discharge port.
- If the vessel comes ashore, the cargo can be discharged and stored ashore under the owner's control. The owner will be responsible for the costs of storage, unless the charterparty expressly allows for the recovery of costs.
- Where storage is not a feasible option at the discharge port, the owner must lien the cargo on board wherever possible.

Local jurisdiction

- The lien must also be legally enforceable and practically possible within the framework of the local jurisdiction in which the discharge port is located.
- If an owner exercises a lien unlawfully under the local law, this may have serious consequences, such as arrest of the vessel by the holder of the BL or a claim in damages for the loss of profit or delay to the cargo. Local legal advice should always be sought before a lien on cargo is exercised.

Notification

- If they are to exercise a lien, the owner must notify the charterer promptly⁴.
- It is often advisable to also notify all other interested parties as to the exercise of the lien. Practically speaking, this may assist in obtaining payment or security from the charterer or another interested party.
- English law does not impose any legal requirement to give formal notice as to the exercise of a lien.
- A failure to give notice of the exercise of a lien would only invalidate the lien if the contract contained an express stipulation that notice must be given or, possibly, if local law (at the place of the exercise of the lien) required notice to be given.

Defence cover is, by its very nature, discretionary in that the club must be satisfied as to the merits and quantum of the claim in question and the likelihood of achieving a successful outcome, if it is to lend support.

Members requiring further information on this topic should direct their enquiries to either their usual contact at the club, or to sam.kendall-marsden@ctplc.com or annie.stow@ctplc.com.

1 [1985] 2 Lloyd's Rep 168
 2 London arbitration No. 5/92 (LMLN 321, page 4),
 3 [1985] 2 Lloyd's Rep 168
 4 London Arbitration No. 16/91 (LMLN 307, page 3)

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