



▶ **LEGAL COSTS COVER (LCC) -
LIENS**



LIENS

Liens are an important tool in the maritime industry, defined as 'the right to take another's property if an obligation is not discharged'. Liens are a remedy available to a shipowner to secure claims against a charterer when there has been a breach of contract, most usually non-payment or short payment of hire.

Liens are 'in rem' claims meaning they concern the property, i.e. the vessel and/or its cargo. The property itself is treated as the wrongdoer although it naturally forces the owner of such property to act.

This guide provides some general guidance for owners and charterers on the effectiveness of liens and some other self-help remedies.

Rights under a lien: What, when and how?

A shipowner's lien is a possessory lien which may entitle owners to retain cargo as security for payments of a debt. This is a tool to put commercial pressure on the charterer to pay any outstanding and disputed dues. The lien is exercised by simply keeping possession, i.e. refusing to discharge the cargo, or discharging it into a warehouse on behalf of the owner. These costs can then be added to the debt due. Before retaining possession, owners must give notice to the cargo owners with details of the retention including the outstanding sums due. If, as is often the case, it is not clear who the cargo owner is, then it is prudent to give notice to all parties involved or named in all the relevant documents.

It is important to note that each jurisdiction has different criteria for recognising a lien. English common law provides a very narrow scope which does not include unpaid hire and is limited to the following:

1. Freight payable at the time of delivery only.
2. General average.
3. Expenses necessary to preserve the goods.

More common, and much more useful, are contractual liens; express clauses which are written into charter parties.

Examples

NYPE 1946 Form clause 18 "... the owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter"

Shelltime 4 Clause 26 "Owners shall have a lien upon all cargoes and all freights, sub-freights and demurrage for any amounts due under this Charter..."

What if the cargo is owned by a third party?

Where the cargo is owned by a third party, the lien clause must be incorporated into the Bills of Lading (B/L) in order to be valid. Failure to incorporate the clause into the B/L would mean the contractual lien is not binding on the cargo owner and therefore any refusal to deliver the cargo will be wrongful. If the owner refuses to discharge the cargo without a valid and binding lien clause, then the owner may lose the right to indemnity from

LIENS

the charterer in respect of liability to the cargo owner.

However, if the lien clause has been correctly incorporated then it will be binding on any holder of the B/L. The owner may legally refuse delivery of the cargo until the outstanding sums under the charter have been paid.

Is the lien clause incorporated into the bill of lading?

It is important to check on a case-by-case basis whether the lien clause has been correctly incorporated, particularly where there is a chain of charters.

The following are some general assumptions which can be made:

- Where the head charter is a voyage charter then it can be generally presumed that this is the charter intended to be incorporated.
- Where the head charter is a time charter, and there is sub voyage charter, it is presumed that the voyage charter is intended to be incorporated to the B/L as the time charter is not relevant to the B/L.
- Where only time charter(s) are applicable then a lien clause is often not incorporated into the B/L.

These are only assumptions based on the nature of time and voyage charters. We would advise checking each B/L and charter chain whenever seeking to exercise a lien.

To secure protection, owners should include an express provision in the charter party

which requires that the head time charter is clearly incorporated into any applicable B/L. It is advised to include specific wording that allows the owner to also claim for the additional costs of exercising the lien, such as detention and storage costs.

Exercising the lien and practical issues

Liens may be lost if the local law does not recognise them, and we therefore advise seeking local advice before attempting to exercise a lien. In some jurisdictions, liens are recognised only when the cargo is owned by the charterer/ defaulting party.

Owners may not stop the ship in transit to exercise a lien but instead must wait until the place of delivery (although the usual waiting place in/off the port is generally accepted). However, owners do not have to enter the port if the local law would not recognise their contractual right to refuse discharge. Instead, owners can direct the vessel to the nearest reasonably convenient port at which the lien can be exercised.

What next?

A lien is a useful tool and can be effective in forcing charterers to pay in their own commercial interests. The lien itself does not carry the power of sale; the power of sale instead must be ordered by the court in the jurisdiction where the lien was exercised.

If a sale of the cargo is ordered and a buyer is found, the funds are paid to the court. Liability must then be established, usually as an arbitration award, and an application is then made to the court to release the owed funds to the owner.

Other self-help remedies

Interception of freight

Where B/L are issued under which the owner is the carrier, the owner has the right to claim any freight due under said B/L directly from liable parties¹. This differs to a lien clause as a B/L is a direct contract between the owner and the shipper/holder, enabling the owner to enforce its terms.

If the charterer has failed to pay freight on time, the owner has the right to receive full freight from the shipper/holder. The owner keeps what they are owed and pays the balance to the defaulting charterer.

Potential issues

Practical issues can arise where the shipper/holder is unsure who to pay and, in such cases, it is a useful option to have the sums paid into an escrow account. It is beneficial for the owner as the sums are secured, with the money remaining in the account until the dispute is resolved.

Where a B/L is marked 'freight pre-paid' it is important to check that the freight has actually been pre-paid. Where it has, this is of course not an option.

If freight has not actually been pre-paid, but the B/L has been transferred to a bona fide third party who relied on the 'freight pre-paid' mark then the owner is not entitled to receive freight from them.

Arrest of a ship

Where the charterer also owns vessels, or has shipowners included in their company structure, it may be possible to arrest a vessel

to secure a claim. The first step should be to establish common ownership or control between the charterer and the vessel to be arrested.

Under English law, arrest of a vessel for a maritime claim is a statutory right. A maritime claim is defined as "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"². The statutory requirements for arrest for unpaid hire more specifically 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 was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship.

The scope for arrest, both which vessels can be arrested and for what type of claim, depends on the jurisdiction and we therefore recommend seeking local advice before attempting to arrest a vessel.

Conclusion

The legal framework for exercising a lien on cargo can be relatively complex, especially if the cargo is owned by a 3rd party. Interception of freight is a powerful tool provided to the owners to recover the amounts due to them; yet, it comes with its own difficulties and complications. We strongly recommend to Members to seek legal advice when considering a self-help remedy.

¹ Alpha Marine Corp v Minmetals Logistics Zhejiang Co Ltd, the "MV SMART" [2021] EWHC 1157 (Comm)

² Supreme Court Act 1981 Section 20(2)(b)

For further information please visit
www.shipownersclub.com/lcc

If you have any further questions about LCC,
please contact the LCC Managers.

London

Georgia Maltezou
LCC Manager - London

D +44 207 423 3415
E georgia.maltezou@shipownersclub.com
M +44 7392 081 230
T +44 207 488 0911

Singapore

Maggie-Jo McGregor
Head of Claims - Singapore

D +65 6593 0665
E maggie.jo@shipownersclub.com
M +65 9099 8601
T +65 6593 0443

Surani De Mel

Head of Claims - Singapore

D +65 6593 0421
E surani.dharmaratne@shipownersclub.com
M +65 8666 8440
T +65 6593 0443

If you are interested in purchasing this cover
please liaise with:

London

Mark Harrington
Commercial Director - London

D +44 207 423 7107
E mark.harrington@shipownersclub.com
M +44 7876 252 359
T +44 207 488 0911

Singapore

Jeremy Slater
Head of Underwriting - Singapore

D +65 6593 0428
E jeremy.slater@shipownersclub.com
M +65 8366 0768
T +65 6593 0420

Who, in conjunction with your broker, will be
pleased to provide you with a quote.



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London

White Chapel Building, 2nd floor
10 Whitechapel High Street
London E1 EQS

T +44 207 488 0911

F +44 207 480 5806

E info@shipownersclub.com

The Shipowners' Mutual Protection and Indemnity Association
(Luxembourg) | 16, Rue Notre-Dame |
L-2240 Luxembourg | Incorporated in Luxembourg |
RC Luxembourg B14228

Singapore

9 Temasek Boulevard
#22-02 Suntec Tower Two
Singapore 038989

T +65 6593 0420

F +65 6593 0449

E info@shipowners.com.sg

The Shipowners' Mutual Protection and Indemnity
Association (Luxembourg) | Singapore Branch |
Company No. T08FC7268A