Owners should carry out thorough due diligence during pre-contract negotiations, to prevent incurring time and expense caused by chasing Charterers for unpaid hire.

Despite completing thorough due diligence, the Club appreciates that it isn’t always possible to prevent Charterers defaulting on their hire payments. In particular, we recognise that in the current market there are limited contracts available. Owners’ bargaining power in pre-contract negotiations is therefore likely to be restricted. In this scenario it is useful to know as much as possible about the Charterers, to help obtain security, prior to embarking on potentially costly and lengthy litigation.

What should you do if your Charterer hasn’t paid?

Before taking a course of action the Owners must decide if the unpaid hire claim is validly disputed or if the Charterers are just delaying payment, for example, because they have cash flow issues.

In the current market, the latter scenario has become increasingly common and requires Owners to make a challenging judgement call on how hard to squeeze Charterers. Squeeze too hard and Charterers may go out of business, but press too little and other creditors may secure their claims ahead of yours. Often in this scenario, Owners are left playing a waiting game. However, there are several options open to Owners, which we will explore in greater detail in this article. Owners should bear in mind that this article is intended to provide general advice from an English law perspective only and we recommend obtaining legal advice before taking any such steps.

**Option 1: Suspension**

Assuming the charterparty is still in operation, it may contain a provision which allows Owners to suspend performance of their obligations under the charterparty until such time as all the hire due is received. A good example of this can be found in clause 12 of the Supplytime 2005 Form, which allows Owners to suspend performance whilst the hire continues to accrue. This is an effective tactic when Charterers need to use the vessel, as it often forces them to pay any outstanding hire.

**Clause 12 of the Supplytime 2005 Form**

Where there is a failure to pay Hire by the due date, the Owners shall notify the Charterers in writing of such failure and further may also suspend the performance of any or all their obligations under this Charter Party until such time as all the Hire due to the Owners under the Charter Party has been received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on Hire. The Owners’ right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

**Option 2: Withdrawal**

If Charterers continue to ignore demands for payment, then the charterparty will likely provide an express contractual right of withdrawal. For example, clause 5 of the New York Produce Exchange Form provides that failure to make regular and punctual payments of hire on or before the due date constitutes a breach of the charterparty and that “the Owners shall be at liberty to withdraw the vessel”. It is important to note however that without such an express provision, late payment of hire alone won’t give the Owners the right to withdraw.

Before taking this step, we strongly recommend obtaining legal advice as there are factors which may affect an Owners ability to withdraw the vessel. For example, the Owners may have waived their right to withdraw the vessel or there may be notice provisions which haven’t been complied with or an anti-technicality clause, which is designed to give Charterers a grace period to rectify a default due to an oversight or technical issue. Withdrawal is a very significant step which, if taken prematurely, may result in Owners being in repudiatory breach of the contract and liable to pay damages.
Option 3: Contractual Lien
The terms of the charterparty might entitle Owners to exercise a possessory lien over the cargo or equipment onboard the vessel for unpaid hire, as seen in clause 23 of the New York Produce Exchange Form.

For further information on exercising such liens, please read our article: Cargo liens for unpaid hire and freight due under a time or voyage charterparty.

Option 4: Arrest
Is it possible to arrest a ship or property, such as bunkers, within the same ownership group? The viability of this will largely depend upon the law and jurisdiction of where the Charterers’ assets are located. For example, Singapore law allows only for the arrest of vessels owned by the named Charterer company whereas, laws in South Africa allows the arrest of property within the same company group such as property owned by subsidiaries, parents and/or affiliates. Specific jurisdictional advice is therefore recommended before taking any steps to arrest Charterers’ assets.

The purpose of arresting Charterers’ assets is that it may force them to either pay the unpaid hire or at least provide security in the form of a letter of undertaking ‘LOU’ or bank guarantee. When obtaining such security, Owners should always bear in mind that it is only ever as good as the person giving it and careful attention should therefore be given to the financial integrity of the provider. You should check the credit rating of any bank providing a guarantee and LOU’s from International Group clubs are preferable.

Option 5: Commence Proceedings – but obtain security first
When all other options fail, Owners may want to consider commencing legal proceedings to try and recover their unpaid hire. However, before doing so, it is always preferable to obtain security for the claim as a judgment or award will be worthless if there is nothing to enforce it against or those enforcement proceedings will be severely protracted due to the law of the Charterers’ domicile. Nigeria recognises English High Court judgments, but Defendants have an automatic right of appeal against any recognition order all the way up to the Supreme Court, which takes years to conclude.

How can we help?
The Club can assist with legal advice and fees which, given the complexity of cross jurisdiction and conflict of laws, can be time-consuming and expensive. This assistance provides Members’ with the assurance to allow them to contract, safe in the knowledge that they can attempt to recover what they are rightfully owed under their contract in the event of wrongful non-payment of hire by their Charterers.

Matthew Bevan
Matthew is a trainee solicitor and a Claims Handler for the Club’s Offshore Syndicate. He has experience in underwriting offshore contracts and has recently handled matters concerning the complex interplay between various primary insurances and P&I cover.

If you have any further questions, please do not hesitate to contact Matthew Bevan using the details below:

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