



## Defence Guides

# Liens on cargo in a nutshell

Where hire/freight has not been paid to owners by charterers, it may be possible for owners to lien the cargo shipped i.e. refrain from releasing it to receivers, pending payment of the outstanding hire/freight.

### When can owners exercise a lien?

Under English law, there must be a contractual right to lien.

Owners can lien charterers cargo only if the charter party between owners and charterers has a lien clause, such as clause 18 of the NYPE form.

In order for owners to lien cargo which does not belong to charterers, i.e. 3rd party bill of lading holder, the charter party lien clause must be incorporated (expressly or by reference) into the bill of lading. Otherwise, whilst the exercise of the lien may be lawful, as against charterers under the charterparty, it could be unlawful as against the receivers under the bill of lading. General words of incorporation in the bill of lading, such as the Congenbill form, “all terms and conditions, liberties and exceptions of the charter party” will only include the time charter lien clause if the bill of lading identifies the time charter as the contract whose terms are incorporated. However, if the bill of lading does not identify the time charter, the usual presumption is that the terms of the end voyage charter under which the bill of lading carriage is being undertaken will be incorporated and not those of the head time charter.

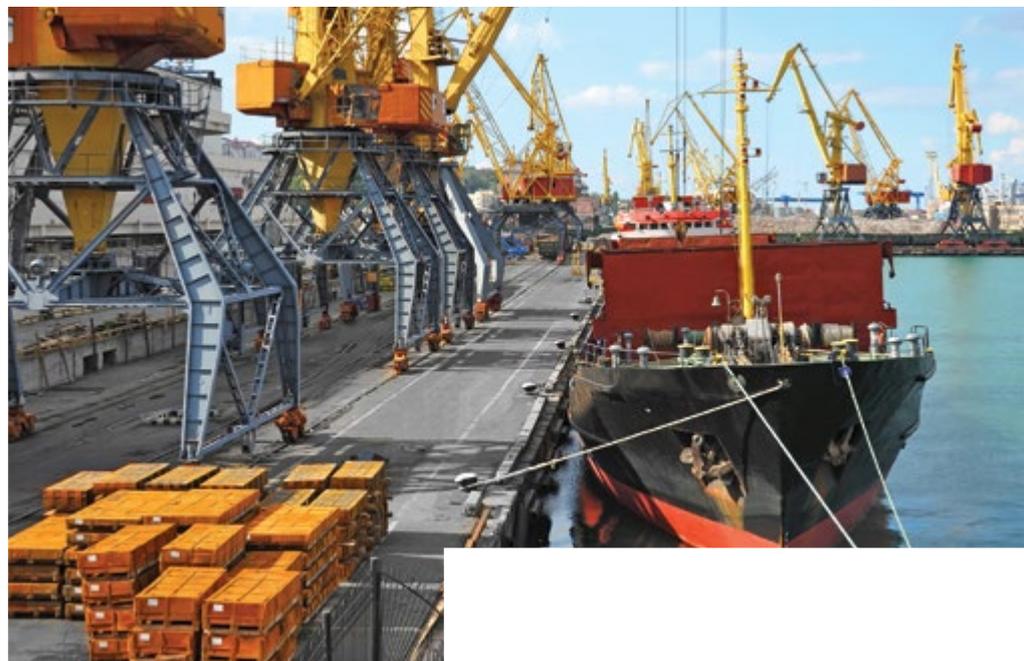
Where disponent owners are owed freight/hire from charterers, but the bill of lading is issued by head owners ie they are the contractual carriers, disponent owners can not exercise a lien over cargo under the bill, as they are not a party to the bill of lading contract. It is unclear whether disponent owners can order head owners to exercise a lien in these circumstances.

### Where and how can a lien be exercised?

Usually the lien must be exercised when the vessel is at or anchored off the discharge port, or ashore if the cargo can be discharged and stored in a warehouse under owners’ control (although the costs of storage will be for owners account unless there is an express charter party provision for recovery of costs). Once the cargo is delivered to the receivers (i.e. is no longer in owners’ control), the lien is lost.

Owners cannot usually exercise this right by stopping the vessel en route to the discharge port e.g. when bunkering. However, there may be special circumstances where (if it can be proven that at the discharge port it is impossible to exercise a lien and any further carriage will lead to the loss of possession/lien of the cargo following the arrival at the port) a lien may be exercised earlier than at the discharge port.

Even if there is a contractual right to lien under English law, the lien must be capable – both legally and practically – of being exercised in the local jurisdiction i.e. the place of discharge. The contractual lien will need to be recognised and enforceable under the local law (e.g. by way of a court order). Many jurisdictions, China for example, do not recognise the right to lien cargo, unless it is owned by the debtor, so unless the cargo is owned by charterers, owners can not lien the cargo.





If owners exercise a lien unlawfully under local law, then owners can potentially be exposed to a claim in damages for delay and loss of profit /arrest of the vessel from the bill of lading holder.

Once the lien is exercised over the cargo, owners will still have a duty of care for the cargo as bailees. If the charter freight/hire remains unpaid by charterers, owners may wish to sell the cargo to recover the freight/hire from the sale proceeds. Unless expressly stipulated, the lien clause will not give owners an automatic right to sell the cargo. Even if there is an express provision in the lien clause, it may still be necessary or advisable to obtain an order from the local court.

Advice on local law should always be taken before exercising a lien over cargo.

### Lien in respect of which debts?

Once it has been established that owners have a contractual right to lien cargo, owners must show that sums are actually due and unpaid at the time the lien is exercised and that the type of claim is covered by the lien clause. For example, in the absence of any specific wording, a lien for non-payment of freight will not cover a claim for demurrage or any amount due under the charter, other than freight. (see however the Gencon 1994 charter party Clause 8, which is widely drafted and extends the lien to many claims: “the owners shall have a lien on the cargo and on all sub-freights, demurrage, claims for damages and for all other amounts due under this charterparty including costs of recovering the same”).

### Will time lost be for charterer’s account?

Subject to the terms in the time charter party, the ship should remain on hire whilst owners exercise their contractual right to lien. Similarly, in respect of a voyage charter, laytime, demurrage, detention should be for charterers account.

However, owners must act reasonably and if for example, a more practical and cost effective solution is available but not followed, (warehousing instead of refusing to discharge) then time may be suspended.

**This article was written by Julien Rabeux in the Club’s Hong Kong office with additional input from Holman Fenwick Willan (London).**

This note is for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a particular situation please contact the Club.