

A lien down the line– the trials and tribulations of exercising a charterparty lien

Getting paid under a charterparty has its problems in the current commercial climate. Often an Owner, in particular, will need to look at the specific terms of their charterparty for available remedies and ways to secure their claims. A charterparty chain can often provide an Owner with options further down the contractual chain under English law.

A common situation

In an A-B-C time charter structure, or where B sub-voyage charters, B leaves hire unpaid and A calls on C to pay over sub-hire or freight. A does that using B's agreement that one of the remedies for unpaid hire is a bypass under which A will get certain sums owed by others to B. The tale is familiar and the relevant provisions are loosely called a lien clause, though A is seeking in essence to intercept monies, rather than holding goods until sums due on them are paid, which is what a lien really is.

Immediate issues

A's rights are derived from the charterparty, under which B has agreed that in some circumstances A can get B's debtors (such as C) to pay monies direct to A. But A must first identify them and serve notice that the monies should be paid to him. Until then the debtors can continue to pay B.

Sometimes it is plain that the sums owed to B are caught by the lien clause, but frequently C will query (and B will challenge) A, perhaps urging that the debt is not among those listed. B may readily admit owing hire to A but still claim the payment from C, perhaps also threatening C with recovery proceedings, or maybe actual lien of cargo, if he pays A.

Content to pay *someone*, C may just want to avoid trouble and to clarify what action protects him. Payment into an escrow account or court are sensible steps and are often suggested. But they are also regularly rejected as those with cash-flow problems look to prevent funds being tied up. The court or tribunal might have to interpret the clause and determine the issues, and a key point - whether common wording allowing A to collect sub-hire also applies to freight - is still argued.

What normally happens

Once A has validly served notice of lien on B and C, one of three things generally follow:

1. both agree with A on everything, and C pays A until B's debt is cleared or C's liability to B is exhausted;
2. both contest A's claim, with C saying he will continue to pay B. Just as for (1), this is unusual; and

3. mostly, B alone challenges A's claim and declines payment into a secure account pending resolution.

What can A do?

Legal powers

A's best tools are his charterparty (especially its law and jurisdiction clause) and planning ahead in anticipation of (2) or (3).

Under (2), A might have to follow up with an urgent application for an injunction to freeze a possibly imminent payment by C in B's account. But there may be many difficulties. Timing will be crucial, and unless B and C sensibly relent these costly steps may need repeating for any future payment.

Under (3), A will be pursuing B for unpaid hire and will seek a related order under the lien clause that the payments from C go into a suitable account until final determination. Likewise B might attack C under the sub-charter. If it is not possible to agree consolidation or other combination of these separate actions, the court or tribunal will usually order it (where available). In arbitration, though, A might need an order from the court on the interim fate of the payments, if a tribunal does not have that particular power. This may give rise to procedural problems with service on parties overseas.

Legal logistics

Planning ahead by examining and later triggering possibilities may prove crucial. Thus A might serve notice shortly before the vessel arrives in a jurisdiction which has provisions that can help. As well as injunctive action among EU courts, depending on the circumstances local laws and procedures may permit orders - perhaps preventing discharge, or even attaching the cargo ashore - that will give A leverage.

A should always proceed as if neither B nor C will cooperate, seeking urgent local advice and as far as possible preparing for any suitable step immediately the vessel arrives.

Final reckoning

Closing time charterparty accounting may come around with the issues still unresolved and B and C seeking credit for unused bunkers. Ordinarily, valid deduction by B just reduces his debt, but could A challenge that, and likewise perhaps as between B and C? The precise charterparty wording will often resolve a once novel but increasingly common issue.

Last, but not least

We initially said there was English law throughout, but if this is not so there could be many other difficulties.

Suppose for example that A-B is English law and High Court but B-C stipulates some other law and local arbitration. C pays nothing to anyone and A wants to compel him - to enforce the rights B has contractually given him. A has no contract with C, and the other law might not recognise a structure by which A seeks to step into B's shoes by contractual or equitable assignment to him of B's rights to payment from C.

There are many other possibilities, and A might have to advance over some difficult ground in order to get to a determined inactive C, with the potential pitfalls of validity of suit - basic *locus standi* - proper law, jurisdiction and time limitation. Where there is no common thread of governing law and forum, A might need urgent advice on a complex matrix.

Summary

Exercising what is called a lien on sub-hire, sub-freight or other sums can be straightforward. However, if one party fails to cooperate, reneges or simply dodges, a claimant might face many difficulties. It is usually essential and often vital to seek early assistance so all options can be explored as soon as possible.

Campbell Johnston Clark
59 Mansell Street
London
E1 8AN
www.cjclaw.com