

Means of Protection of the Owner vis-à-vis asset-light Charterers

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Protections and Actions vis-a-vis Charters

1. Guarantee for Charterers' performance
2. Owners' ability to withdraw the Vessel vs Anti-technicality clauses
3. Prevention of Charterer offsetting against hire
4. Lien over the cargo
5. Lien over sub-freight and sub-hire
6. Owners' ability to intercept payment of freight – *The Bulk Chile* [2013]
7. Owners ability to sell cargo on board belonging to Charterers
8. Other means of protection

Guarantees for Charterers' Payments

- Guarantee must be signed in order to avoid allegations that it was given without the guarantor's consent – see *The Pounda*
- *Golden Ocean Group Ltd v Salgaocar Mining Industries* [2011] – it was not necessary for a guarantee to be recorded in a separate agreement. Email correspondence between the parties were sufficient to establish the guarantee as they contained the electronic signatures of the parties to the alleged contract.
- Beware wording such as 'subject to contract' or 'subject to the satisfaction of conditions' being included in order to avoid a guarantee being formed

Withdrawing the Vessel

- NYPE 1946, Clause 5: "*...failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice, to any claim they (the Owners) may otherwise have on the Charterers*"
- Withdrawal must be exercised reasonably promptly
- Owners must be careful not to accept / ratify late payment, thereby, losing the right to withdraw
- Beware the 'anti-technicality clause'
- In addition to a right of withdrawal, also consider including a right to suspend performance for failure to pay hire

Anti-technicality Clause

- Owner must give notice to the Charterer before the vessel may be withdrawn for non-payment of hire – i.e. a 'grace period'. Only if Charterers fall outside the 'grace period' will they be entitled to withdraw the Vessel
- NYPE Clause 11(b): *"Where there is failure to make punctual and regular payment due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners [] clear banking days (as recognised at the agreed place of payment) written notice to rectify the failure, and when so rectified within those [] days following the Owners' notice, the payment shall stand as regular and punctual."*
- Negotiate withdrawal of ATN for immediate right to withdraw
- Withdrawal is all or nothing
- Withdrawal for non-payment of hire will, generally, remove the right to recover loss of profit

Off-setting against Hire

- Clause preventing Charterers from off-setting any amounts against hire owed.
- Wording to the effect that Charterers have no right to offset funds against hire due and payable
- Will ensure that Owners maximise their chances of recovery

Lien over Cargo

- Contained in unamended NYPE 1946 at Cl.18: *"the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter"*
- NYPE - a lien may, arguably, be exercised over any cargo. Contrasts with Baltime 1939 where a lien only exercisable over time charterer's own cargo
- Charterparty lien (between Owner and Charterer) will not be binding on cargo interests unless the lien clause has been incorporated into the B/L

Lien over sub-freight and / or sub-hire

- NYPE 1946 grant liens over sub-freight but not over sub-hire. NYPE 1993 and 2015 grant liens over "*sub-freights and/or all sub-hires*" (at Cl.23)
- "Sub-freights" in the 1946 form *may* include "sub-hire" – see the conflicting Commercial Court decisions in *The Cebu* [1983] and *The Cebu (No.2)* [1990]
- Lien over sub-freights/sub-hires may extend to sub-freights/sub-hires owed to sub-charterers if a relevant clause giving Charterers a lien, as disponent Owners, over sub-charterers' freights/sub-hires – see *The Western Moscow* [2012]
- A lien must be exercised whilst the sub-freight is still owing and so timing of lien notice is important.
- No particular form for notice is required – the key component is that notice of the assignment must be given to the debtor as 'perfection'– *The Spiros C* [2000]
- Lien may need to be registered as a charge if against a UK company

Interception – *The Bulk Chile*

- As long as sub-freight is owing to Charterers, Owners may also have a right to intercept the freight payments under a bill of lading pursuant to the principle set out in *The Bulk Chile* [2013]
- So long as payment has not already been effected, Owners may direct shippers to make payment to themselves rather than a third party

Sale of Cargo

- Finally, where Charterers are the owners of the cargo, Owners may also request that the Court exercises its power to order a sale in certain circumstances – see the relatively recent decision in *The Moscow Star*

Other means of protection

- Agree the issuance of straight bills of lading during contract negotiation, in order to limit the risk of misdelivery of the cargo at the discharge port.
- Do not accept Letters of indemnity for the discharge of the cargo from asset-light counterparts.
- Ask for prepayment of hire and bunkers for short time charter trips.

Thank you!