Cargo liens and freight forwarders

AUTHOR / KEY CONTACT

Linda Jacques
Partner

Linda.jacques@LA-law.com
01202 702611

On the face of it, the right of a freight forwarder to exercise a lien for unpaid bills should be a relatively simple affair. Unfortunately, the complexities of modern supply chains can often throw up challenging situations, in which those rights need to be carefully weighed up, before deciding whether to exercise a lien over goods.

Many freight forwarders with offices in the UK are members of the British International Freight Association (BIFA), which has a corporate membership of about 1,500. Freight is handled by those companies under BIFA's standard trading terms, which incorporate a healthy lien clause. That lien is exercisable on all goods and documents relating to the goods, for all sums due at any time, by the customer or owners of the goods. The current BIFA terms also give an express right to sell the goods after giving 21 days' notice.

Where the exercise of a lien is governed by the BIFA terms, a freight forwarder will still need to consider whether a lien can legitimately be exercised on the facts of the particular situation facing it. There may also be situations where for some reason the BIFA terms do not apply. In those situations, determining whether there is any contractual right to lien will be the first hurdle to cross. The financial landscape between forwarder and customer can often change very swiftly as a result of decisions made by third parties. The Centre for Retail Research records that in 2018, various medium to large companies have entered administration, some with little warning.

Ultra Furniture entered administration after Tesco Direct announced it was closing its website, as 70% of Ultra Furniture sales came from that website. Flooring Republic (FR), owned by a Chinese Multinational, which owned under just 80 shops, entered prepack administration in 2018 after taking the decision to move the business on line. Poundworld, with 350 stores and 5,300 staff, is slowly sinking after failing to find a buyer. Maplin went into administration on the same day in 2018 as Toys R Us, following the withdrawal of credit insurance by two companies. This highlights that forwarders can often be faced by a sudden change in a customer's financial fortunes, often with little notice.

Whether a lien can be properly exercised over goods will involve a consideration of the following:

- What is due and owing to the forwarder at the time the lien is exercised? Problems can often arise when a forwarder is trying to use the lien to collect a number of debts owed on the current shipment as well as previous shipments. In addition, the use of credit terms to a customer can cause confusion over whether an invoice is technically "due and owing." The BIFA terms allow a forwarder to include in that description

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any sum properly earned but not yet invoiced, as part of that debt. However, if for some reason the BIFA terms are not applicable, and there is no provision in a contract to include debt which is not invoiced or technically due and owning, caution should be exercised.

- Whether there is an administrator appointed. If the administrator is appointed before the date a lien is exercised, there is no right to lien the goods. Timing is therefore of the essence, if it looks like an administrator might be appointed.

- Who the goods are owned by? This perhaps one of the most difficult areas when dealing with liens. Freight forwarding chains by their nature involve third parties moving goods from the seller to the ultimate buyer. Trying to identify the actual owners of the goods can often be a difficult exercise. As a general rule there is no right to lien the goods of third party for the debts of a customer although the BIFA terms give a right to lien if the customer is the owner of the goods or "has the authority to act on behalf of the owners". Determining that issue is not without its issues. The extent of the lien being exercised also needs to be considered, particularly if the lien covers more than the costs of that particular shipment and includes old debt on previous shipments owed by a customer.

If a lien is improperly exercised, the English Courts do have jurisdiction to deal with applications for the release of cargo being wrongfully withheld and they will make costs order against a party found to have wrongfully detained goods. There is also the right to ask for damages to be awarded against a party who is found to have wrongfully liened goods. These applications are not expensive and certain Courts are used to dealing with them.

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