



Ship Type: All Trade Area: Spain

Bulletin 378 - 09/04 - Liens On Cargo – ‘Deposito Judicial’ - Spain

It is often asked whether or not a lien can be exercised over cargo in Spain as it is one of the shipowner's most useful tools in many jurisdictions, whether to secure freight, salvage security or any other debt.

Liens as such do not exist in Spain but the nearest equivalent is the judicial deposit (*depósito judicial*), which is provided for by Article 665 of the Spanish Commercial Code. This Article states that "it shall not be lawful for the Master to delay the discharge in the event of his suspecting that [the] obligation [to pay freight and other costs due] is not going to be complied with". This article further states that "If there are grounds for mistrust the Judge or Court, at the request of the Master, may agree to the deposit of the cargo until [the debt] has been fully settled."

Establishing 'mistrust' or 'bad faith' is a subjective test and, therefore, the ordering of the depositing of the cargo is discretionary. What assists in these cases is correspondence or other documentary evidence of the debt; even better if the cargo interests have recognised the debt or its payment by a certain date. Otherwise correspondence showing that there is a refusal to pay, for whatever reason, will be evidential. In essence, the judge must be persuaded that there is a real fear that e.g. the freight will not be paid and the reasons must be strong enough to convince him to agree to order the deposit of the cargo.

The main practical consideration is that, although the request for *depósito judicial* should be made as an emergency *ex parte* application and a decision is usually available within two days, this cannot always be relied on. All too often this subject is considered too late with a ship either already berthed or with her arrival imminent. A strict and/or slow judge will request an original Power of Attorney duly legalised, and the shipowner must suggest a place for the deposit of the cargo and assume responsibility in the first instance for storage costs. If the judge allows the request, the master can subsequently request the sale of all or part of the cargo in full or part settlement of the debt and costs incurred.

Unfortunately, often the type of cargo and warehousing and/or costs are a problem and may make the option of *depósito judicial* practically impossible.

One advantage of obtaining an order for *depósito judicial* is that the shipowner will then have a 20 day period during which a preferential debt can be exercised over all other creditors (save for a *bona fide* third party who acquires rights in the cargo).

The Club's correspondents advise that it is wise to give at least 48 hours' notice of the ship's arrival and the instructions to seek a *depósito judicial*.

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