

The Best Guard – Mechanic's Lien^{1, 2}

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ABSTRACT

This article describes the definition of lien and the use of lien in construction contracts. After understanding the main concepts, we used MADM to compare three debt recovery options, and found that use lien laws are the best way to ensure payment to contractors, subcontractors, and suppliers.

Finally, we conclude that Assigning the project manager to prepare a Mechanic's Lien at the start of the project is the quickest and most effective way. Mechanic's Lien works extremely well, but the requirements are quite onerous. Therefore, to record lien's reports at the beginning of the project can greatly simplify the process. If necessary, submit the application directly to the court and complete the early procedures quickly.

Key words: Lien, payment, priority, Mechanic's lien, notice of lien, Arbitrate

INTRODUCTION

Along with the increase of commercial activities, more and more payment problems have appeared, which will result in three apparent outcomes as followed. For the first place, it is the increase of time-cost for many small and medium-sized companies. Besides, it is the lack of money to pay for their downstream companies which will result in a credit crisis. Furthermore, it is a shortage of cash flow.

Therefore, two actions ought to be taken to deal with the payment problems. On the one hand, it requires project managers to take emergency measures to avoid these problems, on the other side, using the lien law is an effective strategy when the contractor, subcontractor, and supplier did not receive payment from the owner or the payment was overdue. There are different types of lien: one is Consensual Lien covering Purchase-Money Security Liens and Non-Purchase-Money Security Liens. There are other types of liens are the Mechanic's Liens and Tax Liens. The last

¹ Editor's note: This paper was prepared for the course "International Contract Management" facilitated by Dr Paul D. Giammalvo of PT Mitratata Citragraha, Jakarta, Indonesia as an Adjunct Professor under contract to SKEMA Business School for the program Master of Science in Project and Programme Management and Business Development. <http://www.skema.edu/programmes/masters-of-science>. For more information on this global program (Lille and Paris in France; Belo Horizonte in Brazil), contact Dr Paul Gardiner, Global Programme Director, at paul.gardiner@skema.edu.

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one is Judgment Lien; “a Judgment Lien can occur in a variety of circumstances. Basically, any event that makes you in court will result in a Judgment Lien.”³

There are some details from the UK: “FSB research exposed the UK’s paid late problem, which costs the UK economy £2.5bn each year and kills 50,000 small firms. It has a significant impact on downstream companies. The FSB’s survey of approximately 1,000 small businesses shows the size of the delay. 30% of payments are usually late. Only 12% of companies are always paying on time. About one-tenth of small companies say that 80% or more of their payments are usually late. Subcontractor companies and supplier report that 60% of deferred payments are worth more than £1,000 and the average value are £6,142. Large private companies are most likely to pay late to downstream companies.”⁴

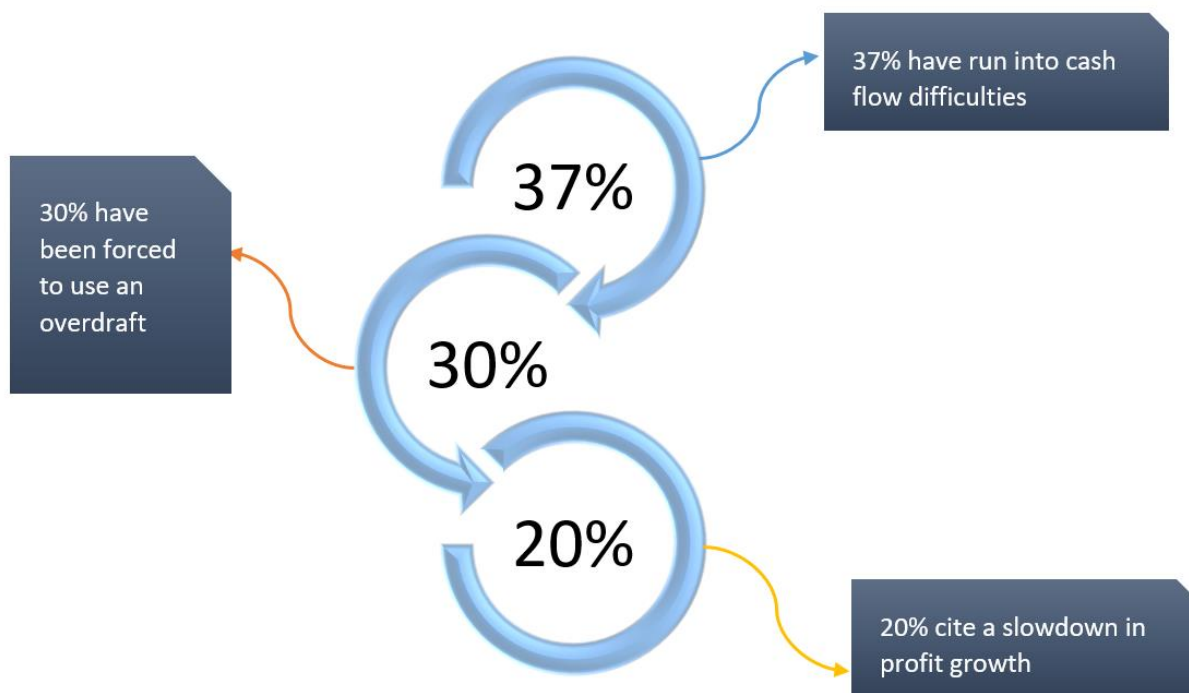


Figure 1: Impact of late payments on subcontractor and supplier⁵

This situation is often reflected in the construction industry. In a private building project, there are a lot of stakeholders. In addition to the project owner and his team, the contractor team is the main

³ Different Lien Types Provide Creditors with Different Rights. Retrieved from <https://www.bizfilings.com/toolkit/research-topics/running-your-business/asset-strategies/different-lien-types-provide-creditors-with-different-rights>

⁴ Federation of Small Businesses. (2016). Time to Act: The economic impact of poor payment practice. Retrieved from [https://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-report---late-payments-2016-\(final\).pdf?sfvrsn=0](https://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-report---late-payments-2016-(final).pdf?sfvrsn=0)

⁵ By the Author and date from

construction units; they are responsible for the main part of the project. On the other hand, the construction process will be allocated to a different subcontractors team force different area; the subcontractor also has their material suppliers. This will require multiple materials suppliers to provide construction materials on time. But if something goes wrong with the payment, it will affect the whole project Every construction unit throughout the project needs strong laws to protect their interests to ensure that everyone gets paid when they finish their work. So the project managers should think about The mechanic's lien law.

According to the "Mechanical Retention Law" statement, when the owner fails to fulfill his payment obligation, the contractor who works for the owner has the right to possess owner’s movable and immovable property as provided of laws, Until owner pays all his debts(Here the owner is the debtor, and the contractor is the creditor). At the same time, lien gives creditors priority, which means that if the owner is unable to repay the debt, the contractor has the right to auction debtor’s movable and immovable property and preference get the compensation to settle arrears.

The diagram below shows the relevancy between the contractors, sub-contractors, and vendors.

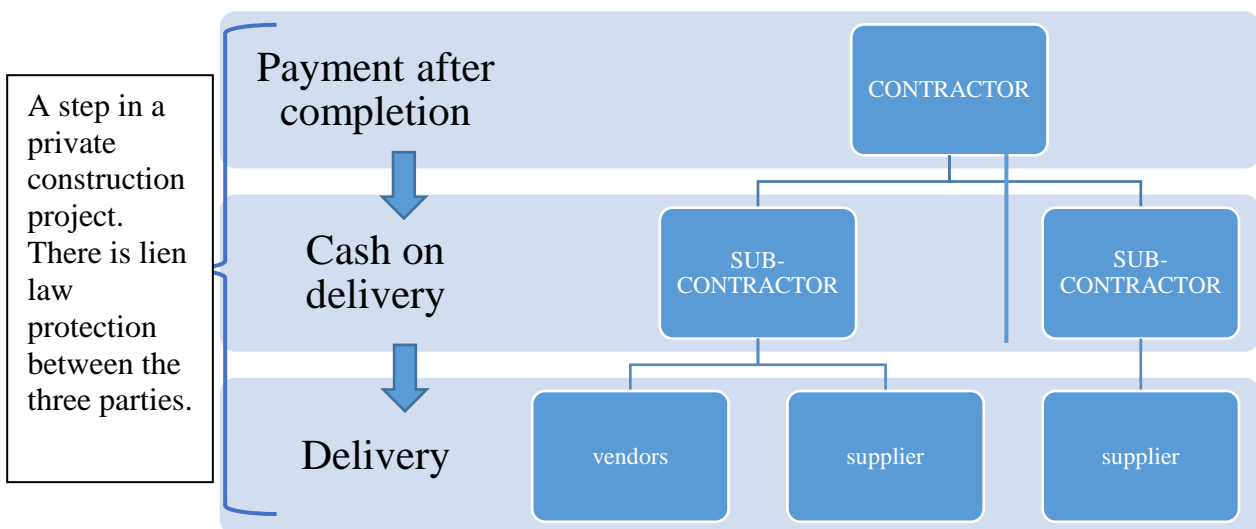


Figure 2: relevance between the contractors, sub-contractors, and vendors.⁶

⁶ Beach R, Webster M, Campbell KM. (2005). An evaluation of partnership development in the construction industry. *Int J Project Management*. doi:10.1016/j.ijproman.2005.04.001

STEP 1: Problem Definition:

This topic will focus on Mechanic's Liens to answer the following question:

1. Why need use Mechanic's lien law and what is it advantages?
2. What is an intent notice of Lien?
3. How effective use of lien law to ensure payment to contractors, sub-contractors, and vendors?

METHODOLOGY

Firstly, the table explores the difference between a general construction contract and construction contract with a Mechanic's Lien as table 1, and we'll compare their strengths. In this page, we will use Multi-Attribute Decision-Making Models to analyze these alternatives solution.

	General construction contract	The construction contract with a Mechanic's lien
Preparation	Prosecute to the court under the proposed contract	Send notice of intent and file a mechanics lien
Claim procedure	Enter the payment process and wait for the owner’s compensation	When the mechanic's lien takes effect, the court will freeze the property of the owner.
Multiple guarantees	You can only file a lawsuit against the person who contracted with you.	You can file suit against the general contractor and the property owner, and the land
Priority	No priority	Prioritize your debt and pay for it
Deadline	It depends on the debtor's consciousness	Mechanic's lien will set a firm deadline for when litigation will begin if the claim isn't paid.
Cost	lawyer fee, Litigation costs, etc	lawyer fee, Litigation costs, Mechanic's lien filing fee

Table 1: General construction contract vs. The construction contract with a Mechanic's lien.⁷

⁷ By the Author and the basis from Scott Wolfe Jr. (2018, October). How do Mechanics Liens Work? 17 Ways a Lien Gets You Paid. <https://blog.zlien.com/construction-payment/17-ways-a-mechanics-lien-works-to-get-you-paid/>

According to the results of the comparison in the table above, Mechanic's Lien has an extra expense and process is complicated but it gets more advantages, more security. In contrast, the general construction contract is simple to operate and costs less. So using Mechanic's lien is more likely to achieve the results we want.

STEP2: Feasible Alternatives

Now we will force how to use Mechanic's lien to help contractors, sub-contractors, and vendors get paid.

We make three feasible alternatives.

- Firstly, we can hire a professional lawyer to help us.
- Secondly, we require the project manager to apply for the Mechanic's Lien and improve the materials required by the Mechanic's Lien in the whole project process
- Thirdly, according to the contract, threaten the owner or put the owner on notice that if you are not paid promptly that you will file a lien.

STEP 3: Development of the outcomes

The best alternative for contractors, sub-contractors, and vendors is to get the maximum compensation with the least cost.

The first alternative: we hire a professional lawyer to help us, this will increase the cost of money. The lawyer can provide professional legal services to help improve the litigation process. He will complete the documents required by the Mechanic's Lien. And this solution may cause more labor cost. We need to assign people from the project team to communicate with lawyers about documents and material sheets.

The second alternative: this solution can save cost, assign a project manager to implement Mechanic's Lien to ensure all projects comply with Mechanic's lien requirements that can avoid project errors. Develop a plan for the use of the Mechanic's Lien from the beginning of the project, which can standardize the implementation of the project so that the project always meets the Mechanic's Lien standard. The project manager can record the reports for Mechanic's Lien while supervising the project, that solving the labor cost and saving the time cost.

The third alternative: this solution has no cost compared to the other two alternatives. It's just a verbal warning, whether it can finally get paid depends on whether the owner fulfills his obligations.

STEP 4: Selection of the criteria

In order to make the results of the three alternatives clearer, we bring the three alternatives into the context of international arbitration for comparative analysis; we will list some important attributes and compare them to find the most effective ones.⁸

In our research, we will use MADM to get the best option. By comparing these attributes in the three alternatives, we can find the best solution more intuitively. In general, with Mechanic's Lien, we have to think about the cost of using it, the complexity, the risk of litigation, whether it's effective, whether it's sustainable, whether it's even possible to get results.

Attribute	Alternative 1: hire a professional lawyer	Alternative 2: Assign a project manager to implement Mechanic's lien	Alternative 3: the constraint of the construction contract
Operability			
Complexity			
Implementation cost			
Freedom to Choose a Neutral and Competent Decisionmaker			
Speed			
Confidentiality			
Absence of Appeal			
Enforceability			
Potential Need for Court Intervention			

Table 2: Multi-Attribute Decision making models-analysis of the dominance of each alternative.⁹

According to the chart above, we analyze each factor:

⁸ PETER SHERWIN, ANA VERMAL, ELIZABETH FIGUEIRA. Proskauer on International Litigation and Arbitration: Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes(CH.19), <https://www.proskauerguide.com/arbitration/19/1>

⁹ By the Author

1. Operability: This factor is to consider whether each alternative is available. This is the most basic factor in the project.
2. Complexity: This factor is to analyze the difficulty of using these alternatives. It considers whether the implementation process of these alternatives is complicated.
3. Implementation cost: It is also important to consider the cost of implementing the plan. We need to reduce the cost of the execution alternative and get back the pay for the contractors, sub-contractors, and vendors.
4. Freedom to Choose a Neutral and Competent Decisionmaker: The parties to the arbitration may choose their own arbitrators
5. Speed: The arbitral award greatly saves the judgment time and gives the result in one time
6. Confidentiality: Although the arbitration process does not have to be published voluntarily, but it is difficult to guarantee that the arbitration content will not be disclosed.
7. The absence of Appeal: The arbitration process decides the winner or loser directly, so it is difficult to have the chance of appeal.
8. Enforceability: Arbitration proceedings may be conducted on a transnational or cross-cultural basis if the parties to the arbitration agree in advance.
9. Potential Need for Court Intervention: When the result of arbitration is not enforced, or no arbitration is conducted, an appeal is made to the court.

As can be seen from the above table, the constraint of a construction contract has many disadvantages; we can eliminate alternative 3.

FINDINGS

STEP 5: Analysis and comparison of the alternative

According to the analysis results of the above factors, we get this information: only use the constraint of construction contract it does not work, that make contractor face a high risk of paid late. Only stronger insurance alternatives can avoid risks.

Now we need to calculate the score for each factor as followed,

- Excellent = 1 Highly satisfy the objective
- Good = 0.67 Likely to satisfy the objective
- Fair = 0.33 Fairly satisfy the objective
- Poor = 0 Poorly satisfy the objective

Attribute	Alternative 1: hire a professional lawyer	Alternative 2: Assign a project manager to implement Mechanic's lien	Alternative 3: the constraint of the construction contract
Operability	Excellent	Excellent	Good

Complexity	Fair	Fair	Excellent
Implementation cost	Poor	Good	Excellent
Freedom to Choose a Neutral and Competent Decisionmaker	Fair	Excellent	Poor
Speed	Excellent	Good	Poor
Confidentiality	Fair	Excellent	Excellent
Absence of Appeal	Excellent	Excellent	Poor
Enforceability	Excellent	Excellent	Poor
Potential Need for Court Intervention	Excellent	Excellent	Poor

Table:3: Qualitative analysis ¹⁰

Then by using of the MADM Compensatory model (Dimensionless value) here, we get it as followed,

Attribute	Alternative 1: hire a professional lawyer	Alternative 2: Assign a project manager to implement Mechanic's lien	Alternative 3: the constraint of the construction contract
Operability	1	1	0.67
Complexity	0.33	0.33	1
Implementation cost	0	0.67	1
Freedom to Choose a Neutral and Competent Decisionmaker	0.33	1	0.33
Speed	1	0.67	0
Confidentiality	0.33	1	1
Absence of Appeal	1	1	0
Enforceability	1	1	0

¹⁰ By the Author

Potential Need for Court Intervention	1	1	0
SUM	5.99	7.67	4

Table:3: the score for each factor¹¹

The data from table 3, alternative 3 is far behind the other two alternatives, so we go to the next step with Non-dimensional data technique only with alternative 1 and 2.

Attribute	Step1	Step2	Alternative 1		Alternative 2	
	Relative rank	Normalized weight(A)	(B)	(A)*(B)	(C)	(A)*(C)
Operability	9	0.2	1	0.2	1	0.2
Complexity	4	0.089	0.33	0.029	0.33	0.029
Implementation cost	8	0.178	0	0	0.67	0.119
Freedom to Choose a Neutral and Competent Decisionmaker	2	0.044	0.33	0.015	1	0.044
Speed	7	0.156	1	0.156	0.67	0.104
Confidentiality	3	0.067	0.33	0.022	1	0.067
Absence of Appeal	1	0.022	1	0.022	1	0.022
Enforceability	6	0.133	1	0.133	1	0.133
Potential Need for Court Intervention	5	0.111	1	0.111	1	0.111
SUM	45		SUM	0.67	SUM	0.829

Table:4: Additive weighting model analysis¹²

¹¹ By the Author

¹² By the Author

From the MADM model, we get the result that alternative 2 is better than alternative 1.

STEP 6: Selection of the preferred alternative

Starting from the analysis in table 2, we removed one low-score item (Alternative 3: the constraint of the construction contract) and then weighted the remaining two items using the Additive model, and finally, we concluded that Alternative 2 (Assign a project manager to implement Mechanic's Lien) was the optimal option.

So, we suggest using alternative 2 to assign project managers to implement a Mechanic's Lien plan. The alternative 2 can save a lot of time for subcontractor's (contractors and vendors) project team, and the project manager can complete the documents required by Mechanic's Lien when recording the daily project progress.

STEP 7: Performance Monitoring and Post Evaluation Results

In order to better display the monitoring results, we can focus on these steps.

- The project manager shall submit the preparation report about the lien.
- Send notification of intent to all stakeholders.
- Remind the owner to settle the payment on the agreed date.
- Submit lien's application form to the Arbitral tribunals or court.
- Decide to cancel or enforce lien based on the owner's action.

CONCLUSIONS

Now we can answer the following question:

1. Why need use Mechanic's Lien law and what is it advantages?
2. What is an intent notice of Lien?
3. How effective use of lien law to ensure payment to contractors, sub-contractors, and vendors?

By comparing the three alternatives, assign a project manager to use Mechanic's Lien has the lowest risk, the lowest time cost and the greatest deterrent to the owners who do not take their duties. When using this alternative, it is important to pay attention to how to submit the notice of intent. The notice of lien is partly a warning notice and partly a letter of requirement.

Finally, to sum up with Scott Wolfe words: "It is sent before a Mechanic's Lien and warned the property owner, the prime contractor and others stakeholder that a Mechanic's Lien is will be filed in the immediate future if payment is not received. Lien rights are unique to the construction industry. More than just a piece of paper or a tactic aimed at collecting on a debt, a mechanics lien is actually a right, a special right created over 200 years ago exclusively for the construction

industry. This right empowers the industry's members to get paid the money they've rightfully earned on their projects, in full and on time."¹³

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Zhan Xionghuan, Chinese, 25 years old, major in Project and Programme Management & Business Development (PPMBD) at SKEMA Business School in Paris, France. I graduated from XiMen Institute of Technology University in China. I enjoy making friends, and I am good at dealing with people.

In my past student life, I often appeared as an activity organizer. The duties and obligations of the class made me willing to communicate with others and help others in need. Traditional family education has shaped my character of respecting teachers, being kind to others, being grateful and being honest. Accepting education, an overseas graduate student, has brought me a diversified cultural impact. Empathy, patience, tolerance, and normalcy have become the norm.

In 2017 (May-November), I worked as an intern in Zhengda company and experienced the working state for the first time. Although the internship was not long, I got a lot of exercises. Participated in competition on behalf of the company for the first time and won the prize; The first time as the host and colleagues to complete the publicity session; Completed four recruitments independently for the first time; Introduced talents for the company for the first time.

These experiences enriched my social experience, and I am more looking forward to future tasks. Now I live in Paris and can be contacted at xonghuan.zhan@skema.edu and <https://www.linkedin.com/in/熊桓-詹-484577158>