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# After withdrawal: charterers' wrongs and shipowners' remedies

*Simon Baughen\**

*The right of withdrawal is a potent remedy for a shipowner. However, exercising the remedy at a time when cargo is on board will lead to the shipowner's incurring costs in fulfilling contractual obligations owed to shippers, and, in a falling market, the shipowner will incur additional losses represented by the difference between the charter rate and the market rate for the unexpired residue of the terminated charter. As well as claiming the unpaid hire outstanding at the date of the withdrawal, the shipowner will want to recover these additional costs and losses. This article will examine the options open to shipowners in recovering both the costs of completing voyages under contracts of carriage with shippers and the loss sustained by withdrawing in a falling market. These remedies need to be set in the context of the web of contracts that are involved when carrying cargo under a time charter, such as contracts with shippers under, and lawful holders of, bills of lading, and contracts under sub- and sub-sub-charters.*

## I. INTRODUCTION

Hire is the lifeblood of the shipowner's business. To secure its punctual payment, time charters will invariably provide for the shipowner to have a right to withdraw the vessel from the charterer's service in the event that hire is not paid punctually and in full. Market conditions tend to determine the issues relating to withdrawal that come before the courts. In the rising market of the 1970s, shipowners were keen to find any excuse to get out of their time charters and pounced on any delay on the part of charterers in tendering full payment of hire. Since the financial crisis of 2008 there has been a pronounced collapse in the market, with charterers unable to carry on making hire payments under charters made in happier times. For shipowners, the remedy of withdrawal now has the disadvantage that, once free of the old charter, the vessel will be refixed at a rate considerably lower than under the old charter, together with the associated costs of completing bill of lading commitments entered into during the currency of the withdrawn charter. The focus now is on shipowners' remedies after a withdrawal and here there have been three seminal decisions: that of the Court of Appeal in *Spar Shipping* on recovery of damages from charterers following a withdrawal; that of the Supreme Court in *The Kos* on recovery of post-withdrawal costs from charterers; and that of the Court of Appeal in *The Bulk Chile* on recovery of such costs from third parties through recovery of freight due under the

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bill of lading and through the exercise of the lien on sub-freights. This paper will start by examining the prospects of recovery from time charterers, before moving on to consider other targets, such as cargo owners and sub-charterers.

## II. CLAIMS AGAINST TIME CHARTERERS

### (a) Damages claims

Withdrawal is an option to terminate and its exercise will not, in itself, give rise to any claim for damages.<sup>1</sup> The shipowner's claim would be limited to hire outstanding at the date of withdrawal, together with interest. However, if the shipowner were entitled to terminate the contract for breach of the obligation to pay hire punctually, then damages would be recoverable. This depends on how the obligation to make punctual payment of hire is classified. If it is a condition, then any breach will entitle the shipowner to terminate the charter and to claim damages in respect of the unexpired residue of the charter. If, on the other hand, the obligation is an innominate term, then the right to terminate will depend on whether the consequences of the breach are sufficiently serious to go to the root of the contract so as to deprive the shipowner of substantially the whole benefit of the charterparty.

#### *Termination due to breach of condition?*

Until recently, there was a first instance split on this issue, with two decisions holding that the obligation to pay hire punctually was an innominate term, and one to the effect that it was a condition. First, there is *Tenax Steamship Co Ltd v The Brimnes (Owners) (The Brimnes)*,<sup>2</sup> where Brandon J held that, had the shipowners not been entitled to withdraw the vessel, they would not have been entitled to terminate for breach of the obligation to pay hire punctually, as that obligation was not a condition. Second, there is the contrary decision of Flaux J in *Kuwait Rocks Co v AMN Bulkcarriers Inc (The Astra)*,<sup>3</sup> that the obligation to make punctual payment of hire is a condition, at least where there is an anti-technicality provision in the withdrawal clause. Referring to *Bunge Corp, New York v Tradax Export SA, Panama*,<sup>4</sup> he identified a general rule that time provisions in commercial contracts are conditions, a view supported by dicta of Lord Diplock in *Afovos Shipping Co SA v R Pagnan & Fratelli (The Afovos)*.<sup>5</sup> Third, there is *Spar Shipping AS v Grand China*

1. *Financings Ltd v Baldock* [1963] 2 QB 104. The case involved a hire-purchase agreement which contained an option to terminate in the event of breach. The Court of Appeal held that following termination, in the absence of repudiation, damages were limited to the overdue instalments and interest thereon.

2. [1972] 2 Lloyd's Rep 465; [1973] 1 WLR 386; aff'd [1975] QB 929; [1974] 2 Lloyd's Rep 241 (CA). The Court of Appeal upheld Brandon J's decision that the shipowners had been entitled to withdraw the vessel but made no comment on the condition point.

3. [2013] EWHC 865 (Comm); [2013] 2 Lloyd's Rep 69.

4. [1981] 2 Lloyd's Rep 1 (HL); [1981] 1 WLR 711.

5. [1983] 1 Lloyd's Rep 335, 341; [1983] 1 WLR 195, 203: "The owners are to be at liberty to withdraw the vessel from the service of the charterers; in other words, they are entitled to treat the breach when it occurs as a breach of condition and so giving them the right to elect to treat it as putting an end to all their own primary obligations under the charter-party then remaining unperformed."

*Logistics Holding (Group) Co Ltd*,<sup>6</sup> where Popplewell J declined to follow *The Astra*. He held first that, in the absence of clear language, a contractual termination clause, such as a withdrawal clause, was to be treated as an option to cancel which did not confer greater rights to damages at common law than would otherwise exist.<sup>7</sup> Second, the obligation to make punctual payment of hire is not a condition. The presumption in mercantile contracts was that time stipulations are not conditions, the opposite to that propounded by Flaux J. The general approach should be that, where predicated breaches of a term may have consequences ranging from the trivial to the serious, that is a strong indication that the term is to be treated as an innominate term. In addition, there was the fact that, for 40 years since *The Brimnes*, owners and charterers had conducted business on the basis that hire is not a condition, or at the very least may not be.

The issue has now been settled by the Court of Appeal in *Spar Shipping*,<sup>8</sup> which has recently upheld Popplewell J's decision that the obligation to pay hire under cl.11 of the NYPE charter was not a condition. The clause was a payment term and was not a condition precedent to the performance by Spar of their obligations under the charterparties in the same direct or immediate sense that the terms were interdependent in the sale of goods contract in *Bunge v Tradax*. It could not be said that any failure to pay hire punctually in advance, no matter how trivial, would derail Spar's performance under the charterparties. The true construction of the charters did not indicate that cl.11 was a condition. It did not expressly make time of the essence nor spell out the consequences of breach. It was quite clear "that the consequences of a breach of cl.11 can vary dramatically—from the trivial to the grave; in such circumstances it is one thing to give effect to an express contractual termination clause but quite another to treat that clause as a condition".<sup>9</sup> Any presumption that time is of the essence in mercantile contracts did not apply generally to the time of payment unless the terms of the contract indicated a different intention. Nor did the anti-technicality clause (cl.11(b)) strengthen the case for the timely payment of hire being a condition of the charterparties.

The decision may seem hard on the shipowner, given the critical importance to its business of the prompt payment of hire, but it is a straightforward matter to make specific contractual provision to turn this obligation into a condition. One such way is by expressly providing that time is of the essence with the obligation to pay hire, as is the case with cl.38.3 of the Barecon 2001 form of demise charter, which provides "time shall be of [the] essence", which makes the obligation to pay hire a condition of the contract, subject to the period of grace.<sup>10</sup> Another way, as seen in cl.11(c) of the NYPE 2015 form, is by providing that owners are to be entitled to damages in the event of withdrawal for the loss of the remainder of the charterparty. Prior to the Supreme Court's recent re-evaluation of penalty clauses in *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis (Consumers Association intervening)*,<sup>11</sup> this clause would probably have been rendered unenforceable,

6. [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep 407. The claim was made against the guarantors of the charterers and involved issues of the validity of the guarantee.

7. Applying *Financings Ltd v Baldock* [1963] 2 QB 104.

8. [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447.

9. *Ibid.*, [55].

10. *Parbulk II A/S v Heritage Maritime Ltd SA (The Mahakam)* [2011] EWHC 2917 (Comm); [2012] 1 Lloyd's Rep 87.

11. [2015] UKSC 67; [2016] 1 Lloyd's Rep 55; [2016] AC 1172.

as not being a genuine pre-estimate of the shipowner's loss.<sup>12</sup> In determining whether a contractual provision was penal, the Supreme Court has held that the true test was whether it was a secondary obligation which imposed a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. It is likely that cl.11(c) would satisfy this new test.

*Termination due to repudiation or renunciation by the charterers*

*Spar Shipping* establishes that the obligation to pay hire is an innominate term, not a condition. The innocent party's right to terminate for breach of an innominate term depends upon whether the breach "goes to the root" of the contract or deprives the innocent party of substantially the whole benefit of the contract.<sup>13</sup> A breach which has this effect is described as a repudiation. However, prospective breaches of the contract may also justify the innocent party in terminating the contract if the other party has shown an intention not to perform the contract according to its terms and that the effect of such refusal to perform will go to the root of the contract. Such a prospective breach is described as a renunciation or an anticipatory breach. In *Spar Shipping*, Popplewell J found that, while the past failures to pay hire did not go to the root of the contract so as to justify the owners in terminating the charter, the charterers had evinced an intention not to make full payment of hire for future instalments, and that the effects of this would go to the root of the contract, so justifying the owners in terminating the contract.<sup>14</sup> This intention could be evidenced by past breaches which on their own would be insufficient to be repudiatory. The past breaches and the threatened future breaches when taken together would be repudiatory. Popplewell J held that persistent late payments over a period of five months from April 2011 evidenced a renunciation by the charterers, and stated:<sup>15</sup>

"Occasional and brief delays in payment will not be repudiatory, but where the hire is due semi-monthly in advance, regular delays measured in weeks often will be, because in those circumstances performance is substantially different from what has been bargained for, which is a charterparty under which the owner is to meet his obligations from the hire which has already been provided."

The Court of Appeal upheld Popplewell J's finding on renunciation. Hire was payable in advance to provide a fund from which shipowners could meet the expenses of rendering the services they have undertaken to provide under the charterparty. Shipowners were not obliged to perform the services on credit, but only against advance payment. The financial strength of the particular shipowner had no bearing whatever on the nature of the bargain entered into. Adopting the formulation of anticipatory breach in *Universal Cargo Carriers*

12. As was a similar provision in *Financings v Baldock* [1963] 2 QB 104. See too *Lansat Shipping Co Ltd v Glencore Grain BV (The Paragon)* [2009] EWCA Civ 855; [2009] 2 Lloyd's Rep 688.

13. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 69–70; [1961] 2 Lloyd's Rep 478, 493, per Diplock LJ.

14. In *The Astra* [2013] EWHC 865 (Comm); [2013] 2 Lloyd's Rep 69, Flaux J made a similar finding, upholding the tribunal's finding that the charterers' conduct in persistent failure to pay the full rate of hire amounted to a renunciation of the charter entitling the owners to terminate the charter and to claim damages.

15. [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep 407, [214]. In *The Brimnes* [1972] 2 Lloyd's Rep 465; [1973] 1 WLR 386, Brandon J found that the delays by a varying number of days in 13 payments of hire did not amount to repudiation of the contract by the charterers. This may be viewed as a remarkably generous assessment of charterers' conduct.

*Corp v Citati*,<sup>16</sup> a reasonable shipowner could have no realistic expectation that charterers would in the future pay hire punctually in advance. Charterers admitted that they were in difficulty owing to market conditions and therefore their future performance turned on market vicissitudes.<sup>17</sup> This prospective non-performance would unilaterally convert a contract for payment in advance into a transaction for unsecured credit and without any provision for the payment of interest. An evinced intention not to pay hire punctually in the future is very different from a failure to pay a single instalment of hire punctually. The Court of Appeal rejected charterers' argument that an arithmetical comparison between the arrears and the total sums payable over the life of the charters showed that owners would not be deprived of substantially the whole benefit of the charterparties. "[T]his submission simply does not grapple with the nature and importance of the bargain for the payment of hire in advance."<sup>18</sup>

### (b) Indemnity claims

Following withdrawal, the shipowner may well be faced with additional costs due to the presence on board the vessel of cargo loaded pursuant to the charterer's orders prior to the withdrawal. Can such costs be recoverable from the time charterer under the indemnity, express or implied,<sup>19</sup> in respect of costs incurred in following the orders of the charterer regarding the employment of the vessel? Prior to 2012 there had been no suggestion that post-withdrawal costs could be recoverable through the indemnity. The question had arisen in *Tropwood AG of Zug v Jade Enterprises Ltd (The Tropwind) (No 2)*,<sup>20</sup> in which Robert Goff J had held that, following the withdrawal, the charterers, by requesting the owners to fulfil the existing bill of lading commitments, had become liable to compensate them on the basis of a quantum meruit at the market rate. On appeal,<sup>21</sup> it was held that there had been no effective withdrawal and the charter continued, with hire being payable, until redelivery on conclusion of the final voyage. Lord Denning MR was of the view that, had there been an effective withdrawal, the owners would have had no claim against the time charterers:

"Even if the notice of withdrawal were effective by itself without more, I cannot see any basis on which the shipowners could recover any sum from the charterers ... If there is cargo on board at the time of the notice of withdrawal—and the shipowner carries it to its destination—he does so by way of fulfilling the original charter or bill of lading—and not by way of any new request by the charterer. So he cannot recover the market rate either on a quantum meruit or otherwise".<sup>22</sup>

16. [1957] 2 QB 401, 436; [1957] 1 Lloyd's Rep 174, 193.

17. A similar finding may be made where there is a persistent pattern of under-payment of hire under a sub time charter. In *London Arbitration 29/16* (2016) 966 LMLN 3, the disponent owner obtained damages for renunciation and the tribunal rejected the argument that there should be no award of damages as it would have been unable to perform the charter, as the owners had withdrawn from the head charter owing to the disponent owner's failure to pay hire.

18. *Spar Shipping* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447, [87], per Gross LJ.

19. An indemnity will be implied into a time charter against the consequences of complying with charterers' orders as to the employment of the vessel: *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon)* [1994] 2 Lloyd's Rep 277 (CA).

20. [1981] 1 Lloyd's Rep 45 (QB).

21. [1982] 1 Lloyd's Rep 232 (CA).

22. *Ibid*, 237. Lord Denning MR was of the view, wrongly, that a withdrawal could not be effected "[i]f they allow the vessel to remain in the service of the charterers, fulfilling contracts of carriage which the charterers have made and the bills of lading that have been already issued".

A post-withdrawal indemnity claim was made in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)*.<sup>23</sup> The vessel was withdrawn at Angra dos Reis in Brazil, having loaded part of a cargo belonging to the time charterers. At this stage loading had not completed and no bills of lading had been issued. Following withdrawal, the cargo then had to be discharged at the loading port, which took 2.64 days. The charterers threatened to arrest the vessel for wrongful withdrawal and the shipowners provided a guarantee for \$18,000,000. The shipowners claimed from the charterers by way of indemnity: (a) compensation at the market rate<sup>24</sup> for the use or detention of the ship between notice of withdrawal and discharge of the cargo, totalling 2.64 days; (b) for fuel consumed during that time; and (c) for the costs of providing and maintaining the guarantee. The owners' indemnity claim was rejected at first instance and in the Court of Appeal on the ground that the post-withdrawal costs had been incurred by reason of the shipowner's decision to exercise its option to withdraw, rather than as a result of the prior orders as regards the cargo to be loaded.

However, the Supreme Court, Lord Mance dissenting, held that all three claims could be recovered under the indemnity.<sup>25</sup> The key question was whether the charterers' order was an effective cause of the owner's having to bear a risk or cost of a kind which he had not contractually agreed to bear. The charterer's order did not have to be the only cause of the loss. The Supreme Court found that the charterers' order to load the parcel of cargo which was on board the vessel when it was withdrawn was the effective cause of the shipowner's loss. Lord Sumption stated:<sup>26</sup>

"The need to discharge the cargo in the owners' time arose from the combination of two factors, namely (i) that the cargo had been loaded, and (ii) that the purpose for which it had been loaded (ie carriage under the charterparty to its destination) had come to an end with the termination of the charterparty. In other words, the cargo which charterers had ordered the vessel to load was still on board when the charterparty came to an end. On any realistic view, this was because the charterers had put it there."

Although it was only because of the withdrawal of the vessel that the subsequent discharge of the cargo had to be done in the owners' time and without earning contractual hire, that was the very reason why the detention of the vessel fell within the indemnity. The owners had not assumed the risk of discharging the cargo in their own time following a withdrawal. Lord Mance dissented on this point, taking the same view as the lower courts: "[t]he owners were not performing the charterers' instructions and they were not receiving hire for the time wasted prior to discharge. The 'direct' or 'unbroken' causal link required by the authorities is lacking".<sup>27</sup> The loss was not caused by compliance with the owners' instructions, but rather because the charter was at an end.

In *The Kos* no bills of lading had been issued and there was no question of the cargo's being carried to its intended destination after the withdrawal. The case was unusual in that the cargo loaded belonged to the charterer. The more common situation following

23. [2009] EWHC 1843 (Comm); [2010] 1 Lloyd's Rep 87; varied [2010] EWCA Civ 772; [2010] 2 Lloyd's Rep 409; rvsd [2012] UKSC 17; [2012] 2 Lloyd's Rep 292; [2012] 2 AC 164.

24. At the time, June 2008, the market rate was some three and a half times the charter hire.

25. [2012] UKSC 17; [2012] 2 Lloyd's Rep 292; [2012] 2 AC 164.

26. *Ibid.*, [13].

27. *Ibid.*, [51].

a withdrawal would be that the cargo would belong to third-party shippers who had the expectation of freight prepaid bills of lading being issued by the shipowner on completion of loading. In this situation, might the shipowners be able to claim under the indemnity for the costs of performing the bill of lading voyage? On the indemnity analysis adopted by four Justices of the Supreme Court, the costs of performing such a voyage would be recoverable under the time charterer's indemnity, whether express or implied, as being costs consequent upon the time charterer's order to load the cargo and to issue bills of lading, marked "freight prepaid", so precluding recovery of freight from the holders of the bills. Even the dissenting Justice, Lord Mance, was of the view that the indemnity might be engaged in this situation, leading to charterers having to pay owners the market rate: "Further, if owners were left with no practical option but to carry the cargo to its destination, then they might still have an argument that their time and money were spent 'in compliance with the time charterers' instructions'."<sup>28</sup>

### III. REMEDIES AGAINST BILL OF LADING HOLDERS AND SUB-CHARTERERS

#### (a) Contractual claims under the bill of lading

Following a withdrawal, the shipowner may also seek to recover its costs from other parties involved in the carriage of the cargo left on board at the time of the termination of the time charter. Where the cargo is in the process of being loaded when the vessel is withdrawn, the immediate question arises whether the shipowner may cease loading and discharge the cargo on board at the port of loading, as happened in *The Kos*, where the partly loaded cargo belonged to the time charterer. The answer will depend on the law of the contract between the shipowner and the shipper that will come into existence at the start of loading, which will be determined by the law of the place of loading.<sup>29</sup>

Under English law, it is likely that there will be an implied contract between the shippers and the shipowners which starts when loading begins and that contract will be on the terms of the bill of lading that will be issued on completion of loading, including terms relating to applicable law and jurisdiction.<sup>30</sup> Accordingly, once loading starts, the shipowners will be contractually obliged to complete loading. That contract will be on the terms of the bill

28. *Ibid.*, [50].

29. Where the place of loading is in a Member State of the EU, the law to be applied to this issue will be determined by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Article 10 provides: "1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid. 2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1."

30. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 426; [1954] 1 Lloyd's Rep 321, 333, *per* Devlin J: "There is an alternative way by which, on the facts of this case, the same result would be achieved. By delivering the goods alongside the seller impliedly invited the shipowner to load them, and the shipowner by lifting the goods impliedly accepted that invitation. The implied contract so created must incorporate the shipowner's usual terms; none other could have been contemplated; the shipowner would not contract for the loading of the goods on terms different from those which he offered for the voyage as a whole."

of lading which the charterer has agreed will be issued by the shipowner on completion of loading.<sup>31</sup> Where these are to be “freight prepaid” bills, the shipowner will be contractually obliged to fulfil the bill of lading voyage without being able to recover anything from third-party bill of lading holders. As regards the shipper, the factual matrix may indicate that there is no undertaking to pay freight, and this will be the case where the bill of lading contains no freight clauses of its own and does not incorporate the terms of any charterparty.<sup>32</sup> Agreements with the holders of such bills for contributions towards the costs of performing the voyage are likely to be voidable for economic duress, as any such agreement is likely to have been made in response to an illegitimate threat not to perform the voyage.<sup>33</sup>

The obligation to pay freight under the bill of lading is likely to arise through the incorporation into the bill of lading of the terms of a charter. Where the shipowner has concluded a voyage charter, the bill of lading will generally incorporate the terms of that charter, so giving the shipowner additional security for payment of sums due under the charter, and, where there is a cesser clause, enabling the transfer of the obligations under the charter from the charterer to the bill of lading holder. Where the vessel is on time charter, it will be the time charterer who makes the contracts of carriage for the voyages covered by the bills of lading, and under most forms of time charter the charterer will have control over the forms in which those bills of lading are to be issued. The time charterer may well wish to secure payment from the sub-charterer and will achieve this by requiring the shipowner to issue a bill of lading incorporating the terms of the sub-charterer. The time charterer’s remedies, such as the lien on cargo, will be exercisable through the shipowner under this separate contract with the sub-charterer shipper under the bill of lading. The employment clause will entitle the time charterer to give orders to the shipowner to exercise its lien on cargo under the contract contained in or evidenced by the bill of lading.<sup>34</sup> The presence of “freight prepaid” wording on the bill of lading will estop the shipowner from exercising its contractual right to freight, or to exercise a lien over the cargo for outstanding freight, as against parties other than the person liable to pay freight under the incorporated charter—generally the shipper under the bill of lading.<sup>35</sup>

A peculiarity of a bill of lading contract which incorporates a sub-, or sub-sub-, charter is that the obligation to pay freight is not owed to the shipowner, but to the time charterer; so how can the shipowner require payment to himself? The shipowner’s rights to freight

31. The time charterer will be able to procure a bill of lading in its chosen form, such as one claused “freight prepaid” by reason of the common time charter provision that the master is to sign bills of lading as presented. The clause will give the time charterer implied authority to sign the bills of lading itself on behalf of the master. *W&R Fletcher (New Zealand) v Sigurd Haavik A/S (The Vikfrost)* [1980] 1 Lloyd’s Rep 560 (CA). This authority should also extend to the creation of the contract between the shipper and the shipowner on the terms of the bill of lading that it is anticipated will be issued on shipment.

32. *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd’s Rep 641 (CA).

33. *Vantage Navigation Corp v Suhail and Saud Bahwan Building Material (The Alev)* [1989] 1 Lloyd’s Rep 138 (QB).

34. *Castleton Commodities Shipping Co Pte Ltd v Silver Rock Investments Inc (The Clipper Monarch)* [2015] EWHC 2584 (Comm); [2016] 1 Lloyd’s Law Rep 1.

35. Freight was claimed from the shipper under “freight prepaid” bills of lading incorporating the terms of a sub-charter in *India Steamship Co Ltd v Louis Dreyfus Sugar Ltd (The Indian Reliance)* [1997] 1 Lloyd’s Rep 52 (QB) and *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2012] EWHC 2107 (Comm); [2012] 2 Lloyd’s Rep 594; affd [2013] EWCA Civ 184; [2013] 2 Lloyd’s Rep 38; [2013] 1 WLR 3440.

under the bill of lading, and their relationship with their claims under the time charter, were considered in *Wehner v Dene Steam Shipping Co.*<sup>36</sup> A shipowner's bill of lading had been issued providing for the payment of freight on right and true delivery. The time charterers were in default and the shipowner gave notice to the sub-charterer's agents at the port of discharge that freight under the bill of lading was to be paid for the account of the shipowner. Channell J held that this was correct, as the bill of lading was a contract with the shipowner, and the sub-charterer's agents were also to be regarded as the agents of the shipowner for the purposes of collecting freight under the bill of lading. The shipowners would be entitled to retain the amount due from the time charterers, as at the date of giving notice to the agents that payment was to be made to them, and to account for any surplus to the time charterer or sub-charterer as the case may be.

This analysis has been carried through into the more common situation where the time charterer instructs the shipowner to issue bills of lading incorporating the terms of either its sub-charter, or of a sub-sub-charter. In *The Indian Reliance*,<sup>37</sup> Rix J, as he then was, held that the time charterer was constituted the shipowner's agent for receipt of freights under the bill of lading.<sup>38</sup> This was on the basis of the employment clause in the time charter.<sup>39</sup> Payment to the agent would be treated as payment to the shipowner. Accordingly, payment to the time charterers of the 95% freight due under the sub-charter incorporated into the bill of lading prior to the shipowner's giving notice to the sub-charterer/shipper discharged its liability to the shipowner under the bill of lading to that extent.

The shipowner's right to claim freight under such a bill of lading might be problematic in that the incorporated charter will direct payment to the disponent owner. Rix J was of the view that the incorporation of the charter provision specifying the nominated account for payment of freight should be treated as making the freight due to the owners, but payable to the time charterer:<sup>40</sup>

"The effect of such payment would be that owners could not thereafter seek to claim freight a second time or seek to lien cargo on the basis of freight going still unpaid. If, however, owners intervened to claim the freight before it was paid to the nominated account, then they would be in time to intercept it."

In *The Spiros C*,<sup>41</sup> the issue resurfaced with the bill of lading shipper arguing that a debt payable to a third party cannot be sued for as a debt by the promisee: Rix LJ despatched that argument as follows:<sup>42</sup>

36. [1905] 2 KB 92 (QB).

37. [1997] 1 Lloyd's Rep 52 (QB).

38. This is not the case where the head charter is a voyage charter. Thus, in *Compania Comercial y Naviera San Martin SA v China National Foreign Trade Transportation Corp (The Constanza M)* [1980] 1 Lloyd's Rep 505 (aff'd [1981] 2 Lloyd's Rep 147 (CA)) the sub-charterer's payment to the head charterer did not discharge its liability for freight under the bill of lading which incorporated the terms of the head charter—under which freight had not been paid.

39. See *Wehner v Dene* [1905] 2 KB 92 (QB) in which Channell J had found to this effect by reason of the standard employment clause which provided that the captain was to sign bills of lading at any rate of freight that may be directed by the charterer.

40. [1997] 1 Lloyd's Rep 52 (QB), 58.

41. *Tradigrain SA v King Diamond Shipping SA (The Spiros C)* [2000] 2 Lloyd's Rep 319.

42. *Ibid*, 331 [56]. The Court of Appeal held that deductions from freight agreed by the time charterer with the shipper prior to the shipowner's intervention could not be recovered by the shipowner under the contract evidenced by the bill of lading.

“Prima facie that might seem to be correct, but as *Chitty* remarks in the passage at para 19-044 cited by Mr Males: ‘The objection loses much of its force if the promisor would not in fact be prejudiced by having to pay the promisee rather than the third party.’”

There is then a reference in footnote 97 to para 19-060, where the following appears:

“‘But the question whether the promisee [the owner] can unilaterally (ie without the consent of the promisor) [Tradigrain] demand that payment be made to himself depends once again on the construction of the contract. If the contract can be construed as one to pay the third party ‘or as the promisee shall direct’ then the promisee is entitled to demand payment to himself.’”

In Rix LJ’s view, a bill of lading in which freight was payable as per charterparty was probably such a contract. This view was subsequently endorsed by the Court of Appeal in *Dry Bulk Handy Holding Inc and another v Fayette International Holdings Ltd and Another (The Bulk Chile)*,<sup>43</sup> in which they held that the shipowner does have the right to redirect to itself payment of the freight due under the charter incorporated in the bill of lading. The case involved default under a time charter, in which the time charterer then went into liquidation in South Korea. The owners then sought to claim sub-hires from the trip sub-charterer, Fayette, and sub-sub-freight from the sub-sub-charterer, and shipper under the bill of lading, Metinvest. The three bills of lading provided for “Freight payable as per [the voyage charterparty]” and were marked “freight prepaid”. After the time charterer, KLC, had failed to pay hire, shipowners gave notice of lien on 1 February to Metinvest and Fayette.<sup>44</sup> The following day the vessel started loading cargo at Sevastopol, the first of her two loading ports. On 5 February owners gave a second notice of lien to Metinvest and Fayette, stating that the lien extended to “cargo now on loaded on board ... to be carried under bills of lading numbers ...”. On 8 February loading completed and the bills of lading were issued to Metinvest, as shipper. On 26 February owners withdrew from the KLC charter. On 1 March Fayette gave owners notice of redelivery and on 5 March they instructed the master to proceed to the bill of lading destination ports and fulfil the delivery obligations under bills of lading. On 10 March the cargo was delivered and on April 2011 Metinvest paid freight to Fayette of US\$2,591,291.99.

The owners claimed against Metinvest for freight under the bill of lading.<sup>45</sup> Andrew Smith J held that the owners were entitled to recover the freight, provided that they gave notice to Metinvest before they had paid the freight to Fayette.<sup>46</sup> Although the notice given had been titled “Notice of Lien”, the second request in it made clear that it also required payment of freight due under the bill of lading direct to the shipowner. The right to freight subsisted notwithstanding that the charter referred to in the bill of lading specified payment

43. [2012] EWHC 2107 (Comm); [2012] 2 Lloyd’s Rep 594; affd [2013] EWCA Civ 184; [2013] 2 Lloyd’s Rep 38; [2013] 1 WLR 3440.

44. The notice stated that Metinvest and Fayette : “are kindly required to treat this message as Notice of Lien over any balance of freight(s) and/or hire(s) due under any charters, bills of lading, or other contracts of carriage relating to the voyage(s) and cargo(es) covered by the above bills of lading”, and that the addressees were requested to: “(1) Confirm to us the amount of freight(s) and/or hire(s) due from you under any charters, bills of lading, or other contracts of carriage relating to the voyage(s) and cargo(es) covered by the bills of lading; and (2) Arrange payment of all such freight(s) and/or hire(s) in your hands directly to our account when due, as below”.

45. The owners also claimed freight from Metinvest and Fayette by way of a lien on sub-freight and against Fayette for quantum meruit hire. These claims are discussed later in this paper.

46. In this case, the charter required payment of freight, but did not specify a payee, and it was presumed that payment was to be made to Fayette as the disponent owner under the charter.

of freight to a third party, not to the shipowner. The full freight due could be claimed by giving notice to the shippers at any time prior to their paying the charterer, and this right did not depend on any sums being due to the shipowner under the time charter. The Court of Appeal endorsed this analysis, Tomlinson LJ stating:<sup>47</sup>

“the nominated recipient is, as between the shipowner and the shipper, to be regarded as the shipowner’s agent. ... I cannot see why the shipowner’s contract with the shipper should be taken to preclude the shipowner from cancelling his nominated agent’s authority to act on his behalf in receiving the freight, before such payment has been made, and requiring it to be made to himself. ... It follows that I see no difficulty in the shipowner countermanding his direction to the shipper to pay freight to a third party provided of course that he does so before the shipper has made the payment as initially directed.”

It made no difference that the first notice was given before loading of cargo started and before the issue of any bill of lading, Tomlinson LJ observing:<sup>48</sup>

“I can see no basis upon which the shipowner can be prevented from stipulating in advance the terms upon which he would be prepared to enter into a contract of carriage with the shippers. Indeed, that might be thought less objectionable than countermanding after their issue the direction given in the bills of lading.”

The claim to freight was not limited to the amount due from the head charterer. If there were a surplus of freight over the shipowner’s claim, that would have to be held for the account of the head charterer.<sup>49</sup> This might create difficulties if the time charterer were insolvent, but in the present case the problem did not arise. The owners had undertaken to the court that they would not enforce their judgment against Metinvest for the full amount of the freight, US\$2.18 million, for a sum greater than US\$1,339,625.93, which was the combined total of hire due and unpaid under the head charter and the amount of remuneration to which the owners were entitled from Fayette consequent upon their implied request that the owners should continue to make the vessel available to Fayette following the withdrawal. Furthermore, the shipowner can intervene and claim the bill of lading freight even when there is no default under the head charter, although Tomlinson LJ regarded it as arguable that a time charterer could restrain the shipowner from claiming freight in these circumstances “on the simple ground that until such time as the charterer is in default the shipowner has, by reason of clause 8 of the NYPE Form, or a similar employment clause, agreed to delegate collection of freight to the charterer”.<sup>50</sup>

There are some problems with this analysis. First, it will be the time charterer who has instructed the shipowner to issue bills of lading incorporating the sub-charterer, with a view to protecting its rights against the sub-charterer, rather than to creating a parallel contractual right to those sub-freights under the contract contained in or evidenced by the bill of lading. Although this will create a contract between the shipowner and the shipper, the freight due will be determined by the terms of the incorporated charter. The construction of the payment instructions in the incorporated charter so as to pay the charterer or as

47. [2013] EWCA Civ 184; [2013] 2 Lloyd’s Rep 38; [2013] 1 WLR 3440, [25].

48. *Ibid.*, [32].

49. *Wehner v Dene* [1905] 2 KB 92 (QB).

50. *The Bulk Chile* [2013] EWCA Civ 184; [2013] 2 Lloyd’s Rep 38, [28]; [2013] 1 WLR 3440, [28].

the shipowner may direct would have to be read back into the charter itself, a separate contract that will pre-date the bill of lading incorporating it. Second, assuming that the bill of lading does give the shipowner the right to direct payment of sub-freights to itself, the obligation to account for any surplus received when the bill of lading incorporates a sub-sub-charter should surely be owed to the disponent owner under the sub-charter, to whom the freight is contractually due, rather than to the time charterer, to whom it is not.<sup>51</sup> Third, consideration needs to be given to the mechanism by which the shipper's payment of freight to the shipowner would discharge its obligation to pay freight to the disponent owner under its charterparty. This could be achieved by implying a term into a voyage charter that provides for the issue of shipowners' bills of lading incorporating the freight provisions of the voyage charter, that a payment to the shipowner under the bill of lading will discharge the obligation to pay the disponent owner freight under the voyage charter.

### (b) Non-contractual claims against cargo owners

In *The Kos*,<sup>52</sup> the shipowners advanced their claim for recovery of costs and time incurred in the post-withdrawal period on the alternative ground of a non-contractual bailment. Relying on *China Pacific SA v Food Corpn of India (The Winson)*,<sup>53</sup> Andrew Smith J allowed the shipowners to recover both reasonable expenses and reasonable remuneration. Although the claim in *The Winson* was only for reasonable expenses incurred by the shipowner, the principle set out by Lord Diplock—that the bailor's liability arises because he had enjoyed the benefit of the bailee's services—justified the recovery of reasonable remuneration in respect of the bailee's performance of its duty to hold the cargo available to the bailor.<sup>54</sup> The Court of Appeal reversed the decision in part, allowing only the reasonable expenses incurred by the shipowner. Longmore LJ found that remuneration would require an express or implied agreement, which was not present here; the shipowners were doing no more than required of a gratuitous bailee in the post-withdrawal period.

The Supreme Court unanimously reinstated the findings of Andrew Smith J and allowed the shipowners to recover quantum meruit remuneration for the 2.64 days between withdrawal and the time the ship sailed away. There had been a consensual bailment of the charterers' cargo, which ceased to be contractual following the withdrawal, after which owners owed a continuing duty to take reasonable care of the cargo until arrangements had been made for its discharge. The principle derived from cases which had described it as arising out of an agency of necessity of the carrier.<sup>55</sup> Lord Sumption stated:<sup>56</sup>

51. In *Wehner v Dene* [1905] 2 KB 92, 99, Channell J spoke of any surplus being accounted for to the time charterer or the sub-charterer, as the case might be. Coghlin, Baker, Kenny, Kimball, Belknap, *Time Charters*, 7th edn (Informa, London, 2014), [30.79] suggests that "The better view is that the owners' obligation to account arises from an implied term of the time charter, and is therefore owed only to the charterers".

52. [2009] EWHC 1843 (Comm); [2010] 1 Lloyd's Rep 87; varied [2010] EWCA Civ 772; [2010] 2 Lloyd's Rep 409; rvsd [2012] UKSC 17; [2012] 2 Lloyd's Rep 292; [2012] 2 AC 164.

53. [1982] 1 Lloyd's Rep 117; [1982] AC 939.

54. In his note on the decision ([2010] LMCLQ 226, 231) Professor Gerard McMeel made the point that the assessment of that benefit might have to be on a land-based storage facility rate.

55. *Gaudet v Brown (Cargo ex Argos)* (1873) LR 5 PC 134 and *Great Northern Railway Co v Swaffield* (1874) LR 9 Ex 132.

56. [2012] UKSC 17, [26].

“The decisive point, and the sense in which the word ‘necessity’ is used in these cases, is that if the bailee is in a position where he has no way of discharging his responsibility to care for the goods without incurring loss or expense, then the loss or expense is for the account of the goods-owner.”

Lord Sumption also considered that this principle would justify a claim to remuneration where the claimant stored and handled the goods with his own facilities:<sup>57</sup>

“The opportunity cost of retaining the vessel in Angra dos Reis while the charterers’ cargo remained on board was a true cost even if it was not an out of pocket expense.”

*The Kos* involved a situation where a contractual bailment came to an end and was replaced by a gratuitous bailment. Bailment will also be relevant where goods are carried under a non-contractual bailment, which will be the case when the shipowner carries goods for which charterers’ bills have been issued. The shipowner will be under no obligation to complete the bill of lading voyage but will owe the owners of the cargo a duty as bailee to take reasonable care of the cargo while it is in their custody.<sup>58</sup> If the shipowners perform the voyage, it is possible that a claim for freight may lie against the shipper, even if the bill is a freight prepaid bill. Such a claim was advanced in *Ngo Chew Hong Edible Oil Pte Ltd v Scindia Steam Navigation Co Ltd (The Jalamohan)*,<sup>59</sup> although it failed once the bills were found to be shipowners’ bills. The Supreme Court’s reasoning in *The Kos* would suggest that a claim for remuneration could be advanced by the shipowner who carried the cargo to its destination under a charterer’s bill, without the necessity for acting under any express or implied request. This was the view of Andrew Smith J in *The Bulk Chile*. Had there been no contractual claim to freight under the bill of lading, compensation could have been claimed from Metinvest on the basis of a quantum meruit. The bailee is entitled to recover in respect of carriage of bailed cargo if that is “the best and cheapest way of making [it] available to the [bailor]”.<sup>60</sup> Here owners took the only course reasonably and practically open to them when they carried the cargo to Malaysia and Indonesia and delivered it there.

A claim for remuneration on a quantum meruit basis may also arise if a third party requests the shipowners to perform the bill of lading voyage. This was the case in *Mutual Export Corp v Australian Express Ltd (The Lakatoi Express)*,<sup>61</sup> where the sub-charterers requested that the owners perform the voyage in the charterer’s bill of lading. Similarly, a right to remuneration will arise against a charterer down the chain if they intervene and request the shipowner to fulfil its carriage and delivery obligations under a shipowner’s bill

57. *Ibid*, [29]. Two other grounds were canvassed: a new contract arising between shipowners and time charterers as regards discharge of the cargo, but this was rejected; a claim in restitution which was viewed as possible, but Lord Sumption considered it unnecessary to express a view on it. The claim would probably be one for a reasonable remuneration for free acceptance of a benefit.

58. *Sunrise Maritime Inc v Uvisco Ltd (The Hector)* [1998] 2 Lloyd’s Rep 287. By contrast, there is the Australian decision in *Gadsden Pty Ltd v Strider 1 Ltd (The AES Express)* (1990) 20 NSWLR 57 that, following a withdrawal, the shipowner takes over the charterers’ obligations under the charterers’ bills of lading.

59. [1988] 1 Lloyd’s Rep 443. In *The AES Express* (1990) 20 NSWLR 57 the shipowner was unable to claim freight under the charterers’ bills of lading as it had already been paid to the charterer.

60. *Cargo ex Argos* (1872) LR 5 PC 134, 165, per Sir Montague Smith.

61. (1990) 19 NSWLR 285. Carruthers J held that the sub-charterers were obliged to pay the shipowner a reasonable remuneration for the use of the vessel after the repudiation, and sub-charterers could then claim this as damages against the time charterer. However, the shipowners obtained no right to lien the cargo in respect of such implied remuneration.

of lading. This was the case in *The Bulk Chile*, where Andrew Smith J, whose decision was upheld in the Court of Appeal, found that the shipowner would be entitled to remuneration on a quantum meruit basis from Fayette based on their notice of redelivery of 1 March and their request of 5 March that the cargo be carried to its destination, notwithstanding that this was a service that the shipowners were obliged to perform under the bill of lading.<sup>62</sup>

#### IV. RIGHTS OF LIENS UNDER THE TIME CHARTER

Most time charters will provide the shipowner with two rights of lien. The first is a lien on cargo, a possessory right to retain possession of the cargo pending payment of sums due under the charter. This will be either a common law lien for freight due on right and true delivery of the cargo, and for general average, or a contractual lien for sums due under the charterparty,<sup>63</sup> which will affect the bill of lading holder only if the bill of lading incorporates the provisions of the charter. The second is a right to lien sub-freights or sub-hires, which operates by entitling the shipowner to intercept payments due to the time charterer under sub-charters before payment has been made thereunder.

##### (a) The lien on cargo

The right to lien the cargo on board the vessel is of limited value in the usual situation where the time charterer is not the owner of the cargo loaded onto the vessel. For the contractual lien to be effective against the cargo owner, its provisions need to be incorporated into the bill of lading.<sup>64</sup> Absent such incorporation, any denial of possession of the cargo will amount to a conversion as well as a breach of the contract under the bill of lading. The lien on cargo may be made effective against the third-party owner of the cargo through the terms of the bill of lading itself, or through the incorporation into the bill of lading of the terms of the charter, be it the time charter or a sub-charter, that provides for a lien to be exercised over the cargo in respect of claims under that charter.<sup>65</sup> However, the statement "freight prepaid" in a bill of lading will estop the shipowner from exercising any right of lien as against a bill of lading holder which is not also a party to the charter incorporated in the bill of lading.

62. The owners also claimed compensation from Fayette in restitution on the ground of their free acceptance of a benefit. Andrew Smith J considered (at [82]) that English law probably did provide quantum meruit relief for "freely accepted" services but, although Fayette had received a benefit from the performance of the bill of lading contracts, there had been no free acceptance. Fayette were in no position to prevent CSAV from carrying out their obligations under the bills of lading contracts.

63. See, eg, cl.18 of the NYPE 1946 form.

64. As regards the time charterer, there are conflicting first instance decisions as to whether the cargo may be liened when the charterer is not the owner of the cargo. In *Aegnoussiotis Shipping Corp of Monrovia v Kristian Jebsens Rederi of Bergen AS (The Aegnoussiotis)* [1977] 1 Lloyd's Rep 268, Donaldson J held that the exercise of a lien in such circumstances was valid against the charterer. Mocatta J had previously found to the contrary in *Steelwood Carriers of Monrovia v Evimeria Compania Naviera SA of Panama (The Agios Giorgis)* [1976] 2 Lloyd's Rep 192.

65. If a lien subsists, the shipowner will also be able to claim the cost of exercising it: *Metall Market OOO v Vitorio Shipping Co Ltd (The Lehmann Timber)* [2013] EWCA Civ 650; [2014] QB 760; [2013] 2 Lloyd's Rep 541.

### (b) The lien on sub-freights

The lien on sub-freights is a right of the shipowner to require payment to him by the sub-charterer of sub-freights in the event of sums being due to him under the head charter.<sup>66</sup> It is exercisable by giving notice to the sub-charterer before payment is made to the head charterer.<sup>67</sup> The lien may also be expressed to apply to sub-hires but there is a divergence of first-instance authority as to whether a lien on sub-freights extends to sub-hires. In *Care Shipping Corp v Latin American Shipping Corp (The Cebu)*,<sup>68</sup> it was held that sub-hires were subject to the lien, but in *Itex Itagrani Export SA v Care Shipping Corporation and Others (The Cebu) (No 2)*,<sup>69</sup> it was held that they were not. In *The Bulk Chile*, Andrew Smith J, albeit reluctantly, followed the second of these decisions and held that the lien on sub-freights did not extend to sub-hires, but was exigible against the freight due from Metinvest under their charter with Fayette. The right may be exercised in respect of freight, or hire, due from a sub-sub-charterer if the sub-charter contains a lien on sub-freights or sub-hire.<sup>70</sup> The shipowner may, therefore, exercise his lien against multiple parties, sub-charterers, and sub-sub-charterers by virtue of the equitable assignments effected by the lien clauses in the chain of charters. However, where a charter in the chain does not contain a lien clause, there can be no lien on freights due under sub-charters below that charter.<sup>71</sup>

Judicial opinion is also divided as to how the lien on sub-freights operates.<sup>72</sup> There have been a series of first instance decisions in which it has been categorised as an equitable assignment.<sup>73</sup> In *The Western Moscow*,<sup>74</sup> Christopher Clarke J held that it operates by way of equitable assignment by way of charge, noting, “Further, if the right is only some form of sui generis contractual right, it is one of restricted use. It would give the owners no

66. The lien clause will usually provide for a lien for any sums due under the charter, as is the case with cl.18 of NYPE 1946. This would mean that the lien should be exercisable in respect of a claim for damages for renunciation by the time charterer. The proposition was asserted by owners in *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS (The Western Moscow)* [2012] EWHC 1224 (Comm); [2012] 2 Lloyd’s Rep 163, [30–31] but the issue did not need to be decided as the sub-freights claimed were lower than the amount of the shipowner’s damages claim for renunciation.

67. The lien may be defeated by a prohibition on assignment in the sub-charter. The issue was adverted to, but not decided, in *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch); [2011] 2 All ER (Comm) 481, [30] and in *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS (The Western Moscow)* [2012] EWHC 1224 (Comm); [2012] 2 Lloyd’s Rep 163, [73].

68. [1983] 1 Lloyd’s Rep 302.

69. [1990] 2 Lloyd’s Rep 316. Many charters will now provide for the lien to lie against all sub-freights and sub-hires, as is the case with line 260 of NYPE 1993.

70. *The Cebu* [1983] 1 Lloyd’s Rep 302 (QB); *The Western Moscow* [2012] EWHC 1224 (Comm); [2012] 2 Lloyd’s Rep 163, [61], Christopher Clarke J holding that this is the effect of the charter clause giving a lien on “all subhires”.

71. As was the case in *The Western Moscow* [2012] EWHC 1224 (Comm); [2012] 2 Lloyd’s Rep 163.

72. The view that the lien creates an equitable charge derives from *dicta* of Lord Russell of Killowen in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1979] AC 757, 784; [1979] 1 Lloyd’s Rep 201, 210, and has been applied at first instance in *Re Welsh Irish Ferries Ltd (The Ugland Trailer)* [1986] Ch 471; [1985] 2 Lloyd’s Rep 372; *Annangel Glory Compania Naviera S.A. v M.Golodetz Ltd, Middle East Marketing (UK) Ltd and Clive Rober Hammond (The Annangel Glory)* [1988] 1 Lloyd’s Rep 45 and *The Cebu (No 2)* [1990] 2 Lloyd’s Rep 316.

73. The assignment in the time charter will operate as an agreement to transfer choses in action that have not yet come into existence—the rights to freight under future sub-charters. The effect in equity of this agreement is that when the chose in action does come into existence, a trust is constituted over the chose in action by the assignor in favour of the assignee: *The Annangel Glory* [1988] 1 Lloyd’s Rep 45, 47 col.2.

74. [2012] EWHC 1224 (Comm); [2012] 2 Lloyd’s Rep 163.

direct claim against the sub-charterer; but only a right to have the charterers restrained from receiving the sub-charter hire or ordered to direct its payment to the owners or to a blocked account".<sup>75</sup> The lien on sub-freights has the characteristics of a floating charge in that it creates a charge over assets of the charterer, the freights or sub-hires due to the charterer, both present and future.<sup>76</sup> The right cannot be exercised if nothing is due to the owner. No proprietary interest is created until something is due to the owner and notice of lien is given. Until then the charterer can claim the freights in the ordinary course of business and payment by the sub-charterer will discharge it from any liability to the owner.<sup>77</sup> The giving of notice crystallises the proprietary right so that from then on the security becomes a fixed charge over the debt due to the charterer. The other view is that the lien on sub-freights is a personal contractual right of interception analogous to an unpaid seller's right of stoppage in transit, and not a charge or proprietary right at all.<sup>78</sup> Whatever the basis of the right, on receipt of a notice of lien the sub-charterer will face two competing claims to the freight and would be wise to make a stakeholder application to the court under Part 86 of the Civil Procedure Rules to avoid the possibility of having to make a double payment.<sup>79</sup>

It is also unclear whether the lien operates as an assignment of all the freight or as an assignment of so much of the freight as is represented by the debt owed. The former view is supported by observations in *The Cebu (No.1)*<sup>80</sup> of Lloyd J, with whom Christopher Clarke J agreed in *The Western Moscow*.<sup>81</sup> On this view, the security created would be a floating mortgage. However, Nourse J in *Re Welsh Irish Ferries Ltd (The Uglund Trailer)*<sup>82</sup> was of the view that, "Having been given for any amounts due under the charter, it obviously cannot be an out-and-out assignment. It can only be an assignment by way of security for what is owed by the charterer to the shipowner". If the former, the greatest amount claimable by the owners down the chain of assignments from the time charterers would be for the value of the largest sum owed at any link in the chain. If the latter, the claim could

75. Christopher Clarke J referred with approval to the analysis of the lien on sub-freight propounded by Graeme Bowtle, "Liens and Sub-freights" [2002] LMCLQ 289.

76. After the decision of the House of Lords in *Re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41; [2005] 2 Lloyd's Rep 275; [2005] 2 AC 680, the lien on sub-freight can only be regarded as a floating charge, as it permits the sub-charterer to pay and the time charterer to receive the freight pending any exercise of the lien.

77. *Tagart, Beaton v James Fisher* [1903] 1 KB 391 (CA).

78. This argument was propounded by Dr Fidelis Oditah, "The Juridical Nature of a Lien on Sub-freights" [1989] LMCLQ 191, and has been endorsed by Lord Millett, in *Agnew v IRC* [2001] UKPC 28; [2001] 2 AC 710; [2001] Lloyd's Rep Bank 251, [38–41]. In *Samsun Logix Corp v Oceantrade Corp* [2007] EWHC 2372 (Comm) [41]; [2008] 1 Lloyd's Rep 450, [41], Gross J was of the view that: "even if the clause 18 lien is not a charge because, in accordance with Lord Millett's opinion, it confers no proprietary rights, if it is analogous to a right of stoppage *in transitu*, it is likely in any event to accord priority in bankruptcy: see *Benjamin's Sale of Goods*, 5th edn (1997), [15.062]."

79. See *Libyan Navigator Ltd v Lamda Maritime Holdings S.P.Z.O.O., Standard Tankers LLC* [2014] EWHC 1399, where Males J held that it was appropriate to grant a sub-charterer interpleader relief requiring it to pay the disputed freight into court.

80. [1983] 1 Lloyd's Rep 302, 308 col.2: "So here, the equitable assignment by LAMSCO to Naviera Tolteca was effective to transfer to Naviera Tolteca the whole right of LAMSCO to receive freight due from ITEX, so long as there was anything due from LAMSCO to Naviera Tolteca."

81. [2012] EWHC 1224 (Comm); [2012] 2 Lloyd's Rep 163, [60–61].

82. [1986] Ch 471, 478; [1985] 2 Lloyd's Rep 372, 374 col.2. This view was previously taken by Lord Russell in *The Nanfri* [1979] 1 Lloyd's Rep 201, 210; [1979] AC 757, 784: "The lien operates as an equitable charge upon what is due from the shipper to the charterer."

be for the value of the smallest sum owed at any link in the chain. However, the distinction may not matter in practice, because with a floating mortgage once the debt secured has been discharged any surplus would be held on resulting trust for the debtor.<sup>83</sup>

On the basis that the lien constitutes a floating charge, where the charterer is a UK company the lien must be registered in accordance with the Companies Act 2006, s.859A<sup>84</sup> within 21 days of the charge being created, which will be the date of the time charter itself.<sup>85</sup> Failure to do so will render the charge void against any liquidator, administrator or creditor of the charterers, but the provision will apply only where the time charterer is a UK company.<sup>86</sup>

However, registration may be required by the law of the country in which the charterer is incorporated, and it will be this law which will become relevant in the event of the charterer's insolvency. This was the case in the recent decision of the Singapore High Court in *Duncan, Cameron Lindsay v Diablo Fortune Inc.*<sup>87</sup> The Singapore charterers went into liquidation and the liquidator successfully contended that the lien was void against them for want of registration under the Singapore Companies Act, s.131(1). The shipowners contended that the charter was subject to English law, and that it was the UK Companies Act 2006 that applied to the registration of charges and whose provisions applied only to companies incorporated in England, Wales, or Scotland, but not to a company incorporated abroad. The Singapore High Court held that, as the company was incorporated in Singapore, the requirements of the Singapore Companies Act, s.131 applied regardless of the law governing the creation of the charge or the location of the property. A distinction needed to be made between the law governing the initial validity and/or creation of the security interest and the law governing the priority of such interests and the distribution of assets in the insolvency of the company. The latter issues are resolved by the law of the state in which the insolvency proceedings are commenced. The invalidity of a charge as against a liquidator due to non-registration is one such issue.

The process of claiming freight due under the sub-sub-charter by way of lien is very similar to that involved in claiming freight due under the bill of lading incorporating that sub-sub-charter. In both cases notice must be given to the sub-sub-charterer/bill of lading holder before freight is paid on up the chain.<sup>88</sup> The lien notice must inform the sub-charterers that the owners are assignees of debts owed by them, what debts are so assigned, that an amount is due to owners under the head charter, and that owners require the assigned debts to be paid directly to them. The notice does not need to specify how much is due to owners

83. By analogy with *Charles v Jones* (1887) 35 Ch D 544, 549.

84. Introduced the Companies Act 2006 (Amendment of Pt 25) Regulations 2013 (SI 2013/600) and covering charges created on or after 6 April 2013.

85. *The Ugland Trailer* [1986] Ch 471; [1985] 2 Lloyd's Rep 372, and *The Annangel Glory* [1988] 1 Lloyd's Rep 45, which were decided under the equivalent provisions of the Companies Act 1948 and the Companies Act 1985 respectively.

86. Since 2011, the registration requirements no longer apply to overseas companies with a place of business in the UK: Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011 (SI 2011/2194).

87. [2017] SGHC 172; noted I Teo [2018] LMCLQ 14.

88. And before notice is given by any other party, such as a bank, to whom the charterer may have assigned the freight. The claim of the first assignee to give notice will prevail, even if its assignment was not the first in time to be created: *G&N Angelakis Shipping Co SA v Compagnie Nationale Algerienne de Navigation (The Attika Hope)* [1988] 1 Lloyd's Rep 439 (QB).

under the head charter,<sup>89</sup> provided that it specifies that an amount is due, and can cover sub-freights which have not yet become due. In *The Bulk Chile* the notice was given well before eventual payment of the sub-freight and before the time at which payment had fallen due, which was two banking days after completion of loading. Andrew Smith J held that an effective notice could be given in respect of sub-freights which would become due in the future.<sup>90</sup> The chose in action which had been assigned, the right to freight, was created when the charter was concluded, so there was no question of enforcement against future debts.<sup>91</sup>

However, the legal basis of the two rights is not the same. One involves an assignment of rights to freight under a sub-charter, the other a contractual right to freight under a bill of lading. The lien on sub-freights may be asserted not only against the sub-charterer but against sub-sub-charterers, if the sub-charter provides for a lien on sub-freights, whereas the claim to freight under the bill of lading is a claim against a single party for a single amount of freight. The provisions of the bill of lading, such as "freight prepaid" clausing, will clearly affect the claim to freight, but these will have no effect on the operation of the lien on sub-freights. The lien on sub-freights is exercisable only if sums are due to the shipowner under the time charter, whereas the claim to bill of lading freight may be made irrespective of any sum being due under the time charter.<sup>92</sup> Furthermore, when notice is given to pay bill of lading freight, payment to the shipowner will discharge the sub-charterer's obligation to pay the charterer. By contrast, when the sub-freight is the subject of a lien, payment to the shipowner will not effect such a discharge and the sub-charterer will need to make a stakeholder application to avoid the possibility of having to pay the freight a second time.

## V. INSOLVENCY OF THE TIME CHARTERER

In recent years there has been a number of high profile insolvencies of shipping lines, most recently that of Hanjin, which had 60 container vessels on charter at the time they filed for receivership in South Korea in August 2016.<sup>93</sup> The insolvency of the time charterer will

89. *The Bulk Chile* [2012] EWHC 2107 (Comm); [2012] 2 Lloyd's Rep 594, Andrew Smith J stating (at [60]): "(i) I do not consider that the First Notice mis-states the amount under the KLC: see para 44 above. Even if it did, this would not be material. In my judgment, what was required was that Metinvest be informed that there was an amount due, not how much was due, and (whatever the position with regard to statutory assignments) I do not accept that an error in unnecessary information vitiates a notice invoking the lien over sub-freights."

90. *Ibid.*, [61–67]. There was no appeal on the finding as to the exercise of the lien on sub-freight.

91. Andrew Smith J referred to the statement of Mustill LJ in relation to freight in *Colonial Bank v European Grain & Shipping Ltd (The Dominique)* [1989] AC 1056, 1066; [1988] 1 Lloyd's Rep 215, 221 col.1: "All contractual rights are vested from the moment when the contract is made, even though they may not presently be enforceable, either because the promisee must first perform his own part, or because some condition independent of the will of either party (such as the elapsing of time) has yet to be satisfied. Equally, all unperformed obligations to pay money are in one sense *debitum in praesenti solvendum in futuro*."

92. In *The Bulk Chile* [2012] EWHC 2107 (Comm); [2012] 2 Lloyd's Rep 594, [32], a claim of US\$2.6 million by DBHH, payable over 10 years, appeared to have been admitted in the KLC's rehabilitation programme in Korea, but this was irrelevant to the shipowners' claim to freight from the bill of lading holder. Similarly, in *Byatt International SA v Canworld Shipping Co Ltd and another (The MV Loyalty)* 2013 BCCA 427, another case involving KLC, where Donald J stated (at [25]): "Compromises made in insolvency are not relevant to the legal entitlements against parties not involved in the compromise."

93. See [www.reuters.com/article/us-hanjin-shipping-debt/all-hanjin-shipping-chartered-vessels-to-be-returned-to-owners-after-unloading-judge-idUSKCN11P0D0](http://www.reuters.com/article/us-hanjin-shipping-debt/all-hanjin-shipping-chartered-vessels-to-be-returned-to-owners-after-unloading-judge-idUSKCN11P0D0). On 19 September 2016 the South Korean Court ordered Hanjin to cancel any charter agreements and return any ships that had dropped off their cargo already.

clearly affect owners' claims against the time charterer, but will also have an impact on the exercise of the shipowner's lien on sub-freights/sub-hires.

Insolvency proceedings in England and Wales will involve a statutory stay of proceedings against the company and its property on the making of a winding-up order.<sup>94</sup> Proceedings may be brought against the company only with the leave of the court, subject to such terms as the court may impose. Where property is charged as security for a debt, the company's property is not the subject matter of the charge, but only its equity of redemption in relation to it.<sup>95</sup> Accordingly, the lien on sub-freights can still be exercised against a UK charterer, provided it has been registered in accordance with the Companies Act 2006, s.859A.<sup>96</sup> The notice of lien can be given even after the winding up proceedings have begun and will not be avoided as a disposition under the Insolvency Act 1986, s.127, as the crystallisation of a floating charge does not amount to a disposition of the company's property.<sup>97</sup> There is a similar provision with administration, with an additional statutory moratorium on enforcing security over the company's property except with the consent of the administrator or with the permission of the court, which would affect the exercise of the lien on sub-freights.<sup>98</sup>

Where it is a foreign charterer that is insolvent, the enforcement of the lien on sub-freights will fall under one of two cross-border insolvency regimes. With foreign insolvency proceedings in a state which is party to the UNCITRAL Model Law on Cross Border Insolvency, procedural assistance will be given to the foreign insolvency in relation to the insolvent party's assets which are located in another state which is party to the Model Law. In the UK the Model Law is given the force of law by the Cross-Border Insolvency Regulations 2006 ("CBIR"). The foreign office-holder in the insolvency proceedings<sup>99</sup> against the time charterer will be able to obtain recognition orders in the UK which will entitle it to the same procedural assistance as would be available under a British insolvency.

94. Insolvency Act 1986, s.130(2).

95. See *Re David Lloyd & Co* (1887) 6 Ch D, *Re Pyle Works Ltd* (1890) 44 Ch D 534 and, more recently, *Buchler v Talbot* [2004] UKHL 9; [2004] 2 AC 298, 308 and 313.

96. A floating charge will be invalid under the Insolvency Act 1986, s.245 if created at a "relevant time", which is one year for persons unconnected with the company and two years for connected persons. First, for unconnected persons, s.245(4) provides that "time is not a relevant time for the purposes of this section unless the company— (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created." Additionally, for both connected and unconnected persons s.245(2)(a) provides an exception in respect of "(a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge ...", which would cover the value of hire paid for the services provided by the shipowner under the time charter.

97. *Re Margart Pty Ltd*, *Hamilton v Westpac Banking Corp* [1985] BCLC 314; *Re French's Wine Bar Ltd* [1987] BCLC 314 (QB). The disposition of property would occur on the creation of the charge and not on its crystallisation.

98. Insolvency Act 1986, Sch.B1, para.43(3). Administration involves issues concerning the interests of creditors, the company debtor and other interested parties in maintaining the existence of the debtor and its business in the context of rescue/turnaround proceedings. The guidelines for when the court will give permission to enforce security are set out in *Re Atlantic Computer Systems Plc* [1992] Ch 505, 529. Leave to enforce security would normally be granted, provided that this was unlikely to impede the achievement of the purpose for which the administration was being pursued.

99. These may be foreign main proceedings, taking place in the state where the debtor has the centre of its main interests; or non-main proceedings taking place in a state where the debtor has an establishment, ie any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services.

The CBIR does not allow for the importing of the law of the state of the foreign insolvency proceedings,<sup>100</sup> nor does it provide an additional ground for allowing for the recognition of judgments arising out of those foreign insolvency proceedings.<sup>101</sup>

Under the Model Law, Art.20(1), where there is a foreign main proceeding, there will then be an automatic stay of certain actions, such as commencement or continuation of actions or proceedings against the debtor or its assets, or execution against a debtor's assets. However, Art.20(6) provides that the court has power to modify or terminate the automatic stay and to do so upon such terms and conditions as it thinks fit. Article 20(2), as implemented through the CBIR, requires the court to apply the same test and principles as it would apply to the stay of a winding-up order under the Insolvency Act 1986, s.130(2), which gives the court a "free hand to do what is right and fair according to the circumstances of each case".<sup>102</sup> The stay will usually be lifted when disputed claims need to be resolved by proceedings and it is right and fair in all the circumstances to accept and implement this need. Article 20(3)(a) provides, without prejudice to the provisions of paras 1 and 2, that the stay does not affect any right to take any steps to enforce security over the debtor's property.

However, the enforcement of security may be prevented by the provisions of Art.21, which provides that, as regards both foreign main and non-main proceedings, the court has power to grant "any appropriate relief", such as staying proceedings against the debtor or execution against the debtor's assets and granting any additional relief that may be available to a British insolvency office-holder under the law of Great Britain.<sup>103</sup> This includes the statutory moratorium on enforcing security over the company's property except with the consent of the administrator or with the permission of the court.<sup>104</sup> Security is defined in the Model Law, Art.2(n)(i) as including "any mortgage, charge, lien or other security". Accordingly, the stay will affect the enforcement of the lien through

100. *Fibria Cellulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), holding that the discretionary power of the court to grant "any appropriate relief" under Art.21(1) did not empower an English court to apply Korean insolvency law rendering void ipso facto clauses. This would entail applying Korean insolvency law to the substantive rights of the parties under a contract governed by English law. See too the rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399, that a debt governed by English law cannot be discharged by a foreign insolvency proceeding. *Gibbs* was followed in *Bakhshiyeva v Sberbank of Russia* [2018] EWHC 59 (Ch), in which Hildyard J declined to order permanent moratorium or stay under the CBIR to prevent a creditor exercising its rights under a contract governed by English law contrary to the terms of the foreign insolvency proceeding by which all creditors were, under the relevant foreign law, intended to be bound.

101. *Rubin v Eurofinance SA* [2012] UKSC 46; [2012] 2 Lloyd's Rep 615; [2013] 1 AC 236. The CBIR and the Model Law said nothing about enforcement of foreign judgments. The Supreme Court held, Lord Clarke of Stone-cum-Ebony dissenting, that at common law the assistance extended to a foreign insolvency did not extend to the enforcement of foreign avoidance judgments. These could not be enforced other than through general rules for enforcement of foreign judgments, involving either the defendant's presence in the foreign country in which the proceedings were commenced or its submission submitted to the jurisdiction of that country. The defendant's participation in the foreign insolvency proceedings would amount to a submission to the resulting avoidance proceedings.

102. See *Re Grosvenor Metal Co Ltd* [1950] Ch 63, 65, per Vaisey J; *Re Suidair International Airways Ltd* [1951] Ch 165; *Re Redman (Builders) Ltd* [1964] 1 WLR 541; *Re Aro Co Ltd* [1980] Ch 196 (CA), 209; and *Bourne v Charit-Email Technology Partnership LLP (in liq)* [2009] EWHC 1901 (Ch); [2010] 1 BCLC 210, 212–213.

103. Art.21(1)(g).

104. Under the Insolvency Act 1986, Sch.B1, para.43(3).

arbitration proceedings against the time charterer, and its sub-charterers against whom the lien on sub-freights has been exercised. Article 22(1) requires the court to be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons, including if appropriate the debtor, are adequately protected when it grants or denies relief under Art.21 or modifies or terminates relief under Art.20(6).<sup>105</sup>

Additional relief for the foreign representative is provided by Art.21(2), which provides that the court may turn over to the foreign representative assets of the insolvent located in Great Britain provided the court is satisfied that the interests of creditors in Great Britain are adequately protected; and by Art.23, which provides that the foreign representative may apply to the court for an order under the anti-avoidance provisions of the Insolvency Act 1986 and the Bankruptcy (Scotland) Act 1985.

How does this regime affect the enforcement of a lien on sub-freights, arising under charterparties which are subject to English law, when there are foreign insolvency proceedings against it in a state which is party to the Model Law? Arbitration proceedings against the insolvent time charterer will be subject to the automatic stay under Art.20(1). Similarly the arbitration proceedings against the sub-charterer, the next step in enforcing the shipowner's lien, will be stayed, either automatically under Art.20(1) or under Art.21(1) on the application of the foreign office-holder. The CBIR appears to have no application as regards the shipowner's separate claim to freight under the bill of lading.<sup>106</sup> The court, though, has a discretion in lifting the stay and allowing the arbitration to proceed.<sup>107</sup> There have been two contrasting High Court decisions involving the CBIR and stays of arbitrations against sub-charterers in respect of freight claim under the lien on sub-freights under the time charter.

In *D/S Norden A/S v Samsun Logix Corp*,<sup>108</sup> the Korean receiver had petitioned the Korean Court to set aside Norden's lien notice over the sub-hires on the ground that it should be avoided as it was sent out at a time when it was reasonably expected that Samsun was in imminent danger of becoming insolvent. It obtained a stay of arbitration proceedings by the shipowner against the time charterer and ordered a stay of enforcement of any security against the time charterer's property under Art.21(1)(g). The shipowners then applied for the stays to be lifted. Their counsel argued that there was no prospect of an English court granting relief to give effect to a Korean decision invalidating the security

105. Art.22(1) will be particularly relevant where the foreign insolvency is in the nature of administration. Although Art.20(2) refers to a winding-up order under the Insolvency Act 1986, s.130(2), the court's discretion will be exercised on similar grounds when the foreign proceedings were akin to administration, by reason of Art.22(1): *Seawolf Tankers Inc, Heidmar Inc v Pan Ocean Co Ltd* [2015] EWHC 1500 (Ch).

106. In *The Bulk Chile* [2012] EWHC 2107 (Comm); [2012] 2 Lloyd's Rep 594, Norris J had previously ordered that no step might be taken to enforce any security over [KLC's] property, but Andrew Smith J only addressed the order as regards the owners' lien claim. He found that the recognition order did not affect the exercise of the lien as the evidence as to Korean law showed that such claims fell outside the Korean Comprehensive Stay Order.

107. The court has been prepared to lift the stay on arbitration proceedings against the time charterer where the contract is subject to English law and the claims involve difficult issues under English law, subject to an undertaking not to enforce any award: *Seawolf Tankers Inc, Heidmar Inc v Pan Ocean Co Ltd* [2015] EWHC 1500 (Ch) (the effect of the anti-deprivation principle on an *ipso facto* clause), and *Ronelp Marine Ltd v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch) (issues of illegality, and of the interaction between contractual remedies and common law remedies for repudiatory breach).

108. [2009] EWHC 2304 (Ch); [2009] BPIR 1367.

under the lien in circumstances where the security would not be vulnerable to challenge under English domestic law. While accepting the force of the submission, Mr G Newey QC held that questions as to the extent, if any, to which a Korean decision in the receiver's favour could be enforced in England would best be addressed if and when the Korean court had so ruled. He ordered a stay of the enforcement of the lien on sub-hires<sup>109</sup> until the conclusion of the Korean insolvency proceedings, conditional on the time charterer, Samsun, and its receiver undertaking not to argue that the shipowners were bound by the decision of the Korean court as a result of participating in the Korean proceedings.<sup>110</sup>

In the second decision, *Cosco Bulk Carrier Co Ltd v Armada Shipping SA*,<sup>111</sup> Briggs J allowed the shipowner's arbitration against the sub-charterer to proceed but kept the stay in place in respect of enforcement of any resulting award. The case involving a recognition order of Swiss bankruptcy proceedings, which were main proceedings, against a time charterer, Armada. Two arbitration proceedings were afoot in respect of the competing claims to sub-hire due under the sub-charterer, one between the shipowner and the sub-charterer,<sup>112</sup> the other commenced by the sub-charterer against the time charterer to avoid double jeopardy. The parties to the second arbitration had extended an invitation to the office-holder to allow the time charterer to be joined to that arbitration. By agreement with the shipowner, the sub-charterer had paid the lien sub-hires into an escrow account. The funds in the account did not amount to assets of Armada and could not be ordered to be transferred to the Swiss Office-holder under Art.21(2). Briggs J put to one side the question whether the lien on sub-freights and sub-hires created a floating charge under English law, a matter on which there was still legal uncertainty, and whether the question of priorities should be determined by English or Swiss law. At this stage he was not prepared to decide whether the shipowner was enforcing a "security" through its lien, as the juridical nature of the lien on sub-freight was still undecided and was ripe for consideration at least by the Court of Appeal. Instead, he proceeded on the assumption that the underlying dispute related to property in relation to which the time charterer had an arguable claim to a beneficial interest, the chose in action over the sub-hires owed by the sub-charterer. Article 22(1) required him to be satisfied that this was adequately protected. This was achieved by applying the same test and principles as would apply to the stay of a winding-up order under the Insolvency Act 1986, s.130(2), as mandated by Art.20(2).

Briggs J exercised his discretion and allowed the stay to be lifted in respect of owners' arbitration proceedings against sub-charterers. The balance of fairness, convenience and justice pointed strongly in favour of the underlying dispute being determined in London arbitration rather than in the Swiss Bankruptcy Court. All the issues, except possibly certain aspects of the fifth issue, as to priority, were issues of English law. The lifting of the stay was subject to two conditions. First, the time charterer should have liberty to apply for further relief under Art.22(3) if it could not be effectively joined into the first arbitration, through no fault of its own. Secondly, "that there should be a stay of enforcement or

109. Under Art.21(1)(g).

110. This would preclude the receiver from enforcing any Korean judgment against the shipowner, leaving open the question of enforcement of the lien to a later determination by the English court.

111. [2011] EWHC 216 (Ch); [2011] 2 All ER (Comm) 481.

112. The owners exercised their lien in relation to their claim for an indemnity in respect of a payment made to a bunker supplier following an arrest of the vessel.

execution of any arbitral award under Art.21(1)(b) until, after such an award has become final, Armada has had the opportunity to restore the matter to this court, in the event that any aspect of the interests of its creditors or office-holder have not been addressed by the arbitrators, or upon appeal". This condition addressed the possibility of an outcome to the five legal issues raised in relation to the owners' exercise of the lien on sub-freights<sup>113</sup> that might give rise to a priority issue as between Cosco and Armada's office-holder or creditors which the arbitration process would be ill-suited to resolve. This was particularly true of the fifth issue, the consequences in terms of priority in Armada's bankruptcy.<sup>114</sup>

These two decisions leave hanging the question what would be the effect of a decision in the foreign insolvency proceedings that the shipowner's lien either had no proprietary effect or was unenforceable for non-registration as a charge under the law of the place of the insolvency proceedings.<sup>115</sup> The CBIR affords procedural assistance to the foreign insolvency but does not affect the substantive law relating to rights *in rem*. With a lien on sub-freights, which is created by an assignment in a time charter that contains a reference to English law, the substantive law regarding the proprietary effect of the lien would be that of England and should be unaffected by any conflicting decision in the foreign insolvency proceedings—such as non-recognition of the lien as a proprietary right. Priority issues, though, should fall to be determined under the law of the insolvency.<sup>116</sup> In exercising its discretion as to whether to lift the stay on enforcement of any arbitration award against the sub-charterer, the court would probably be guided by these considerations.

The second cross-border insolvency regime which will affect the enforcement of the lien on sub-freight is the 2015 Regulation on Insolvency Proceedings (recast),<sup>117</sup> which will apply where the insolvency proceedings take place in a Member State of the EU, except Denmark.<sup>118</sup> Unlike the CBIR,<sup>119</sup> which has only procedural effect, the Regulation

113. These issues were:

- (1) The juridical nature and effect of an owner's lien on sub-hire;
- (2) the effect of the prohibition on assignment in the sub-charter;
- (3) whether the lien was exercised for an excessive amount and, if so, with what consequence;
- (4) whether Cosco can rely upon the lien in respect of its claim to an indemnity for its payment for bunkers;
- (5) the consequences in terms of priority in Armada's bankruptcy.

114. It is likely that this issue would be held not to be arbitrable, as was held by the Singapore High Court in *Duncan, Cameron Lindsay v Diablo Fortune Inc* [2017] SGHC 172. If a priority issue did arise, that would have to be reconsidered by the court at the time the owners applied to lift the stay of enforcement or execution of the arbitration award, or the office-holder restored the matter to the court.

115. Compare the view expressed in *D/S Norden v Samsun* [2009] EWHC 2304 (Ch) with that in *Samsun Logix Corp v Oceantrade Corp* [2007] EWHC 2372 (Comm); [2008] 1 Lloyd's Rep 450, where the time charterer, OTC, became subject to Chapter 11 proceedings in the US, and sub-freights had been paid into the account of its London solicitors. Gross J noted (at [25]) that: "It is not in dispute that the ultimate fate of the funds in the Mills account rests (at least primarily) in the hands of the US Bankruptcy Court, by reason of that court's jurisdiction over the Chapter 11 proceedings concerning OTC."

116. So held by the Singapore High Court in *Duncan, Cameron Lindsay v Diablo Fortune Inc* [2017] SGHC 172, applying the decision of Hoffmann J in *Re Weldtech Equipment Ltd* [1991] BCLC 393, 395, that the Companies Act 1985, s.395 applied to a charge created by an English company, although the proper law of the instrument creating the charge was that of Germany.

117. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). The recast Regulation applies to insolvency proceedings commenced on or after 26 June 2017. Proceedings commenced before that date fall under Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings.

118. Denmark does not participate in the judicial cooperation between the EU Member States.

119. Article 3 of the CBIR provides that: "To the extent that this Law conflicts with an obligation of the United Kingdom under the EC Insolvency Regulation, the requirements of the EC Insolvency Regulation prevail."

has both substantive and procedural effect. Article 3(1) provides that the courts of the Member State within the territory of which the centre of a debtor's main interests (the "COMI")<sup>120</sup> is situated are to have jurisdiction to open insolvency proceedings.<sup>121</sup> Article 20 provides that the effect of opening these proceedings shall "[p]roduce the same effects in any other Member State as under this law of the State of the opening of proceedings".<sup>122</sup>

Article 7(1) provides that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.<sup>123</sup> Article 7(2) provides a list of particular matters which the law of that Member State is to determine, such as "... (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings ... (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending ... (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors".<sup>124</sup> Article 16 provides an exception to Art.7(2)(m) by disapplying it "where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case". This means that avoidance provisions in the *lex fori concursus* will not be applied where the detrimental act, which took place before the opening of the insolvency proceedings, would not be challengeable under the avoidance provisions of the *lex causae*.<sup>125</sup> With a lien on sub-freights, the "detrimental act" would be the giving of notice at a time when the owner was aware that the time charterer was facing insolvency. If the charter was subject to English law, the notice would not be challengeable under the UK insolvency legislation, and would not be avoided even if subject to avoidance under the insolvency legislation of the *lex fori concursus*.

Article 8<sup>126</sup> provides an exception to the general rule in relation to pre-existing *in rem* rights over assets within the territory of another Member State. It provides:

"1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets—both specific assets and collections of indefinite assets as a whole which change from time to time—belonging to

120. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

121. Where the debtor has an establishment in another Member State, the courts of that Member State may open secondary insolvency proceedings

122. Formerly Art.17 of the 2000 Insolvency Proceedings Regulation.

123. Formerly Art.4(1) of the 2000 Insolvency Proceedings Regulation.

124. Formerly Art.4(2) of the 2000 Insolvency Proceedings Regulation.

125. In *Vinyls Italia SpA v Mediterranea Navigazione SpA* (Case C-54/16) Judgment of the Court (Fifth Chamber) 8 June 2017, the ECJ recently considered the Insolvency Regulation 2000, Art.13 (the predecessor to Art.16). The ECJ held: (1) the party bearing the burden of proof must show that, where the *lex causae* makes it possible to challenge an act regarded as being detrimental, the conditions to be met in order that challenge to be upheld, which differ from those of the *lex fori concursus*, have not actually been fulfilled; (2) Art.13 applies where both parties to the contract are established in the *lex fori concursus*, provided the parties did not choose their contractual law for abusive or fraudulent ends; (3) the form and time limits for relying on Art.13 are determined by the rules laid down by the *lex fori concursus*.

126. Formerly Art.5 of the 2000 Insolvency Proceedings Regulation.

the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.”

Article 8 is worded so as to cover floating charges, with its reference in para.1 to “collections of indefinite assets as a whole which change from time to time”. With a lien on sub-freights, the charge will be created at the date of the charterparty, although it crystallises later. Thus, Art.8 will apply if the charterparty is created before the opening of insolvency proceedings. Article 8(2) then provides a list of four categories of rights which constitute right *in rem* under para.1. The first two include rights arising by way of a lien.<sup>127</sup>

The Art.8 exception means that the basis, validity and extent of the right will be determined by the non-insolvency law of the *lex situs* as regards rights *in rem* which are already in existence at the time of the opening of the insolvency proceedings. In locating where the asset, the chose in action which is subject to the lien, is situated, guidance is provided by Art.2(9)(viii),<sup>128</sup> which defines “claims” in relation to “the Member State in which the assets are situated”, as “the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in art. 3(1)”. With a lien on sub-freight, the asset would be situated in the Member State in which the sub-charterer has its COMI, and it would be the law of that Member State which determined the *in rem* rights against the asset.<sup>129</sup> This is in contrast to the position under the choice of law rules for assignments under the Rome I Regulation, Art.14, under which the substantive law relating to the *in rem* effect of the lien on sub-freight would be determined by the choice of law in the time charter which created the assignment.<sup>130</sup> However, the exception in Art.8 applies only where the asset is located within the territory of another Member State at the opening of proceedings and does not apply where the asset is located in a non-Member State. Further, Art.8(4) provides that the *in rem* exception does not preclude actions for voidness, voidability or unenforceability, as referred to in Art.7(2)(m).<sup>131</sup>

The exercise of the lien, by commencement of proceedings against the sub-charterer, would also appear to fall within the further exception provided in Art.18,<sup>132</sup> where judicial or arbitral proceedings are commenced before the opening of insolvency proceedings in the

127. (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage; (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee.

128. Formerly, Art.2(g) of the 2000 Insolvency Proceedings Regulation.

129. Recital 68 (formerly recital 25) states: “The basis, validity and extent of rights *in rem* should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of a right *in rem* should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security.”

130. Regulation (EC) No 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (“Rome I”). Article 14 provides that the law in the contract creating the assignment governs the relationship between assignor and assignee and that law determines the assignability of the claim, “(2) ... the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged.”

131. Which is, in turn, subject to an exception under Art.16.

132. Formerly Art.15 of the 2000 Insolvency Proceedings Regulation, which referred only to law suits, but was held to extend to arbitration. The question whether pending lawsuits should be continued or discontinued in the light of insolvency is to be determined by the law of the state in which those proceedings are pending: *Syska v Vivendi Universal SA* [2009] EWCA Civ 677; [2009] Bus LR 1494.

time charterer's COMI. In such an event, Art.18 provides for the effects of the insolvency proceedings on the pending lawsuit or pending arbitral proceedings to be governed solely by the law of the Member State in which the law suit is pending or in which the arbitral tribunal has its suit. However, this exception will not apply to the enforcement proceedings arising from a law suit or arbitral proceedings.<sup>133</sup>

It is also possible that the insolvency law of the Member State in which the time charterer has its COMI could extend its reach to proceedings against the bill of lading holder in respect of the same freight, through incorporation of the sub-charter. Although the bill of lading is a separate contract from the sub-charter, payment of freight to the shipowner under the bill of lading will discharge the sub-charterer's obligation to pay freight to the time charterer under the sub-charter, and so reduce the assets of the insolvent time charterer. In *Aria Inc v Credit Agricole Corporate and Investment Bank*,<sup>134</sup> a bank guarantee was put up to prevent the arrest of the vessel by a bunker supplier who had provided bunkers to the sub-charterer. The guarantee was funded by the shipowners and covered a judgment against either the shipowner or the sub-charterer. Insolvency proceedings were subsequently opened in Greece against the sub-charterer. The guarantee could not be regarded as property of the insolvent sub-charterer but under Greek law the liquidator had the power to prevent acts which would damage the interests of the creditors. The bankruptcy estate would be prejudiced by allowing a claim to be made on the guarantee because this would generate a back-to-back contingent claim of the owners against the time charterer which would then be passed on to the insolvent sub-charterer. The English court granted an injunction to prevent the bunker suppliers claiming on the guarantee in respect of a judgment obtained in France. Similarly, owners' claim to freight under the bill of lading might be enjoined because its effect would discharge the sub-charterer's liability for freight to the insolvent charterer and so reduce the assets available in the insolvency.

## VI. CONCLUSION

After a withdrawal, the shipowner will seek to claim: first, any accrued claims under the charter, including unpaid hire up to the date of withdrawal, plus interest; second, the costs of dealing with the cargo on board the vessel at the time of withdrawal, which will be the market rate plus bunkers consumed from the time of withdrawal to the removal of the cargo from the vessel; third, damages for the difference between the charter rate and the market rate for the unexpired residue of the charter (assuming the charter rate is higher than the market rate).

The shipowner will always be able to claim the first of these from the charterer. Following the Supreme Court's decision in *The Kos*, the shipowner will also be able to recover the second head by way of indemnity from the charterer, such costs being the consequences of complying with the charterer's orders to load the cargo and issue bills of lading for its

133. In *LBI hf v Kepler Capital Markets SA* (Case C-85/12) 24.10.2013 the effect of a parallel provision in Directive 2001/24/EC was construed so that the words "lawsuits pending" covered only substantive proceedings and not enforcement actions arising from such lawsuits.

134. [2014] EWHC 872 (Comm).

carriage. Where the cargo belongs to the charterer, there is an additional ground of recovery based on bailment. However, it will have no automatic right to claim the third item. The duty to pay hire is not a condition—if it were, a single breach would justify termination and recovery of damages. As the obligation to pay hire is an intermediate term, recovery under this heading will be dependent on a finding that there has been a renunciation by the charterer through a persistent pattern of under-payment or late payments of hire, and that the consequences of this renunciation are sufficiently serious to go to the root of the contract. The first element should be evidenced by a repeated failure over a matter of months to make full payment of hire, although there will always be some uncertainty as to what pattern of past default will evidence the charterer's refusal to perform the contract according to its terms in the future—as witness the finding in *The Brimnes* that a persistent pattern of delays in payment of some days over a period of over a year did not amount to a renunciation. Once renunciation is established, it should be straightforward to establish that its consequences are sufficiently serious to go to the root of the contract, given the analysis adopted the Court of Appeal in *Spar Shipping*.

Claims for freight, or quantum meruit remuneration, may also be asserted against third parties involved in the carriage of the goods on board the vessel at the date of the withdrawal, a matter of importance to the shipowner in the event of the insolvency of its time charterer. *The Bulk Chile* establishes a clear road map to recovery in such circumstances. The first route is through the bill of lading contract. If this is a shipowner's bill and incorporates the terms of a charter (usually a sub-, or sub-sub-charter), the shipowner will have a direct contractual nexus with the bill of lading shipper and, provided notice is given in time, the shipowner will be able to require payment of freight due under the incorporated charter to itself, rather than to the nominated payee under the charter. The existence of "freight prepaid" clausings will not avail the shipper if it is party to the incorporated charter, in which case there will be no estoppel as it will have direct knowledge as to whether or not freight has in fact been paid. The full freight can be claimed, although the shipowner will have to account for any excess received over the amount of its claims against the time charterer. Uncertainty remains as to whom the shipowner should account for this excess—the time charterer, as suggested by *Time Charters*, or the disponent owner who is entitled to the freight under the incorporated charter. It is also assumed that payment to the shipowner will discharge the charterer's obligation to pay freight to the nominated payee under the incorporated charter. Additionally a sub-charterer who is not a party to the bill of lading contract may find that a new contract comes into operation between itself and the shipowner if it requests the shipowner to fulfil the voyages specified in the bill of lading, as Fayette found out to its cost in *The Bulk Chile*. Non-contractual claims may also be relevant where there is no contractual link with the shipowner, such as when the cargo is being carried under charterer's bills of lading.

A similar route to recovery, although legally distinct, is through the lien on sub-freights, or sub-hires, that is found in most time charters. The claim here is limited to the amount outstanding to the shipowner at the date at which notice is given to the party liable to pay freight under a sub- or sub-sub-charter. Uncertainties still remain as to the nature of the right which is given, although the consensus of first instance opinion is that the right operates by way of equitable assignment, creating either an equitable charge or an

equitable mortgage, over the chose in action, and that the lien on sub-freight will not operate over sub-hire. The shipowner's right to lien down the chain of charters will be blocked as soon as it encounters a trip charter or a charter containing a prohibition on assignment.

The ability to claim against parties other than the time charterer will be particularly important for the shipowner in the event of the time charterer's insolvency. However, the effect of an insolvency will cast a shadow over the enforcement of a lien on sub-freights due to the time charterer and, arguably over the contractual claim under the bill of lading to those sub-freights if the bill of lading has incorporated that sub-charter. The applicable cross-border regime will depend on whether the charterer's centre of main interests is within a Member State of the EU, excluding Denmark. If so, the Insolvency Regulation (Recast) will apply and the substantive law of the place in which insolvency proceedings are opened will determine how and when the lien may be enforced, subject to the *in rem* exception in Art.8. For insolvencies outside the EU, the Cross Border Insolvency Regulation will be the applicable regime. It is likely that proceedings against the sub-charterer will be allowed to continue, but that enforcement of any resulting judgment or award will have to wait until the conclusion of the foreign insolvency proceedings. Here there is an unresolved issue of whether the English courts will grant relief to give effect to a foreign decision invalidating the security under the lien in circumstances where the security would not be vulnerable to challenge under English domestic law.