**Liens on cargo and sub-freight: recent developments and commercial context**

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No literary quote is more apposite to liens than this, from Lewis Carroll's *Through the Looking-Glass*:[[1]](#footnote-1)

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

The word lien is a verbal tent housing a variety of different legal figures which in reality have very little in common. It has been said that it ‘serves often to conceal the varieties of benefit which flow from it as between and within different legal systems’.[[2]](#footnote-2) There are different types of liens in different subjects.[[3]](#footnote-3) Not only do they operate differently, the various liens have different legal roots and operate in completely different ways, whether by contract, equity or as rights arising from possession.[[4]](#footnote-4) The nature of the lien depends on the subject and on the contractual measure at issue.[[5]](#footnote-5) The most well-known and discussed maritime liens are undoubtedly maritime and statutory liens,[[6]](#footnote-6) which enable the enforcement of debts against a ship through the admiralty centrepiece of judicial sale, but there are a number of other liens in shipping that are arguably both more impactful and less studied. This includes including liens on sub-freight, a fertile ground for litigation of late, and liens on cargo, the subjects of this article. In the following their genesis and role and function in commerce will be considered, against the background of several recent cases. It will be shown that although they are technically no different to analogous liens in a non-shipping context, it is asserted that they should be taken to be idiosyncratic to the shipping context. It will be argued that a coherent legal framework will only emerge as a result of some proactive judicial attention.

**Introduction**

Commercial parties have to be certain of one thing: getting paid for their goods and services. Because maritime trade is fast, mobile and organised in special purpose vehicles, there is little available in terms of fixed, real security to provide such certainty. Meanwhile, insolvencies and even trade fraud are not uncommon occurrences, limiting creditors’ options to seek payment. Liens provide some reassurance by being a security in something or other – whether tangible or as a matter of right.[[7]](#footnote-7) The availability of that security can be relied upon to condition delivery upon payment, extract payment from an unwilling party, or in appropriate circumstances to compensate for a complete absence of payment, for example if the debtor has become insolvent.

To operate as security, liens must be valid, one way or another, against third parties. A purely contractual right can be enforced against the counterpart, but the real usefulness of liens lies in being valid and enforceable against the world-at-large. The entitled party will have better rights in the subject matter, that it can defend against third parties. In this, there is an inherent contradiction here. While maritime and statutory liens have the backing of law and arise automatically from defined contexts, in the commercial context, liens usually arise from a contract between the parties, but must somehow become enforceable against third parties. Nevertheless, a lien means a security interest recognised by the law. The first question here is therefore what contractual security interests in shipping contracts have been recognised by the law.

The contractual context of the liens at issue here mean that analogous liens may also exist outside shipping law, arising from similar transactions and circumstances.[[8]](#footnote-8) One would expect uniformity in principle across sectors, simply for the sake of principle and consistency. However, shipping liens part company with the general law in significant ways. In the following, a small number of recent cases will be discussed to identify in what ways the liens in shipping contracts differ from the norm.

**Liens on cargo: possession and third parties**

The simplest lien is the possessory lien employed to give effect to the carrier’s claim for freight under a contract of carriage. This arises from contract or is implied in certain transactions. The basis for the lien is *possession*: if a party has possession of the goods, certain rights follow. For example, a tradesman who has repaired a gadget and still has it in his possession will have a right to retain the goods until he is paid by the customer.[[9]](#footnote-9) Normally, if someone keeps hold of another’s property, the other person has a right to take action to retrieve the property. Here, because the tradesman has possession, it has a right to keep the object where it might otherwise be liable in contract or for the tort of conversion. This right applies to the carrier’s right to keep hold of cargo before releasing it to the bill of lading holder or other party entitled to receive the goods. Possession is what makes the right effective against third parties: the carrier is not obliged to release the cargo to any party, including one that does not owe freight.

The lien on cargo is particular as opposed to general. A general lien would lie against all of the party’s property in possession.[[10]](#footnote-10) In the context of shipping, that would mean for example all of the property on board any of the shipowner’s vessels. Instead, the lien on cargo is only on the property under that particular bill of lading or possibly also other bills of lading on the same ship at the same time. The roots in possession make the lien on cargo similar to other liens; the tradesman’s lien noted above and liens in connection with storage.[[11]](#footnote-11) However legitimately agreed possession of another person’s property is hardly unique to shipping. The contractual context provides the precise terms upon which the possession is exercised and what rights it gives the possessor.

**Contract terms**

Although possession is what gives rise to the lien and the opportunity to exercise it, it flows from the common law and usage, but is today usually modified by contract – a charterparty, contract of affreightment or bill of lading. However, although the lien is determined by the contract, the contract relies on the law for enforcement. As will be seen, the courts have focused on the specificity of the shipping context in resolving cases – the terms of the right are idiosyncratic to carriage.

The contractual effect of the lien means that it can most straightforwardly be exercised between the carrier and the cargo interest, where the carrier is the issuer of the bill of lading and the cargo interest is the holder. The importance of the carrier is that it is the entity in physical possession of the cargo. However, other entities are relevant and a variety of constellations of parties may arise in the event of a dispute. The outcome will depend on the relevant contracts. In *Five Oceans v Cingler*,[[12]](#footnote-12)the time charterer sued its voyage charterer seeking to exercise a contractual lien for freight and detention costs over cargo belonging to a sub-voyage charterer with whom it had no contract, and who was also the shipper and bill of lading holder. The bills of lading had been issued by the Master for the shipowner. The sub-voyage charterer intervened in proceedings to assert that the bill of lading incorporated the time charterparty and that the time charterer therefore did not have any lien over the cargo. Although the position is usually that the head voyage charter is incorporated into the bills of lading, the bill of lading holder did have some evidence for its asserted position that it was the time charterparty in this case. The question became one of legal machinery – which of the charterparties had the parties incorporated into the bill of lading representing the cargo? If it was the head voyage charterparty, the lien clause in that charterparty would be a term of the bill of lading.

The judge held that it was. The shipowner had in the time charterparty committed the Master to signing only bills of lading on the Congenbill 1994 form, which must mean that the time charterparty contemplated the existence of a Gencon form charterparty capable of incorporation in the bills of lading and being the subject of their reference to ‘freight’.[[13]](#footnote-13) Accordingly, the Gencon-based voyage charterparty was incorporated and the carrier had a lien over the cargo. However, although this was what the time charterer had argued for, its position was not helped. The judge went on to note that the ship owner is still the entity in possession of the cargo, so that the most the time charterer could do[[14]](#footnote-14) was to instruct the owner not to discharge the cargo. This did not amount to a lien;[[15]](#footnote-15) nor did it presuppose that the shipowner was in fact owed any sums.[[16]](#footnote-16) It would exercise the rights as trustee of the time charterer and the time charterer would be vested with an equitable right in the benefit of the security in the cargo.[[17]](#footnote-17) Presumably, where a time charterer has issued the bills, the effect is the same.

As can be seen, the usefulness of a possessory lien depends almost entirely on having possession of the object, or having the ear of the entity that does. It follows that there is no right to retake possession of something that’s been released, and if the object is without value to the owner or lacks a resale value in the marketplace, the lien is not useful. Release of the object is particularly important in the shipping context: where the parties have the same port agent, does release to that agent mean that the carrier has given up possession for the purpose of the lien on freight? It almost certainly does, with the result that the carrier henceforth cannot recover freight or even storage costs through use of the lien. In such cases, a letter of indemnity will shield the carrier against the risk of misdelivery of the cargo itself, but provides no guarantee that unpaid freight will be paid. In *The Zagora*,[[18]](#footnote-18) the carrier and an intermediate buyer of the cargo had used the same port agents, who duly forwarded the cargo to its destination with the result that sellers went unpaid. The judge observed that delivery to the agent as agent for the carrier would have served no purpose.

This is an observation which is true in a context where – as here – a letter of indemnity had been provided, but which ignores that the carrier may wish to exercise its lien on cargo in respect of freight. Relinquishing possession has decisive, negative effects for the carrier who can no longer use the cargo as security for freight.

A further issue is what sums may be recovered through use of the lien. It is designed for freight, but may costs be recovered too? Should the shipowner elect to discharge the cargo into safe storage, can those costs be recovered along with the freight? In *Metall Market OOO v Vitorio Shipping Co Ltd (The ‘Lehmann Timber’)*,[[19]](#footnote-19) the Court of Appeal rejected application of the most basic form of lien in favour of one idiosyncratic to carriage contracts. The facts were that following seizure by pirates of the vessel *Lehmann Timber*, the carrier sought a general average bond and an insurance guarantee from cargo interests. The cargo was discharged into a warehouse. This gave rise to storage costs, which the carrier sought to recover from the cargo owner. At first instance,[[20]](#footnote-20) Popplewell J held that the lien over the cargo had not been discharged by the guarantee supplied by insurers. He also held that based on common law, the carrier could not recover storage costs under the lien on the cargo itself, as the exercise of the lien was essentially a self-help remedy.[[21]](#footnote-21)

While upholding the judge’s decision that the lien had not been discharged by the provision of alternate security (the insurance guarantee), the Court of Appeal reversed the judge’s decision on the second issue. Their Lordships opined that the common law ‘artificer’s lien’ was not applicable to the present situation. The leading case for that principle was *Somes*, a House of Lords case from 1869.[[22]](#footnote-22) It revolved around a ship placed for repairs in a shipyard. The owner disputed costs, and the shipyard exercised its common law lien to retain the ship. On top of repair costs, the shipyard also claimed dock dues pertaining to the time period of retention. The House of Lords said on that occasion that given that this was an ‘artificer’s lien’, that is, a lien by a tradesman who has agreed to carry out work, the shipyard had a lien for the price of their work and nothing more. It had previously been thought that this principle applied without more to the carrier’s lien on cargo: if it chose to retain the cargo in its possession and place it in a warehouse, it must bear the costs of that action itself.

The common law principle at issue provided that a lien did not give a cause of action for costs incurred in exercising the rights arising from the lien. However, in the context of carriage of goods by sea, different considerations were at stake. The Court of Appeal held in *The Lehmann Timber* that the artificer’s lien was not the same as a contract of carriage. In the latter situation, there was a contract to carry the goods which also involved caring for them. As the Court of Appeal put it: “Shipping is performed on the basis that time is money and that a ship is a floating and travelling warehouse for which cargo must pay either in the form of agreed freight or hire, or by way of damages for any breach of contract.”[[23]](#footnote-23) The Court went on to say that “the benefits are mixed: the shipowner preserves his lien in his own interest, but the cargo interest is also benefited by the continuing care of his cargo.”[[24]](#footnote-24) As a result, the carrier was entitled to recover storage costs.

There are good pragmatical reasons for why non-recovery of storage costs renders a lien void of its value. As the Court of Appeal put it,

“A shipowner should not be required to abandon his lien because the only other choices facing him were the disastrous ones of turning his ship into a floating warehouse for an indefinite period, or throwing the cargo into the sea, or storing them on land at his own expense.”[[25]](#footnote-25)

Any refrigerated cargo, any high-value cargo or indeed almost any form of liquid cargo will be worth the investment in proper storage, whereas the lack of such facilities will render the cargo – and therefore the lien – immediately useless to the carrier as well as the intended or any other cargo recipient. Where the cargo – for example food or medicines – was refrigerated on board, refrigeration must continue throughout the transport. Storage costs are simply a fact of shipping. The Court of Appeal’s decision was certainly a pragmatically correct one, but the legal basis leaves a little to be desired.

Here, although the lien on cargo was recognised as a legal instrument applicable to the situation, it was also held that it was a rule of its own, which did not follow more widely applicable principles. It is important to note how the Court of Appeal described the context surrounding the lien: it was not merely a contract, but a contract of carriage. If the Court of Appeal had referred to ‘a contract’, this could have been read as a reference to general contract law and the lien arising from possession being modified by the contract terms. However, the Court of Appeal went further: it described the contract as one *of carriage*,[[26]](#footnote-26) under which the shipowner undertakes to carry and care for the goods. It thereby arguably imported the entire equilibrium of commercial liabilities and realities into the lien on cargo.[[27]](#footnote-27)

**Liens on sub-freight – and subhire**

Liens on sub-freight[[28]](#footnote-28) are entirely different from liens on cargo in both genesis and function. An effective lien on sub-freights gives the shipowner a course of action to pursue in the event it is not being paid hire. If so, the charterparty lien clause may stipulate that the shipowner is entitled to give notice to other parties who owe sums to the charterer and request that they must be paid to the shipowner instead. This happens under the contract between the shipowner and the head charterer, usually a time charterer. How can the provisions of that contract be made to apply to further parties, who are not parties to that contract? The genesis of liens on sub-freight is quite different from that of liens on cargo. In fact, they have no basis in common law. They arise entirely from contract, as a result of which their enforcement against third parties, a precondition for their function as security, is the pivotal issue. Lien clauses have evolved over the years. Their interpretation is key to what sums can be recovered.

**Legal background**

The lien on sub-freight is said to have evolved from the shipowner’s lien on cargo and to be a creature of neither common law nor equity, but of maritime law.[[29]](#footnote-29) Legally, there are two theories as to how liens on sub-freight arise, because they do not fit neatly into any standard legal model. The winning theory in recent times appears to be that the lien on sub-freights is an equitable assignment for security.[[30]](#footnote-30) However, another theory has at times been in play to the extent that it was recognised in the Privy Council case *Re Brumark Investments*,[[31]](#footnote-31) where it was referred to as “a contractual non-possessory right of a kind which is *sui generis*”.[[32]](#footnote-32) Each of the two theories solves problems; but each also leaves some unresolved. If the lien is an equitable charge, the problem that arises is that such charges normally need to be registered to have validity against third parties. Registration gives rise to a floating charge on the asset which crystallises with notice. Registration of liens on sub-freight is not in keeping with the shipping business model and is not generally done. If on the other hand the lien is a *sui generis* contractual non-possessory right, it does not need to be registered to have validity and priority. However, uncertainty will arise as to the precise scope of the rights enjoyed by the shipowner and the foundation for their exercise against third parties. For English law, Christopher Clarke J in *The Western Moscow*[[33]](#footnote-33)adopted the theory of the ‘equitable assignment by way of a floating charge’[[34]](#footnote-34) theory. This required disregarding the Privy Council authority in favour of the earlier first instance case *Care Shipping Corporation v. Latin American Shipping Corp (The Cebu) (No 1)*,[[35]](#footnote-35) and the judge relied on specialised shipping authors to do so.[[36]](#footnote-36) The same position was adopted by the Singapore Court of Appeal when the opportunity arose in *Diablo Fortune Inc v Duncan, Cameron Lindsay and another*.[[37]](#footnote-37) The Singapore Court of Appeal accepted that the lien is an equitable assignment by way of a floating charge, referring also to Hong Kong authority to the same effect. The logical next problem, that such charges usually require registration to be effective against third parties, was approached by recommending legislative change to provide that these liens were a carve-out from that rule, as had been enacted in Hong Kong.[[38]](#footnote-38)

It is worth noting *Motor Yacht Sales Australia Pty Limited v Megisti Yacht Charters Limited*,[[39]](#footnote-39) a case concerning a vessel rather than subfreight (or cargo), where the respondents sought to justify a caveat entered on the shipping register with a number of arguments, one of which was that they had previously owned the motor yacht *Hunter* in trust for the applicant and that they had an equitable lien over *Hunter* in respect of liabilities and expenses incurred by them as trustees.[[40]](#footnote-40) The case concerned maritime and statutory liens, whose potential existence was said to prevent transfer of unencumbered title as per the ship sale agreement. The judge held that precisely *because* the potential liens were undiscoverable, there was no justification for a construction that the definition of completion required transfer of unencumbered title.[[41]](#footnote-41)

The reasoning translates to liens on freight: they are not discoverable as a result of the judicially indicated lack of a requirement to register them. For a competing creditor possessing a properly registered floating charge over the sums, the lien is undiscoverable. As a result, pledges of monies subject to a lien are arguably not capable of standing in the way of competing transactions, for example to more than one charterer, or to other creditors. The best course of action for such a creditor is to discount entirely the hire and freight from the value of the floating charge, on an assumption that it will be consumed by a disponent owner’s lien. This may reduce the attractiveness of the charterer as debtor.[[42]](#footnote-42)

That the lien is an equitable charge appears to be the accepted position in common law jurisdictions – making these liens eccentric even by maritime law standards: arising from ‘maritime law’ and from the shipowner’s rights to retain possession of cargo for unpaid freight; but unconnected to possession and enforceable in the common law courts; of a type usually requiring registration, but the courts landing heavily in favour of registration not being required.

**Contracts**

The effect that the lien on sub-freights has on third parties is through the contractual clauses. This means that the written agreements involved take centre-stage, and it is important to decide what contracts are relevant to the situation, between what parties the has effect and what clauses are incorporated from other contracts. Incorporation follows the rules usual to shipping contracts.[[43]](#footnote-43) The scope of the lien clause – whether incorporated from other contracts or present in the contract itself is also crucial and will be discussed in the following.

For the third parties, whether they are voyage charterers or bill of lading holders, it may not matter much to whom they pay, as long as their payment is legally recognised as discharging their contractual obligations. If they are uncertain as to whether the notice from the shipowner is the proper exercise of a right, they have the option of setting the disputed sum aside with solicitors or in court until the matter is settled to avoid being drawn into litigation. But they may well be happy to pay to the shipowner instead of their counterpart, as long as that payment is in effective discharge of their obligations. Problems arise for the third party where either the shipowner or the charterer is insolvent (and the charterer may well not be paying precisely because it is having liquidity issues). In such a case, the third party is at risk of paying freight twice if it first pays to the wrong party. In *Samsun Logix Corp v Oceantrade Corp*,[[44]](#footnote-44) Samsun had taken out a freezing order on all assets of Oceantrade, their time charterer for the vessel *Nord Monaco*. Oceantrade was at the time in Chapter 11 proceedings in US. The freezing order was later varied to permit payments by Helm, the voyage charterer of Oceantrade under a separate chain of charterparties for the vessel *Orhan Deval*, to Oceantrade’s solicitors. Helm paid to solicitors Mills & Co on 7 September 2005. Samsun claimed that the freezing order gave them the rights to the funds held by the solicitors. Oceantrade’s disponent owners under the charter for *Orhan Deval*, called Deval, exercised their lien on sub-freight on 9 September 2005, two days after the payment, asserting that they had the right to exercise their contractual lien on sub-freights. The question arose who had better rights to the funds: Samsun under the freezing order, or Deval in accordance with their lien on sub-freights.[[45]](#footnote-45) For this particular payment, did Deval have a lien over the Helm freight? The Court held that the fact that payment had been made by Helm to Oceantrade’s solicitors meant that it was too late to exercise the lien on sub-freights.

This case also raises the point of the timing of payment. As seen, the lien on cargo expires at the moment possession is given up. Here, the shipowner’s opportunity to assert rights to the sub-freight expires to the extent payment to the time charterer has been made before notice of the lien. However, counterintuitively, the shipowner’s lien on sub-freight may subsist beyond the time when it has received payment from its charterer. That is, the owner’s right to give notice to the person owing sub-freight does not depend on money being owed by the time charterer. That was the outcome in *Wollongong Coal Ltd v PCL (Shipping) Pte Ltd*,[[46]](#footnote-46) in which PCL was the time charterer of the MV *Illawarra Fortune* and WCL was the shipper under owner’s bills of lading in respect of a cargo of coal on board. There was also a voyage charter for the vessel between PCL and WCL’s parent company, where freight and shipping costs of USD3.2 million remained unpaid. PCL had taken assignment of the shipowner’s rights under the bills of lading and sought to recover USD3.2m from WCL in respect of the unpaid freight under the voyage charterparty. Bills of lading had first been issued to WCL in August 2013 and identical switch bills had been issued in September 2013, identifying a third party as shipper in place of WCL. One of the questions for the judge was whether the shipowner could have[[47]](#footnote-47) recovered the freight and shipping costs from WCL under the August Bills, and whether PCL could therefore do the same as the assignee of the shipowner. The judge dismissed PCL’s claim, but held that had the August bills not been cancelled, PCL would have been entitled to succeed against WCL. The bills of lading stated ‘freight payable as per charterparty’. The meaning of these words was in dispute, WCL arguing that it meant that the shipowner had given up its right to receive freight. The judge relied on notably *Tradigrain SA v King Diamond Shipping SA (The “Spiros C”)*[[48]](#footnote-48) and *Dry Bulk Handy Holding Inc v Fayette International Holdings Limited (The ‘Bulk Chile’)*[[49]](#footnote-49) to the effect that the shipowner had not given up its rights but had merely designated an agent for the purpose of receiving freight. It had been argued that the words were insufficient to imply the obligation to pay freight into the bill of lading; but the judge pointed out that the shipper’s duty to pay freight was a common law obligation of the shipper. The shipowner thus retained the right to collect freight and that right was susceptible to assignment to the time charterer. The right could not be regarded as conditional upon an intermediate charterer having defaulted in its obligations.

**Liens on sub-freight – and what other sums?**

Compared to liens on cargo, which have a secure legal foundation in being centred on the incidence of possession of the cargo item at issue, the lien on sub-freight has more nebulous foundations. What is at issue here is a lien on the sums to be paid under the contract. The lien does not cause the freight debtor itself – the contractual counterpart – to take any action with sums they have been or are about to be paid, but is designed to intercept those sums before they are paid by other parties. The effect of the lien in the shipowner’s contract with the time charterer is therefore on the voyage charterer and further parties. This is often referred to as intercepting freight and is accomplished by notice from the shipowner to the party in question, who is requested to pay not to the contractual recipient but to the shipowner.

The notional origin of the lien can be seen in the *Illawarra Fortune* case above – the shipper’s common law duty to pay freight. Where there is a chartering chain, the vessel will be subject to a chain of contracts in the form of a time charterparty and a voyage charterparty with hire payable under the former and freight under the latter. With contemporary contracting practices involving chartering chains of increasing complexity, the connection between the shipowner’s lien on the cargo and the lien on sub-freight is not the most transparent. With a time and voyage charterer successively, and the voyage charterer also the shipper, one might see the connection – but it is also common for the time charterer to conclude a sub-time charterparty for a shorter period or a defined number of trips instead of a voyage charterparty, or for there to be sub-voyage charterparties.[[50]](#footnote-50) While originally, the lien was on sub-freight under a voyage charterparty or a bill of lading, the question arose whether a lien could be created on sub-hire and other sums.

The answer to that question will depend for the most part on the contract wording, specifically on the liens clause. There has been an evolution through case law and case law over the years, expanding the sums potentially covered. From the starting point of NYPE 1946, which referred exclusively to ‘freight’, the expansion to ‘hire’, or more precisely, sub-hire, is now accepted. In *The Cebu No* 1,[[51]](#footnote-51) it was held that ‘freight’ also referred to sub-hire, but later in *The Cebu No 2*,[[52]](#footnote-52) 1it was held that the word freight should be taken at face value and did not include sub-hire. The authors of NYPE 1993 came to the rescue by adding hire to the list of liabilities included. The shipowner’s rights still depend on expressly specifying the sums to which it will wish to lay claim in the charterparty liens clause.

It will be apparent that the choice between an unamended NYPE 1946 and 1993 will be significant, and that if the point is negotiated the shipowner will want a clause with the greatest possible scope whereas the charterer will wish to limit it to preserve its freedom in contracting with sub-charterers. While the question of whether sub-freight includes sub-hire cannot be said to remain open, in considering this issue in *Dry Bulk Handy Holding Inc v Fayette International Holdings Limited (The “Bulk Chile”)*,[[53]](#footnote-53) the judge at first instance did express a preference for the solution in *The Cebu No 1*. However, as the judge in *The Cebu No 2* had considered that case and come to a different conclusion, the latter case was to be followed. The facts were that Dry Bulk Handling Holding[[54]](#footnote-54) had time chartered the vessel *Bulk Chile* to KLC Korea Line Corporation on a time charterparty on NYPE 1946 terms. KLC in turn had trip-time chartered the vessel to Fayette, and Fayette had voyage chartered it to Metinvest on Gencon terms. When KLC failed to pay as a result of insolvency proceedings, Dry Bulk notified both Fayette and Metinvest that is wished to exercise its lien. Because the chain involved both time and voyage charters, the question arose whether the lien on sub-freights applied equally to hire payments. That is, could Dry Bulk claim that Fayette’s hire payments to KLC, as well as Metinvest’s freight payments to KLC’s sub-charterer Fayette be paid to Dry Bulk? On the judge’s conclusion,[[55]](#footnote-55) payments from the voyage charterer but not the sub-time charterer were subject to the lien. There was no appeal on this issue. It is noted that a combination of NYPE 1946 for the head time charter and trip time charterparties instead of voyage charterparties thereafter will ensure there is nothing to lien for the shipowner. Where from the shipowner’s perspective

There is also a question as to what sums may be recovered through the exercise of the lien. In *The Bulk Chile*, there was a potentially interesting argument as to whether the damages for repudiation were encompassed by the lien. This required no decision, as the amounts due under the sub-charters were much smaller than the claim. However in *Wollongong Coal Limited v PCL (Shipping) Pte Ltd*,[[56]](#footnote-56) the judge did consider in respect of what sums the shipowner could present a lien on sub-freight and included the bunker adjustment but not port costs, demurrage or dead-freight. Demurrage was a liability of the voyage charterer, not the shipper and bill of lading holder; the dead-freight liability did not arise under the bills of lading in question; and port costs did not feature in the charterparty.

**Comments**

Liens on cargo are based on the simple fact of the carrier’s possession of the cargo, but arise from the carriage contract and are given effect with a keen eye on the commercial shipping context. Uncertainty may well arise from this fact, as the release of cargo not only involves a bill of lading (in fact, hardly ever involves a bill of lading and in any case that bill of lading may well state that freight is pre-paid) but also what may be a very long series of letters of indemnity[[57]](#footnote-57) as well as port agents[[58]](#footnote-58) and other interested parties. Liens on cargo do not very often emerge as the central issue in litigation. Instead they are in practice used as a crude enforcement tool on which the shipowner may rely in order to get paid its earned freight[[59]](#footnote-59) – the cargo owner’s interest is simply to have the cargo released to ensure it can be traded. Paying freight, perhaps with a caveat or settlement of some kind, makes sense even where the payor has some reservations against paying and is planning to pursue legal recourse. As a result, legal issues involving liens on cargo are considered by the courts relatively infrequently and the typical situations in which this short term enforcement tool is employed are less than fertile ground for exacting legal considerations of broad principle.

Similarly, lien on sub freight are a *sui generis* kind of floating charge, not requiring registration and where it has not entirely been made clear what sums are recoverable, beyond the core. The precision of the head charter’s liens clause and its ever-expanding range of payments covered may provide a false sense of security in promising that if a party becomes insolvent, there must be a pocket somewhere where unpaid hire can be recovered. Indeed, most of the cases do arise from insolvency – perhaps indicating that all claims that can be settled, are. That in turn also means that few cases reach the courts and there is unlikely to be significant developments in the law.

Legislative attention to this purely commercial subject appears highly unlikely, with the obvious exemption of legislating for the exemption that courts have recommended on registration of liens on sub-freight which nevertheless will require some concerted lobbying efforts. This places a heavy onus upon courts to explicate their ratio in each case and place it within a wide, consistent framework. It is submitted that rather than giving rise to a need for an eccentric, shipping-based approach, this enhances the need for broad, consistent and well-anchored principles to ensure that the parties do not encounter surprises at the dispute resolution stage:[[60]](#footnote-60) plain and clear law is needed, grounded in fundamental principles against which the parties can structure their contracts. In particular, departures from an established legal framework in favour of the contractual specificities of the shipping sector have superficial attractions, but may cause problems as the next inevitable question will refer to what those practices in reality are – a question that the courts may not be best equipped to answer.[[61]](#footnote-61)

1. First published in 1872. [↑](#footnote-ref-1)
2. David C Jackson, *Enforcement of Maritime Claims*, 4th ed, Informa 2005, at para 17.1. [↑](#footnote-ref-2)
3. For present purposes, in ships, cargoes and freight – see further below. [↑](#footnote-ref-3)
4. See Jackson, fn 2 above, chapter 17 et seq. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. For which see for example David C Jackson, *Enforcement of Maritime Claims*, 4th ed, Informa 2005; Maritime Liens (British Shipping Laws, Vol. 14) (Stevens & Sons, London, 1980); the review of compatibility of liens and limitation of liability in English and Chinese law in Dingjing Huang (2015) *Reconciling maritime liens and limitation of liability for maritime claims: a comparison of English law and Chinese law*, PhD thesis, University of Southampton ()available online from https://eprints.soton.ac.uk and Shengnan Jia, *Impact of Secured Transactions Law on Shipowner’s Contractual Security in the Chartering Industry: Common and Civil Law Perspectives*, PhD thesis, City University 2019. [↑](#footnote-ref-6)
7. A recently completed PhD thesis made the considered decision to use the word security in place of liens: Shengnan Jia, PhD thesis, City University 2019. The thesis, entitled *Impact of Secured Transactions Law on Shipowner’s Contractual Security in the Chartering Industry: Common and Civil Law Perspectives*, presents the argument for a greater impact of financial security law on maritime liens. [↑](#footnote-ref-7)
8. For a recent example, see *Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd* [2019] SGHC 276. [↑](#footnote-ref-8)
9. The carrier is entitled to keep the cargo as security for freight, just as a TV repairer is entitled to keep the TV until she has been compensated for the fruits of her workmanship. [↑](#footnote-ref-9)
10. For further explanation in the context of a review of the history of equitable liens and an argument for their use in the 21st century, see Fiona R Burns, ‘The Equitable Lien Rediscovered: A Remedy for the 21st Century’ (2002) 25(1) UNSW Law Journal 1, available [↑](#footnote-ref-10)
11. As seen in *Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd* [2019] SGHC 276. [↑](#footnote-ref-11)
12. *Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener)* [2015] SGHC 311. [↑](#footnote-ref-12)
13. At [31]. [↑](#footnote-ref-13)
14. As against parties other than its own voyage charterer, although this did not amount to a lien on the cargo, para 33. [↑](#footnote-ref-14)
15. At [32]. The time charterer could however intercept sub-freight. [↑](#footnote-ref-15)
16. At [36]. [↑](#footnote-ref-16)
17. At [36]. [↑](#footnote-ref-17)
18. See eg *Oldendorff GmbH & Co KG v Sea Powerful II Special Maritime Enterprises (The “Zagora”)* [2016] EWHC 3212 (Comm) [2017] 1 Lloyd’s Rep 194 where the same port agent was nominated by more than one party to the transaction. [↑](#footnote-ref-18)
19. *Metall Market OOO v Vitorio Shipping Co Ltd (The ‘Lehmann Timber’)* [2013] EWCA Civ 650, [2013] 2 Lloyd's Rep. 541. [↑](#footnote-ref-19)
20. Reported at *Metall Market OOO v Vitorio Shipping Co Ltd (The ‘Lehmann Timber’)* [2012] EWHC 844 (Comm), [2012] 2 Lloyd's Rep. 73. [↑](#footnote-ref-20)
21. At [76]. [↑](#footnote-ref-21)
22. *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338. [↑](#footnote-ref-22)
23. [2013] EWCA Civ 650, [2013] 2 Lloyd's Rep. 541 at [127]. [↑](#footnote-ref-23)
24. At [129]. [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. For example at [109]: “It is immediately apparent from these submissions how difficult it is to fit the complexities of a contract of carriage by sea into the *Somes* simplicity of a straightforward common law artificer's lien of pure self-help uncomplicated by contractual terms or implications.” [↑](#footnote-ref-26)
27. For such considerations of commercial reality and equilibrium made judicially, albeit in an entirely different context, a recommended *locus* is Lord Goff in *Firma C-Trade SA* v*. Newcastle Protection and Indemnity Association (The “Fanti”)*; *Socony Mobil Oil Co. Inc. and others* v*. West of England Ship Owners Mutual Insurance Association (London) Ltd. (The “Padre Island”) (No. 2)* [1990] 2 Lloyd's Rep. 191, esp at p 204. [↑](#footnote-ref-27)
28. The term of art is lien on sub-freight, because liens on sub-hire were long not recognised. See further below. [↑](#footnote-ref-28)
29. *Agnew and another v Commissioner of Inland Revenue (“Re Brumark Investments”)* [2001] 2 AC 710 per Lord Millet at [41], *obiter*. [↑](#footnote-ref-29)
30. In *Western Bulk Shipowning III A/S V Carbofer Maritime Trading APS and others (The "Western Moscow")* [2012] EWHC 1224 (Comm), [2012] 2 Lloyd's Rep. 163 – for this case, see further below. [↑](#footnote-ref-30)
31. [2001] UKPC 28. [↑](#footnote-ref-31)
32. See further Graeme Bowtle, ‘Liens on Sub-freights’, [2002] LMCLQ 289 and ‘Liens on sub-hire and freight’, [2013] LMCLQ 142. [↑](#footnote-ref-32)
33. In *Western Bulk Shipowning III A/S V Carbofer Maritime Trading APS and others (The "Western Moscow")* [2012] EWHC 1224 (Comm), [2012] 2 Lloyd's Rep. 163. [↑](#footnote-ref-33)
34. In *Western Bulk Shipowning III A/S V Carbofer Maritime Trading APS and others (The "Western Moscow")* [2012] EWHC 1224 (Comm), [2012] 2 Lloyd's Rep. 163. [↑](#footnote-ref-34)
35. *Care Shipping Corporation v. Latin American Shipping Corp (The Cebu) (No 1)* [1983] 1 Lloyd’s Rep 302. [↑](#footnote-ref-35)
36. Noting Graeme Bowtle, ‘Liens on Sub-freights’, [2002] LMCLQ 289 and the 21st edition of *Scrutton* on Charterparties. [↑](#footnote-ref-36)
37. [2018] SGCA 26. Further, in Canada, the theory appears not to have been questioned by the Court of Appeal for British Columbia in *Byatt International SA v Canworld Shipping Co Ltd And Another (The "MV Loyalty")* 2013 BCCA 427, [2013] Lloyd’s Law Reports Plus 89. [↑](#footnote-ref-37)
38. At [75]. [↑](#footnote-ref-38)
39. [2019] FCA 1454. [↑](#footnote-ref-39)
40. At [76]. [↑](#footnote-ref-40)
41. At [89]-[91]. [↑](#footnote-ref-41)
42. REF to be added. [↑](#footnote-ref-42)
43. The general rule is that the head voyage charterparty is incorporated, even if the parties to the bill of lading and those seeking to enforce the lien are not a party to that contract. Unlike arbitration clauses which must be mentioned explicitly, incorporation of a lien clause into a bill of lading by general reference to a charterparty is the rule. [↑](#footnote-ref-43)
44. [2008] 1 Lloyd’s Rep 450. [↑](#footnote-ref-44)
45. It is worth nothing the position of Helm as sub-charterer: if aware that the disponent owner is in financial trouble, a sub-charterer must be very careful to whom payment is made and comply with any notice to pay to their disponent owner, at the risk of paying the same sum twice to disponent owners as well as head owners. [↑](#footnote-ref-45)
46. [2020] NSWSC 184. [↑](#footnote-ref-46)
47. The point was obiter in view of other conclusions. [↑](#footnote-ref-47)
48. [2000] 2 Lloyds Rep 319. [↑](#footnote-ref-48)
49. [2013] 2 Lloyds Rep 38. [↑](#footnote-ref-49)
50. See further on trip time charterparties Johanna Hjalmarsson, ‘Trip time charterparties and their binary endgames’, (2018) LMCLQ 376-397. [↑](#footnote-ref-50)
51. *Care Shipping Corporation v. Latin American Shipping Corp* [1983] 1 Lloyd’s Rep 302. [↑](#footnote-ref-51)
52. *Itex Itagrani Export SA v Care Shipping Corporation and Others (The Cebu) (No 2)* [1990] 2 Lloyd’s Rep 316. [↑](#footnote-ref-52)
53. DRY BULK HANDY HOLDING INC AND ANOTHER

    v

    FAYETTE INTERNATIONAL HOLDINGS LTD AND ANOTHER

    (THE "BULK CHILE")

    [2012] EWHC 2107 (Comm), [2012] 2 Lloyd’s Rep 594, at [47] – [49]. [↑](#footnote-ref-53)
54. DBHH had also chartered the vessel to CSAV and then chartered it in both their names to KLC. As a result, CSAV was the proper claimant for some of the claims. This does not make any difference for present purposes. For simplicity, DBHH will be referred to as the lien claimant. [↑](#footnote-ref-54)
55. There was no appeal on this point. [↑](#footnote-ref-55)
56. [2020] NSWSC 184; supra. [↑](#footnote-ref-56)
57. As in *Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The “Songa Winds”)* [2018] EWCA Civ 1901, [2018] 2 Lloyd’s Rep 374. [↑](#footnote-ref-57)
58. As in *Oldendorff GmbH & Co KG v Sea Powerful II Special Maritime Enterprises (The “Zagora”)* [2016] EWHC 3212 (Comm), [2017] 1 Lloyd’s Rep 194. [↑](#footnote-ref-58)
59. Meirong Zhou, Ti Yang, Wei Tan, ‘An Analysis of the Legal Issues in Lien Clause in the Time Charter Party’, (2009) 1 China Oceans Law Review 350. [↑](#footnote-ref-59)
60. L Bernstein, ‘Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms’ (1996) 144 U Pa L Rev 1765. [↑](#footnote-ref-60)
61. L Bernstein, ‘Custom in the Courts’ (2015) 110 Nw U L Rev 63. [↑](#footnote-ref-61)