The Lien on Sub-freights
A Practical Guide for the Chartering Trade

Candidate number: 4005
Submission deadline: 5th December 2018
Number of words: 17,689 words
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ACKNOWLEDGEMENTS

This brief note does not do justice to the debt of gratitude I owe to my parents, having been my bedrock come what may.

I am also grateful to my supervisor for his guidance and for always catching me out on my unfounded assumptions.

I would also like to extend my gratitude to Lasse Brautaset for his insight into the NYPE 2015 re-drafting process and Professor Hans Tjio for extending his amicus curiae brief in the seminal decision of Diablo Fortune Inc. v Cameron Lindsay Duncan [2018] SGCA 26.

I am especially grateful for my friends and neighbours in Oslo whose warmth made my stay in Norway, even through the winters, so enjoyable.

Finally, I am thankful for the help rendered by the Scandinavian Institute for Maritime Law for keeping me on course in every sense of the word.

November 2018
TABLE OF ABBREVIATIONS

In Text

_Baltime_ “Baltime 1939 (as revised 2001)” time-charterparty and its predecessor versions insofar as the _Lien Clause_ is concerned

_BIMCO_ Originally “The Baltic and International Maritime Council”  
See: <https://www.bimco.org/about-us-and-our-members> accessed on 22 August 2018

_BL_ Bill(s) of Lading

_Lien_ the Lien on Sub-Hire and Sub-Freights

_NYPE_ “NYPE 2015” time-charterparty and its predecessor versions except where expressly distinguished – see Part 4.2

_Sub-Freights_ Sub-Freights and Sub-Hire (except where expressly distinguished – see Part 4.2)

Guidance on Footnotes

Full case citations, editorial references of treatises and citations of articles referred to are set out in full in the Table of References below.

In the interest of brevity of footnotes, case citations have been limited to the first name of the plaintiff or appellant (as the case may be) or the name of the vessel involved. Where several judgments of the same name are referred to, they are distinguished by the court level.

Similarly, treatises and texts are referred to by their title.

Articles are also referred to by the author, year and publication / journal (where the same author has published twice in the same year and journal, the page number of the article is also provided).
1 Introduction

1. The lien on sub-hire and sub-freights is ubiquitous in the maritime trade and is found in virtually every standard-form charterparty promulgated by BIMCO\(^1\), “the world’s largest international shipping association”.

2. The lien on sub-hire and sub-freights has long confused lawyers and judges alike. With the recent Singapore Court of Appeal decision in *Diablo Fortune Inc. v Cameron Lindsay Duncan*\(^2\), the first time the nature of the Lien came before a final court in any commonwealth jurisdiction, the modern understanding amongst jurists in the commonwealth is confusingly both beyond question and questionable.

1.1 What is the Lien on Sub-Freights

3. The confusion surrounding the Lien is exacerbated by the fact that most of these disputes arose against the backdrop of domestic insolvency laws (some recent decisions also consider the effect of cross-border insolvency regimes). Decisions concerning Liens have focused on its underlying nature (i.e. as a security interest or mere contractual right) as the domestic insolvency regimes of most if not all commonwealth nations render charges on book debts (e.g. assignments of the sub-freights) unenforceable against liquidators upon the insolvency of the charterer\(^3\) but not alternative means of quasi-securities (e.g. *sui generis* contractual rights).

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\(^1\) The “Lien Clause” can be found in various versions of the BareCon, NYPE, “BALTIME” and even “GENCON” charterparties. Forms of the “Lien Clause” can also be found in a variety of ‘more specialised’ charterparties.

\(^2\) See also *Duncan*; Ian Teo [2018] LMCLQ 14

\(^3\) Beginning with *Ugland Trailer* concerning Section 95(2) of the Companies Act 1948 and arose again in *Annangel Glory* concerning the successor section, Sections 395–396 of the Companies Act 1985 (replaced by Sections 859A–859F, Companies Act 2006).

Similarly, Section 205 of the Companies(New South Wales)Code, was in dispute in *Lakatoi Express* and in Singapore, Section 131 of the Companies Act(Cap.50), arose in *Diablo*.

*See also* - Bowtle [2002] LMCLQ, pgs 290 & 292
4. Judicial opinion in the commonwealth appears to be coalescing around treating the *Lien* as equitable assignments by the charterer of sub-freights to the (disponent) owner as security for the charterer’s obligations (*inter alia* to pay hire) akin to floating charges\(^4\) but not equitable liens\(^5\).

5. Some deny this as juridical heresy\(^6\). They compare the *Lien* with an unpaid seller’s right of stoppage *in transitu*\(^7\) even though the differences between intangible property and chattels\(^8\) complicate the search for guiding principles to develop the law on the *Lien*. There remains no ready-made analogy for the *Lien*\(^9\). The theory that the *Lien* is a *sui generis* personal, contractual right is also increasingly bereft of judicial\(^10\) and academic\(^11\) support.

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\(^4\) Governments Stock Investment Co. v Manila Railway[1897]AC 81(UKHL); In Re Yorkshire Woolcombers Association Ltd[1903]2Ch.284(EWCA), confirmed upon appeal in Illingworth v Houldsworth[1904]AC 355(UKHL); Nolan,(2005)64(3)CLJ554; Charlesworth on Company Law, pgg616–617: a floating charge is described as having the following four characteristics:

1. *In Re Yorkshire Woolcombers Association Ltd*: it is an “equitable charge on assets for the time-being of the company”;

2. *Governments Stock and Other Securities Investment Co. Ltd v Manila Railway Co. Ltd*: “it attaches to the class of assets charged in the varying conditions in which they happen to be from time to time i.e. it does not fasten on any definite property but is a charge on property which is constantly changing”

3. *Evans v Rival Granite Quarries Ltd* [1910] 2 KB.979 and *Re Brightlife Ltd* [1987] Ch.200(EWHC): “it remains dormant, subject to any automatic crystallisation, until the undertaking charged ceases to be a going-concern, or until the ... [chargee] intervenes. His right to intervene may be suspended by agreement but if there is no agreement for suspension he may intervene whenever he pleases after default. When this happens the charge is said to ‘crystallise’ and becomes fixed”; and

4. *Re Borax Co.* [1901] 3 Ch.326 and *re HH Vivian & Co. Ltd* [1900] 2 Ch.654: “although it is an immediate and continuing charge, until it becomes fixed the company can, without [chargee’s] consent, control the assets, including taking them outside the scope of the charge, e.g. it has been held that a company can sell all or any of its business or property for shares or debentures of another company if the memorandum gives it the power to do so, and the debenture holders [chargees] cannot prevent such a sale if the company remains a going-concern”

*See also - Re Brightlife Ltd* on automatic crystallisation

\(^5\) Worthington,(1994)53(2)CLJ 263, pg267; Bowtle [2002] LMCLQ, pg289

\(^6\) *Re Brumark*, para.[41]; responding to CIR [1999] NZCA 227, paras.[10]&[31]; Oditah, [1989] LMCLQ

\(^7\) e.g. Section 39, Sale of Goods Act 1979(UK); Section 41, Sale of Goods Act 1908(NZ); Section 42, Sale of Goods Act 1954(AUS); Section 41, Sale of Goods Act(Cap. 393)(SG))

\(^8\) Palmer on Bailment, Cap. 30“Intangible Property”

\(^9\) Contra. *Diablo*,para.[30]

\(^10\) *Ibid*, Western Moscow; contra. Go Star

\(^11\) Bowtle,[2013] LMCLQ,pq145;
6. While many might insist that the *Lien* differs significantly from a floating charge, it is increasingly difficult to identify how as jurisprudence develops as if the *Lien* is a variety of the floating charge.

7. Both theories carry unhappy practical and commercial implications for the *Lien*. The *Lien* does not allow sub-freights to be followed into the hands of charterers and if it is a floating charge, is unenforceable against charterers’ liquidators if not duly registered in time (usually three weeks or 30 days), from the creation of the charge (execution of the charterparty). Registration against every subsidiary charterer is difficult since owners often find out their identity too late and is impractical for short charters. As a *sui generis* contractual right, the *Lien* is not enforceable against subsidiary charterers and may be an unenforceable attempt to skirt mandatory *pari passu* distribution upon a charterers’ insolvency.

8. A third theory has recently emerged, suggesting that the *Lien* is a “springing security interest”¹⁴. The language of the *Lien Clauses* suggests an immediate security, but this theory postulates that the *Lien* grants owners an option to take an assignment of sub-freights, resulting in the low priority of owners’ *Liens*. This theory also better explains why liened sub-freights cannot be followed into the hands of charterers unlike if they were assigned from the outset but would, uncommercially, still require registration to be enforceable in insolvency.¹⁵

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¹² *Ugland Trailer*, pg376,Col.2: liens on sub-freights have to be registered to be enforceable when it matters most – upon the insolvency of the charterer; *Western Moscow*, para.[51]; *Diablo*, paras.[27-32]

¹³ *British Eagle; Joo Yee; Watts,[1995] LMCLQ; Lee Suet Lin,(2003) ICCLR 1

¹⁴ *Diablo*(SGCA); *Asiatic Enterprises*[2001](SGCA); *Murphy v Wright*(1992)5 BPR 11,734(NSWCA); Lee Eng Beng,(2000)12 SAcLJ 210; Tan Cheng Han,(2001)13 SAcLJ 451

¹⁵ *Re Spectrum Plus*, para.[110](Lord Scott); Contra. *Re MC Bacon Ltd (No. 1); Diablo*, para.[64-67]
Despite allusions to maritime law\textsuperscript{16}, no decision or research encountered thus far has developed the historic but still relevant\textsuperscript{17} construct of freight as incidental to ownership and \emph{dominus} of a vessel\textsuperscript{18}. The similarities are certainly striking – mortgagees and insurers who take possession of the vessel and complete carriage of cargoes are entitled to freight (or hire) payable (originally to owners) after they take possession but may not follow any freight paid in advance into owners’ hands or require cargo interests to pay freight once more for the carriage performed. This obscure theory must be developed elsewhere, but it may be that \textit{Lien Clauses} only express owners’ and operators’ implicit, non-contractual right to collect freight as enunciated in cases concerning mortgagees and hull-insurers, and grant subsidiary charterers a right derived from owners. A happy outcome of present jurisprudence is that owners do not enjoy special rights and the \textit{Lien} is treated similarly across all levels on a chain of charterparties\textsuperscript{19}. Given the modern commercial context\textsuperscript{20}, the \textit{Lien} also usefully bites on advance freight and hire\textsuperscript{21} but significantly may be subordinated to later assignees of freight\textsuperscript{22}.

\begin{itemize}
\item \textit{Re Brumark}, para.[41]; \textit{Go Star}, paras.[98–99]; Hon. Steven Rares,[2018] LMCLQ 398, pg399; \textit{contra}. Justice Steven Chong, NUS CML Working Paper17/01, pg7: “maritime law” refers to no more than the common law applied to maritime disputes; \textit{Bowtle} [2002] LMCLQ,pg291: maritime law is essentially 19\textsuperscript{th} and 20\textsuperscript{th} century commercial common law
\item \textit{Arnould’s Law of Marine Insurance & Average}, paras.[30.30-31],[31.07]&[31.15-17]; Clause 20, Institute Time Clauses (Hull) 1/11/95 and Clause 22, International Hull Clauses 2003
\item \textit{Keith v Burrows}; \textit{Simpson v Thomson}; \textit{Red Sea}
\item \textit{Panglobal Friendship}; \textit{Lancaster}: in bareboat charters, the \textit{Lien Clause} grants one possessory lien over the vessel to charterers and two non-possessory ‘liens’ over cargo and sub-freights to owners and in time charters grants one possessory lien (over cargo) and one non-possessory ‘lien’ over sub-freights to owners and one non-possessory ‘lien’ over the vessel to charterers. This analysis proceeded on generally applicable laws of bailment and not according to any rules particular to maritime law.
\item Despite historically requiring possession, liens on receivables may be developing into a coherent area of law: \textit{Goode on Legal Problems of Credit and Security}, Caps.[1.07],[1.43-45]&[1.53-58]; \textit{Re Lehman Bros}, paras.[34–48] concerning a “general lien”, albeit also providing for a power of sale and to apply the proceeds of such sale to discharge outstanding obligations; \textit{Oditah, Legal Aspects of Receivables Financing}, Cap.[5.3] on liens on documentary intangibles; \textit{Security and Title-Based Financing},Cap.[5.79-92]; \textit{Re BCCI SA(No. 8)} concerning a lien on bank account, \textit{contra Re Charge Card} [1989](EWCA),[1987](EWHC) which were not expressly overruled on flawed assets; \textit{Alan Berg}[2001] JBL
\item \textit{Reynolds QC},[2002] LMCLQ
\item As to freight: \textit{Sea Insurance}, as to hire: \textit{Red Sea}, pgg25–26(Lord Esher MR)
\item \textit{Law of Ship Mortgages}, paras.[17.1.1-17.1.6]&[17.10.1-17.10.4]; provided notice of the assignment is given to sub-charterers in accordance with the rule in \textit{Dearle v Hall} (1828) 3 Russ 1,38 ER 475(Ch)(UKHL); \textit{Attika Hope}; \textit{Security and Title-Based Financing},Cap.[7.76]
\end{itemize}
10. It seems the *Lien* was thrust into the proverbial deep-end with courts forced to weave theoretical gold as to its nature with far too few straws of jurisprudence. What everyone can agree on, suffice it to say, is that the *Lien* is a non-possessory\(^{23}\) mechanism to offer owners some security (although not necessarily a security interest\(^{24}\)) for charterers’ obligations (not necessarily hire\(^{25}\)) under the charterparty.

### 1.2 The Purpose of This Paper

11. Notwithstanding the confusion amongst jurists, the chartering trade has little option but to live with the ubiquitous *Lien*. I do not intend in this paper to take up the herculean task of resolving the confusion surrounding the nature of the *Lien* which far greater minds have avoided, even while overhauling entire areas of law\(^ {26}\).

12. Instead, this paper hopes to catalogue some of the various effects of the *Lien* as determined in decided cases. It is hoped that this paper may be useful to operators in the charter trade who may one day have to answer (disponent) owners’ *Liens* in unfamiliar jurisdictions. Incidentally, it is hoped charterers will better understand legal presumptions concerning allocation of commercial risks under charterparties and how charterers may guard against unnecessary liability to head-charterers and owners.

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\(^{23}\) *Lancaster, Re Brumark,* para.[41]; *Western Moscow,* paras.[38] &[47], *Bulk Chile* (EWHC), paras.[54-55]; *contra.* Andrew Tettenborn,[1985] LMCLQ, pgg377-378; *Pars Ram,* para.[6] as to constructive possession

\(^{24}\) *Goode,* paras.[1.03-04],[1.17],[1.21] &[1.31-35]: security interests in common law regimes require owners of assets to encumber them such that they be applied in satisfaction of a particular debt rather than the functional effect of the arrangement

\(^{25}\) *Cebu*(No.1)

\(^{26}\) *Re Brumark,* *Re Spectrum Plus*
2 Structure

13. After briefly laying out the contrasting strands of theory in the introduction, and outlining the common-law methodology, the substantive portion of this paper begins with a brief introduction to the prevailing versions of the *Lien Clauses* in use in the maritime trade today. The focus of this section is on the practical effects of the accepted interpretations of *Lien Clauses*, covering what may be recovered, what may be subject to the *Lien* and concomitantly who may have to answer owners’ *Liens*.

14. Then considered is how the *Lien* affects day-to-day operations in the charter trade. This section is primarily focused on charterers rights to freight and to control the commercial exploitation of the vessel under the *Employment Clause*. This inquiry pertains to day-to-day functioning before owners exercise their *Lien*.

15. This paper thereafter tackles practical complications created upon owners’ exercise of their *Lien*, beginning with formal requirements for owners to exercise their *Lien*, and then moving to identify key issues which sub-charterers should immediately re-visit before responding to owners.

16. Efforts have been made to avoid overly theoretical analyses of the common-law but ascertaining and defending legal rights requires grappling with legal doctrine. Against the backdrop of some legal theory, is what is hoped, a helpful guide for subsidiary charterers to identify formal and substantive defences. Tied to the inquiry on charterers’ defences are procedural remedies available before commonwealth courts and, unsurprisingly in the maritime sector, arbitral tribunals.

17. It follows naturally from sub-charterers’ defences that owners may raise more than just a claim under their *Lien*, and these claims are briefly mentioned so that sub-charterers are alive to these issues.

18. A practical concern is also that intermediate-charterers may be affected by the operation of owners’ *Liens* and may lose out on their profit margins. An attempt is thus made to rationalise how sub-freights in excess of owners’ claims are distributed against the paucity of case of authority on this point.
19. Recognising some problems, Hong Kong and Singapore have introduced statutory carve-outs for the *Lien*\(^{27}\). Its effects on the charter trade are discussed in the last section of this paper but it suffices to note that these statutory amendments modify domestic insolvency laws instead of affecting the day-to-day operations in the charter trade. These legislative efforts appear to be apposite topic on which to wind-up this paper.

\(^{27}\) Teo [2018] LMCLQ 490
3 Methodology

20. This paper had originally attempted to review the principal commonwealth decisions ruling on *Lien Clauses* with a view to defining the precise scope and eventually shed some light on the nature of the *Lien*.

21. Like maritime trade, the common-law is not purely domestic but builds on jurisdiction-specific, binding decisions and persuasive decisions arising in similar circumstances and/or in jurisdictions built on similar principles\(^{28}\). Various common-law courts have considered the *Lien* in passing, in disputes concerning matters ranging from owners’ entitlement to freight from charterers (against charterers’ counterclaims) and shippers (under BLs), the charterer’s *Employment Clause*\(^ {29}\) (and the owners’ concomitant indemnity\(^ {30}\)) and even in the context of preferential creditors under insolvency regimes.

22. A broad spectrum of cases across many jurisdictions are therefore considered because these cases have added to the contextualised understanding of the *Lien*, and because the common-law continues to cross-pollinate, drawing on related strands of reasoning. My own linguistic and temporal limitations compel me to limit my survey to cases directly and indirectly concerning the *Lien* and similar arrangements emanating from England (& Wales), Canada, Australia, Hong Kong, Singapore and New Zealand.

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\(^{28}\) *Fn.4:* Richard Nolan, pg557

\(^{29}\) *See* Clause 9 of “*BALTIME 1939 Rev. 2001*” and Clauses 8 and 31 of NYPE 2015; *fn.121*

23. American decisions have however been excluded because the admiralty jurisdiction of the USA long departed from rest of the commonwealth\textsuperscript{31}. Consequently, their approach to the Lien is significantly more generous\textsuperscript{32}. American courts appear to treat all claims justiciable before admiralty courts as secured by maritime liens. Charterparty claims giving rise to maritime liens\textsuperscript{33}, aided by alternative means of maritime attachment\textsuperscript{34}, enable (dispone) owners to surmount privity of contract more readily and avoid registration requirements\textsuperscript{35}.


\textsuperscript{32} \textit{Maritime Liens and Claims}, (2\textsuperscript{nd} edn, International Shipping Publications, 1998), Cap.21,Part VII,pg786; \textit{Time Charters},Cap.[30A]; O’Rourke, 7 Loy.LA Int’l&Comp.L.Rev.73(1984);

\textsuperscript{33} Provided the charterparty is not merely executory – \textit{Time Charters}, Cap.[30A.01]&[30A.13]; \textit{Voyage Charters},Cap.[17A.7-17A.9]&[17A.21] citing \textit{Freights of Mt. Shasta} (1927)(AMC); \textit{The Halcyon Isle}[1980](SGPC),pg333Col.1(Lord Diplock)

\textsuperscript{34} Tetley QC, 73 Tulane L.Rev.1895(1999), part.IV.C: American law retained old rules of English admiralty attachment under Supplemental Rule B

\textsuperscript{35} \textit{Time Charters},Cap.[30A.13]
4 Construction of the “Lien Clause” in Commonwealth Decisions

24. Two forms of the Lien Clause are prevalent in the chartering trade today. Clause 17 of the Baltime time-charterparty is reproduced below:

“17. Lien
The Owners shall have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers shall have a lien on the Vessel for all moneys paid in advance and not earned.”

25. The similar but notably different Lien Clause as found in the recent NYPE time-charterparty (2015) is also reproduced below for easy reference:

“23. Liens
The Owners shall have a lien upon all cargoes, sub-hires and sub-freights (including deadfreight and demurrage) belonging or due to the Charterers or any sub-charterers, for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.”

26. Notwithstanding weighty commonwealth jurisprudence, the NYPE Explanatory Notes36 describes the Lien, fairly neutrally, as a non-possessory lien “in the form of ‘intercepting’ a payment due to charterers”37 without attempting a theoretical explanation. It is anyway worth noting however that commonwealth courts do not afford significant weight to explanatory notes unless incorporated into the contract proper38, nor are courts likely to overturn established legal doctrine concerning Liens on the strength of explanatory notes.

37 Ibid, pg17; contra Spiros C, para.[52](Rix LJ)
4.1 Which “Amounts” are Due

27. Much like how owners’ common-law liens on cargo have historically secured freight (albeit only freight payable on delivery), remuneration under the charterparty is precisely the sort of claim (contractual) Liens are intended to secure. Modern Lien Clauses expressly provide also for general average claims, but no longer express provide that “expenses and damages due under or for breach”\(^ {39} \) of charterparties may be satisfied out of liened sub-freights.

28. Courts have exhorted that the Lien Clause should be interpreted restrictively, or at least against the clear commercial context of the chartering trade\(^ {40} \). However, the removal of references to “expenses and damages” in modern Lien Clauses is now not likely to prevent owners from satisfying damages and expenses (likely minimal agency costs of exercising Liens) out of sub-freights. Instead, these amounts are more likely to be treated as “amounts [implicitly] due under” the charterparties.

29. It was thought initially that ‘loss of the bargain’ damages may not be satisfied by the Lien\(^ {41} \). Damages may have been viewed as secondary obligations not arising under the charterparty but instead imposed by law\(^ {42} \). Contract law has progressed and damages, though still secondary obligations, are considered as arising under the contract\(^ {43} \) and owners may now satisfy claims for such damages\(^ {44} \).

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\(^ {39} \) Cf. the “Baltic and White Sea Time Charter 1912” form used in Molthes Rederi [1927](EWHC)

\(^ {40} \) Nanfri[1978](EWHC), pg591(Kerr J): the “lien clause must be construed in the context of the time charter as a whole. ... the lien clause purports to give them additional remedies, but ... these must be limited by the reference to normal shipping practice. The normal way of exercising the lien is to try to intercept sub-freights or bills of lading freights before they reach the charterers by giving the appropriate notices ... or perhaps by claiming that even thereafter the effect of the notices is that the moneys are held in trust by the charterers for the owners”; Kos (UKSC), paras.[9-18](Lord Sumption)

\(^ {41} \) Samuel v West Hartlepool,pg128

\(^ {42} \) Lakatoi Express, citing Freights of the Kate 63F707 and Dominique [1989](UKHL): limited to voyage-charterers’ right to obtain damages against assignees of freight and whether unliquidated damages gave rise to equitable set-offs. Arguably, Lord Diplock’s reasoning on secondary obligations supports treating damages as arising under a contract.

\(^ {43} \) Fiona Trust, para.[11](Lord Hoffmann): causes of action (arising “under” or “out of” a contract) subject to arbitration; Potoi Chau [1984](UKHL),ppg237–238(Lord Diplock); Lips [1987](UKHL), pg317,Col.1(Lord Brandon)

\(^ {44} \) Andreas Lemos , paras.[55-56](Dubé J) – the bill of lading also provided for a very broad lien; Western Moscow, paras.[30-31], contra. para.[33]
30. Owners appear always to have been able to satisfy indemnity claims (arising out of the charterers’ breach) for expenses incurred on behalf of the charterers out of such sub-freights\(^\text{45}\). The inconsistency between indemnity claims and damages appears originally to have been justified on the basis that owners’ indemnity claims need not necessarily arise out of charterers’ breaches\(^\text{46}\) but such a distinction is not always apparent.

31. Cases confirming owners’ rights to damages (e.g. demurrage) upon exercising possessory, artificers’ liens on cargo are mired in historical rules\(^\text{47}\) but offer mild support for owners’ claims to recover expenses arising from the exercise of their Lien, if any.

4.2 What are Sub-Freights?

32. The Explanatory Notes however highlight the distinction between sub-freights and sub-hires\(^\text{48}\) covered by the Lien Clause.

33. By way of background, common-law (because of long-standing authority\(^\text{49}\)) affords freight under voyage-charterparties and BLs with a unique, almost anomalous, status\(^\text{50}\). Unless expressly provided otherwise, freight is immune from counterclaims and set-off\(^\text{51}\). This exception, however, is so restrictively guarded that courts have overlooked the (temporary) confusion in the commercial trade as to terminology (when charterers used the word “freight” to refer to time-charterparty hire\(^\text{52}\)).

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\(^{45}\) Samuel v West Hartlepool, pg127; Lakatoi Express; Grace Liberty II; Cosco Bulk

\(^{46}\) Samuel v West Hartlepool, suggesting that owners were impliedly permitted to incur expenses on behalf of charterers in emergencies. How the charterers’ death on-shore amounted to an emergency is unclear; fn.30

\(^{47}\) Western Moscow, para.[30(B)]; contra Lehmann Timber, paras.[52–120]; Boral Gas, pgg328–349; Jarl Trä, paras.[20-30]

\(^{48}\) Cebu(No.2)

\(^{49}\) Aries; Nanfri(UKHL),pg205,Col.2(Lord Wilberforce)

\(^{50}\) Cebu(No.1), pg306,Col.1; United Carriers Ltd, pg102(May LJ);

\(^{51}\) Nanfri (EWCA), pg139,Col.1(Lord Denning MR) and pg145,Col.2(Goff LJ)

\(^{52}\) Id
34. Despite efforts at harmonising areas of maritime law (e.g. blurring distinctions between freight and hire save where special rules are entrenched\(^{53}\), some courts have treated the *Lien* restrictively\(^{54}\) and refused to treat the *Lien* as also biting on sub-hire (due under a sub-time-charterparties) in the absence of clear words\(^{55}\).

35. Restrictively construing “*sub-freights*” as including only freight due under a sub-voyage-charterparty was recognised as uncommercial and prone to abuse from the outset\(^{56}\). This construction continues to be criticised as unduly complex and out-of-touch with the trade\(^{57}\) but is binding in England until overturned\(^{58}\).

36. Other courts have not sought to overturn this distinction within their jurisdictions either. Instead, other courts are therefore likely to continue to refer to the distinct terminology used in the *NYPE Lien Clause* to give “*sub-freights*” (and thus the *Baltime Lien Clause*) a restrictive reading\(^{59}\) – perpetuating this uncommercial draftsman’s trap\(^{60}\).

37. Whether the *Lien* as an assignment of receivables\(^{61}\) due to the charterer or a *sui generis* contractual right, it is considered also that the *Lien* may be suitably amended to extend to other receivables like deadfreight, demurrage\(^{62}\), salvage remuneration or general average contributions (concerning freight interests\(^{63}\)) or even insurance proceeds\(^{64}\).

\(^{53}\) *Id*; *Cebu (No.1)*, pg306,Col.1;  
\(^{54}\) *Fn*.40  
\(^{55}\) *Cebu (No.2)*,pg322,Col.2  
\(^{56}\) *Cebu (No.1)*,pg310,Col.1  
\(^{57}\) *Carver on Charterparties*,Cap.[13-067];  
\(^{58}\) *Bulk Chile*(EWHC), paras.[47-49]  
\(^{59}\) As Lloyd J did in reverse in *Cebu (No.1)*,pgg304,Col.1;307,Col.1  
\(^{61}\) *Security and Title-Based Financing*,Cap.[7.75] on the distinction between ‘book debts’ and receivables. The term “receivables” is used for convenience  
\(^{62}\) *e.g.* Clause 26, *ShellTime4*  
\(^{63}\) *Maritime Liens*, para.[37]  
\(^{64}\) *Law of Ship Mortgages*, paras.[17.2.6]&[17.10.3] and Appendix 3 definition of “*Earnings*”
4.3 Who is Subject to Owners’ Lien?

38. Another difference between NYPE and Baltime Lien Clauses is that the latter is limited to sub-freights “belonging or due to” charterers. The Baltime Lien Clause therefore grants owners a lien only on sub-freights payable by immediate sub-charterers under a sub-voyage-charterparty only\(^{65}\). The Baltime Lien Clause does not grant owners a lien on sub-hire payable by sub-charterers on a sub-time-charterparty or on sub-freights payable by sub-sub-charterers and below regardless of the type of charterparty; practically useless higher up the chain of charterparties, or if immediate sub-charterers are punctual with their charter-hire payments\(^{66}\) as will be seen at Part 6.2.3 below.

39. Compared to the restrictive Baltime Lien Clause, the NYPE Lien Clause grants owners a lien on “all sub-freights [and now, sub-hire] whether or not due to the head charterers direct”\(^{67}\). The owner is not subrogated to the charterer’s remedies because subrogation was apparently traditionally limited to contracts of indemnity\(^{68}\) but assigned charterers’ rights to sub-sub-freights. Effectively, owners may exercise the charterers’ remedies against the sub-charterer – i.e. the charterers’ own lien on sub-sub-freights\(^{69}\), as will be elaborated on at Part 7.2 below.

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\(^{65}\) Nanfri(UKHL), pg209,Col.1(Lord Fraser); Cebu(No.1), pg307,Col.1; Western Moscow, para.[61]

\(^{66}\) Byatt Int’l

\(^{67}\) Cebu(No.1), pg306,Col.2

\(^{68}\) Ibid at pg309,Col.2; rejecting American Steel Barge Co. v Chesapeake & O. Coal Agency 115 Fed.Rep.669(1902) (1st Cir.C.A.); contra. Bank of Cyprus, citing Orakpo v Manson Investments Ltd [1978] AC 95(UKHL), pg112(Lord Edmund-Davies) and Re T H Knitwear, pg286

\(^{69}\) Ibid, pg306,Col.2–based on parties’ concessions at pg309,Col.1 that charterers’ rights to sub-freights and to claim sub-sub-freights were assigned to owners; Ugland Trailer,pg375,Col.2; Western Moscow, paras.[42-43]
40. If the *Lien* is a *sui generis* contractual right, it does not have any third-party effects\(^70\) and regardless of the language used, would not be competent to grant rights over third-parties (i.e. owners’ rights to sub-sub-freights). Although this query is now effectively moot, the choice of language in the *NYPE Lien Clause* may have been precautionary only, without granting rights not legally capable of being granted (i.e. rights over third-parties to a contract)\(^71\). The *NYPE Lien Clause* may have been intended to reproduce the same effects as the *Baltime Lien Clause* through different terms (i.e. a lien on sub-freights due to the immediate charterer, and a right to BL freight as explained at Part 5.1 below).

41. A peculiarity of the maritime trade is that not all sub-freights are intercepted by way of a lien. As explained at Part 5.1.1 below, owners may intervene and collect freight due under a BL, even if a voyage-charterparty was incorporated making freight expressly payable to a sub-charterer, because owners are party to the BL and are directly entitled to such freight\(^72\). The reference to BL freight in the *Baltime Lien clause* therefore may not grant owners greater rights than under the *NYPE Lien Clause*. However, Lloyd J’s reliance on cases concerning the owners’ possessory lien over cargo\(^73\) under the *NYPE Lien Clause* may also suggest that charterers are obliged to obtain a lien on sub-sub-freights in contrast to the *Baltime* form\(^74\). This will be developed in Part 5.4 below, but holders of BLs for cargo carried on a vessel chartered under the *Baltime* time-charterparty may find that they may be directed to pay freight to owners even under charterers’ BLs.

\(^{70}\) Oditah [1989] LMCLQ, pg196; *Western Moscow*, paras.[50-51]  
\(^{71}\) *Legal Aspects of Receivables Financing*, Cap.[5.3]  
\(^{72}\) *Spiros C*  
\(^{73}\) *Aegnoussiotis*, pg276; Lloyd J rejected *Agios Giorgis* which had been overruled in *Nanfri* (EWCA) concerning the distinction between “freight” and “hire” but not the extent of owners’ liens on cargoes belonging to third-parties and the inapplicability of the principles governing the owners’/carriers’ common law lien over cargo under bills of lading to the owners’ lien over the time-charterers’ cargo; *Carver on Charterparties*, Cap.13-010; *Time Charters*, Cap.[30.12]; contra. *Maritime Liens & Claims*, pgg793–794: this view arguably oversimplifies and mischaracterises the holding in *The Aegnoussiotis* but instead prefers *The Chrysovalandou Dyo* which did not limit the holding in *Aegnoussiotis*  
\(^{74}\) *Nanfri* (UKHL), pg209, Col.1 (Lord Fraser)
42. Predictably, sub-freights due from sovereigns are likely to be immune to attachment or arrest. Under the prevailing *floating charge* theory, it is not clear that exercising the *Lien* amounts to an attempt by owners to attach or arrest sub-freight. However, courts may incline towards expanding sovereign immunity and accept a state’s creditworthiness to honour eventual judgment-debts\(^75\).
5 Commercial Chartering and Owners’ Liens on Sub-Freights

43. The full effects of Lien Clauses are felt upon exercising their Lien. Nonetheless, Lien Clauses form part of the commercial bargain struck between owners and charterers and its effects in the usual course of trade are considered below. A starting point is to consider how freight is apportioned and thereafter how the vessel in question may be employed.

5.1 Who is Entitled to Freight

44. Courts have repeatedly affirmed that Lien Clauses and owners’ Liens should be construed (restrictively) against the commercial context of charterparties76 - the allocation of financial risks between parties and the presumptions on contracts of carriage under BLs77 (confirmed also by demise clauses in BLs78). By way of background, BLs are contracts of carriage between carriers and holders of BLs79 (but are merely evidence of the terms of the contract vis-à-vis the shipper80). Where there is a coincidence of identities, charterparty terms supersede BL terms81 unless expressly provided otherwise82.

5.1.1 Owners’ Bills of Lading

45. As parties to the contract contained in BLs, owners are directly entitled to freight due thereunder83. Owners exercising their rights under the Lien Clause over BL freight are not exercising a lien on sub-freights but are demanding sums contractually due to them under the BL are in fact paid to them84. In contrast, Liens are a mechanism to collect money payable to another85.

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76 Cf. fn40&132
77 Wehner v Dene; contra. Molthes Rederi; The Ines[1995] 2 Lloyd’s Rep.144
78 Grace Liberty II; contra. The Starsin
79 Section 4, Carriage of Goods by Sea Act 1992(UK); Section 4, Bill of Lading Act(Cap.384),(Singapore); not dissimilar to §299, Norwegian Maritime Code(MarLus Nr.435); Hain Steamship Co. v Tate & Lyle Ltd[1936] 2 All ER 597(UKHL)
80 Section 2(5),Carriage of Goods by Sea Act 1992(UK); Section 2(5),Bill of Lading Act(Cap.384)(Singapore);
81 Dunelmia, Carriage of Goods by Sea, Cap.[12.04]
82 Silva Plana; Voyage Charters,Cap.[17.8]; Carriage of Goods by Sea,Cap.[12.05]
83 Wehner v Dene, pg99; Spiros C, para.[13]
84 Molthes Rederi, pgg261,Col. 2-262,Col.1; Spiros C, paras.[52-55]
85 Id; Nanfri(EWCA), pg137,Col.1(Lord Denning MR);
46. As regards BL freight, the Lien Clause reflects a commercial arrangement between owners, charterers and shippers. In return for rights to employ the vessel, owners extract hire from charterers. Employment is the delegation of commercial functions of fixing contracts for the vessel (effectively bearing the commercial risks of vessel operation), carrying a concomitant mandate to negotiate terms of carriage and to enjoy the freight (to whom collection is also delegated)\textsuperscript{86}.

47. As concerns shippers, freight is due to owners for carriage of cargoes under the BL. Vis-à-vis shippers, owners are also free to control the collection of freight\textsuperscript{87}. However, because of the commercial arrangement contained in the charterparty, owners may not interfere in the collection of freight until charterers default\textsuperscript{88}. Until charterers' authority is terminated, they control the collection of freight\textsuperscript{89} and consequently bind owners, whether by accepting shippers’ personal credit (by marking BLs “freight prepaid”) or via set-off (pursuant to express contractual terms or informal payment arrangements\textsuperscript{90}).

48. When purporting to exercise their Lien over BL freight, owners are not intercepting payments due to another. Instead, owners are terminating charterers’ delegated authority to collect freight\textsuperscript{91} and are intervening in the function delegated to charterers under the charterparty\textsuperscript{92} by collecting the freight due to themselves\textsuperscript{93}.

49. As between owners and charterers, freight is apportioned as under the charterparty\textsuperscript{94} but is not assigned to charterers. Charterers are only entitled to freight until owners revoke their mandate\textsuperscript{95} to collect freight, effectively as collection agents\textsuperscript{96}.

\textsuperscript{86} Spiros C, paras.[39-41]; Simon Rainey QC, “Chapter 1–‘Interrupting the Lifeblood’: the Owner’s Remedies for Non-payment of Hire after Spar Shipping” in Charterparties: Law Practice and Emerging Legal Issues, Bulk Chile(EWCA), paras.[24-25]&[32]
\textsuperscript{87} Spiros C, para.[57]; Bulk Chile(EWCA), para.[23]
\textsuperscript{88} Ibid, para.[39]
\textsuperscript{89} Ibid, paras.[52-55]; Molthes Rederi, pgg261, Col.2–pg262, Col.1; applied in Bulk Chile(EWCA), paras.[23-24]
\textsuperscript{90} Ibid, para.[41]
\textsuperscript{91} Ibid, para.[52]
\textsuperscript{92} Ibid, para.[57]
\textsuperscript{93} Bulk Chile (EWCA), paras.[25]; Diablo, para.[34]
5.1.2 Other Cases: Charterers’ Bills of Lading & Chartered Carriage

50. The essential difference between owners’ BLs and other arrangements (i.e. charterers’ BLs\(^97\), where no BL issued\(^98\) and/or where sub-hire is in question\(^99\)) is that owners have no direct contractual right to the sub-freight or sub-hire in question. In such cases, sub-freights and sub-hires are contractually due to the charterers. Only in these cases are owners, in fact, exercising a lien on sub-freights (due to charterers) instead of redirecting payments of freights to which owners are already entitled.

51. Because charterers enjoy direct rights to freights under their own BLs and sub-charterparties, they may freely assign the same. As owners’ Liens are an assignment of charterers’ receivables, owners stand alongside other assignees of the same. Charterers’ assignees of sub-freights under charterers’ BLs and sub-charterparties may even enjoy greater priority over owners’ Lien if earlier notice is given to sub-charterers or shippers\(^100\). Assignees likely even know about owners’ Liens, but rank in priority to owners if notice of their assignment reaches sub-charterers first\(^101\) provided assignees are unaware that the Lien has been exercised\(^102\).

52. It is also not fraudulent for charterers to assign sub-freights to financiers before owners exercise their Lien\(^103\) and doing so does not breach the charterparty unless the charterparty contains negative covenants restricting charterers’ rights to assign or encumber sub-freights.

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\(^{96}\) Ibid; Indian Reliance, pg58,Col.1-2

\(^{97}\) Tagart, Beaton; Molthes Rederi;

\(^{98}\) Ugland Trailer

\(^{99}\) Cebu(No.1); Cebu(No.2); Byatt Int’l; Diablo

\(^{100}\) Attika Hope

\(^{101}\) Ibid; Anson’s Law of Contract, pgs671-672

\(^{102}\) Attika Hope: Parts 5.2 and 5.3 below; Diablo, para.[41-43]

\(^{103}\) Andrew Burrows “Assignment” in Chitty on Contracts(Vol. 1): irrelevant that an assignor is aware of previous assignments when further assigning a debt to a new assignee; Anson’s Law of Contract, pg672: debts may be assigned more than once without fraud; Goode,Cap.[5-08]
53. There is little authority on negative covenants\textsuperscript{104} but a breach of negative covenants likely does not entitle owners to terminate the charterparty despite altering the financial risks of the charterparty\textsuperscript{105} or to any springing security interests in sub-freights but only to damages (which may be worthless against insolvent charterers) or an injunction to prevent charterers from assigning sub-freights to another if somehow, they are aware of the assignments taking place.

### 5.2 Financing Against Sub-Freights

54. As mentioned at Part 5.1.1, charters only enjoy a revocable mandate to collect BL freight under owners’ BLs\textsuperscript{106}. These freights are not assigned to charterers, so financiers extending credit to charterers against assignments of their receivables only take an assignment of the proceeds of charterers’ revocable mandate to collect BL freight. Financiers will be disappointed to discover that such assignments may be rendered nugatory when owners’ exercise their superior, direct rights to BL freight, overriding charterers’ rights to BL freights\textsuperscript{107}.

55. In contradistinction to charterers’ assignee’s flimsy rights under owners’ BLs, charterers’ assignees of sub-freights under charterers’ BLs\textsuperscript{108} and sub-charterparties\textsuperscript{109} since charterers may freely assign these sub-freights due to themselves. Financiers may not be adequately secured by taking assignments of charterers’ receivables where a substantial proportion of these comprise sums payable by shippers under owners’ BLs. Financiers may instead be inclined to require that charterers procure the carriage of cargoes under their own BLs.

\textsuperscript{104} Goode, Cap.[1.76-83]; Security and Title-Based Financing, Cap.[17.06-07]
\textsuperscript{105} Cf. fn.86: Rainey QC
\textsuperscript{106} Spiros C; Bulk Chile(EWCA),para.[29]
\textsuperscript{107} Spiros C, paras.[48]&[57]
\textsuperscript{108} Fns.96&97
\textsuperscript{109} Attika Hope; Wilford [1988] LMCLQ
5.3 Constructive Notice and Duties to Inquire

56. To avoid unenforceability for failing to register charges against the receivables of a company, (disponent) owners have repeatedly argued that registration, to inform third-party creditors of charterers that their receivables were encumbered, was redundant given how pervasive the lien is in the chartering trade.

57. However, courts are generally reluctant to impose constructive notice on mere contracting counterparts, simply because the Lien is ubiquitous. The strict application of registration requirements under domestic insolvency regimes to Liens suggests (albeit only tangentially) that Courts are not inclined to hold that parties in chartering (and those trading with them) ought to be aware of the owners’ Liens any more than parties entering financial transactions should be aware of encumbrances on debtors’ assets.

58. Courts have had but one opportunity to conclusively deny that parties involved in the chartering trade (but not charterers precisely) are constructively aware of the owners’ Liens. In The Attika Hope, Justice Steyn rejected arguments that financiers were bound simply by charterers’ knowledge of the owners’ (unexercised) Lien in their charterparty, rightly concluding that charterers are not financier’s agents without more. Steyn J also likely considered the commercial reality that the financiers (who were trade-creditors) would likely have been aware of the owners’ Liens in the relevant charterparty. Arguably, there is no obligation to investigate the presence of Liens. The Lien is like any other assignment, and actors in the chartering trade need not investigate the encumbrances on a receivable before taking an assignment for value.

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110 fn.3
111 Ugland Trailer, pg376,Col. 2; Annangel Glory, pg49,Col.2; Lakatoi Express; Diablo, paras.[71-72];
112 Attika Hope, pg442,Col.2; R v Chester and North Wales; Rolls Royce, paras.[105-106]
113 Nanfri(EWHC), pg591 was cited to Steyn J
59. Nonetheless, owners’ Liens form part of the landscape of the chartering trade. In *The MV Loyalty*, sub-charterers effectively suffered double-loss as the charterers’ insolvency after having paid sub-hire and owners intercepted BL freights left sub-charterers with no income and no practical recourse against charterers. This outcome was unfortunate but not so inequitable or unjust to be avoided because the parties involved should have been aware of the commercial realities in question – specifically, the application of the insolvency regime of the charterers’ *lex incorporpontis* and that owners may be entitled to freight under their *Lien* or by being party to the BL.

60. While courts do not require parties to inquire into the existence of *Liens* merely when entering chartership or financial transactions, parties must be aware of the effects of their *Lien*. In *The Go Star*, owners were held to have been sufficiently aware of the sub-sub-charterparty to be found liable for inducing sub-charterers thereunder to breach it by issuing threats in the form of lien notices. Owners were naturally aware of significant details of the sub-sub-sub-charterparty terms and how losses may arise thereunder the charterparties were unsurprisingly on back-to-back terms. It cannot be said, however, that the owners’ knowledge was imputed because of the existence of the *Lien*, or their use of lien notices, but rather because of the owners’ tortious interference in the sub-sub-sub-charterparty.

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114 *Byatt Int’l*
115 *Ibid*, paras.[14-16]&[24]
116 *Ibid*, paras.[17-19]&[22-23], sub-charterers’ claim of unjust enrichment unsustainable on the facts
117 *Ibid*, paras.[24-26], although the compulsory application of the insolvency regime of an entity’s *lex incorporpontis* is increasingly doubtful as the UNCITRAL Model Law on Cross-Border Insolvency becomes more prevalent
118 *Ibid*, para.[27], citing *Wehner v Dene*
119 *Go Star*, paras.[88-90]
120 *Ibid*, paras.[1-2]&[15-16]
5.4 Charterers’ Rights under the Employment Clause and Obligations under the Lien Clause

61. Lien Clauses (prior to owners exercising their Lien) may also restrict how charterers employ the vessel. However, courts have been pro-trade, limiting owners’ rights under Lien Clauses in favour of charterers’ rights under the Employment Clause and general commercial practices of the trade. The locus classicus for this approach is The Nanfri which laid much of the groundwork for the common-law understanding of Liens, perhaps incidentally.

62. Apart from the carriers’ common-law liens, liens are creatures of contract and are generally personal remedies against lienees (as a defence to conversion or rei vindicatio claims – although this description is inapplicable to Liens). Therefore, charterers’ failure to contractually secure liens on cargo (where such liens are not implied) or sub-freights ‘down the chain’ would defeat owners’ rights to exercise such liens against third-parties to their charterparty. Terms in the sub-charterparty may also defeat owners’ Liens as explained in Part 7.2.3 below.

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121 Clause 9 of the “BALTIME 1939 Rev. 2001” and Clause 8 of the NYPE 2015 both provide that the “Master … shall be under the orders … of the Charterers as regards employment” and agency;

Clause 9 of the “BALTIME 1939 Rev. 2001” further provides that charterers “shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders…”;

Clause 31(b) of the NYPE 2015 similarly provides that “[all] bills of lading … shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading … signed by the Charterers or their agents or by the Master at their request.”

122 (UKHL),(EWCA),(EWHC)

123 Ugland Trailer, pg375,Col.2; Re Brumark, para.[41]; Western Moscow,para.[32]

124 Palmer on Bailment at Cap. 20 “Bailment in Shipping Contracts”

125 Security and Title-Based Financing, Cap.[5.82-83]

126 Maritime Liens & Claims, pgg793–794; Carver on Charterparties,Cap.[13-030]; note also the caution at Time Charters, Cap.[30.12-13]; Baughen,[2018] LMCLQ 348, pg361
63. Readers will recall that the *Baltime Lien Clause* grants owners a lien over cargo belonging and sub-freights payable to charterers but also a right to BL freight\(^{127}\). In *The Nanfri*, the House of Lords explained that the *Baltime Lien Clause* “does not give ... owners any right to require that the charterers shall procure that cargoes (not belonging to the charterers) shall be carried on terms that give the owners a lien over them or that there shall be in existence sub-freights over which the owners can exercise their lien”\(^{128}\).

64. Shortly prior, in a decision concerning cessation of charterers’ liability, the High Court explained that under the *NYPE Lien Clause*, “time charterers agree that the owners shall have a lien upon all cargoes. In so far as such cargoes are owned by third parties, the time charterers accept an obligation to procure the creation of a contractual lien in favour of the owners.”\(^{129}\)

65. *Prima facie*, the *NYPE Lien Clause* limits charterers’ rights under the *NYPE Employment Clause* by imposing positive obligations to secure the owner’s *Liens*. Similar language in the *Baltime Lien Clause* might imply a duty for charterers to eventually secure, in favour of (disponent) owners, a lien on freights accruing under a charterers’ BL. However, even though *The Aegoussihtis* was not cited in *The Nanfri*, future courts\(^{130}\) have not given fuller effect to either the *Baltime or NYPE Lien Clauses*.

\(^{127}\) The lien may be a misnamed direct right as owners are (often) party to the bill of lading – *Wehner v Dene* at pg99, *contra.* the presumption that owners are party to the BL and their rights to freight thereunder may be rebutted on the facts - *Molthes Rederi v Ellerman’s Wilson Line*, pg262,Col.1

\(^{128}\) *Nanfri*(UKHL), pg209,Col.1 (Lord Fraser)

\(^{129}\) *Aegoussihtis*, pg276: Donaldson J upheld owners’ claim against charterers for expenses (i.e. demurrage) incurred by maintaining a possessory lien against their own cargo by stating “If they do not do so and the owners assert a lien over such cargo, the third parties have a cause of action against the owners. But the time charterers themselves are in a different position. They cannot assert and take advantage of their own breach of contract. As against them, the purported exercise of the lien is valid. It follows that hire continued to be payable during the delay in discharging and that the time charterers’ claims, based upon that delay, fail”; this holding was endorsed in *Cebu(No. 1)*; fn.44, paras.[45–48]

\(^{130}\) Spiros C
66. Courts have been slow to restrict charterers’ rights under the Employment Clause, preferring to restrict Lien Clauses. Indeed, the unanimous, broad and powerful statements by the House of Lords, warning that owners’ might otherwise wield the Lien Clause to rewrite charterparties to their benefit, post fact, if not subject to charterers’ rights under the Employment Clause deserve the greatest respect both on authority and principle.

67. Instead, courts have allowed charterers to freely negotiate BL terms and have limited owners’ rights to decline to sign the BLs only where they “contain extraordinary terms or terms manifestly inconsistent with the charter-party”. Where the terms of carriage are inconsistent with the charterparty (e.g. fail to preserve owners’ Liens) but are otherwise within ordinary limits, owners are entitled only to damages - i.e. a personal remedy against charterers.

5.4.1 “Freight Prepaid” Bills of Lading

68. Carriage of cargo is often connected to the sale of cargo itself. For instance, CIF contracts where cargo is sold against documents include the price of freight and such contracts may require “freight prepaid” BLs to operate letters of credit.

131 Nanfri(UKHL), pg206,Col.1(Wilberforce), pg209,Col.1(Lord Fraser) and pg211,Col.1(Lord Russell); Lord Fraser explained that “if the instructions issued by the owners to masters [to require all bills of lading to express owners’ lien clauses] ... had been carried out, the consequences for the charterers would ... have been "extremely serious", and they would have been largely debarred from using the ships for the trade for which they had hired them under these time charters. It is therefore difficult to suppose, as a matter of commercial sense, that the contract can have entitled the owners to give such instructions; if it did, the owners could at any time have held a pistol to the charterers' head and demanded that the charter-party be amended in any way that seemed good to them.” (emphasis added)

132 Berkshire, pg188,Col.1 concerning a demise clause contained in a BL, applied in Anwar Al Sabar, pg264,Col. 2 concerning owners’ rights under Lien Clauses against a “freight prepaid” BL under a GenCon '76 voyage-charterparty

133 See facts of Keith v Burrows

134 Nanfri(UKHL), pg210,Col.1(Lord Fraser) and pg211,Col.1(Lord Russell)

135 See facts of Keith v Burrows

136 International Sale of Goods, paras.[4.09],[4.101]&[8.44]; Bills of Lading and Bankers’ Documentary Receipts, paras.[4.24-4.29]; Bills of Lading, paras.[2.73]&[12.53-12.55]

137 See facts of Soproma SpA v Marine & Animal By-Products Co. [1966] 1 Lloyd’s Rep.367(EWHC) and Nanfri(UKHL); implied in Glencore Grain Rotterdam BV v Lebanese Organisation for Int’l Commerce [1997] 1 Lloyd’s Rep.578(EWHC), pg583
69. Marking BLs “freight prepaid” however does not negative shippers’ or holders’ contractual liabilities for freight\textsuperscript{138} but merely reflects a commercial arrangement whereby charterers accept the personal credit of buyers to pay freight in the future\textsuperscript{139}, not unlike charterparties where (disponent) owners rely on charterers’ creditworthiness (until the mandate to collect freight is revoked)\textsuperscript{140}. However, as in any case of extending credit, charterers risk disappointment if owners exercise their \textit{Lien} and intervene and collect freight due under the owners’ BL as set out at \textbf{Part 5.1.1}.

70. Representations on BLs in the hands of subsequent holders estop owners from claiming otherwise, so BLs marked “freight prepaid” defeat the owners’ lien on cargo for freight against consignees because owners cannot claim freight remains outstanding\textsuperscript{141}. The “freight prepaid” marking however does not affect owners’ \textit{Lien}\textsuperscript{142} – only\textsuperscript{143} payment in fact defeats the owners’ \textit{Lien}.

71. Thus, the mere existence of owners’ \textit{Lien} does not limit charterers’ freedom regarding commercial operations but may expose charterers to damages for agreeing to BL terms inconsistent with the charterparty (insofar as charterers may be required to procure liens).

\textsuperscript{138} \textit{Bills of Lading}, para.[12.53]; \textit{Indian Reliance}, pg55,Col.1

\textsuperscript{139} \textit{Cho Yang} at pg 643, Col. 2;

\textsuperscript{140} \textit{Grace Liberty II}, paras.[17],[22-24],[37]&[46-47]; \textit{Spiros C}, paras.[36-39]; fn.37 on allocation of commercial risks between owners and time-charterers

\textsuperscript{141} Where BL holders are also shippers, no estoppel arises: \textit{Cho Yang}, pg645,Col.2; \textit{Indian Reliance}, pg55,Col.1

\textsuperscript{142} \textit{Nanfri(UKHL)}, pg210,Col.2(Lord Russell): “The lien operates as an equitable charge upon what is due from the shipper to the charterer, and in order to be effective requires an ability to intercept the sub-freight (by notice of claim) before it is paid by shipper to charterer. The simple question is whether the marking of bills of lading freight pre-paid interferes with that ability to intercept. It cannot. If freight is in fact pre-paid before issue of the bill of lading, cadit quaestio. If not, how does the marking freight pre-paid interfere with such ability to intercept as may be available to the other?”; \textit{Applied in Bulk Chile(EWCA)}, paras.[11]&[25]; \textit{Carver on Charterparties}, Cap.[13-06]

\textsuperscript{143} Contra. where charterers assign sub-freights to another, overriding owners’ \textit{Lien}: \textit{Attika Hope}; \textit{Wilford},[1988] LMCLQ
6 Owners’ Exercise of the Lien on Sub-Freights

72. As explained above, owners’ Liens remain dormant until exercised. It is perhaps trite that owners’ liens are exercised by way of a “Lien Notice”. Lien Notices must be sent to sub-charterers to stop them from paying sub-freights to charterers. Failing to send Lien Notices in copy to charterers has not prejudiced owners in any reported case. While owners may do so in the interest of fair-dealing, alerting charterers to owners’ exercise of their lien may not only invite protracted disputes with charterers and sub-charterers, not only threatening cashflow or the Lien itself, but also encouraging impecunious charterers to turn towards the unscrupulous and generate false counterclaims.

6.1 Requirements for A Lien Notice

73. It is widely regarded that there are no strict or formal requirements for a valid Lien Notice “provided [its] meaning is plain”. Owners are also not obliged to quantify their claims against charterers or even provide sufficient particulars for sub-charterers to understand owners’ claims when exercising their Lien. Such requirements apply only to possessory liens (e.g. liens on cargo). Although no reasons have been articulated for this distinction, it is submitted that such requirements are unnecessary as sub-charterers are not faced with new or additional liability but are only required to pay sums for which they were already liable (although sub-charterers may not thereafter raise counterclaims), only to another recipient. Owners’ Liens are distinguishable from possessory liens where lienors may be, even reasonably, imposing new and additional liabilities on cargo interests.

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144 Tagart, Beaton – where the specific holding was that Lien Notices must be sent to persons liable for freight and Lien Notices sent to charterers’ are ineffective

145 Nanfrí(EWCA) pg140,Col.1(Lord Denning MR), pg145,Col.1(Goff LJ); Cebut(No.1), pg310,Col.1

146 Bulk Chile(EWHC), para.[56] citing William Brandt’s Sons & Co v Dunlop Rubber [1905] AC 454(UKHL), pg462(Lord Macnaughten); Bulk Chile: generous treatment of Lien Notices – Part 6.2.2 below

147 Bulk Chile(EWHC), para.[53], derived from Albemarle Supply Co Ltd v Hind & Co. [1928] 1 KB 307(EWCA), pg318(Scrutton LJ)

148 Ibid, para.[55], citing Lancaster, pg501
74. Sub-charterers would be grateful for owners to quantify (with appropriate particulars) their claims against charterers (but without prejudice to any further claims owners may have) when exercising their Lien, at least so that they may consider if the Liens have been validly exercised.

75. In *The Bulk Chile*, owners, as head-charterers’ agents, appeared to exercise the head-charterers’ Lien covering sub-freights under Clause 18 of the *NYPE '46* time-charterparty. The Lien Notices were interpreted as sufficient to inform voyage-charterers that freight ought not to be paid to charterers above them. Arguably, this was a very generous view of the Lien Notices and might even imply an obligation on voyage-charterers to inquire to whom freight should be paid, especially where freight is due under a BL.\(^{149}\)

### 6.1.1 Lien Notices Without Demand

76. In *The Go Star*, owners’ sent repeated Lien Notices to sub-charterers without demanding payment of sub-freights. Instead, owners duplicitously equivocated on exercising their Lien and advised sub-charterers not to pay freight to charterers against the risk of double-liability to owners. Owners hoped to terminate a non-performing head-charterparty and to avoid having to discharge any cargo already on board, scared off sub-charterers (putting them in breach of the sub-charterparty). For having intentionally procured the breach of the sub-charterparty, owners were liable for the charterers’ resulting losses.

77. However, it has been suggested that owners may issue pre-emptive Lien Notices, without demanding payment to preserve their priority over subsequent assignees of sub-freights from charterers\(^{150}\). In *The Attika Hope*, owners’ rights under their Lien was subordinated to the charterers’ assignees’ of freight. Owners’ Lien had arisen upon execution of the charterparty\(^{151}\), prior to charterers assigning the sub-freights to their creditors but charterers’ assignees enjoyed higher priority\(^{152}\), crucially because notice of their assignment was given to sub-charterers before owners issued their Lien Notice.

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\(^{149}\) *Ibid*, para.[31]

\(^{150}\) *Wilford [1988] LMCLQ*, pg150

\(^{151}\) *Bulk Chile(EWCH)*, para.[65]

\(^{152}\) *Attika Hope*, pg442,Col.2, applying the rule in *Dearle v Hall*
78. Out of an abundance of caution, owners should unequivocally state in such pre-emptive Lien Notices that the Lien is not being exercised (for reasons set out at Part 7.2.2 below, no right to exercise the Lien would exist at this time), no demand for payment is being made, and is issued purely to provide sub-charterers notice of owners’ rights and to preserve their priority. However, where the terms of the sub-charterparty themselves amount to notice of the charterers’ assignment of sub-freights to another (e.g. The Attika Hope), the efficacy of pre-emptive Lien Notices is doubtful.

79. Separately, in The Western Moscow, Justice Clarke explained that assignments (e.g. the Lien) take effect upon notice (e.g. the Lien Notice) but are till then subject to equities (i.e. sub-charterers cross-claims closely connected to charterers’ claim for sub-freights\(^{153}\)). Where charterers grant sub-charterers express rights to set-off sub-freights against charterers’ (unconnected) debts to the sub-charterer\(^{154}\) (i.e. pay sub-freights via contra-accounting\(^{155}\)), a pre-emptive Lien Notice may threaten to defeat sub-charterers’ rights of set-off. Further effects of contractual terms are considered at Part 7.2.3 below, but it is submitted that insofar as the Lien is a type of floating charge, a set-off clause is unaffected by pre-emptive Lien Notices intended to secure owners’ priority because they do not crystallise owner’s rights over sub-freights.

### 6.2 Timing of the Lien Notice

80. Timing is key with Lien Notices. Sent too early, a Lien Notice is invalid but too late and the lien on sub-freights is ineffective.

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\(^{153}\) Nanfri(EWCA), pg140,Col.1(Lord Denning MR) and pg145,Col.1(Goff LJ)

\(^{154}\) Western Moscow, paras.[73-74]

\(^{155}\) Ibid, para.[92]
6.2.1 Sums Must have Fallen Due Under the Charterparty

81. It has long been accepted that both owners’ possessory liens on cargo\(^\text{156}\) and non-possessory \textit{Liens}\(^\text{157}\) may only be exercised after sums have fallen due (regarding, advance payments, such sums need not have been earned)\(^\text{158}\).

82. As explained at \textbf{Part 4.1 above}, owners likely may now satisfy claims for substantial damages out of liened sub-freights. This presupposes that amounts have fallen due under the charterparty due to charterers’ repudiatory breach and owners have accepted the breach thus terminating the charterparty. It would appear, implicitly\(^\text{159}\), that the \textit{Lien} survives and that this self-help remedy is not lost when the charterparty is terminated\(^\text{160}\).

6.2.2 Must Sums have Fallen Due Under the Sub-Charterparty?

83. In \textit{The Bulk Chile}, the Court of Appeal explicitly found that \textit{Lien Notices} issued by owners, on behalf of head-charterers, to shippers / voyage-charterers before BLs were even issued was effective. It is hard to extrapolate this finding, which strictly speaking applies only to BL freight to owners’ \textit{Liens} generally. That the BLs (on the CongenBill form which, pursuant to the voyage-charterparty\(^\text{161}\)) were marked “freight prepaid” did not affect owners’ rights to redirect freight to themselves (no third-parties were involved either). Freight was paid two months later\(^\text{162}\) and directed to owners through court proceedings.

\begin{footnotes}
\item 156 \textit{The Bombay} [1904] AC 826(PC);
\item 157 \textit{Wehner v Dene}, pgg94&101; \textit{Samuel v West Hartlepool}, pg128;
\item 158 \textit{Ibid}; \textit{Lakatoi Express}
\item 159 \textit{Id}; \textit{Lakatoi Express} applying \textit{Tropwind}(EWCA),pg237(Dunn LJ); (EWHC),pg52
\item 160 \textit{Lakatoi Express} applying \textit{Photo Production v Securicor Transport} [1980]AC 827(UKHL)
\item 161 \textit{Bulk Chile}(EWCA),para.[8]
\item 162 \textit{Ibid}, paras.[11-12]
\end{footnotes}
84. In *The Ermis*, the Canadian Federal Court granted voyage-charterers interpleader relief in response to *Lien Notices* from head-charterers (even before draft-BLs had been drawn-up\(^{163}\)) and competing claims from intermediate charterers. Voyage-charterers were liable for freight (holders of the BLs, when issued, did not assume eventual liability for freight) ten banking days after issuance of owners’ BLs. Here, the head-charterers were exercising a true *Lien*. However, in granting interpleader relief, the Federal Court’s decision only reflects a preliminary view of the law which must be determined by a later court.

85. These cases suggest that a *Lien* may be exercised against sub-freights which have not yet fallen due. This view is also consistent with prevailing theories on the *Lien*, whether it operates as an equitable assignment or *sui generis* contractual right, that allow owners to intercept charterers’ accrued receivables albeit payable in the future.

6.2.3 Sub-Freights must still be Unpaid / Outstanding

86. This peculiar feature of the *Lien* (which continues to spark debate to date\(^{164}\)) is that it is only effective if the *Lien Notice* reaches the sub-charterer, shipper or consignee before sub-freights have been paid.

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\(^{163}\) *Ermis*, paras.[9]&[10-11]

\(^{164}\) Oditah [1989] LMCLQ; *Re Brumark*, paras.[38-46] particularly paras.[41-43] per Lord Millet:

“… Since the subfreights are book debts ... incapable of physical possession, the lien has been described as an equitable charge: see ... The Nanfri ... if the lien is a charge it is a charge of a kind unknown to equity. An equitable charge confers a proprietary interest by way of security. It is of the essence of a proprietary right that it is capable of binding third parties into whose hands the property may come. But the lien on subfreights does not bind third parties. It ... It is defeasible on payment irrespective of the identity of the recipient. ... it is similar to a floating charge while it floats, but it differs in that it is incapable of crystallisation. The ship owner is unable to enforce the lien against the recipient of the subfreights but, as Oditah observes, this is not because payment is the event which defeats it (as Nourse J stated in [*The Ugland Trailer*]; it is because the right to enforce the lien against third parties depends on an underlying property right, and this the lien does not give. ... 

... the questions which have exercised academic commentators: whether a debt or other receivable can be separated from its proceeds; whether they represent a single security interest or two; and whether a charge on book debts necessarily takes effect as a single indivisible charge on the debts and their proceeds irrespective of the way in which it may be drafted.

Property and its proceeds are clearly different assets. On a sale of goods the seller exchanges one asset for another. Both assets continue to exist, the goods in the hands of the buyer and proceeds of sale in the hands of the seller. If a book debt is assigned, the debt is transferred to the assignee in exchange for money paid to the assignor. ... The only difference between realising a debt by assignment and collection is that, on collection, the debt is wholly extinguished. As in the case of alienation, it is replaced in the hands of the creditor by a different asset, viz its proceeds.”; Goode at Cap. [1.63-73]
87. The starting point of every modern analysis of the Lien is Tagart, Beaton & Co. v James Fisher & Sons v West Hartlepool Steam Navigation Company decided (unfortunately all too briefly) by the Lord Chancellor, Lord Chief Justice and the President of the Probate, Divorce & Admiralty Division of the High Court. Virtually every successive decision since has reaffirmed that the “lien ... on a sub-freight means a right to receive it as freight and to stop that freight at any time before it has been paid to the time charterer or his agent”. Once “the freight has been paid over by the consignees to persons who are entitled to receive it, the shipowner's right to stop it on its way ceases to exist” – “the lien upon it is gone”165. Consequently, “if the shipowners’ [Lien Notice] to pay comes too late, and the sub-freight has already been paid, then the [Lien] fails to bite on anything”166.

88. Payment happens when sub-charterers lose control of funds representing sub-freights167. Further, paying to agents amounts to paying the principal, charterers168, accordingly defeating owners’ Liens169. Although owners’ Liens have been upheld when sub-freights were collected by port agents who were also owners’ agents170, it is submitted that courts may inquire into the functions performed for each principal and even then, may only uphold owners’ Liens in cases of BL freight171.

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165 Tagart, Beaton, pg394(Earl Halsbury LC)
166 Spiros C,para.[11]; Western Moscow,para.[35]
167 Samsun Logix, para.[39(ii)] applying Tagart, Beaton, pg394 (Earl Halsbury LC), cf. para.[41(i)]: noting the attractive simplicity of the Lien being lost once sub-charterers are discharged from their obligations to pay sub-freights but Gross J declined to affirmatively state so.
168 Tagart, Beaton, pg394(Earl Halsbury LC)
169 Contra. Molthes Rederi where agents independently undertook to hold freight for owners’ benefit; Time Charters,Cap.[30.73]
170 Ibid; fn.126: Baughen, pg356
171 Legal Aspects of Receivables Financing, Cap.[5.3]
7 Responding to Owners’ Liens on Sub-Freights

89. When a *Lien Notice* is received, alarm bells sound. Legal advice is measured, and sub-charterers are often advised to hold on to freight. A flurry of emails between owners, head-charterers, sub-charterers and shippers follow. Charterers, having defaulted on their charterparty are in parlous financial circumstances. Facing their own financial pressures, charterers often demand freight be paid to them and sub-charterers are left facing competing claims for the same freight. However, sub-charterers may sensibly respond to owners’ *Liens* and protect themselves from double liability to owners and charterers.

7.1 Interpleading Against Double Liability

90. Sub-charterers have long been advised to interplead against coinciding claims from owners and charterers\(^ {172} \). In *The Ermis*, the Federal Court of Canada commended sub-charterers’ rapid creation of an escrow account to hold sub-freight payments for the benefit of both charterers and head-charterers. Sub-charterers were similarly commended in *The Lakatoi Express*. With escrow accounts, charterers and owners both enjoy security for their freight and courts are not likely to find that either charterers or more likely owners have any basis to terminate the sub-charterparty or the charterparty. They appear to be an affordable option to protect against double liability to both owners and charterers, provided parties agree to terms of the escrow account and accept payments may thereto.

7.1.1 Interpleader Proceedings

91. Where an escrow account does not get traction, sub-charterers may resort to interpleader proceedings which are unlike traditional adversarial proceedings.

\(^ {172} \text{Nanfri(EWCA), pg}137,\text{Col.1(Lord Denning MR); Maritime Law, Cap.[4.13(b)]} \)
92. Interpleaders are commenced by a party from whom two or more persons are claiming the same property or debt. Instead of responding separately, sub-charterers may commence proceedings as a claimant against owners and charterers claiming the same sub-freights. Sub-charterers must admit liability for the freight in question and upon placing the sub-freights in the actual or notional custody of the court may ‘drop out’\textsuperscript{173}. Thereafter, interpleader proceedings are no longer against any person but prevent the sub-charterers’ double liability and only concern the sub-freights in dispute\textsuperscript{174}. This minimises the sub-charterers costs as well\textsuperscript{175}.

93. In the maritime field, interpleaders are often resorted to, but are not an insurance policy\textsuperscript{176} where separate liability arises to different claimants, on different bases (e.g. in contract, tort and bailment)\textsuperscript{177}. However, courts appear to readily\textsuperscript{178} grant sub-charterers’ interpleader relief when facing competing claims because of owners’ Liens\textsuperscript{179}.

94. Interpleading ensures that sub-charterers do not pay the wrong party and risk having to pay twice\textsuperscript{180}, whether because sub-charterers are not able to determine if such sub-freights have been assigned to other parties or because owners’ Liens are unenforceable against an insolvent charterer\textsuperscript{181}. Notwithstanding the confusion as to the nature of the Lien, sub-charterers are not independently liable to owners but liable only under one contract: the sub-charterparty. The risks, arising out of the confusion between jurists, is then shifted to charterers and owners who must establish their relative rights to the sub-freights.

\textsuperscript{173} Part86.1, Civil Procedure Rules(UK);\ ING Bank v Canpotex Shipping & Marine Petrobulk, OW Bunkers (UK) [2017] 2 Lloyd’s Rep.270(FCA), para.[58](Nadon JA), citing Precious Shipping v OW Bunker Far East(Singapore)[2015] 4 SLR 1229(SGHC), paras.[59-60]; fn.126: Baughen, pg363
\textsuperscript{174} Tong Lee & Co. v Koh Chiow Meng [1992] SGHC 28; Eastern Holdings Establishment of Vaduz v Singer & Friedlander [1967] 2 All ER 1192(Ch)(EWHC)
\textsuperscript{175} HSBC v United Overseas Bank [1992] 1 SLR(R)579, para.[53]; Banque Belge v Hambrouck [1921] 1 KB 321(EWCA)
\textsuperscript{176} Precious Shipping Public Co. v OW Bunker Far East [2015], para.[33]; Cheng,(2016)28 SAcLJ 631
\textsuperscript{177} Hon. Steven Rares [2018] LMCLQ, pgg403-408
\textsuperscript{178} Ermis [2008](FCC)
\textsuperscript{179} Cebu(No. 1); Annangel Glory; Cebu(No. 2); Byatt International v Canworld Shipping;
\textsuperscript{180} Attika Hope; Ermis
\textsuperscript{181} Fn.3
7.1.2 Developments in Arbitral Procedure

95. In Cosco Bulk v Armada Shipping; STX Pan Ocean182, Justice Briggs183 was not precisely determining arbitrators’ jurisdiction but whether charterers should be compelled to participate (affecting the enforceability of the award) as they enjoyed insolvency protection184. He commented positively on arbitral proceedings commenced by owners directly against sub-charterers. Charterers had been invited to join the arbitration proceedings and eventually compelled to participate because most of the issues in contention were governed by English and not Swiss law.

96. Insofar as the Lien assigns to owners, charterers’ rights and remedies185 against the sub-charterers, a tribunal will likely find jurisdiction arbitrate under the arbitration agreement contained in the sub-charterparty and require sub-charterers to respond to owners’ claims. Given the confusion surrounding the nature of the Lien and owners’ rights thereunder, it is likely that tribunals will have to rely robustly on the floating charge theory of Liens to ground jurisdiction when dealing with subsidiary sub-charterers – perhaps after hearing arguments on the merits. This exposes parties to some risk that after an expensive merits hearing, a tribunal might conclude that the Lien is a sui generis contractual right and decline jurisdiction.

182 [2011] EWHC 216(Ch)
183 Now Lord Briggs, JSC
184 Ibid, paras.[9]&[15]
185 Cebu(No. 1), pg309,Col.2
Additionally, as noted in *Samsun Logix v Oceantrade Corp; Deval Denizeilik VE Ticaret AS*\(^{186}\), judicial interpleader decisions (e.g. in interpleader proceedings) are likely to receive favourable treatment in foreign courts (especially where the charterer is being wound-up overseas). Arguably, a common thread in insolvency regimes is to achieve the reasonable realisation of the insolvent estate’s personal liabilities while respecting the proprietary rights of others (creditors or otherwise). Foreign courts may prefer public pronouncements of parties’ (including owners’) proprietary rights\(^{187}\) because confidential arbitrations, closed to third-parties are generally not considered capable of pronouncing any party’s proprietary rights (enforceable against the world)\(^{188}\).

\(^{186}\) [2007] EWHC 2372

\(^{187}\) *Ibid*, paras.[26-27]

\(^{188}\) *Ibid*, paras.[28-29]
This arbitral equivalent of interpleader proceedings, is not totally unheard of – courts may stay interpleader proceedings and direct parties to arbitrate the competing claims if “all claimants are party to an arbitration agreement”\(^{189}\). However, it is submitted that even the most pro-arbitration courts still construe arbitration agreements practically and commonsensically\(^{190}\) and are less likely to compel parties to arbitrate an otherwise arbitrable dispute\(^{191}\) if doing so would have broader in rem or third-party effects\(^{192}\) or would restrict remedies exercisable only by liquidators\(^{193}\). The liquidators’ remedy to avoid owners’ Liens for want of registration\(^{194}\) is particularly relevant. As the obligation to register is imposed by the charterers’ lex incorpotationis, liquidators will likely have to seek such relief in the charterers’ ‘home’ jurisdiction\(^{195}\).

\(^{189}\) Judicial Commissioner Foo Chee Hock (editor-in-chief), Singapore Civil Procedure 2016 Vol. I (Sweet&Maxwell,2016), para.[17/5/6]

\(^{190}\) China Export & Credit Insurance Co. v Emerald Energy Resources[2018] EWHC 1503(Comm), para.[58], citing Tomolugen Holdings v Silva Investors[2015] SGCA 57, para.[113](Menon CJ)

\(^{191}\) Tomolugen Holdings v Silva Investors; Carter,(2016)19(4)Int.ALR 89, pg96


\(^{193}\) Choon & Ganesh,(2014) 44 HKLJ 179; Larsen Oil and Gas,paras.[44-46]: “A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and...that arise only...due to the operation of the insolvency regime...the statutory provisions in the insolvency regime...to recoup for the benefit of the company’s creditors losses caused...especially[through]avoidance and wrongful trading provisions. This...could be compromised if...pre-insolvency management had the ability to restrict...avenues by which...company’s creditors could enforce the very statutory remedies which were meant to protect them...The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.”

\(^{194}\) Fn.3

\(^{195}\) Diablo, para.[2]; Duncan, paras.[17-18]
99. On these premises, sub-charterers would be wise to prefer interpleader proceedings instead of arbitral proceedings without unduly fearing liability for indemnity costs or stays of court proceedings\textsuperscript{196}. Considering the ‘law and jurisdiction’ clauses in the sub-charterparty, sub-charterers should perhaps interplead before courts at the seat of the contemplated arbitration, ensuring that courts supervising potential arbitrations are also cognisant of ongoing interpleader proceedings. Insofar as owners are exercising rights assigned under an agreement subject to arbitration\textsuperscript{197}, sub-charterers may likely avoid owners’ arguments that they have not submitted to such a jurisdiction and also obtain additional protections from any enforcement actions owners may attempt against sub-charterers\textsuperscript{198}.

100. During the interpleader proceedings, liquidation proceedings against charterers, if any, may be able to progress to a stage where liquidators may be appointed, seek recognition before the courts hearing the interpleader (if from another jurisdiction) and stay such proceedings pending resolution of the registrability of owners’ Liens under the charterers’ \textit{lex incorporionis} and the effect of any failure to do so\textsuperscript{199}.

101. Courts, however, will likely require parties to turn to arbitral interpleaders where charterers are solvent\textsuperscript{200} in view of growing consensus that the \textit{Lien} is an assignment of the charterers’ rights and remedies against sub-charterers in favour of owners.

7.2 Defending Owners’ Liens on Sub-Freights

102. Confusion as to the nature of \textit{Liens} still exposes parties involved to risk. Before approaching how to defend against the \textit{Lien}, it is apposite to outline legal orthodoxy on how it operates between three or more different entities.

\textsuperscript{196} A v B [2007] EWHC 54(Comm); Tjong Very Sumito; Pipeline Services WA; Mittal,[2016] 3 JBL 186; David Kwok,(2018)34 Arbitration International 149; Maritime Law, Cap.[1.3(d)]

\textsuperscript{197} Fn.182; Vincze,(2003)NJCL; Contra. Rals International and Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 WLR 713 (UKHL) for the contrary position on bills of exchange because of their unique nature as unconditional promises to pay; Mahajan&Devendra, KluwerArbitration Blog (22 November 2016)

\textsuperscript{198} Fn.176:Cheng, paras.[32-33]

\textsuperscript{199} Justice Belinda Ang, “Waking Up from the Shipowners’ Nightmare” (12 October 2017), paras.[36-43]; fn.3

\textsuperscript{200} On facts similar to Cebu(No. 1); Larsen Oil and Gas, paras.[47]
103. Under the floating charge theory, the Lien is an equitable assignment by charterers of sub-freights to owners. Equitable assignments of future debts “cannot be exercised if nothing is due to the owner” under the charterparty and are perfected by a Lien Notice\textsuperscript{201} after which sub-freights become payable to owners directly. The Lien “provides an immediate security interest at the date of the charter ...[granting priority but] creates no proprietary interest in favour of the owner” until perfected “because until then it is open to the charterer to claim the debt in the ordinary course of business”\textsuperscript{202}.

104. As to sub-sub-freights, sub-charterers are considered to have assigned to charterers their right to sub-sub-freights under their lien on sub-freights, and charterers in turn assign their similarly qualified right to sub-sub-freights to owners\textsuperscript{203}. Owners are not subrogated (by law) to charterers’ remedies against sub-charterers\textsuperscript{204} as this may presumably enable owners to intercept sub-sub-freights (as if they were charterers pursuing payment of sub-freights) under a Baltime Lien Clause, eroding the distinction between Baltime and NYPE Lien Clauses.

105. As assignors cannot grant assignees greater rights than they themselves have\textsuperscript{205}, charterers cannot assign to owners, a Lien over sub-sub-freights where charterers are in arrears under the charterparty but where sub-charterers are not in default of the sub-charterparty as charterers’ Liens over sub-sub-freights may only be exercised when sub-charterers default on the sub-charterparty. Whereas the Lien may bite on sub-freights ‘down the chain’ (having been assigned ‘up the chain’), the conditions of the Lien must arguably be satisfied at every link in this chain for the Lien to operate.

\textsuperscript{201} *Western Moscow*, para.[41]
\textsuperscript{202} *Ibid*, para.[49]; *Diablo*, paras.[37]&[55]
\textsuperscript{203} *Cebu(No. 1)* pg309,Col.1
\textsuperscript{204} *Ibid* at pg309,Col.2
\textsuperscript{205} *Anson’s Law of Contract* at pg669; Contra. fn.256 – assignors may not transfer burdens, and assignees may therefore avoid procedural limitations to which assignors may been subject; fn.197:Mahajan&Devendra
106. The *sui generis* contractual right theory has not been developed in cases and if it is a creature of maritime law\(^\text{206}\), its effects are unclear. The *Lien* may (reflecting 19\(^\text{th}\) century custom) be solely personal and does not enable owners to intercept sub-sub-freights payable to sub-charterers\(^\text{207}\). It is also worth investigating (unfortunately, elsewhere) if the *Lien* is a right derived from ownership and *dominus* of a vessel\(^\text{208}\), insofar as freight may be incidental thereto, such that the *Lien Clause* operates only to express the implied rights\(^\text{209}\) of owners (over BL freight under both owners’ and charterers’ BLs). If the *Lien* even enabled (disponent) owners to intercept sub-sub-freights when originally conceived as maritime law or custom, it may be that the *Lien* does not work because charterers assign their rights to sub-freights ‘up the chain’, but instead because charterers derive a right to intercept freight from owners.

### 7.2.1 Defences Based on Timing and the ‘Chain of Charterparties’

107. The *Lien’s* susceptibility to being defeated by prior payments of sub-freights\(^\text{210}\) (whether by contractually required advances or non-contractual prepayments\(^\text{211}\) or set-offs\(^\text{212}\)) has been canvassed at Part 6.2.3.

108. The *floating charge* theory militates towards holding that owners have no lien over sub-sub-freights (to cover outstanding hire) if sub-freights are not also outstanding\(^\text{213}\). Where charterers are in arrears under the charterparty but sub-charterers have paid sub-freights under the sub-charterparty, owners likely cannot turn to the ‘next in line’ and exercise their *Lien* on sub-sub-freights as charterers have no *Lien* on sub-sub-freights to assign to owners because sub-charterers are not in default of the sub-charterparty.

\(^{206}\) Fns.13,16-18; *AG v Glen Line*; contra. *Sea Insurance*, pg718(Lopes LJ)  
\(^{207}\) Fn.70  
\(^{208}\) Fn.18  
\(^{209}\) Contra. *Time Charterers*, Cap.[30.8], albeit regarding possessory liens on cargo  
\(^{210}\) Fn.168  
\(^{211}\) *Spiros C*  
\(^{212}\) *Western Moscow*  
\(^{213}\) *Cebu(No.1)*, pg308,Col.2
109. No reported cases have upheld owners’ Liens over sub-sub-freights where sub-freights are not also outstanding. In *The Cebu (No. 1)*, where the floating charge theory was enunciated, sub-charterers were in arrears and charterers and owners could exercise a lien on sub-sub-freights214. In *The Western Moscow*, Clarke J opined that Liens operate by way of a series of assignments215. On this basis, owners’ Liens on sub-sub-hire would only be sustainable216 if hire and sub-hire were outstanding under the charterparty217 and sub-charterparty218 respectively, and obviously, if sub-sub-hire had not yet been paid.

110. It is therefore unlikely that owners’ Liens may operate against subsidiary freights unless every sub-charterer in the chain was in default of its obligations when exercised. Even in a sector known for tight cashflow and sailing close to the wind, it appears the chances of owners successfully exercising Liens on subsidiary freights are slim.

111. In *The Ermis*, it is not clear if sub-hire was outstanding but owners cleverly obtained an assignment of the sub-charterparty219, rendering the inquiry as to sub-hire irrelevant. Owners then freely pursued sub-sub-sub-freight in satisfaction of sub-sub-hire. This potential work-around extends owners’ remedies when the Lien does not trickle ‘down the chain’ of charterparties.

### 7.2.1 Potential Equitable Defences

112. Equitable defences (often case-specific) rarely feature in maritime disputes220 and are even discouraged as these fetter parties’ legal rights and confuse their responses under pressure221 in this highly commercial sector.

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214 *Cebu (No.1)*, pg308,Col.2
215 *Western Moscow*, paras.[36] & [48-52], *see also* paras.[36-47] on the theory of the Lien
216 *Ibid*, para.[58]
217 *Ibid*, paras.[24-28]
218 *Ibid*, paras.[53-56]
219 *Ermis*, para.[11]
220 *Scaptrade*(UKHL)
221 *Scaptrade*(EWCA), pg.153,Col.1(Goff LJ); Gerard McMeel, “Chapter 14–Charterparties and the Modern Law of Penalties” in *Charterparties: Law Practice and Emerging Legal Issues; Bareboat Charters*, Cap.[29.6-7]
113. However, equitable remedies have been mooted in the context of *Lien Clauses*. Charterers’ liens on the vessel for excess advance hire are not equitable liens\(^{222}\) (the minimum encumbrance to secure a claim\(^{223}\)) but a right to enjoin owners from employing the vessel until excess advance hire is repaid\(^{224}\).

114. In the context of owners’ *Liens*, charterers (presupposing compliance with their obligations under the charterparty) may restrain owners from collecting BL freight if owners stand on strict legal rights and demand BL freight in breach of the charterparty\(^{225}\). Charterers may also be entitled to terminate the charterparty\(^{226}\) and to damages but may prefer an injunction where owners are nearly insolvent.

115. In *The MV Loyalty*, the British Columbia Court of Appeal upheld owners’ ‘lien’ over BL freight\(^{227}\) (rather than sub-freights) which the High Court had denied for (unfortunately, vague) equitable reasons. That sub-charterers suffered double-loss\(^{228}\) did not generate any equites capable of overriding the “commercial reality” reflected by the charterparty chain\(^{229}\) and owners’ direct contractual rights to BL freight. The court also summarily dismissed owners’ *Liens* on sub-sub-freight but added that sub-sub-freight was “beyond [owners’] reach”\(^{230}\) without identifying if this was because of the narrow scope of the applicable *Lien Clause* or because sub-charterers had not been in default of the sub-charterparty. Curiously, the court seemed to confuse owners’ *Liens* over BL freight with their Lien over sub-freights, describing the former as “a valid contractual claim by the owner through the head charter party and it is a right that runs through the chain of charterparties”\(^{231}\).

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\(^{222}\) *Lancaster*, pg503, Col.1 (Goff J)

\(^{223}\) *Fn.5*: Worthington

\(^{224}\) *Lancaster*, pg502, Col.2

\(^{225}\) *Bulk Chile*(EWCA), para.[28]

\(^{226}\) *Ibid*; Nanfri (UKHL)

\(^{227}\) *MV Loyalty*, para.[9]

\(^{228}\) Para.[59]

\(^{229}\) *MV Loyalty*, para.[26]; endorsed in *Byatt Int’l SA v Canworld Shipping* [2013] BCCA 558, para.[13-14] as an application of *Wehner v Dene* and *Cebu*(No.1)

\(^{230}\) *Ibid*, paras.[31-32]

\(^{231}\) *Id*
116. *The MV Loyalty* is unclear on whether owners’ *Lien* on sub-sub-freights are ineffective unless sub-charterers are also in default. On an application for a stay pending leave to appeal, the Court of Appeal suggested that owners are free to demand BL freight, restricted only by their obligations under the head-charterparty (such that head-charterers had to have defaulted). The impact owners’ established ‘liens’ on BL freight may have on sub-charterers (to whom the collection of freight has been sub-delegated), whether they were complying with the sub-charterparty, was irrelevant.

117. These observations raise contradict the reasoning of *The Spiros C*. There, Lord Justice Rix considered that where “two innocent parties have to pay for the default of a third”, “the risk of non-payment of hire rests on the owner and no one else”\(^\text{232}\). However, this applied only to the collection of freight and subsidiary charterers’ power to bind owners thereto. This analysis appears to fail where there are more than two innocent parties. The risk of non-payment of hire thus appears to trickle-down to subsidiary charterers who finance their sub-hire payments with BL freight.

118. Charterers may appeal to the equitable doctrine of marshalling which applies “between two or more creditors, each of whom are owed debts by the same debtor, but one of whom who can enforce his claim against more than one security or fund and the other can resort to only one”\(^\text{233}\) which is also subject to the former creditors’ interests. Marshalling obliges the creditor with more than one security to satisfy its debts out of other securities available to it, so as not to exhaust another’s sole security\(^\text{234}\). In a chain of charterparties, however, only one debt is owed (by shippers) to one person (i.e. owners) and equity is achieved by restricting owners’ rights to “intervene and demand … [BL] freight be paid to himself … only if that freight has not already been paid”\(^\text{235}\). Owners’ rights to BL freight are not security interests but legal rights which equitable marshalling appears unable to override. Otherwise, given that sub-charterers likely would also have to be in arrears under the sub-charterparty, it is not clear if any inequities would arise if owners’ *Lien* sub-sub-freights.

\(^{232}\) *Spiros C*, para.[38]
\(^{233}\) *Re BCCI SA*(No. 8), pgg230-231 (Lord Hoffmann); *Goode*, Cap.[5.36]
\(^{234}\) *Law of Ship Mortgages*, Cap.[7.11]
\(^{235}\) *Fn.*232
7.2.2 Defences Based on Inaccuracies in and of Lien Notices

119. Keen observers might inquire into the effect of Lien Notices submitted before amounts fall due under the charterparty. Notwithstanding that Lien Clauses are predominantly found in time-charterparties (but also work in voyage-charterparties) one may be tempted to draw comparisons with Notices of Readiness ("NOR") tendered under laytime provisions found in voyage-charterparties.

120. No reported case has dismissed Lien Notices sent before charterers were in arrears; courts have only denied claims for sums not yet due at the time the Liens were validly exercised\(^{236}\). It is therefore unclear if Lien Notices are merely inchoate (i.e. they become valid when teetering charterers fall into arrears) or entirely invalid (i.e. they may be disregarded even if charterers default thereafter) and subsidiarily, if such invalidity can be overcome by express waivers\(^{237}\). These questions, however, likely will not apply to preemptive Lien Notices intended not to obtain payment, but only to establish priority for owners’ vested but inchoate rights to a Lien\(^{238}\).

121. On scant authority, it is submitted that a Lien Notices should be treated as invalid if they are sent before charterers default on the charterparty because the “right cannot be exercised if nothing is due”\(^{239}\). If the Lien is a type of floating charge, it must crystallise before owners may tender their Lien Notice unless Lien Clauses are amended to provide otherwise (e.g. owners may exercise their Lien by mere notice)\(^{240}\).

\(^{236}\) Wehner v Dene, pg101; Samuel v West Hartlepool, pgg127-128

\(^{237}\) The Mexico I [1990] 1 Lloyd’s Rep.507(EWCA), pg515(Mustill LJ); Laytime and Demurrage,Cap.[3.267-295]

\(^{238}\) Bulk Chile(EWHC), para.[65] ; Fn.126: Baughen,p365

\(^{239}\) Ibid

\(^{240}\) Re Spectrum Plus at para.[100](Lord Scott); Re Brightlife, pgg207&213-214; Goode, Cap.[4.37-56]
122. *Lien Notices* are not statements of fact like NORs\(^{241}\) nor defined by contractual stipulations\(^{242}\). Sub-charterers nonetheless require as much certainty when paying freight as when loading or discharging. The financial position of charterers vis-à-vis owners is harder for sub-charterers to independently ascertain than physical readiness of vessels, and sub-charterers are far less likely to have sufficient knowledge to waive inconsistencies in *Lien Notices*\(^{243}\) (if legally possible).

123. This inquiry is infinitely more complicated when charterers reasonably but incorrectly withhold hire from owners\(^{244}\). It is therefore recommended that sub-charterers communicate with charterers and owners and offer to open escrow accounts or commence interpleader proceedings.

124. However, sub-charterers are not likely to successfully resist owners’ *Liens* by pursuing formal defences based on inaccuracies in *Lien Notices* which do not suffice to invalidate the notice as there are no formal requirements for a *Lien Notice* and courts appear to be generous in reading a clear effect into notices\(^{245}\).

### 7.2.3 Contractual Defences

125. Sub-charterers may protect themselves against owners’ *Liens* (and even claims from charterers’ financiers) by resorting to contractual terms in sub-charterparties.

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\(^{241}\) *Commencement of Laytime*, para.[107]


\(^{243}\) *Ibid*, para.[109]; *Mihalios Xilas*, pg307,Col.1(Lord Diplock); *Laytime and Demurrage*, Cap.[3.279]

\(^{244}\) *Fn.51;Chryssovalandou Dyo*

\(^{245}\) *Bulk Chile*(EWCA),para.[31], (EWHC), para.[52]
126. In *The Western Moscow*, sub-sub-charterers relied on an *NYPE Lien Clause* in the sub-sub-charterparty amended to the effect that owners would have no lien on sub-freights. The terms of this clause were not reproduced but described as preventing charterers’ possible exposure to double claims (i.e. capable of defeating owners’ *Liens*) – particularly important where charterers were indebted to charterers. Reference was also made to *Cosco Bulk Carrier Co. v Armada Shipping SA, STX Pan Ocean* where the sub-charterparty expressly prohibited charterers from assigning sub-freights arising thereunder to another.

127. This is an area of law mired in unnecessary semantic complexity and laden with draftsmen’s traps. It is submitted that a ‘no lien’ clause which merely declares that (disponent) owners do not have a *Lien* on sub-freights, like failing to include (or scratching out) a *Lien Clause* in a sub-charterparty will defeat a lien on sub-sub-freights but not a *Lien* on sub-freights. Sub-charterers are exposed to owners’ *Liens* because of the *Lien Clause* in the charterparty. A ‘no lien’ clause may not, therefore, help sub-charterers avoid owners’ *Liens* or double claims but rather helps sub-sub-charterers because sub-charterers do not assign their rights to sub-sub-freights to charterers. Sub-charterers seeking to avoid having to respond to owners’ *Liens* should ensure that sub-charterparties expressly prohibit charterers from assigning, declaring trusts over or charging sub-freights. However, both types of clauses will stop owners’ *Liens* from traveling further ‘down the chain’ of charterparties, starting at least with sub-sub-charterers.

246 *Western Moscow*, para.[73]
247 *Id*
248 *Cosco Bulk*, paras.[30]&[51]
249 *see fn.60*
250 *Don King Productions v Warren* [2000] Ch.291(EWCA); Anson’s *Law of Contract*, pg672
251 *Time Charters*, Cap.[30.57]; Goode, Cap.[3.38-45]
128. While sub-charterers may avoid the complications of owners’ Liens by prohibiting assignments of sub-freights, charterers themselves are however still bound to pay over sub-freights to owners *inter se* ²⁵². Jurists are divided on whether assignors are constructive trustees of the receivables assigned for assignees ²⁵³ or are merely contractual creditors. As detailed in Part 8, owners may therefore be limited to pursuing (a second) payment from sub-charterers and may not be entitled to proprietary security over sub-freights in charterers’ hands upon the latter’s insolvency (even if the Lien is registered).

129. Expressly providing for sub-charterers to pay hire via set-off is however not a defence against owners’ Liens without more ²⁵⁴. Set-off clauses merely grant contracting counterparties the right to make payment by ‘squaring-off’ outstanding accounts but these rights must be expressly exercised, often by notice ²⁵⁵. While sub-charterers may impliedly set-off cross-claims which directly impeach charterers’ rights to hire against hire payments due ²⁵⁶, an express set-off clause (allowing sub-charterers to set-off unconnected claims ²⁵⁷) must be triggered by a notice from sub-charterers ²⁵⁸. Unless exercised before owners exercise their Lien, set-off clauses do not appear to assist sub-charterers ²⁵⁹.

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²⁵² *Security and Title-Based Financing*, Cap.[7.88]
²⁵³ *R v Chester & North Wales*, pgg1500-1501(Millett LJ)&pgg1504-1505(Hobhouse LJ), although it is submitted that this decision concerned statutory interpretation rather than equitable proprietary rights
²⁵⁴ *Western Moscow*, para.[92]
²⁵⁵ *Security and Title-Based Financing*, Cap.[7.95]
²⁵⁶ *Fn.145;* applied in *Trident Beauty* (UKHL); (EWCA) in a dispute between charterers and assignees of charter hire the Court of Appeal, eager not to disturb established financing practices, considered that charterers’ lien on the vessel for unearned hire was not intrinsically tied to the obligation to pay hire or that (an assignees’) rights to hire was not qualified with the charterers’ lien for unearned advance hire so such that charterers could claim against them unless such equities (i.e. off-hire claims) already existed at the time the charterer was notified of the assignment of charter hire; *Fn.13: Watts; Ibid*, Cap[7.96-97]
²⁵⁸ *Fns.254&255*
²⁵⁹ *Security and Title-Based Financing*, Cap.[7.97]
8 Payment of Freight to Owners

130. Part 6.2.3 above explains that the Lien is ineffective after sub-freights have been paid before owners exercise it.\textsuperscript{260}

131. Sub-charterers should avoid deciding who to pay when the Lien by interpleading, even if encouraged to pay sub-freights to owners or charterers’ threaten to terminate the sub-charterparty. However, one can imagine sub-charterers instructing bankers to pay sub-freights on Friday, only to receive a Lien Notice on Saturday, before payment clears banking channels on Monday before sub-charterers can stop payments. Unfortunately, there do not appear to be any reported cases concerning the payment of sub-freights after the Lien has been exercised.

132. Both floating charge and sui generis contractual right theories pull in opposing directions. American jurisprudence requires sub-charterers to pay sub-freights twice but as American law on Liens is built on maritime liens, analogies therefrom are inapplicable in other commonwealth jurisdictions.

133. The sui generis contractual right theory seems to preclude claims against charterers and might require owners to pursue sub-charterers once more. Unfortunately, little is known of this theory save that it “is merely a personal right to intercept freight before it is paid analogous to a right of stoppage in transitu... defeasible on payment irrespective of the identity of the recipient”, while “the essence of a proprietary right that it is capable of binding third parties into whose hands the property may come”\textsuperscript{265}. Accordingly, owners may not even have any direct claim against sub-charterers to compel them to pay sub-freights to themselves. This theory might render the Lien nugatory where sub-charterers may pay sub-freights to charterers without fear of consequence.

\textsuperscript{260} Fn.165
\textsuperscript{261} Ermis
\textsuperscript{262} Attika Hope
\textsuperscript{263} Time Charters,Cap.[30A.31]
\textsuperscript{264} Oditah [1989] LMCLQ, pg196
\textsuperscript{265} Re Brumark,para[41]
\textsuperscript{266} Western Moscow,para.[51]
134. Under the prevailing floating charge theory, statements may have been misinterpreted and misapplied\textsuperscript{267} but unfortunately, authority is available for nearly any proposition\textsuperscript{268}. Strictly speaking, \textit{Tagart, Beaton & Co v James Fisher & Sons} only precludes “the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight”\textsuperscript{269} before the \textit{Lien} is exercised\textsuperscript{270}. No other decision squarely prevents owners’ from following sub-freights into charterers’ hands after their \textit{Lien} was validly exercised by notice to sub-charterers \textbf{before} payment.

135. However, the implication of the other holding (viz. owners’ \textit{Liens} may only be exercised by a \textit{Lien Notice} sent to sub-charterers), suggests that sub-freights paid to charterers cannot be followed into charterers’ hands in any instance\textsuperscript{271} (and is fodder for \textit{sui generis} contractual right theory).

136. In \textit{The Ugland Trailer}, Justice Nourse considered that third-parties receiving sub-freights “\textit{with notice of the lien}” may be liable to owners but not charterers receiving such sub-freights because “\textit{the very event of payment ... defeats the}” \textit{Lien}\textsuperscript{272}. It was unclear whether Nourse J was discussing a \textit{Lien} which had been exercised when sub-freights are received by third-parties or charterers. These comments are consistent with subordination of subsequent assignees with knowledge of the pre-existing \textit{Lien} (although mere suspicion is insufficient)\textsuperscript{273} regardless of whether it has been exercised and how the \textit{Lien} is defeated by payment to charterers before it is exercised – as if it were a \textit{floating charge}\textsuperscript{274}.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{267} \textit{Fn.5:} Worthington
\item \textsuperscript{268} \textit{Id}
\item \textsuperscript{269} \textit{Tagart, Beaton,} pgg394–395(Lord Alverstone CJ)
\item \textsuperscript{270} \textit{Diablo,} para.[42]; \textit{Tagart, Beaton,} pg393
\item \textsuperscript{271} \textit{Tagart, Beaton,} pg394(Earl Halsbury LC); \textit{Andreas Lemos,} para.[40]; \textit{Spiros C,} para.[11]
\item \textsuperscript{272} \textit{Ugland Trailer,} pg375,Col.1
\item \textsuperscript{273} Paras.[58-60]
\item \textsuperscript{274} \textit{Goode,} Cap.[1.63-73]; Oditah [1989] LMCLQ, pg195
\end{itemize}
\end{footnotesize}
137. However, courts, appreciating the inconsistency between Liens and floating charges, may soon allow sub-freights to be followed into charterers’ hands when the Lien is exercised before payment.

138. In The Western Moscow, Clarke J doubted Nourse J’s example of third-parties as such payments would not likely amount to sub-freights at all. In Diablo v Duncan, the Singapore Court of Appeal appeared at pains to agree with Clarke J, explaining how floating charges granted no proprietary interests in secured assets until the charge crystalised, without adverting to their proprietary interests or how chargors hold proceeds of charged assets on constructive trust for chargees after the charge crystallises.

139. In Duncan v Diablo, the Singapore High Court relied on the following academic reasoning to suggest in obiter that owners could not follow sub-freights into the hands of charterers even if the Lien was validly exercised:

“If the owner gives notice to the cargo interests before payment, the ‘lien’ crystallizes and the owner acquires a proprietary interest in the sub-freight so that the owner can claim the amount due from cargo interests even if they have paid it to the charterer or third party.”

140. While the first limb of the above reasoning is beyond reproach, the second limb, with respect, is not exhaustive.

275 Diablo, paras.[41-47]
276 Goode, Cap.[3.35]
277 Duncan, paras.[60-63], endorsed on appeal at Diablo, para.[20]
278 Bowtle[2002] LMCLQ at pg292
141. If exercising the *Lien* is akin to crystallising a floating charge\(^\text{279}\) and owners acquire a proprietary interest in the sub-freight thereafter, charterers arguably may be wrongfully appropriating the sub-freights by accepting payment\(^\text{280}\). Further, insofar as it is impossible to take fixed charges over receivables but only floating charges over their proceeds\(^\text{281}\), it appears illogical that the *Lien* may be crystallised, granting owners a fixed charge over sub-freights payable but no rights whatsoever over their proceeds in charterers’ hands.

142. Insofar as *Liens* create charges in favour of owners, charterers would be obliged to respect owners’ proprietary interests over sub-freights in their hands, provided the *Lien* was validly exercised, and hold the same as constructive trustees for owners\(^\text{282}\). It is submitted therefore that by copying them into *Lien Notices* in the event payment is already underway, owners may possibly preserve an avenue of recourse against charterers by informing charterers that they are no longer entitled to sub-freights. This should affect charterers’ conscience to render them constructive trustees of sub-freights for owners\(^\text{283}\).

143. It is also incontrovertible that as owners take an assignment of sub-freights upon exercising the *Lien*, sub-charterers are bound to pay owners to obtain good discharge of their obligation under the sub-charterparty to pay sub-freights\(^\text{284}\). As *Lien Notices* must be given to sub-charterers for owners to validly exercise their *Lien*, sub-charterers would be aware of who is entitled to payment and thus are likely liable to pay twice if sub-freights are wrongfully paid to charterers after the *Lien Notice* is received by sub-charterers.

\(^{279}\) *Diablo*, para.[37]; *Western Moscow*, para.[50]

\(^{280}\) *Goode*, Cap.[1.64] & [3.34]

\(^{281}\) *Goode*, Cap[4.17]; *Re Spectrum Plus*

\(^{282}\) Fns.274; *Goode*, Cap[3.34-35]

\(^{283}\) Fns.37,40&132; considering the commercial context of the charter trade; *Westdeustche Landesbank*, pgg28-33(Lord Browne-Wilkinson)

\(^{284}\) *Ibid*, paras.[29-30]; *Western Moscow*, para.[37]; *Security and Title-Based Financing*, Cap.[8.160]
144. Sub-charterers may push (beyond) the boundaries of marshalling in these circumstances as well\textsuperscript{285} but will likely be unsuccessful. Sub-charterers, having to pay sub-freights twice with no practical recourse\textsuperscript{286} against insolvent charterers, may however find courts reluctant to rationalise the law of \textit{Liens} with the law of floating charges or to introduce constructive trusts\textsuperscript{287} into typically commercial sectors\textsuperscript{288}. Instead, sub-charterers knowingly participating in the chartering enterprise with the knowledge that owners may through their \textit{Lien} intercept sub-freights\textsuperscript{289} should not be surprised that courts may avoid challenging the orthodoxy that owners cannot follow sub-freights paid into charterers’ hands even if their \textit{Lien} was validly exercised despite murmurs to the contrary.

8.1 Alternative Bases for Owners’ Claims

145. Where \textit{Liens} have been ineffective, owners have also resorted to unjust enrichment claims against sub-charterers to achieve a similar effect as their \textit{Liens}. Owners may seek \textit{quantum meruit} remuneration for completing the voyage (even if required under a pre-existing BL\textsuperscript{290}) from sub-charterers when owners exercise their right to withdraw the vessel (by way of notice\textsuperscript{291}) when charterers breach the charterparty without amounting to a repudiation and owners are thus not entitled to ‘loss of bargain’ damages\textsuperscript{292}.

146. However, courts appear reluctant to resort to unjust enrichment in the commercial chartering trade and resort instead to contractual mechanisms or remuneration for bailments\textsuperscript{293}. Courts however seek to ensure that owners are remunerated, given the commercial setting, for carrying cargo even after terminating the charterparty without being entitled to damages\textsuperscript{294}.

\textsuperscript{285} See Para.[118]
\textsuperscript{286} See \textit{Part 9.1}
\textsuperscript{287} \textit{Fn}.282
\textsuperscript{288} \textit{Westdeustche Landesbank}, pgg28(Lord Browne-Wilkinson),46(Lord Woolf),69(Lord Lloyd); \textit{Magsood}, paras.[34-39]; although it is submitted that such concerns should not arise under a specific, intentional and express assignment of sub-freights
\textsuperscript{289} Para.[59]
\textsuperscript{290} \textit{Ibid}; \textit{Bulk Chile}
\textsuperscript{291} \textit{Lakatoi Express}; \textit{Tropwind}(EWHC), pg52;
\textsuperscript{292} \textit{Fn}.86: Rainey QC
\textsuperscript{293} \textit{Kos}(UKSC), para.[31](Lord Sumption)
\textsuperscript{294} \textit{Kos} (EWHC),para.[46]
147. In *The Lakatoi Express*, Justice Carruthers briefly suggested sub-charterers would be liable for such remuneration after withdrawal but dismissed owners’ *Liens* as such remuneration would not be an “*amount due*” under the charterparty (although logically, the *Lien* replicates the remuneration claim). This outcome may be explained through traditional bailment theory concerning how bailees attorn to bailors, how bailees’ rights vis-à-vis cargo arise and how bailors are liable to compensate bailees for their extraordinary (but not pre-existing) efforts. Carruthers J, added in *The AES Express* that owners stepped into the shoes of charterers vis-à-vis sub-charterers as bailees for reward of cargo on board and could not be in a better position regarding freight after terminating the charterparty to claim BL freight (even under charterers’ BLs) if charterers had already been paid. How owners’ rights to remuneration were prejudiced by charterers’ accepting prior payment in is unfortunately unclear.

148. In *The Bulk Chile*, sub-charterers were liable to owners for market-rate hire because their communication with owners via arrival notices evinced an intention to contract directly with owners. It is submitted that sub-charterers will in most cases behave similarly, cooperating with owners to obtain delivery of cargoes already being carried (which owners are bound to under BLs) to their destinations, thus exposing themselves to liability under implied contracts. Justice Smith, cognisant of this, opined that sub-charterers would have to have an opportunity to decline owners’ offer to complete the BL voyage and ‘freely accept’ completion of the voyage before they would be liable for *quantum meruit* remuneration but would still liable under implied contracts. This may therefore be a distinction without any difference.

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295 Tay, (1966)5 Syd.LR; Bugden, “Bailment”; *Winson; Pioneer Container*
296 *AES Express*; cf *ibid*
297 *Ibid*; cf. Spiros C
298 *Bulk Chile* (EWCA), para.[33]; (EWHC), para.[74]&[77]
299 *Bulk Chile* (EWHC), para.[82]
9 Accounting for Excess Freight ‘ Intercepted’

149. Chains of charterparties are often back-to-back but provide a profit margin for each subsidiary charterer. Owners intercepting sub-freights due to charterers or intervening in BL freight\(^{300}\) may therefore obtain more than necessary to satisfy outstanding hire claims. Unfortunately, few details on accounting for excess freight are available\(^{301}\).

150. In \textit{Wehner v Dene}, owners intervening in BL freight had “to account [for excess freight] to the charterer or the sub-charterer, as the case might be”\(^{302}\). In this case, owners had to account for freight ‘bottom-up’, so excess freight was handed to sub-charterers who would then account for any excess to charterers\(^{303}\).

151. In \textit{The MV Loyalty}, there was no excess for owners to account\(^{304}\). However, the court failed to reject sub-charterers’ claims on the law or clarify that excess freight would have been diverted to sub-sub-charterers (to whom BL freight would have been paid if not for the owners’ \textit{Lien}) or charterers who contracted directly with owners before being paid over to sub-charterers.

152. In \textit{The Bulk Chile}, Lord Justice Tomlinson interpreted Channel J’s comments in \textit{Wehner v Dene} as imposing on owners an obligation to account for excess freight to head-charterers\(^{305}\). This appears a better view\(^{306}\) as Channel J’s reference to sub-charterers was motivated by parties’ concessions. Tomlinson LJ’s reasoning unfortunately revives the inconsistency of Rix LJ’s statements in \textit{The Spiros C}\(^{307}\) on how the risk of non-payment of hire rests on owners, but the risk of loss from owners’ \textit{Liens} is borne by sub-charterers.

\(^{300}\) \textit{Bulk Chile} (EWCA), para.[26]; \textit{Time Charters}, Cap.[30.79]
\(^{301}\) \textit{Bulk Chile} (EWCA), para.[26]; \textit{Time Charters}, Cap.[30.79]
\(^{302}\) \textit{Wehner v Dene}, pg99
\(^{303}\) \textit{Ibid}, pg92
\(^{304}\) \textit{MV Loyalty}, para.[31]
\(^{305}\) \textit{Bulk Chile} (EWCA), para.[26]
\(^{306}\) \textit{Time Charters}, Cap.[30.79]
\(^{307}\) \textit{Spiros C}, para.[39]
153. Before accounting for any excess freight to (sub-)charterers, it appears that owners do not hold the excess freight in trust but may set-off further cross-claims against them (e.g. arising under other transactions or claims for stevedore damage)\textsuperscript{308}. This implies that ‘insolvency set-off’ would also apply, benefitting owners upon charterers’ insolvency\textsuperscript{309} unlike where assets are charged to secure debts\textsuperscript{310}. This is consistent with how owners would account for excess hire to charterers under an implied term in the charterparty\textsuperscript{311} rather than to sub-charterers (perhaps under a resulting trust\textsuperscript{312}). Unfortunately, this parks the added risk of charterers’ insolvencies on sub-charterers\textsuperscript{313}.

9.1 Recovering Excess Sub-Freight Paid

154. Sub-freights intercepted by owners (in satisfaction of hire already due) may be paid in advance under the sub-charterparty. Separately, owners may also be entitled to terminate the charterparty after intercepting sub-freights.

155. Hire, earned on a \textit{per diem} basis\textsuperscript{314} ceases when charterparties are terminated and the vessel withdrawn. Owners are not entitled to retain\textsuperscript{315} hire not earned\textsuperscript{316}. Where the vessel is withdrawn, charterers too are not entitled to retain sub-freights paid in advance. It would follow, that owners as assignees of charterers, also have to return unearned hire.

\begin{itemize}
\item[308] \textit{Samuel v West Hartlepool}, pg129
\item[309] \textit{Re BCCI SA(No. 8); Law of Assignment}, Cap.[30.56-66];
\item[310] \textit{Goode},Cap.[1.73]
\item[311] \textit{Fns.254-256,306}
\item[312] \textit{Fn.126: Baughen, pg364}
\item[313] \textit{Fn.126: Baughen, pg358}
\item[314] \textit{French Marine}, pg346,Col.2(Lord Dunedin)
\item[315] \textit{Time Charters},Cap.[16.10]; \textit{Trident Beauty(UKHL)}, pg368(Lord Goff): “an obligation ... is implicit”
\item[316] \textit{Mihalios Xilas},pg308,Col.1(Lord Diplock)
\end{itemize}
56

156. Both NYPE and Baltime Lien Clauses provide charterers a lien on vessels until advance but unearned hire is returned. This non-possessory ‘lien’ is however merely a right to seek an injunction against (disponent) owners to prevent employment of the vessel until hire is repaid\[^{317}\]. Lien Clauses however do not replicate owners’ expansive Lien over “all sub-freights”\[^{318}\] but anyway cannot grant sub-charterers a lien over ‘all vessels’. It is therefore uncertain if sub-charterers may be assigned to charterers’ liens over the vessel.

157. Even if so, this lien will be ineffective. As owners may only exercise their Lien when amounts are outstanding under the charterparty, charterers have no unearned hire to secure via their lien on the vessel. Sub-charterers also will have no direct claim against owners because their ‘lien on the vessel’ is a right to an injunction against charterers. Even assuming an injunction against likely insolvent charterers is forthcoming, only the charterers and their agents and servants (but this does not include owners) may be enjoined from using the vessel.

158. Otherwise, under their Lien, owners are assignees of sub-freights and sub-charterers have no direct (contractual or restitutionary) claim against assignees\[^{319}\] for excess unearned freight paid. Even though sub-freight is unearned and liable to be returned by charterers, it is not ‘provisional’ and assignees may collect the freight free of any hidden or underlying conditions\[^{320}\] or ‘defects’\[^{321}\]. Owners are assigned (only) the benefits of the sub-charterparty and charterers remain liable to sub-charterers to return the unearned sub-freight. Where charterers are insolvent, sub-charterers will have to wait for any dividend from the insolvent estate and do not have a direct claim against owners\[^{322}\].

\[^{317}\] Lancaster

\[^{318}\] Fn.67

\[^{319}\] Trident Beauty(UKHL), pgg367-368(Lord Goff)

\[^{320}\] Ibid, pg372,Col.2(Lord Woolf)

\[^{321}\] Ibid; Fns.256

\[^{322}\] Barker,[1994] LMCLQ
10 Conclusion

159. Readers may be forgiven for mistaking this paper as, somewhat unabashedly, proselytising for interpleader relief which enables sub-charterers to avoid the risks caused by juridical confusion surrounding the Lien.

160. Apart from Singapore (which is decidedly on-board), the highest courts in several common-law jurisdictions are today more likely than ever to join the chorus that owners’ Liens are floating charges. When these courts do so, those in the chartering trade and their legal advisors will have a deep bank of established law to help understand how to respond to owners’ Liens.

161. Until then, the uncertainty concerning the theory underlying owners’ Liens affects virtually every action owners and sub-charterers may take. Practice has clarified only the formal steps connected to owners’ Liens, but the legal understanding of the substantive steps which affect parties’ financial exposure still remains tentative.

162. It remains unclear whether Liens are valid where charterers reasonably dispute that amounts are due under the charterparty and if sub-charterers may be liable to pay sub-freights twice if a Lien has been validly exercised whilst payment was making its way through banking channels. It is hoped that the movement towards recognising owners’ Liens as floating charges will finally allow owners to follow sub-freights into charterers’ hands, provided the Lien was validly exercised.

163. How excess sub-freights intercepted by owners is distributed between charterers and subsidiary charterers also remains unclear. At the same time, courts’ reluctance to clarify the effect of equitable and restitutionary doctrines in the context of the charter trade, relying instead on contract (and where necessary, bailment), exposes those in the charter trade to some risk of shock. These shocks, it is hoped, will not be too rude, when courts are forced to confront the implications as to equitable proprietary interests in receivables given the pre-existing (and, it is submitted, commercial) law on floating charges.
164. As we have seen often, an apparently valid *Lien* may also be liable to be set aside when charterers shortly go into insolvency. Domestic insolvency laws may provide that *floating charges* granted within a specified period before insolvency are invalid, security interests may be undue preferences, or entirely void against the liquidator. The risk that owners’ *Liens* may be valid today, and void tomorrow when liquidators step in is particularly stark (but also one more reason for sub-charterers to place their faith in interpleader relief).

165. Ironically, parties’ rights are clearer in Hong Kong and Singapore when the situation is most parlous and confusing: when charterers are insolvent. Domestic insolvency laws are drawn into the fray and provide for clear solutions. We will shortly consider the statutory interventions in these two jurisdictions given the importance to the maritime trade.

166. The growing popularity of the UNCITRAL Model Law of Cross-Border Insolvency poses its own challenges, although most tout that the benefits of harmonisation over expected teething pains. However, it appears harmonisation does not overcome inconsistencies in domestic jurisdictions and local legislation will have to cure the ills of owners’ *Liens* but this will have to be taken up elsewhere.

10.1 Statutory Amendments

167. In Hong Kong, amendments were brought into force in March 2014 following five rounds of public consultations with stakeholders. The Companies Ordinance was amended, not for doctrinal neatness but because charterparties with *Lien Clauses* were negotiated by shipbrokers, without legal assistance, over brief email exchanges. Section 334(4) of the Companies Ordinance now explicitly clarifies that owners’ *Liens* are not *floating charges*.

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323 *DS Norden*
324 Hong Kong Companies Registry: “New Companies Ordinance(Chapter 622) – Highlights” (January 2014)
325 *Ibid*, the confusion was noted at pg39
168. No decisions emanating from Hong Kong since appear to have dealt with owners’ *Liens*, especially against charterer’s insolvencies. It has been suggested that in Hong Kong, *Liens* no longer offer any security interests as statute makes clear the *Lien* is not a charge on the charterers’ receivables\textsuperscript{326}. However, is remains possible that the *Liens* still provide owners some comfort as flawed assets which must be redeemed by charterers’ liquidators\textsuperscript{327}.

169. In rapid response to *Diablo Fortune v Cameron Duncan*, the Singaporean Ministry of Law conducted a public consultation and amended the Companies Act. Owners’ *Liens* need no longer be registered and will be enforceable against liquidators when charterers fall insolvent in the future unless charterers have already assigned their receivables to another\textsuperscript{328}. The 2\textsuperscript{nd} Minister of Finance noted in parliament how short charterparties may have been performed before *Liens* might be registered, and compounded with the number of charterparties being contracted daily, the administrative rush might be unsustainable for both charterers (whose directors may be criminally liable for not registering owners’ *Liens*) and the Registrar of Companies.

170. Counterparts, trading with charterers are sufficiently protected by being able to take securities in sub-freights before owners. Those who come after owners should anyway be aware of the ubiquitous lien. Conversely, financiers who take assignments of charterers’ future debts rank ahead of owners who come later.

171. These statutory provisions (and in the case of Singapore, the decision of the final appellate decision) provide some clarity on how courts are likely to treat owners’ *Liens*. Even though the owners’ *Liens* have been before English courts numerous times, the slight risk of the Supreme Court overturning and departing from previous first instance decisions remains\textsuperscript{329}.

\textsuperscript{326} Second Reading by 2\textsuperscript{nd} Minister for Finance, Parliament of Singapore(06/August/2018)
\textsuperscript{327} *Fn.19:Re BCCI SA(No.8)*
\textsuperscript{328} *Fn.326,para.[21(b)]*
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