

Liens on Sub-Freights in a Nutshell

How can a ship owner recover hire in circumstances where the charterer fails to pay hire due under the time charter? Owners could withdraw the ship or even sue the charterer. This would, however, cost time and money and may prove to be ineffective particularly if charterers have no assets. One solution would be to tap into the charterer's sources of income:

- a. Charterers may be carrying cargo for their own account;
- b. Charterers' use of the vessel may generate income by way of the following:
 - i. earning freight under bills of lading;
 - ii. earning freight under a sub-voyage charter; or
 - iii. earning hire under a sub-time charter.

Obtaining a lien on sub-freights is a mechanism which allows the ship owner to intercept the income due to time charterers by requiring the cargo interests or the sub-charterers to pay to the owners any freight or sub-hire (as set out in paragraph b. above) that they would otherwise have paid to the defaulting charterers. (For B/L freight see below).

A lien on sub-freights can only arise as a contractual right (and does not exist in common law). A typical wording of a lien clause is as follows:

"The Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter Party and the Charterers to have a lien on the Ship for all monies paid in advance and not earned ..." (NYPE 1946, cl 18). See also NYPE 1993, clause 23 and Baltimore 1939, clause 17.

Does a contractual lien on sub-freights include sub-sub-freights?

Under an NYPE charterparty, owners have the right to lien sub-sub-freights. In that respect, the sub-charter should also contain a lien clause back to back with that in the charter above it, thereby providing an uninterrupted chain of lien clauses within the framework of the charter chain.

A lien would not extend to sub-sub-freights if the wording used indicated otherwise. For example, the lien clause in the

Baltimore charter party refers to sub-freights *"belonging to the time-charterers"*.

Does a contractual lien on sub-freights include sub-time charter hire?

Clause 18 of the NYPE 1946 states that *"The Owners shall have a lien upon all cargoes, and all sub-freights...."*

There are conflicting court decisions as to whether the above clause includes sub-hire. However, the most recent view appears to be that liens on "sub-freights" do not cover liens on sub-hire party (*The "Bulk Chile" [2013] EWCA Civ 184*). Express wording will, of course, change the position, eg NYPE 1993, cl 23: *"lien upon all cargoes and all sub-freights and/or sub-hire"*.

Is a shipowner entitled to lien freight under his bill of lading when it stipulates that "freight is payable as per (a sub-voyage) charter party"?

Yes. A provision that freight is *"payable as per charter party"* (which is not the owners' charter party) does not exclude that right. The freight would still be due to the ship owner, even though it may be payable to another party (*The "Bulk Chile" [2013] EWCA Civ 184*).

When can an owner exercise his right to lien?

The charterers can exercise full rights over the sub-freights as their (ie charterers') income until there is an actual default in the payment of hire to the owner: possible, probable or inevitable (future) default is not enough (*The Spiros C [2000] 2 Lloyd's Rep 319*).

When is the right lost?

The lien must be exercised by way of a demand that is to be received before the freight is paid by the sub-charterer either to the charterer or to his agent (*Samsun Logix v Oceantrade [2008] 1 Lloyd's Rep 450*).



Formalities in exercising a lien

By giving notice to the company due to pay the sub-freight:

The notice does not need to be in any particular form. However, the notice should make clear:

- that the charterer is in default of payment of hire;
- the source of the lien;
- the demand for payment which should be quantified as far as possible;
- the consequences of not complying with the lien notice, namely that the party receiving the lien notice may end up paying the hire/freight that is being liened twice over.

It is recommended to ask a solicitor to draft the notice in order to comply with all the requirements.

How much may be retained?

Under the lien the ship owner may retain only those sums which are due from his time charterer (*Samuel v West Hartlepool (1906) com. Cas. 115*). By way of example, if a lien over sub-freights is exercised on 15 May, the lien will only be effective in relation to unpaid hire which is payable before that date, but not effective in relation to hire which falls due on 20 May. Similarly, the lien does not extend to a claim by ship owners for damages under the time charter.

After deduction of the amounts due, the ship owner must account to the charterer for the balance. However, where there is:

- (a) unpaid hire which is not covered by the lien (see above); or
- (b) a damages claim by owners against charterers,

Owners may have a right of set-off and counterclaim over the balance in respect of the sums accruing due or the claim for damages (*Samuel v West Hartlepool*).

“Freight pre-paid” B/Ls

A bill of lading containing the mention “freight pre-paid” will not necessarily mean that the owners will be barred from liening sub-freight. The important fact to ascertain is whether freight has actually been paid. Sometimes only a portion of the freight is paid, or not at all, despite the bill of lading stating that it is “*freight prepaid*”.

What if the sub-charterer ignores the notice of lien?

If the sub-charterer ignores the notice of lien and goes ahead and pays freight to the defaulting charterer the sub-charterer will be liable to pay the amount of that freight to the ship owner notwithstanding that the sub charterer will already have paid the same to the charterer above him in the charter chain.

This article was written by Julien Rabeux in the Club’s Hong Kong office with additional input from Holman Fenwick Willan (London).

This note is for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a particular situation please contact the Club.