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**The Impact of Secured Transactions Law
on Shipowner's Contractual Security
in The Chartering Industry:
Common and Civil Law Perspectives**



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Doctor of Philosophy (PhD) Thesis
City, University of London
The City Law School
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Abstract

A shipowner's lien on cargo and sub-freights in a standard charterparty form is initially derived from commercial practice and is widely recognised and employed in the chartering industry. However, its legal implication, nature and effect in common and civil law are controversial. The controversy is attributed not only to the concept of the lien arising from common law but results also from the development of the chartering industry and of modern secured transactions law. This thesis will examine the extent to which modern secured transactions law affects the legal nature and effect of shipowner's lien in the traditional chartering industry.

In order to achieve this purpose, the thesis will first demonstrate that the word 'lien' in charterparties is a rather inappropriate and imprecise legal term in so far as its use in a lien clause is concerned; this has led to ambiguity in both legal systems. It is therefore proposed that the term 'security', which can sufficiently illustrate the purpose of a shipowner's 'lien', should replace the latter word in this thesis. Further to this proposal, in the thesis this security will be divided into two sub-clauses, each of which describes the purpose of the parties and the different legal natures of security on cargo and on sub-freights.

The thesis will then investigate the impact of the legal nature and effect of a shipowner's cargo and sub-freight security along with the development of the chartering industry and of modern secured transactions law. Further to this investigation, it is argued that, regardless of common law or civil law, modern secured transactions law has impacted on the legal nature and effect of cargo and sub-freight security. However, the character of the chartering industry should also to some extent affect the legal effect of this shipowner's security. On this basis, it is suggested that the traditional shipowner's

security be incorporated into the security system. Its legal nature in modern secured transactions law should therefore be governed by the law of security. Its legal effect should be influenced by both the law of security and also the nature of the chartering industry. Concerning the shipowner's security, which is a traditional charterparty clause, if its exercise does not impact on public interests or intervene in the secured transactions market, its effect is not on the premise that it satisfies the legal requirement of secured transactions law. However, this thesis also highlights that the legal effect of this security is to a great extent affected by policy considerations. One may therefore conclude that in different jurisdictions the impact of the chartering industry or secured transactions law on the shipowner's security is uncertain.

Abbreviations

Baltic and International Maritime Council	BIMCO
BIMCO Standard Bareboat Charter	BARECON
BIMCO Uniform Time-charter Form	BALTIME
British Petroleum Voyage Charter Party	BPVOY
China International Commercial Court	CICC
China Maritime Arbitration Commission	CMAC
Chinese Maritime Arbitration Association	CMAA
German Maritime Arbitration Association	GMAA
General Time Charter Party	GENTIME
Gross Domestic Product	GDP
London Maritime Arbitrators Associations	LMAA
New York Produce Exchange Form	NYPE
Belt and Road Initiative	BRI
Shanghai Maritime Court of P.R.C.	SMC

Supreme People's Court of China

SPC

The Baltic and International Maritime Council Uniform General Charter GENCON

United Nations Commission on International Trade Law UNCITRAL

United Nations Convention on Contracts for the International Sale of Goods CISG

Chapter One: INTRODUCTION

This thesis is concerned with the legal nature and effect of a traditional shipowner's lien in a standard charterparty form, as well as with the development of the chartering industry and of modern secured transactions law. The shipowner's lien on cargo and sub-freights is initially derived from commercial practice and has a long history. Its main function is to improve the performance of a charterer's obligation which is consistent with the purpose of the security. In the modern transnational commercial field, secured transactions commonly take place across legal systems, while the system of security constitutes an effective legal model of risk management. However, the character of the chartering industry means that the shipowner's security has its own characteristics. Also relevant is that the chartering industry itself is gradually developing and so the nature of a shipowner's security may correspondingly change. In this context, the thesis will examine the extent to which modern secured transactions law will affect the legal nature and effect of the shipowner's security in the traditional chartering industry.

1. Background

It is fully recognised that maritime law is an ancient legal domain. In the ancient Babylonian Code of Hammurabi, maritime legislation played an important role in dealing with seaborne trade. Later, in the Greek and Roman period, general principles regarding maritime transactions handed down by the Hammurabi Code were succeeded and greatly improved upon.¹ Along with ancient maritime law, charterparties² as 'remarkable contracts' in the maritime transportation milieu have become one of the most important and difficult subjects owing to the technical expertise contained in their contractual clauses and 'their broad international scope and the importance of the world

¹ Proshanto K Mukherjee, *Maritime Legislation* (WMU Publications 2002)11-16

² The origin and meaning of a charterparty will discuss in Section 2.2

trade they facilitate'.³ The characteristic sophistication and international nature of 'remarkable contracts' has stimulated a demand for international uniformity. Even though, due to the party autonomy principle, there is no international convention binding charterparties, a variety of standard forms leading to uniformity have a long history⁴ and have been published by different international communities and companies. According to recent statistics of the Baltic and International Maritime Council (hereinafter referred to as BIMCO), there are in use twenty standard forms relating to voyage charterparties, nine standard forms relating to time charterparties and two standard forms relating to bareboat charterparties.⁵ Furthermore, the above figures do not cover standard forms independently issued by monopoly companies such as British Petroleum⁶ and by the Maritime Arbitration Commissions such as the China Maritime Arbitration Commission (hereinafter referred to as 'CMAC').⁷ All these standard forms may be used widely around the world.

It is noteworthy when an international chartering industry applies to international standard forms to deal with an international business, the applicable law is not 'international' which means that the applicable law is monopolized by common law. More specifically, almost all standard charterparty forms have provided that any disputes arising from charterparties shall be referred to arbitration in London, New York or other common law jurisdictions, governed by English law, American law, etc.⁸

³ NJJ Gaskell, C Debattista and R J Swatton, *Chorley and Giles' Shipping Law* (8th edn, Pitman Publishing 1987)165; see also William Tetley, *International Maritime and Admiralty Law* (International Shipping Publications 2002)172

⁴ 'Charterparties: A Comparative Analysis' (1990) The UNCTAD Secretariat Report, 5 <http://www.lawandsea.net/1documents/Charter_Parties.pdf> accessed 16 March 2016

⁵ Baltic and International Maritime Council, 'BIMCO Contracts' <https://www.bimco.org/contracts-and-clauses/bimco-contracts> accessed 22 December 2018

⁶ British Petroleum, 'British Petroleum Voyage Charter Party 4' <<http://charterpartyeditor.co/images/Forms/BEEPEEVOY4.pdf>> accessed 18 March 2016

⁷ China Maritime Arbitration Commission (CMAC), 'CMAC Time and Voyage Charterparty 2012' <<http://www.coscoqmc.com.cn/haizhong/info/1039/1127.htm>> accessed 18 March 2016

⁸ For example, Clause 19 'Law and Arbitration' of The Baltic and International Maritime Council Uniform General Charter (GENCON 76/94), <http://www.fleetle.com/a/d/pdf/gencon_1994.pdf> accessed 18 March 2016; Clause 54 'Law and Arbitration' of New York Produce Exchange Form (NYPE 2015), <<https://www.smf.com.sg/wp-content/uploads/2018/11/22-document-nype-2015-sample-copy.pdf>> accessed 18 March 2016. English law as used in this thesis refers simply to the law of England and Wales whereas Scottish law belongs to the civil law system.

Even though a standard form issued by a Maritime Arbitration Commission such as the CMAC provides that any disputes shall be referred to the CMAC in accordance with the existing Arbitration Rules issued by this Commission, the governing law is not provided directly by the standard clause.⁹ This means that contracting parties may be at liberty to choose any countries' law even if a Chinese tribunal hears the case. It is safe to say that common law, particularly English law dominates charterparty disputes. Based on this, a question arises as to whether it is necessary to ascertain the civil law on the basis of the predominant position of common law when disposing of charterparty disputes.

1.1 Why Comparative Research?

There is no doubt that for several centuries the common law system has dominated maritime professional services, including arbitration and litigation. Almost all the principles, rules and philosophy in commercial maritime law originate from common law, particularly, from English law. However, it is true that, in recent years and in the future, the dominant position of common law has been, and will continue to be challenged. It is reported by the City of London Corporation that the UK, as the world leader in maritime, trade and international arbitration, faces growing competition from the emerging areas, particularly Asia 'as a result of the movement of shipping activity and growth in legal capabilities'.¹⁰

For example, to compete with the London Maritime Arbitration Association and English courts, the Supreme People's Court of China (hereinafter referred to as 'SPC') has established an international maritime judicial centre based on the Shanghai Maritime Court of P.R.C. (hereinafter referred to as 'SMC') for providing a platform

⁹ Article 45, CMAC Time Charterparty 2003
<http://www.coscoqmc.com.cn/haizhong/info/1039/1127.htm> accessed 18 March 2016

¹⁰ 'The UK's Global Maritime Professional Services: Contribution and Trends' (April 2016) The City of London Corporation 19, 30-31 [https://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/Research 2016/the-uk-s-global-maritime-professional-services.pdf](https://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/Research%2016/the-uk-s-global-maritime-professional-services.pdf) accessed 21 May 2016

for international communication and for enhancing the influence of Chinese maritime courts.¹¹ As a matter of fact, Chinese maritime courts in 2017 disposed of 17,500 cases, more than any other courts around the world. Among them, 15 per cent, 2625 cases, related to international elements. In theory, international cases can use foreign law in Chinese courts; but in legal practice, to this present author's observation, Chinese courts tend to persuade parties to choose Chinese law. This being the case, it is expected that in the near future Chinese law will play a more important role in the international commercial maritime law domain. In addition, as part of the Belt and Road Initiative (Hereinafter referred to as 'BRI'), in July 2018 the SPC launched the establishment of the China International Commercial Court (hereinafter referred to as 'CICC'),¹² although it is too early to determine to what extent these international commercial courts may impact on the London commercial court and arbitration in the chartering industry; furthermore, the revision of the 'Law and Arbitration' clause of the standard charterparty form maybe take a long time to finish, though the first stage to challenge the position of the London commercial court and arbitration is under way. Recently, in order to enrich the impact of the CICC, the SPC announced a new rule for the CICC. Parties who bring a case to the CICC are entitled to choose the court, arbitration or mediation to address their disputes.¹³ In other words, although the CICC is so-called 'commercial court', it also to some extent plays an arbitration or mediation role. In light of this, the parties to charterparties are entitled to invoke the arbitration in any organisations endorsed by the CICC and the award will be recognised and directly enforced by the CICC.

Competition to the UK also comes from west European continental law countries. As a result of Brexit, some European jurisdictions reacted swiftly to this by setting up or

¹¹ Xinhuanet, 'Establishment of Chinese Maritime Judicial Centre and Smart Maritime Court' (Xinhuanet, 14 June 2018) <http://sh.xinhuanet.com/2018-06/14/c_137252481.htm> accessed 18 June 2018

¹² China International Commercial Court, 'A Brief Introduction of China International Commercial Court' (CICC, 28 June 2018) <<http://cicc.court.gov.cn/html/1/219/193/195/index.html>> accessed 17 December 2018

¹³ Ibid

planning to launch commercial courts to hear international business disputes, such as the International Chamber of the Paris Court of Appeal,¹⁴ in Germany the Regional Court of Frankfurt International Chamber for commercial matters,¹⁵ and the Netherlands Commercial Court in Amsterdam.¹⁶ There is no doubt that these European specialized court chambers are attempting to compete with the London commercial court which disposed of a large number of foreign-related cases, in particular, maritime disputes; in 2016 the UK courts and London Arbitrations disposed of 80 per cent of overseas cases and about 30 per cent these were from Western Europe.¹⁷ For this reason, it is reasonable for these 30 per cent of cases to be taken back to continental European jurisdictions. There has even been a proposal submitted to the European Parliament to consider the establishment of a European commercial court.¹⁸ It is expected that, after Brexit, the establishment of a European commercial court will be pursued more vigorously.

Apart from these commercial courts, European countries are also gradually strengthening their arbitration practices. For example, the German Maritime Arbitration Association (hereinafter referred to as 'GMAA') compares with the London Maritime Arbitrators Associations (hereinafter referred to as 'LMAA'), which mainly hears charterparty disputes and has concluded that 'London's advantage as a maritime

¹⁴ Giesela Ruehl, 'Doors Open For First hearing of International Chambers at Paris Court of Appeal' (Conflict of Laws, 5 July 2018) <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/> accessed 17 December 2018

¹⁵ Sabine Schmidt, 'Regional Court of Frankfurt—Ready for Brexit' (CURTIS, 11 October 2018) <<https://aufsichtsrechtsnotizen.curtis.com/2018/10/11/regional-court-of-frankfurt-ready-for-brexit/>> accessed time. 17, December 2018

¹⁶ 'Netherlands Commercial Court' <<https://www.rechtspraak.nl/English/NCC>> (NCC, 17 December 2018) accessed 17 December 2018

¹⁷ 'The UK's Global Maritime Professional Services: Contribution and Trends' (April 2016) The City of London Corporation 19, 20 <[https://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/Research 2016/the-uk's-global-maritime-professional-services.pdf](https://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/Research%2016/the-uk's-global-maritime-professional-services.pdf)> accessed 21 May 2016. Although this report did not point out that 80 per cent of cases were disposed of in UK courts and by the London Maritime Arbitration, it was said that '[T]he UK maritime business service sector is global. For example, 80 per cent of the services provided by UK maritime law firms are provided to clients based outside of the UK. About 30% is with Western Europe (mostly EU)...' It is inferred that 80 per cent of cases should be heard in the UK and subject to English law.

¹⁸ Giesela Ruehl, 'Doors Open For First hearing of International Chambers at Paris Court of Appeal' (Conflict of Laws, 5 July 2018) <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/> accessed 17 December 2018

arbitration location is in fact more based on traditional considerations than on rule-related advantages of the English system'.¹⁹ Although the GMAA have a sufficient awareness of the 'Law and Arbitration' clause in standard charterparty forms which cannot easily be changed, they submitted a proposal of 'Law: Made in Germany' to illustrate the advantages that they offered in terms of global coverage, effective and cost-efficiency.²⁰

Apart from the competition of individual jurisdictions, civil law jurisdictions are attempting to unite to compete with the common law jurisdictions. For example, the GMAA has cooperated with the CMAC since 2009 for improving the development of arbitration between these two countries.²¹

Given the above context, even though common law jurisdictions, in particular English law, have so far to a great extent dominated the interpretation and application of charterparties, civil law's principles, rules and philosophy can no longer be overlooked. It is expedient to concentrate on the principles and rationales of civil law, in particular for the competitors of English law in European countries and of Chinese law in making good the gap in comparative research.

1.2 Why Shipowner's Security Clause?

¹⁹ The German Maritime Arbitration Association, 'GMAA-Why?' (GMAA) <<https://gmaa.de/en/arbitration/faq-for-arbitration/gmaa-arbitration-why>> accessed 17 December 2018; J.J. Rieckhoff, 'Deutsche Seeschiedsgerichtsbarkeit unter der GMAA Schiedsordnung in Vergleichender Betrachtung Englischer Seeschiedsgerichtsbarkeit unter dem LMAA Reglement' (PhD Thesis, Hamburg 2016)

<<https://gmaa.de/images/gmaa/pdf/artikel/GMAA%20Deutsche%20Seeschiedsgerichtsbarkeit%20Rieckhoff.PDF>> accessed 17 December 2018

²⁰ Heiko Maas, 'Law: Made in Germany' (Law Made in Germany) <https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf> accessed 17 December 2018

²⁰ 'Agreement Between GMAA and CMAC'(CIETAC Shanghai Sub-commission, 9 October 2009) <<http://www.cietacshanghai.org/index.php?m=Article&a=show&id=1654>>accessed 17 December 2018

²¹ Ibid

A shipowner's security clause in the context of a standard charterparty form refers to a shipowner's lien on cargo and on sub-freights. In comparison with other pure contractual clauses, this security clause has its own particular features, as stated below. First, a shipowner's security clause is subject not only to the law of contract, but also to the law of property in the domain of modern commercial law. Although in the traditional shipping industry the cargo security was spontaneously derived from the early maritime activities, and then sub-freight security had been developed accompanied by cargo security,²² the purpose of this 'spontaneous' security was to enhance the shipowner's chances of obtaining performance of the charterer's obligation and so is consistent with the function of modern security law. Therefore, unlike other contractual clauses in charterparties that are simply subject to contract law, the legal nature and effect of this security clause should be subject to both the law of contract and the law of security. In the modern transnational commercial field, secured transactions successfully take place across legal systems due to the fact that the system of security constitutes an effective legal model of risk management.²³ To harmonize and modernize secured transactions law, the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL') has provided different tier documents, including a convention (The United Nations Convention on the Assignment of Receivables in International Trade 2004), a model law (UNCITRAL Model Law on Secured Transaction 2016) and Legislative guides and recommendations (UNCITRAL Model Law on Secured Transaction: Guide to Enactment 2017 and; the UNCITRAL Guide on the Implementation of a Security Rights Registry 2013) to assist different jurisdictions to build a comparatively unitary legal framework in relation to the system of security.²⁴ In this context, it is anticipated that the legal nature and effect of the shipowner's security clauses may to some extent

²² The history of shipowner's cargo and sub-freight security will be discussed in detail in Chapters 4 and 5 respectively.

²³ See General Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. III (7th edn, Hart Publishing Ltd 2019) 1-2

²⁴ United Nations Commission on International Trade Law 'Security Interests' (UNCITRAL) <<https://uncitral.un.org/en/texts/securityinterests>> accessed 29 April 2019

be compatible in two legal systems although the standard charterparty form, as a whole, is influenced by common law.

Secondly, the object of the security clause is to determine that any jurisdictions can take opportunities to dispose of the dispute arising from a charterparty between a shipowner, a charterer and a third party. As mentioned before, 'Law and Arbitration' in a charterparty provides that a dispute arising from the charterparty shall be brought to LMAA or other common law jurisdictions governed by common law. However, the exercise of the shipowner's security is in many situations before arbitration or litigation. As stated by Diplock LJ in *Tappenden (t/a English and American Autos) v Artus*²⁵,

'lien is a self-help remedy, triggered by the performance of work which improves a chattel of which the performer has lawful possession, and does not depend on any implied contractual term... lien as a remedy in rem, requiring for its exercise no intervention by the courts'.²⁶

Furthermore, a vessel carrying the cargo may proceed to any country. In practice, a shipowner normally attempts to exercise his security on cargo or sub-freights before the ship arrives at its destination or discharges its cargo. Under this circumstance, regardless of which jurisdiction and applicable law are involved in a standard form, a dispute arising from the exercise of security is quite common brought to the court of the destination location. It is reasonable to assume that civil law jurisdictions will be involved. From the comparative law point of view, the research on this security is therefore a good start to explore how the two legal systems dispose of the same dispute.

Thirdly, from the practical point of view, the chartering industry by its nature determines that it is difficult to enforce the 'lien' clause. The reasons are various. The

²⁵ [1964] 2 QB 185 (CA)

²⁶ Ibid at 194-195; *Halsbury's Law of England* (5th edn, 2016) Vol 68

owner of the secured property (cargo and sub-freight) may traditionally not be easily identifiable or ascertainable, and sometimes the property cannot easily be disposed of. In the modern chartering industry, the use of multiple charterparties involves more legal issues. For example, a question may arise as to whether a disponent shipowner and sub-disponent shipowners under multiple charterparties can exercise a legal cargo security. This question arises from the condition precedent of the legal cargo security for the creditor to possess the cargo physically, but only the shipowner rather than the disponent shipowner is entitled to possess the cargo physically. Based on this, cargo security for the disponent shipowner might be meaningless. To sum up, many practitioners argue that 'lien' clauses play a limited role in securing the transaction and protecting the creditor. However, in view of the development of modern secured transactions law in the international legal regime, it is worth considering whether modern secured transactions law contributes to a reconsideration of the legal nature and effect of this security clause. No comprehensive research on this clause from both common law and civil law perspectives has so far been undertaken.

1.3 Overarching Research Question

The above context drives the overarching research question in this thesis:

To what extent should the legal nature and effect of the shipowner's contractual security in the traditional chartering industry be influenced by modern secured transactions law?

2. Delimitation and Clarification of the Theme

The overarching theoretical question of this research is 'Impact of Modern Secured Transactions Law on the Legal nature and effect of Shipowner's Security in the Traditional Chartering Industry'. To illustrate the question behind this theme and to understand the reason of using the relevant sources, it is important to delimitate and clarify it term by term.

2.1 ‘Traditional’ and ‘Modern’

There is no timeline to be drawn to distinguish ‘traditional’ and ‘modern’. In this thesis, the term ‘traditional’ is to stress that the shipping or chartering industry has a long history. When clauses in a charterparty were created, there was no a ‘modern’ rule or law to govern them. In comparison with ‘traditional’, the term ‘modern’ is to stress that the system of security has been comprehensively developed.

From the perspective of the function of security, ‘traditional’ and ‘modern’ reflect the change of function. When a traditional security occurs, its primary function is merely to promote the performance of the contractual obligation, but other demands are not highlighted.²⁷ Due to the changing demands of the developing economic system, more functions are needed. In particular, secured credit has now been generally recognised as a principal mean of financing. That is to say, the financing function of the security has been developed.²⁸ Based on this, there are two major functions regarding the security: debt protection and financing.²⁹ The former function is consistent with the shipowner’s security in the traditional chartering industry, while the latter is simply derived from modern secured transactions law. Therefore, ‘traditional’ and ‘modern’ in essence reflect the tendency and outcome of gradual change in the chartering industry and secured transactions law.

In addition, although in the chartering industry there are three basic types of traditional charterparty—a voyage charterparty, a time charterparty and a bareboat/demise

²⁷ See generally, Hailin Zou and Min Chang, *Forms of Contractual Security and its Application* (Law Press China 1998); Benhan Chen, *Comparative Research on the Law of Security Interests* (Wuhan University Press, 2003)1

²⁸ Robert E Scott, ‘The Politics of Article 9’ (1994) 80 (8) *Virginia Law Review* 1783, 1784-1785; Zou and Min (n 27); Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018) Ch1

²⁹ David E Allan, ‘Security: Some Mysteries, Myths, & Monstrosities’(1989) 15 *Monash University Law Review* 337, 342; Zou and Min (n 28); Benhan Chen, *Comparative Research on the Law of Security Interests* (Wuhan University Press, 2003)129; apart from these two functions, some literatures further offer the motives of security, including ‘maximising prospect of recovery in a debtor’s insolvency’, and control and monitoring of the debtor’s property; see for a general statement Gerard McCormack, *Secured Credit under English and American Law* (Cambridge University Press 2004) Ch 1; Beale and others (n 28)

charterparty,³⁰ because of commercial needs there have emerged in the modern era new types of charterparty such as the slot charterparty. Furthermore, in the traditional chartering industry a vessel was simply involved in one or two charterparties, but in modern society a string of charterparties is commonplace.

It can be seen that ‘traditional’ itself is changeable. The further discussion of this is in the following Section 2.2.

2.2 Voyage and Time Charterparties under Multiple Charterparties

The ‘traditional chartering industry’ in this thesis refers to ‘voyage and time charterparties under multiple charterparties’. A charterparty is a commercial device of ancient vintage and the expression is derived from the Latin term *carta partita* literally meaning ‘divided instrument’. The instrument so-called was written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other (hence the term ‘indenture’). Whereas the term ‘charterparty’ was used first in 1539, the concept of a contract between a shipowner and a charterer for the use of a ship had already been in existence since the time of the Code of Hammurabi.³¹ While the Hammurabian Code did not reflect the notion of the charterparty as it evolved in subsequent times, it is notable that some two thousand years later, the Rhodian Sea Law recognised by the Byzantine Empire provided the legal framework for the use and hire of a vessel for carriage of goods by sea.³²

³⁰ Jason Chuah, *Law of International Trade: Cross-border Commercial Transactions* (6th ed, Sweet & Maxwell 2019) 275-276; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 2-4; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) 20-24

³¹ Evidence of this is found in the Babylonian Code of Hammurabi. Article 236 provides that ‘[I]f a man rent his boat to a sailor, and the sailor is careless, and the boat is wrecked or goes aground, the sailor shall give the owner of the boat another boat as compensation’; Article 237 provides that ‘[I]f a man hire a sailor and his boat, and provide it with corn, clothing, oil and dates, and other things of the kind needed for fitting it: if the sailor is careless, the boat is wrecked, and its contents ruined, then the sailor shall compensate for the boat which was wrecked and all in it that he ruined’; Article 275 provides that ‘[I]f any one hire a ferryboat, he shall pay three gerahs in money per day’; Article 276 provides that ‘[I]f he hire a freight-boat, he shall pay two and one-half gerahs per day’, <http://www.admiraltylawguide.com/documents/hammurabi.html> accessed 18 July 2017

³² William Tetley, *Maritime Liens and Claims* (2nd edn, International Shipping Publications 1998) 7-11; Xiaobo Wang, *A Study of The Rhodian Sea-Law* (China University of Political Science and Law Press

In modern times, the term ‘charterparty’ is used to describe a particular kind of shipping document,³³ which refers to a standard form of chartering. The standard charterparty form came into use with the advent and development of the chartering industry. Even though the word ‘charterparty’ can be traced back to the sixteenth century, the chartering industry did not then appear and perception of two parties, namely, the shipowner and the charterer, was absent. In the early period, the charterparty merely referred to the contract, but latterly, it acquired the meaning of a standard charterparty form. Ship chartering or charterparty is an activity within the shipping industry that refers to ‘a contract by which a ship, or a principal part of it, is leased by the owner, especially to a merchant for the conveyance of goods on a predetermined voyage to one or more places or for a specified period of time; a special contract between the shipowner and charterer, especially for the carriage of goods at sea. -- Often shortened to ‘charter’. -- Also written as “charter-party”; “charter party”. --Also termed charter agreement’.³⁴ The different names will therefore be found in the citation of this thesis, but the several usages carry no fundamental distinction. A charterparty will be used in the main content.

Multiple charterparties refer to a chain or string of charterparties.³⁵ In the modern chartering industry, a single charterparty model has been replaced by multiple charterparties. A vessel may in practice be covered by multiple charterparties, including bareboat, time and voyage charterparties.³⁶ Only time or voyage charterparties will be discussed in this thesis and bareboat charterparties are beyond the scope of the work. The reasons are as follows.

2011) 1 and 103

³³ Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 2, fn 11

³⁴ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para1.1

³⁵ Lars Gorton and others, *Shipbroking and Chartering Practice* (7th edn, Informa 2009) 126

³⁶ *Ibid* 126-127

As regards to voyage and time charterparties, they are both traditional characteristics of service contracts.³⁷ ‘Voyage charters are those by which the owner agrees to perform one or more designated voyages in return for the payment of freight... Time charters, whether for a period or for a trip, are those under which, in return for the payment of hire (the charterer has the use of the ship)’.³⁸ The development of the chartering industry has involved more forms of charterparties in light of these two basic forms. Typical examples are time trip charterparties³⁹ and consecutive voyage charterparties.⁴⁰ However, the former form resembles a voyage charterparty while the latter one can be construed from a time charterparty perspective.⁴¹

In addition, with the growth of container vessels, slot or space charterparties that involve ‘the chartering of a part of a ship’ are playing an important role in the chartering industry.⁴² This form of charterparty is characterized as both time and voyage charterparties so that a slot or space charterparty is defined as a ‘hybrid’ contract when BIMCO issues its standard form, namely SLOTHIRE.⁴³ One commentator even claims

³⁷ Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para1.1-1.3; John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 4; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)23-24; In addition, in terms of the nature of a time charterparty in civil law, the nature is different from that of English law. This legal issue will be discussed in Chapter 4.

³⁸ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014)para1.14

³⁹ ‘The time trip charterparty, or trip time charterparty, is a hybrid type of charterparty, usually on one of the well-known standard forms’; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)22; see also, *Chiswell Shipping Ltd & Liberian Jaguar Transports Inc v National Iranian Tanker Co (The World Symphony & World Renown)* [1991] 2 Lloyd’s Rep 251, 257 (Hobhouse J); Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 8; Johanna Hjalmarsson, ‘Trip Charterparties and Their Binary Endgames’ (2018) Lloyd’s Commercial and Maritime Law Quarterly 376, 378

⁴⁰ Consecutive voyage charterparties are described as ‘a variant of the single voyage charterparty’ that is ‘a voyage charterparties for a series of voyages, with each continuing on from the earlier voyage’; Girvin (n 39) 22; Eder and others (n 39) 8

⁴¹ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010)4; Christopher Hancock, ‘Containerisation, slot charters, and the law’ in Rhidian Thomas(ed), *Legal Issues Relating to Time Charterparties* (Informa 2008)248

⁴² Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) 23; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 7; Lars Gorton and others, *Shipbroking and Chartering Practice* (7th edn, Informa 2009)108

⁴³ BIMCO, ‘The Baltic and International Maritime Council Standard Slot Charter Party’ (BIMCO, 20 September 2016) <<https://www.bimco.org/search-result?term=SLOTHIRE>>Accessed 11 November 2018; Philippe Delebecque, ‘Vessel Sharing Agreements, Slot Charter Agreements and Arbitration: A Civil Law Point of View’ (2015) 38 *Gazette De La Chambre* <<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKewjTluak7sLiAhXTSBUHWSVDrcQFjABegQICChAE&url=https%3A%2F%2Fwww.arbitrage->

that a slot or space charterparty could be regarded as a new form of charterparty.⁴⁴ Nevertheless, it should be noted that the purpose of a slot charterparty is to use some space in a vessel rather than using the whole vessel. In this regard, carrying the cargo is still on the basis of a fixed period contract or a series of voyage contracts so that the nature of the slot charterparty is derived from voyage or time charterparties. For this reason, it is not necessary in this thesis to treat the slot charterparty as a new form. To sum up, only ‘voyage or time charterparties’ will be used, and other names of charterparties such as time trip charterparties, consecutive voyage charterparties and slot or space charterparties will not be discussed.

The third basic charterparty, namely a demise or bareboat charterparty, is different in nature from voyage and time charterparties. Because ‘demise’ and ‘bareboat’ are widely used interchangeably, bareboat charterparties will be used in this thesis in order to avoid the repetition. The bareboat charterparty concerns the lease of a vessel rather than the use of a vessel, as do voyage and time charterparties.⁴⁵ The charterer to the bareboat charterparty takes possession of the vessel and takes responsibility for the management and navigation, which is not the case for voyage and time charterparties.⁴⁶ Under the bareboat charterparty the shipowner offers a ‘bare’ vessel without master and crew, which is why this type is called a ‘bareboat’ charterparty.

In the modern chartering industry, a bareboat charterparty has in essence been classified as an operating charterparty and a finance charterparty.⁴⁷ With regard to the operating bareboat charterparty, the charterers are usually free to change the name of the vessel, to use their own style of flag, and so on. Furthermore, they are obliged to repair and maintain the vessel, and to arrange insurance. The shipowner’s position is protected by

maritime.org/%2Fcpt_download.php%3Ffile%3DawardsG38.pdf&usg=AOvVaw2zY6uv8uBF-2FrMBd3H_qk > accessed 18 April 2019

⁴⁴ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014)1

⁴⁵ Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para 1.1-1.3

⁴⁶ Ibid; John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 4; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)23-24

⁴⁷ Davis (n 46) para 1.7-1.8

having rights of inspection and the right to withdraw the vessel.⁴⁸ These characteristic features are apparently distinctive compared with voyage and time charterparties. The nature of the finance bareboat charterparty is completely different from that of traditional charterparties. The shipowner to the finance bareboat charterparty is naturally regarded as the lessor and the financier. Its credit risk can be secured by ownership of the vessel, with rights to terminate the charterparty for failure to pay for hire.⁴⁹ Even though the security model is common, as in voyage and time charterparties, and has been provided in finance charterparties such as the lien on sub-freights, the nature of this charterparty differs from the original intention of charterparties; thus, it is not necessary to discuss the incorporation of this bareboat charterparty's security clause into those of the two basic charterparties. All in all, the security clauses in the bareboat charterparty are beyond the subject matter of this thesis.

To sum up, multiple charterparties in this thesis cover only 'voyage or time charterparties'.

2.3 Secured Property: Cargo and Sub-freights

A shipowner's security refers to a security on cargo and sub-freights. To start with, it is necessary to give a brief account of two terms, 'property' and 'assets', because they have similar meanings. In *Black's Law Dictionary*, 'Property' refers to '[A]ny external thing over which the rights of possession, use, and enjoyment are exercised',⁵⁰ which is intended to stress a right to things, while 'assets' is defined as '[T]he entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill', and '[A]ll the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution',⁵¹ which seems to focus on the recording of capital. Nevertheless, there is

⁴⁸ Ibid at para 1.7

⁴⁹ Ibid at para 1.8

⁵⁰ Bryan A Garner and others (eds), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014)1410

⁵¹ Ibid at 140

no need in this thesis to agonize over which term is better. Although the theme of this thesis is the shipowner's lien in the chartering industry, it is covered by the system of security interests under the personal property law. While security interests are discussed, these two terms are very often used interchangeably in a literature.⁵² For example, in *Goode on Commercial Law*, it is stated that 'real security is a right in another's asset to secure performance of an obligation'⁵³ while in *The Law of Security and Title-Based Financing*, the purpose of the security is to affirm that 'the secured creditor is able, by enforcing the security interest, to obtain payment out of particular property owned by the debtor'.⁵⁴ Sometimes 'chattel' is also used to substitute 'asset' or 'property'.⁵⁵ It is safe to say that, in this context, there are no substantial distinctions among these terms. Because this research is about the shipowner's lien under the law of personal property and in the shipping industry the term 'property' is more regularly employed, the word 'property' will be mainly used. However, depending on the specific context, 'asset' or other terms will be employed as well.

In addition, the research is confined merely to discussing the shipowner's security on cargo and sub-freights.⁵⁶ There is no doubt that 'property' in the maritime domain refers to 'maritime property'. Maritime property consists traditionally of a vessel, regardless of the nationality, cargo and freight.⁵⁷ For this reason, with regard to secured property, it is common practice that the vessel, cargo and freight be regarded as a reasonable category, regardless of who is the owner of the property. From the shipowner's and charterer's point of view, the cargo and freight, exactly speaking, sub-freights, are secured property for the shipowner, while the vessel is for the charterer.

⁵² David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para18.29.

⁵³ Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house2016) 630

⁵⁴ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018) 92

⁵⁵ Michael Bridge, *Personal Property Law* (4th edn, Oxford University Press 2015)70

⁵⁶ In this thesis, sub-freights or sub-freight refers to all sub-freights and/or sub-hires in any sub-charterparties. The further discussion will be found in Chapter 5, Section 2.

⁵⁷ D Rhidian Thomas, *Maritime Liens* (British Shipping Laws Vol.14, Stevens 1980)12; David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005)275-276

In contrast to the shipowner's security on cargo and sub-freights, there is consensus among maritime experts that the charterer's contractual security on the vessel in well-known standard forms is ambiguous and its function is not clear. The explanation for this clause is that its most important function is to please the charterer.⁵⁸ Nevertheless, another reason has been attributed in the shipping industry for the position of a vessel. Any transactions and activities, including shipbuilding, carriage of goods, collision, salvage, or pollution are all relevant about a vessel, so that aggrieved parties in different contracts may rely on the vessel for any claims. For this reason, international conventions, such as the International Convention on Maritime Liens and mortgages⁵⁹ and the International Convention on Arrest of Ships 1952/1999, grant the right of arresting the vessel to various parties, including charterers when the relevant condition is satisfied.⁶⁰ Even if a jurisdiction does not ratify these international conventions, in order to comply with international rules, its domestic law normally provides stipulations that are similar to those in the Convention. For instance, China is not a party of the 1952/1999 Arrest Convention, but the Special Maritime Procedure Law of P.R.C. is generally in line with the provisions of the 1999 Arrest Convention. It can be seen that, compared with the shipowner's security, the charterer's security has a unique character. Thus, this thesis will not discuss the charterer's lien on the vessel.

2.4 Impact of Modern Secured Transactions Law

'Modern secured transactions law' does not refer to specific laws in any jurisdictions. It should be understood as a collective term. 'Secured transactions law' is short of a

⁵⁸ 'Charterparties: A Comparative Analysis' (1990) The UNCTAD Secretariat Report, 57 http://www.lawandsea.net/1documents/Charter_Parties.pdf. accessed 16 March 2016

⁵⁹ International Convention on Maritime Liens and Mortgages 1993, Art 7

⁶⁰ International Convention on Arrest of Ships 1952 provides that a maritime claim arising from 'agreement relating to the use or hire of any ship whether by charter party or otherwise' or 'agreement relating to the carriage of goods in any ship whether by charter party or otherwise' may apply this convention to arrest a ship; see Article 1 (1) (d) (e) 'Definition' this convention has been adopted by more than seventy jurisdictions. In addition, the 1999 Arrest Convention has a similar provision. It is provided that 'any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise and 'any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise'. Compared with the 1952 Arrest Convention, the 1999 convention is not welcomed and came into force on 14 September 2011, having finally been ratified by the requisite eleven countries.

unitary definition in the international legal regime. In accordance with the UNCITRAL Legislative Guide on Secured Transactions: Terminology and Recommendations, ‘Secured transaction’ means a transaction that creates a security right’.⁶¹ In accordance with the International Finance Corporation of the World Bank Group (‘IFC’), the term ‘secured transaction’ refers to ‘credit transaction where a creditor holds an interest in a debtor’s movable property (“collateral”) to secure a loan or a debt obligation’.⁶² Based on this, this author’s usage is that ‘secured transaction law’ refers to the law or specific provisions in legislation governing secured transactions.

Black’s Law Dictionary provides an authoritative definition of ‘security’, which is ‘[C]ollateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor’;⁶³ and then, when ‘property’ is involved, this dictionary proffers a further concept of ‘security interest’, which is ‘[A] property interest created by agreement or by operation of law to secure performance of an obligation (esp. repayment of a debt)’.⁶⁴ In this thesis, ‘security’ and ‘security interest’ are interchangeable.

⁶¹ United Nations Commission on International Trade Law, ‘Legislative Guide on Secured Transactions: Terminology and Recommendations’ <<https://www.uncitral.org/pdf/english/texts/security-ig/e/Terminology-and-Recs.18-1-10.pdf>> accessed 29 April 2019

⁶² International Finance Corporation, ‘Secured Transactions and Collateral Registries Brochure’ (IFC) <<https://www.ifc.org/wps/wcm/connect/793e79804ac10fff9ea69e4220e715ad/Secured+Transactions+and+Collateral+Registries+Brochure-English.pdf?MOD=AJPERES>> accessed 29 April 2019

⁶³ Bryan A Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014)1559

⁶⁴ Ibid at 1562; it should be noted that the question as to whether a security interest is a kind of proprietary right is controversial. Some scholars contend that the nature of security interests is a proprietary right, even though, in comparison with a real property right, the security right is limited; see Roy Goode, ‘Security: A Pragmatic Conceptualist’s Response’, (1989) 15 Monash University Law Review 361; わがつま さかえ, *The Priority Position of the Creditor in the Modern Law(Japanese;近代法における債権の優越的地位)* (Shujiang Wang tr, Encyclopedia of China Publishing House 1999)50-51 and 98-101; Dekuan Liu, ‘The Security: the Property Right or the Creditor Right’ in Zheng Yubo (ed), *Thesis on Real Right in Civil Law II* (Wu-Nan Book Inc. 1985) 517-518. Steven L Harris and Charles W Mooney Jr, ‘A Property-Based Theory of Security Interests: Taking Debtor’s Choices Seriously’(1994) 80 Penn Law: Legal Scholarship Repository 2021, 2051; other scholars assert that the security interest cannot be directly regarded as a property or proprietary right. It can alternatively be regarded as a quasi-property right; see Tian Yin, *French Property Law* (Law Press China 1998) 49-50; David E Allan, ‘Security: Some Mysteries, Myths, & Monstrosities’(1989) 15 Monash University Law Review 337; this thesis will not leave space to discuss this issue. The present author argues that a security right is a kind of a proprietary right. However, whether the *droit de preference* and *droit de suite* arising from the proprietary right are enforceable is dependent on the status of this right compared with other property rights.

Commentators have said that ‘the narrative sustaining and justifying the law of secured transactions is rooted in the idea that security interests, especially those in personal property, are the core engine for economic growth as they redress the problem of “dead capital”’.⁶⁵ It is thus sufficient to say that the concept of secured transactions law is derived from the law of security or security interest, or Personal Property Security Act.

In recent years, some organisations, and academic and practising circles, quite often employ ‘secured transactions law’ to replace the law of security interest or the personal property security act. For example, UNCITRAL enacted conventions, model laws and laws, as mentioned in Section 1.2, and the European Bank for Reconstruction and Development also enacted Model Laws on Secured Transactions.⁶⁶ In addition, Oxford Law School set up a Secured Transactions Law Reform Project monitored since 2010 by the UK Government’s Department for Business, Innovation and Skills, and many distinguished practitioners, scholars and policymakers have been involved in this project;⁶⁷ an influential publication with the title, *Secured Transactions Law Reform: Principles, Policies and Practice*, illustrates all of the Personal Property Security Acts (PPSAs) and Article 9 of the Uniform Commercial Code (USA), seeing these as secured transactions law.⁶⁸

⁶⁵ Giuliano G Castellano and Marek Dubovec, ‘Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad Between Access to Credit and Financial Stability’ (2018) 41 (3) Fordham International Law Journal 531, 535; ‘dead capital’ was presented by the economist Hernando de Soto in his book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (3rd edn, Bantam Press 2000)

⁶⁶ The European Bank for Reconstruction and Development, ‘Model Laws on Secured Transactions’ <<https://www.ebrd.com/what-we-do/legal-reform/access-to-finance/transactions.html>> accessed 29 April 2019; Frederique Dahan, ‘Law Reform in Central and Eastern Europe: The Transplantation of Secured Transactions Laws’, (2000) 2 European Journal of Law Reform 369

⁶⁷ Oxford Law School, ‘Secured Transactions Law Reform Project’ <<https://securedtransactionslawreformproject.org>> accessed 29 April 2019

⁶⁸ PPSAs include, but are not limited to, the Personal Property Security Act (Canada) 1996, the Personal Property Securities Act (New Zealand), and the 1999 Personal Property Securities Act (Australia) 2009; Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016); Hugh Beale, ‘An Outline of a Typical PPSA Scheme’ in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 7

In order to achieve by 2030 the seventeen sustainable development goals presented by the United Nations General Assembly, harmonization and modernization of secured transactions law have become an important project for UNCITRAL.⁶⁹ It is anticipated that secured transactions law in international legal reform will be sustainably developed and will also lead to reform of national law in different jurisdictions. In this context, modern secured transactions law in this thesis is a collective term. From the point of view of an international legal regime, it may refer to the United Nations Convention on the Assignment of Receivables in International Trade; from the point of view of national law, it may refer either to specific legislation, such as the Property Law 2007 of the PRC, or to legislation concerning the application of security, such as the German Commercial Code.

With regard to the ‘impact of modern secured transactions law’, this refers mainly to its new form, function and norm, which are different from traditional security. As mentioned in Section 2.1, a shipowner’s security clause is derived from the traditional chartering industry. It is important for this security to operate and be exercised in practice rather than to be concerned about its particular legal nature. In this context, the research on the legal nature of this security lags behind the development of the law. For example, the early case law simply focused on the legal effect of the sub-freight security rather than on its legal nature, so that the latter has been addressed only in recent years.

⁶⁹ ‘The efforts to harmonize and modernize secured transactions law contribute to achieving the first (“end poverty in all its forms everywhere”) of the seventeen sustainable development goals to be reached by 2030 by the international community; G.A. Res. 70/1, at 15 (21 October 2015). The United Nations General Assembly endorsed the Addis Ababa Action Agenda reiterating the relevance of international legal harmonization to reduce poverty and inequalities; G.A. Res. 69/313, 89 (17 August 2015)’; see Giuliano G Castellano and Marek Dubovec, ‘Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad Between Access to Credit and Financial Stability’ (2018) 41 (3) *Fordham International Law Journal* 531, 532 fn.1; General Assembly, ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Development’ (United Nations, 17 August 2015) <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_313.pdf> accessed 29 April 2019

When the traditional shipowner's security is construed from the perspective of the modern secured transactions law, it is inevitable that this type of law affects the legal effect of this security. However, the main function of this security is simply to improve the performance of an obligation, whereas that of modern secured transactions law is to achieve finance for a company. The extent to which the shipowner's security should be influenced by the law should be evaluated.

2.5 Selected Common and Civil Law Countries

It is difficult to clarify objectively the various taxonomies of legal systems because potential classification criteria are so numerous.⁷⁰ A further complication is that the development of world politics and economics may trigger change in a country's or a region's legal system. Legal globalization has also in recent years obscured the boundaries of legal systems so that mixed legal systems have become popular as a result of legal transplants.⁷¹ Nevertheless, the purpose of this section is not to explore the development or the *status quo* of legal systems. It is generally held that, apart from religious law such as Islamic law and Hindu law, the main legal systems contain common and civil law based on comparable legal styles, sources, and institutional features.⁷² The common and civil law systems have been regarded as the two most

⁷⁰ Jaakko Husa lists the underlying criteria including 'history, ideology, legal style, legal argumentation and thinking, codification level of law, judicial reasoning, structural system of law, structure of court system, spirit and mentality of legal actors, training of lawyers, law's relation to religion and to politics, the economic basis of law, the background philosophy of legal thinking, the doctrine of sources of law, the empirical effectiveness of formal legal rules, the role of tradition in law, paradigmatic societal beliefs about law, etc.'; Mathias Siems, *Comparative Law* (Cambridge University Press 2014)75; see Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 64-65

⁷¹ Mixed legal systems contain two types. First, in some countries different regions apply different legal systems. A typical example is Quebec in Canada. Quebec's history was influenced by French law so that the civil law system is retained there, while other provinces in Canada apply the common law system; secondly, this means that, through legal transfers, a typical civil law country shows features of the common law system, and vice versa; Yongqin Su, 'Accumulation, Option and Innovation of Civil Law' (2006)2 *Journal of Comparative Law* 24, 25

⁷² Mathias Siems, *Comparative Law* (Cambridge University Press 2014)79; Yongqin Su, 'Accumulation, Option and Innovation of Civil Law' (2006)2 *Journal of Comparative Law* 24, 24; it is noted that in a classic book, *An Introduction to Comparative Law* (Ton, Legal systems have been divided into Romanistic family, Germanic family, Nordic family, Common Law family, Law in the Far East (Chinese law and Japanese law) and Religious Legal system (Islamic law and Hindu law), see Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 73

important legal ones around the world, and also because the Gross Domestic Product (hereinafter refers to as ‘GDP’) of two legal systems’ countries absolutely dominates the global economy.⁷³ For this reason, this thesis will focus on these two legal systems.

In respect of the common law system, this thesis expects to concentrate mainly on English law and that of the Commonwealth. It is reasonable to argue that, in the modern legal field, the drafting and interpretation of standard charterparty forms have been heavily influenced by the common law system. In particular and without exception, the ‘Law and Arbitration’ clause of all standard charterparty forms provides that the charterparty shall be governed by English law if the LMAA handles any dispute, or by American law if the Society of Maritime Arbitrators of New York hears the case, or by Singapore/English law if the Singapore Chambers of Maritime Arbitration is chosen.⁷⁴ To be clear, these three arbitration bodies can be deemed to be chosen preferentially and common law is the governing law. Furthermore, the LMAA has been dealing for many years with the majority of maritime disputes, and the number of charterparties disputes in maritime arbitration dominates among these owing to the insertion in them of arbitration clauses.⁷⁵ For this reason, research on any legal issues about charterparties cannot avoid English commercial maritime law, whether from a practical or an academic perspective. In addition, although American law is often applied, in comparison with English law the rate of the former’s use is apparently low, and these two countries’ laws are fundamentally distinctive in some aspects. Thus, common law in this thesis mainly refers to English law and that of the Commonwealth such as Singapore, even if American law will sometimes be relied on.

⁷³ ‘English common law is the most widespread legal system in the world’ (Sweet & Maxwell 2008) <<https://www.sweetandmaxwell.co.uk/about-us/press-releases/061108.pdf>> accessed 29 April 2019

⁷⁴ For example, Article 54 of the New York Produce Exchange Form (NYPE) 2015; Article 22 of the General Time Charter Party (GENTIME)1999; Article 19 of the Uniform General Charter (GENCON) 1994.

⁷⁵ Grant Gilmore and Charles L. Black, *The Law of Admiralty* (New York 1975)196; Bruce Harris, ‘Maritime Arbitrations’ in John Tackaberry and Arthur Marriot (eds) *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice* (4th end, London 2003)745

With regard to civil law, that of continental European countries and of Asian countries will be mainly discussed. The civil law system is derived from continental European countries; in particular, the modern civil law system can be divided into the French-Roman and the Germanic sub-families.⁷⁶ These developed legal systems are able to compete with English law. This thesis will therefore provide enough space to discuss German law and Dutch law because these countries have a long history of seaborne trade. French law will not be highlighted because France has not traditionally been a country to focus on sea power.

As far as Asian countries are concerned, it is Chinese law that will be highlighted⁷⁷. The reason is not only that China has become the world's second-biggest economy in terms of nominal GDP⁷⁸ and its BRI is so far linking more than seventy countries across Asia, Europe and Africa;⁷⁹ but also that China is looking to become a key power in seaborne trade. As well as Chinese law, both Japanese and Korean law will also be considered because both these countries are among of the world's most prominent shipping nations. However, limited space means that consideration of the law of these two countries will necessarily be ephemeral.

3. Structure of Chapter

⁷⁶ Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 73

⁷⁷ It should be noted that Chinese law and Japanese law do not only show the civil law tradition, but also learn from common law. Their legal systems appear to be hybrids. However, transplanting common law into the civil law tradition does not change the original legal culture and philosophy of the civil law system. They therefore, by their very nature, belong to the civil law system; Percy R. Luney, Jr, 'Traditions and Foreign Influences: Systems of Law in China and Japan' (1989)52(2) *Law and Contemporary Problems* 129, 129-150

⁷⁸ International Monetary Fund 'Report for Selected Countries and Subjects' (IMF, October 2018) <<https://www.imf.org/external/pubs/ft/weo/2018/02/weodata/weorept.aspx?pr.x=53&pr.y=8&sy=2017&ey=2018&scsm=1&ssd=1&sort=country&ds=.&br=1&c=924&s=NGDPD%2CPPPGDP%2CNGDPDPC%2CPPPPC&grp=0&a>> accessed 29 April 2019; Scott Kennedy, Wei Liang and Claire Reade, 'How is China Shaping the Global Economic Order' (China Power) <<https://chinapower.csis.org/how-is-china-shaping-the-global-economic-order/>> accessed 29 April 2019

⁷⁹ Alexandra Ma, 'Inside "Belt and Road"' (Business Insider, 31 January 2018) <<https://www.businessinsider.com/what-is-belt-and-road-china-infrastructure-project-2018-1?r=US&IR=T>> accessed 29 April 2019

As presented in Section 1.3, the overarching research question in this thesis is:

To what extent should the legal nature and effect of the shipowner's contractual security in the traditional chartering industry be influenced by modern secured transactions law?

The whole thesis will approach this overarching research question, seeking to build a theoretical framework and devise a structure for understanding the influences.

Chapter 2 will query whether the term 'lien' in the current ~~standard form~~ research should be replaced by the term 'security' so as to reduce or even eliminate the ambiguity and confusion. As mentioned in Section 1.2, in this thesis a shipowner's security refers to a lien on cargo and sub-freights in a charterparty. This chapter will firstly argue that, unlike the maritime lien as a special concept in the domain of maritime, the creation, legal implications and effects of the shipowner's lien are derived from and governed by commercial law, more specifically, by secured transactions law. Secondly, this chapter will argue that the concept of 'lien' is derived from common law. The term 'lien' at common law generates multiple interpretations, leading to ambiguity and confusion. Meanwhile, because of language barriers and the narrow connotation of 'lien' in civil law, civil law jurisdictions cannot understand the concept of 'lien' from a common law perspective. In this context, along with the development of secured transactions law, it is contended that a unitary approach to research on this clause should be applied. The unitary approach means that research on secured transactions employs 'a single, unitary concept of "security right"' ⁸⁰ rather than an ambiguous term (lien) or other terms (e.g., pledge, right of retention). Based on the above arguments, this thesis replaces the shipowner's lien by the shipowner's security. However, even if the proposed unitary

⁸⁰ Spyridon v Bazinas, 'The UNCITRAL Legislative Guide on Secured Transactions and The Draft UNCITRAL Model Law on Secured Transactions Compared' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 485

approach is adopted, the principle of security interests in the different legal systems is not about to change.

Chapter 3 will examine salient features of shipowner's security in the context of contract law and property law. The research question of how the principle of secured transactions law impacts on the protection and legal effect of shipowner's security will be addressed from common and civil law perspectives. The starting point in Section 2 will illustrate the different protection and legal effect of shipowner's security in contract law and also property law. It is anticipated that, because of the involvement of property law, the legal effect of this clause will be affected by how legislation operates. Because property normally concerns the interests of not only contracting parties and but also of third parties, it is sufficient to assume that party autonomy in secured transactions law will be limited. Based on this rationale, Sections 3 and 4 will probe into what principle may impact on party autonomy and how the secured transactions law adopts this principle to impact on the shipowner's security.

Thanks to the different legal philosophies of the two legal systems concerning property law, more specifically, the paramount status of party autonomy in common law and the influence of *numerus clausus* in civil law, it is expected that the protection of the shipowner's security will vary. This chapter will finally argue that, in order to strengthen the legal effect of shipowner's security, modern secured transactions law can be the basis of a combined solution to protect the shipowner. Combining a contractual solution based on party autonomy with a legal solution based on the limitation of party autonomy and *numerus clausus* is an approach that protects the shipowner and achieves the legal effect of shipowner's security. However, whether this is a more effective protection for a shipowner, and whether in the chartering industry the intervention of the legislative solution is reasonable, will be explored in Chapters 4 and 5. In addition, it may be argued that, in order to achieve protection for the shipowner, clarification of the legal nature of shipowner's security plays a crucial role because the

absence of an exact definition directly affects its scope, degree of protection and legal effect. For this reason, the following chapters will concentrate mainly on the legal nature and the corresponding legal effect of shipowner's security.

Chapter 4 will examine to what extent the legal nature and effect of shipowner's cargo security under multiple charterparties should be influenced by the law of secured transactions. There are three main sections (from Section 2 to Section 4) in this chapter. In Section 2, what is the legal nature of shipowner's cargo security will be discussed from the historical development point of view. The aim of this section is to explore how the nature of shipowner's cargo security was influenced as the chartering industry developed. Section 3 will concentrate on the common law system. First, the legal nature and effect of the disponent shipowner's cargo security under multiple charterparties will be examined from case law perspective. It will also be argued that, according to the traditional legal nature of cargo security, protection of the disponent shipowner is insufficient. Secondly, this section will argue that, under multiple charterparties and from the viewpoint of the law of secured transactions, apart from a shipowner in a head charterparty, the other disponent shipowners forfeit the possibility of enjoying legal cargo security because the requirement of possession of the cargo in accordance with secured transactions law cannot be satisfied. This section will demonstrate that, in the context of modern secured transactions law, the legal nature of the disponent shipowner's cargo security can be regarded as an equitable charge. Based on the theory of equitable charge, the disponent shipowner will be well protected.

Section 3 will provide a comprehensive panorama of the nature of time charterparty in the context of civil law. This section will argue because of language barriers and the different legal tradition, in comparison with common law, the civil law countries present the different attitude towards the understanding of the nature of a voyage and time charterparty. The purpose is to investigate whether these different understandings can impact on the understanding of the nature of shipowner's cargo security.

Section 4 will discuss in the context of civil law to what extent the maritime code and secured transactions law impact on the legal effect of the shipowner's and the disponent shipowner's cargo security. To provide an objective analysis, this section will examine both developed and emerging jurisdictions. Before examining the two types of jurisdiction, this section will argue that the understandings of the legal nature of voyage and time charterparties affect to a great extent the structure of the maritime code and the legal effect of shipowner's security in both types of jurisdiction. In the course of examining of the two types of jurisdiction, taking German law as a representative of that in developed jurisdictions, this thesis will argue that regardless of the shipowner's or the disponent shipowner's cargo security, because of the development of secured transactions law (in particular the recognition of indirect possession theory), the legal nature of the disponent shipowner's cargo security is still a possessory security. In addition, apart from secured transactions law, the German legislation is constructed on the basis of the features of the shipping industry and of the roles of its different participants among various contracts, which enables understanding of the legal nature and effect of the shipowner's cargo security. As a result, different shipowners in voyage and time charterparties can resort to legal protection in accordance with legislation. Complementarily, taking Chinese law as a representative of that in emerging jurisdictions, this thesis will argue that, owing to the absence of indirect possession theory and the impact of *numerus clausus* in secured transactions law, the legal effect of both a shipowner's cargo security in a single charterparty and disponent shipowners' cargo security in multiple charterparties is deficient. Although procedural law to some extent makes up for the gap, both *droit de suite* and *droit de preference* of cargo security are lacking.

Given the above context, this chapter will argue that secured transactions law should to some extent impact on the legal nature and effect of cargo security. However, owing to the different legal frameworks and philosophies in the two legal systems, the impact should depend on the unique legal environment.

Chapter 5 will evaluate to what extent secured transactions law and the chartering industry should affect sub-freight security. Because of the different secured property between the cargo security and the sub-freight security, and due also to the dramatic development of intangible right in secured transactions law, it is anticipated that the impact of this law on sub-freight security is different from the impact on cargo security. The conflict between secured transactions law and the needs of the chartering industry should be more evident.

It is expected that Section 2 will demonstrate that the development of the chartering industry led to the change of understanding of secured 'sub-freights'. Judicial decisions will be discussed to argue whether the definition of 'sub-freights' should be redefined. The corresponding market reaction to judicial decisions will be given.

Section 3 will examine the development of the legal nature of sub-freight security in common law. This Section will demonstrate that the understanding and recognition to the legal nature of sub-freight security is in line with the development of secured transactions law. Currently, the authorities have affirmed the legal nature of this security as an equitable assignment by way of a floating charge, although some scholars stick to the right of interception theory. As a consequence of the discussion of this legal nature, there arises the question of what is the circumstance under which the legal effect of this security can be achieved. In accordance with secured transactions law, the legal effect is dependent on the completion of registration. However, whether commercial reality will attenuate this 'legal' registration requirement will also be discussed. Accordingly, the research question of what is the impact of secured transactions law will be addressed.

Section 4 will probe into the legal nature and effect of sub-freight security in civil law. Because the legislation does not provide the legal nature of sub-freight security and as

well as judicial decisions do not mention, this section will therefore mainly identify whether it is feasible that sub-freight security is operative in civil law, and if so, whether its legal nature is similar to that in common law.

Finally, Chapter 6 will conclude this thesis. Section 2 will answer the overarching research question based on the discussion of secured transactions law and the chartering industry. Section 3 will submit several proposals based on the evaluation of comparative law research. Section 4 will suggest further research on the relevant topic which has not been undertaken and on which past research has not provided an in-depth answer.

4. Methodology and Materials

Before the discussion of methodology, it is expedient to clarify the difference between the terms ‘method’ and ‘methodology’. According to the definitions in *Oxford English Dictionary*, ‘method’ refers to ‘a particular procedure for accomplishing or approaching something, especially a systematic or established one’;⁸¹ while ‘methodology’ has been defined as ‘a system of methods used in a particular area of study or activity’.⁸² As seen from this latter interpretation, ‘methodology’ consists of selected methods in a comprehensive system. Such a system is closely related to what a researcher understands the field of a research area to be and guides the researcher’s thinking or his/her questioning of, or within, that field.⁸³ In this case, selected methods and components contribute to forming a systematic framework of methodology, showing the strategy of the research.

⁸¹ ‘Method’ (*OED online*, OUP March 2016) <<http://www.oxforddictionaries.com/definition/english/method>> accessed 28 March 2016

⁸² ‘Methodology’ (*OED online*, OUP March 2016) <<http://www.oxforddictionaries.com/definition/english/methodology>> accessed 28 March 2016

⁸³ Tamara Hervey and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 5; Dawn Watkins and Mandy Burton, ‘Introduction’, in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge 2013) 2

As far as this thesis is concerned, the methodology is predominantly doctrinal. In order to enrich this doctrinal research, the comparative and the historical approaches will constitute the incidental research components. Detailed illustration is as follows:

4.1 Doctrinal Method

The legal doctrinal method is regarded as a dominant research method that has played a significant role over many years in the two legal systems.⁸⁴ There is no current definite uniform terminology to describe the method, so that it can be called the ‘analytical study of law’ and the ‘doctrinal study of law’, and, in civil law countries, it might be named ‘legal science’.⁸⁵ In addition, in civil law countries, a legal doctrine is very often replaced by ‘legal dogmatics’ (*Rechtsdogmatik*).⁸⁶ However, perhaps because of language barriers, in Anglo-American legal theory, ‘legal dogmatics’ is not well recognised because it ‘calls up the idea of “narrow-mindedness”’.⁸⁷ That is to say, it might mean some unchangeable rules. In contrast, the doctrinal approach is more flexible and focuses on legal principles generated by the legislation and courts.⁸⁸ In this thesis, the terminology of doctrinal method will be employed.

With regard to the application of this method, in recent years, along with the increase of academic practitioners, the doctrinal method that means looking at principles has been widely adopted by both lawyers and judges.⁸⁹ One commentator describes academic judges’ work as follows: ‘[T]he messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and

⁸⁴ Anthony Braney, ‘Law as a Parasitic Discipline’ (1998) 25 (1) *Journal of Law and Society* 71, 71; Aleksander Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law* (A treatise of legal philosophy and general jurisprudence Vol. 4, Springer 2005) 1

⁸⁵ *Ibid* at 1-2

⁸⁶ *Ibid* at 2

⁸⁷ *Ibid*

⁸⁸ Susan Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30 (3) *Legal Studies* 345, 350; Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ 17 (2012) 1 *Deakin Law Review* 89, 116

⁸⁹ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ 17 (2012) 1 *Deakin Law Review* 89, 107

critique. These are intellectually demanding tasks, requiring vast knowledge and the ability... to organise dispersed, fragmentary, prolix, and rebarbative material'.⁹⁰ Like the academic judges' work, this thesis will similarly address overarching research questions and corresponding objectives. The whole process of this method may be divided into two stages.

A thorough examination of standard forms, legislation, case law, scholarly writings and legal opinions in both legal systems will be an initial source compilation and data collection. It should be noted that such a descriptive legal process demands an economical method for collecting materials, because the materials themselves vary greatly and many contradict each other or lack authority.⁹¹ For example, in terms of the selection of legislation, the two countries being used for comparison with their influential legislation, notably the German Commercial Code and the Chinese Maritime Code, will be given priority. At this stage, the relevant content of this thesis will comply with a basic principle of being objective and neutral.⁹²

At the second stage, based on the objective exploration, the subjective analysis and understanding, together with other research methods stated below, will direct the thesis to carry out research questions. To finish the above process from the objective examination to subjective observation, a series of materials will be utilised.

First, because the subject matter of this thesis focuses on the 'shipowner's security in voyage and time charterparties', standard charterparty forms will be primary resources.⁹³ However, as mentioned in Section 1, there are many types of standard

⁹⁰ Richard Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' (2007) 74(2) *University of Chicago Law Review* 435, 437

⁹¹ Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing Limited 2012) 13-14

⁹² Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' 17 (2012) 1 *Deakin Law Review* 89, 116

⁹³ It should be noted that standard forms are not listed in the bibliography although they are in this section called primary resources.

forms issued by the different organisations or companies.⁹⁴ It is impossible and unreasonable in this situation to research every form. Thus, from among these standard forms, this thesis will concentrate its research mainly on the Uniform General Charter Form (hereinafter referred to as ‘GENCON’)⁹⁵ in voyage charterparties and the New York Produce Exchange Form (hereinafter referred to as ‘NYPE’) in time charterparties,⁹⁶ because it is generally recognised that these two standard forms are the two most widely used. Also, standard forms are continually being amended and legal practice and legal facts are frequently changing. Where the latest versions of these standard forms are examined, their classic former versions will not, therefore, be ignored. Nevertheless, based on the demands of comparative research, it is the different standard forms in the same type of charterparty that will be introduced. For example, the BIMCO Uniform Time-charter Form (hereinafter referred to as ‘BALTIME’)⁹⁷ will be compared with NYPE.

International conventions, model law and legislative guides enacted by international organisations, and legislation including judicial interpretations, and case law in different jurisdictions will also be regarded as primary resources for this thesis. These primary resources in different jurisdictions directly determine the legal nature and effect of shipowner’s security. They, therefore, provide the authoritative ground for addressing the overarching research question and its corresponding legal issues. However, by ‘authoritative ground’ is not meant that these materials must be correct or have no flaw. Secondary resources are also important in offering a convincing solution to the research question, as described below.

⁹⁴ See Section 1 ‘Background’

⁹⁵ This classic form is issued by BIMCO and comprises three versions—GENCON 22, GENCON 76 and GENCON 94. The latter two versions are currently the ones mainly used in the chartering industry.

⁹⁶ This form is issued by the Association of Ship Brokers and Agents (USA), and is generally used for dry cargo and dry bulk. Its three versions, including NYPE 1946, 1993 and 2015, are all used in the chartering industry.

⁹⁷ This classic form is issued by BIMCO and comprises two versions—BALTIME 1939 and BALTIME 2001.

Secondly, distinguished scholars' publications including their monographs, articles, treatises, as well as learned judges', practitioners' and lawmakers' reports or opinions being seen here as secondary resources will be important in supplementing the primary resources. Even in comparison with primary resources, these secondary resources are more significant. Particularly, when primary resources are not sufficient or are short of a reasonable rationale, secondary resources will play an important role in providing a convincing solution to the research question. They have two main functions.

One function is, though such 'soft' sources cannot have direct legal effect in binding parties, they do provide multiple legal arguments and opinions on the legal nature and effect of shipowner's security and on the principles of secured transactions law; these have assisted this present author in understanding and demonstrating whether existing law and principles are appropriate and what the law should do. For example, when Section 3 of Chapter 5 ventures to explore the conflict between the registration requirement under secured transactions law and chartering practice, the lawmakers' report (from Singapore) and the Law Commission consultation paper (from the UK) reflect the voice of commercial reality, making it helpful to consider whether in the chartering industry the sub-freight security should still be requested to register, in accordance with secured transactions law.

The other function is, having several secondary resources largely constrains the thesis to retain an objective demonstration, even though it is impossible to gather together all such resources. This means that, due to the different roles of the providers of secondary resources, it is helpful for this thesis to hear different voices and to obtain different information to enable the answer to the research to be fair and reasonable. In addition, some academics and judges from certain countries are probably honoured only in their own country or jurisdiction, but they are a broad influential group within their local jurisdiction. Thus, these 'non-international' professionals have also been selected for this thesis.

To sum up, this research's primary purpose concerning the doctrinal method is to collect and select the existing materials and literature cited above and to paraphrase these materials. The ultimate purpose depends on the author's expertise, knowledge and experience in addressing the overarching research question.

4.2 Comparative and Historical Approaches

As stressed at the beginning of this section, the doctrinal method is predominant, and comparative and historical approaches serve as enrichment in this thesis. This consideration is attributable to Martha Minow's enlightenment. Minow regards 'the term "doctrinal" as an accepted term of art, and the process of gaining knowledge from doctrinal work as implicit within the legal research context'.⁹⁸ She had proposed that during the process of the doctrinal research,

'comparative and historical inquires: a) ... (Describe) an earlier era or contrasting legal regime; b)... (Contextualize the selected era or regime utilizing social sciences such as) anthropology or history; c) ... (Illuminate) differences, choices, or continuities when compared with contemporary domestic practice'⁹⁹

As far as the comparative approach is concerned, it 'will serve as a way of promoting insight and knowledge and, maybe some degree of harmonisation over critical issues or, at least, a measure of common understanding'.¹⁰⁰

What is more, there are two prominent advantages. The first aspect is the opportunity to refine the 'analytic categories to higher levels of abstraction in order to bridge

⁹⁸ Terry Hutchinson; Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' 17 (2012) 1, Deakin Law Review 83, 104

⁹⁹ Ibid; see also, Martha Minow, 'Archetypal Legal Scholarship: A Field Guid' (2013) 63 (1) Journal of Legal Education 65, 68

¹⁰⁰ Edward J Eberle, 'The Methodology of Comparative Law' (2011) 16 Roger Williams University Law 51, 51

differences between legal systems’;¹⁰¹ another positive aspect is the opportunity to prompt academics to broaden the scope of their research into the different legal systems and how they interact and correlate in respect of their legal culture and other aspects of social awareness.¹⁰² The comparative approach is, therefore, well established in academic circles.

The comparative approach can be divided into three stages. The first stage refers to the comparison of legal knowledge. In light of resources collected, the thesis will compare the understanding of the same legal concept and issue in the different legal systems. For example, in Chapter 2’s examination of the concept of ‘lien’, it will be demonstrated, through the comparison of its categories and function in the two legal systems, that it embodies different concepts. However, after this first stage, the second one should provide an in-depth comparison of the legal nature and effect of the different concepts. For example, after the primary comparison in Chapter 2 formulates the answer that there are different concepts of ‘lien’ on sub-freights in the two legal systems, the in-depth comparison in Chapter 5 will show that the sub-freights ‘lien’ in common law is a floating charge on future property and in civil law it is a pledge on any future claim. The legal natures and effect of both are similar. The comparative approach will then move to the third stage, where the question to be evaluated is whether the same or different outcomes of a legal issue in the two legal systems are derived from the same or from different legal foundations and philosophies. Complementarily, the existence of different jurisdictions within the same legal system will also be evaluated. In Chapter 5 is an example where both Singapore law and Hong Kong Law do not provide that sub-freight security should comply with the registration requirement in secured transactions law; comparison between them will show that the two jurisdictions employ different rationales, so that the legal effects are fundamentally different in each case.

¹⁰¹ John C Reitz, ‘How to Do Comparative Law’ (1998) 46 (4) *The American Journal of Comparative Law* 617, 636

¹⁰² *Ibid* at 636

The ultimate purpose of the comparative approach is not to find out which legal system or jurisdiction prevails. It is also not to conclude simply that the legal nature and effect of shipowner's security is unitary in the context of the development of secured transactions law, and of the enactment of the international convention or of regional legislation. By the way of offering a rich description of ... (a) contrasting legal regime',¹⁰³ its purpose is to explore the two legal systems' approaches to understanding and applying the principle of secured transactions law.

As far as the historical approach is concerned, it will permeate the process of the doctrinal research. History represents the past but is affecting the present and will imprint upon the future. As suggested by the theme of this thesis, the 'traditional' chartering industry and 'modern' secured transactions law themselves rely on historical analysis. Both chartering industry and law are continuously developing and changing. Their changes may reciprocally affect each other. Thus, when an industry is ailing, the relevant policy and law would normally be liberalised in order to support the development of the industry; conversely, when an industry is prospering, and its associated practitioners may have an increased tolerance of risk, the law tends to restrict improper development of that industry. Some terminologies in the industry and legal field may also change and develop. For example, 'sub-freights' was regarded in the chartering industry as a collective term to include 'freight' and 'hire', and judicial decisions favoured this usage. However, when a clear line was drawn between 'freight' and 'hire', there was judicial contention in attempts to clarify the meaning of these two terms in the charterparty.

However, the historical approach simply serves doctrinal research. It is, therefore, unlike historical research, not necessary to work out the truth 'through considering the perspective and view of every actor whatever their social status or role in events, and

¹⁰³ Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 (1) *Journal of Legal Education* 65, 68

through examining the whole conceivable range of data'.¹⁰⁴ For this reason, when this thesis employs the historical approach, only legal principles and logical conclusions by way of historical description are drawn out.

In conclusion, it is argued that the combination of comparative and historical approaches is an effective way to enrich the doctrinal research.

¹⁰⁴ Terry Hutchinson; Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' 17 (2012) 1, *Deakin Law Review* 83, 117

Chapter Two: The Shipowner's Lien in Charterparties: An Ambiguous Clause

1 Introduction

Since a standard charterparty form is aimed at fostering certainty among contracting parties, uniform understanding of concepts used in charterparties is essential. However, it is contended that the shipowner's lien on cargo and on sub-freights encapsulated in a so-called 'lien' clause in the standard charterparty form, engenders ambiguity and confusion in today's globalised world of shipping. This may be attributable to the use of the term 'lien' in the standard form which is derived from the common law where it is fraught with complex property law related implications, so that the term 'lien' is open to different interpretations depending on the specific background. These various interpretations mean that the same shipowner's 'lien' clause underlies the different natures. By contrast, because of language barriers, it is difficult to arrive at an exact legal concept in the civil law system to match the English equivalent of the lien. Furthermore, the connotation of the similar concept in civil law is relatively narrow.

Against this background, in order to reduce the ambiguity and confusion in the following chapters, this chapter will query whether the term 'lien' in the current thesis should be replaced by the term 'security'. It is necessary to explain that the solution to this question is dependent on the recognition of the term 'lien' in the different legal systems. If the divergence is not too far, the term 'lien' can be retained; conversely, it would not be used. Nevertheless, the starting point is to examine the legal implications of 'lien' in the lien clause that will at once reveal that unlike maritime lien, the shipowner's lien in the present context is not governed by international convention or mandatory law. Its primary implication in terms of the lien clause is that the notion is derived from and governed by commercial law which is its very *raison d'être*.

Afterwards, the meaning of lien at common and civil law will be discussed from the perspective of the general commercial law.

2 Conceptual Essence of the Maritime Lien

At the outset, the discussion focuses on the maritime lien as a special concept in the maritime law domain, because it differs from the general connotation of the lien. In that vein it must be noted that the maritime lien is an ancient concept in maritime law dating back to over 1,500 years. The history of the maritime lien may be traced back to the Digest of Justinian in the sixth century AD. Nevertheless, the earliest written maritime law often refers to the Rhodian Sea Law of 800 BC. However, because of the limited knowledge of this ancient law and its authenticity, it is generally recognised that parts of the Rhodian law were incorporated into the Digest of Justinian. Thus, here it directly points to the Digest of Justinian. Professor William Tetley concludes that there are four types of maritime liens provided by the Book XX, Title IV of the Digest of Justinian including ‘the nautical loan (bottomry) encumbrancing the ship, which debt expired if the ship was lost; a loan to build, buy or equip a ship secured by a privilege; and a privilege for repairing the ship or supplying the crew; and a privilege on cargo by the shipowner or by the person who lent money to pay freight.’¹⁰⁵

The notion of the maritime lien is now circumscribed by international convention law and national legislation in several jurisdictions. Even so, it is acknowledged that in the common law, the phenomenon has largely evolved through case law jurisprudence. In the present work, the concept of maritime lien simply refers to that of the international convention recognised by most jurisdictions. In certain jurisdictions, such as in the United States, the shipowner’s lien on cargo or sub-freights and charterer or cargo owner’s lien on a vessel are all regarded as maritime liens, but this sort of maritime lien can be modified or waived by contract.¹⁰⁶ It must be observed as a prelude to the central

¹⁰⁵ William Tetley, *Maritime Liens and Claims* (2nd edn, International Shipping Publications 1998) 9

¹⁰⁶ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para17A.2 and 17A.9. In this context, the concept of the maritime lien in American law is different from that in the international

theme, that there is no fundamental divergence with respect to the concept of the maritime lien in the two major legal systems. In essence, given the particular circumstances, creditors who enjoy the right of the lien might refer to the shipowner, the charterer, or the seafarer. An authoritative definition of the maritime lien in the common law tradition was given by John Jervis in *The Bold Buccleugh*¹⁰⁷ in the following words:

‘Having its origin of this rule in Civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding *in rem*... This claim or privilege travels with the thing into whosoever’s possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.’¹⁰⁸

Gorell Barnes J in *The Ripon City*¹⁰⁹ further clarified the object of the privilege as follows: ‘... a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing, belonging to another—a *jus in re aliena*.’¹¹⁰ As just-mentioned above, it should be noted that in accordance with the International Convention on Maritime Liens and Mortgages 1967/1993, the object of the maritime lien in most jurisdictions simply refers to the vessel. However, in American law, ‘[A] maritime lien on a ship, cargo, or sub-freights is perfected by bringing an *in rem* action.’¹¹¹ Canadian maritime law traditionally follows the tradition of English law, but in recent years Canadian

convention.

¹⁰⁷ (1851) VII Moore PC 267, 13 ER 884; this authoritative definition has been followed by the subsequent cases such as *The Halley* [1867] LR 2 PC 193; *The Feronia* [1868] LR 2 A & E 65; *The Beldis* [1936] P 51 (CA); *The Tolten* [1946] P135 (CA)

¹⁰⁸ *The Bold Buccleugh* (1851) VII Moore PC 267, 284 (John Jervis)

¹⁰⁹ [1897] P 226

¹¹⁰ Ibid at 242 (Gorell Barnes J); William Tetley, *Maritime Liens and Claims* (2nd edn, International Shipping Publications 1998) 41

¹¹¹ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para17A.3

maritime law has partially separated from English maritime law; a typical example is that the maritime lien in Canada ‘may be defined as a privileged claim upon a ship and freight, and in some cases on cargo, in respect of service done to such ship or injury caused by it’.¹¹² In *The Tolten*,¹¹³ Scott LJ explained the meaning of ‘maritime lien’ under civil law, remarking that the correlation between the common law and the civil law arose from the origin of the term. He stated as follows:

‘The phrase “maritime lien”, was not the original expression in our (English law) admiralty diction. We borrowed from the French, who had in their word “privilege” a clearer and less ambiguous name: hence their telling phrase “creances privilegiees” to describe the secured rights of the sea creditors... There is no difference of meaning, so far as anything in the present appeal is concerned, between the ‘privilege’ of Continental law and our maritime lien. And our judges in early cases used our word “privilege” with the same meaning as that in which “maritime lien” was subsequently used... The essence of the “privilege” was and still is, whether in Continental or English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the privilege creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages.’¹¹⁴

However, there is no uniform definition of the maritime lien in the international maritime law domain resulting in the term being defined differently in different jurisdictions.¹¹⁵ Even so, the International Conventions of 1926 and 1993 on Maritime Liens and Mortgages have to a considerable extent unified the understanding and

¹¹² William Tetley, *Maritime Liens and Claims* (2nd edn, International Shipping Publications 1998) 41

¹¹³ [1946] p 135

¹¹⁴ Ibid at 144 (Scott LJ)

¹¹⁵ D Rhidian Thomas, *Maritime Liens* (British Shipping Laws Vol.14, Stevens 1980)12; Yuzhuo Si, *Maritime Law Monograph* (2nd edn, China Renmin University Press 2010)30

application of the maritime lien. First, the maritime lien is regarded as a privileged claim which ‘takes priority over registered mortgages, “hypothèques” and charges, and no other claim shall take priority over such maritime liens,’¹¹⁶ and travels with the vessel without registration and possession.¹¹⁷ Secondly, it is clear that maritime lien refers to the vessel; in accordance with the international conventions, freights and accessories are not included.¹¹⁸ This means that the debtors to the maritime lien are merely ‘the shipowner, demise charterer, manager or operator of the vessel’.¹¹⁹ Thirdly, the secured claims are limited to include ‘claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel; claims in respect of loss of life or personal injury occurring; claims for reward for the salvage of the vessel; claims for port, canal, and other waterway dues and pilotage dues; claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.’¹²⁰ If state parties wish to expand the number of secured claims, they must do it through national legislation instead of party autonomy.

It is apparent that the term ‘maritime lien’ by its very nature refers to the secured privilege right of maritime creditors. Because of the strong influence of English law in the modern maritime milieu, the original term ‘privilege’ has been replaced by the expression ‘maritime lien’. Nevertheless, in non-anglophone countries, the maritime lien might be translated into a comprehensible term in the local language reflecting its content. For example, in China it is translated into ‘a privilege on vessel’ (船舶优先权). Regardless of the translation and whether or not there is a uniform definition, in

¹¹⁶ International Convention on Maritime Liens and Mortgages 1993, Art 5

¹¹⁷ Article 8 of the International Convention on Maritime Liens and Mortgages (1993) provides that ‘the maritime liens follow the vessel, notwithstanding any change of ownership or of registration or of flag.’

¹¹⁸ Ibid; Brussels Convention on the Unification of Rules Relating to Maritime Liens and Mortgages 1926. Although Articles 2 and 4 of the International Convention on Maritime Liens and Mortgages 1926 provided that the scope of maritime property did not contain freight and accessories, some jurisdictions in the domestic laws provided their own provisions. See American and Canadian law stated above.

¹¹⁹ International Convention on Maritime Liens and Mortgages 1993, Art 4

¹²⁰ Ibid

the face of the absence of any statutory definition, as stated by Sheen J, the maritime lien is ‘more easily recognised than defined’.¹²¹

Against the above background discussion, the maritime lien represents a unique phenomenon comprising a preferential right against all other types of security in commercial law. Its creation is not dependent on the creditors’ possession of the property or on registration; its enforcement is in accordance with the ranking provided by the relevant international convention or national legislation, or, as in the common law system, by operation of law which translates into legal custom and practice supported by case law jurisprudence. This absolute privileged right prevails over other secured or unsecured rights in commercial law. Put another way, the maritime lien is independent of the general system of lien law, but its privileged status strongly impacts on the interests of all secured and unsecured creditors in maritime and commercial law and practice.

By contrast, with regard to the research object of this thesis, namely, the shipowner’s lien in a charterparty, although it is covered by that branch of maritime law, its creation, legal implications and legal effects are derived from and governed by commercial law considerations, more specifically, by secured transactions law and ‘there is, therefore, nothing peculiarly maritime about lien clauses’.¹²² Unlike maritime lien, the shipowner’s lien in a charterparty is not explicitly governed by international convention or mandatory law. In the forthcoming section, the meaning of ‘lien’ at common and civil law will be discussed from the perspective of the general commercial law.

¹²¹ *The Father Thames* [1979] 2 Lloyd’s Rep 364, 368 (Sheen J)

¹²² D Rhidian Thomas, ‘An Outline Analysis of Lien Clauses in Maritime Contracts for the Carriage of Goods’ in Jose Manuel Martin Osante (ed) *New Trends in Maritime Law: Maritime Lien, Arrest of Ships, Mortgages and Forced Sale* (Thomson Reuters 2017)55

3 The Lien in Common Law: A Pragmatic, but Ambiguous Concept

The concept of a lien in common law is a combination of the narrow as well as the broad sense depending on the specific background. The standard charterparty form transplants the broad concept of the lien so that the shipowner's lien clause depicts its different nature. Thus, although the lien is a general concept in commercial law, as Professor Rhidian Thomas concludes, 'their familiarity... has not succeeded in generating certainty of understanding; on the contrary their precise analysis and impact is often a source of difficulty and divided opinion'.¹²³ In this context, this section will examine the inherent deficiency of the shipowner's lien from the perspective of common law.

3.1 A Pragmatic Concept from the Viewpoint of its Creation

Lord Mansfield has stated that '[T]he more we read, unless we are careful to distinguish, the more we shall be confounded'.¹²⁴ This point aptly describes our knowledge and understanding of the lien.

Being a legal term, it is widely recognised that the implication of a 'lien' can be found in the ancient Roman law, although it was not codified into the Justinian's *Corpus Iuris Civilis*. The lien is a right to refuse to pay or perform an obligation against a fraudulent and malicious defence (*exception doli*).¹²⁵ In other words, this right is subject to the law of obligation and under that law, it is normally thought that there must be reciprocity of obligations. Therefore, its function is to secure the performance of the obligation, but it does not constitute a security interest.¹²⁶ However, this is far from the

¹²³ Ibid at 55

¹²⁴ Joseph Story, *The Miscellaneous Writings, Literary, Critical, Judicial and Political* (James Munroe and Company 1835) 235

¹²⁵ Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003) 351; Gordon Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian, Together with Examination Question Set in the University and Bar Examinations (With Solutions)* (Leopold Classic Library 2006) 148; Xinmiao Jiang, Chang Cai and Fangyi Zhu, *Comparative Research on Lien* (Intellectual Property Publishing House Co., Ltd 2007) 3; Kaixiang Liu, 'Commercial Lien System: Comparative Research' (2015) 199 (8) *Jinan Journal (Philosophy and Social Sciences)* 1

¹²⁶ Jiang, Cai and Zhu (n 125) 27; In modern commercial, this kind of lien can be treated as a hybrid

modern concept of the lien, because in the ancient Roman law, a fraudulent or malicious conduct could be regarded as a tortious act; therefore, the right was a remedial mechanism against the tortious act.¹²⁷ The most important point is that, as mentioned earlier, it does not constitute a security interest.

The modern implication of a lien is derived from the *lex mercatoria* in medieval Italy.¹²⁸ This lien grants a creditor the right to detain the debtor's property in response to the debt due.¹²⁹ Like the term 'maritime lien' discussed above, the term 'lien' is derived from French and Latin. Meanwhile, the modern concept of the lien impacts on both the common and civil law. Even so, the development of the lien in the two legal systems is different. In the civil law context, the implication of the lien is not expansive while the common law has developed a broad route to apply the lien. As one commentator has observed:

'[T]he right existed, under the name of a right of retainer, as early as the reign of Edward IV; but the name "lien" does not seem to have been given to this right till about the beginning of the eighteenth century. The word is derived from French, and, further back, from the Latin, primarily means to "tie", to "bind". The common law right of retainer implies possession; and a common law lien implies possession; but the term is sometimes used in a broader sense than the mere right to retain; it is often used to designate rights which do not depend upon possession, as in the case of statutory, equitable and maritime liens.'¹³⁰

nature. On the one hand, its function is like a security interest in the assets concerned; on the other hand, it is 'a matter of the law of obligations in terms of the determination of the reciprocal nature of the obligations and of the connexity between asset and claim...It may also give no more than a contractual defence or exception.' see Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. II (7th edn, Hart Publishing Ltd 2019) 473; The modern German Civil Code and Dutch Civil Code have inherited the concept of 'lien' as in ancient Roman law; see Section 4.1

¹²⁷ Jiang, Cai and Zhu (n 125)25-26

¹²⁸ Ibid at 3; Zaiquan Xie, *Rights in Rem in Civil Law* Vol.III (China University of Political Science and Law Press 1999) 850

¹²⁹ Jiang, Cai and Zhu (n 125)3; Xie (n 128) 850

¹³⁰ Leonard A Jones, *A Treatise, of The Law of Liens, At Common Law, By Statute, Equitable, and Maritime, Vol I* (2nd edn, Honghton, Mifflin 1894)2 and fn.1

Initially, it was contended that the lien was ‘a passive right to retain a chattel’; but this viewpoint, as stated by one author ‘is not consensual, is not conferred by the lienor and is confined to cases where the right has historically been established’.¹³¹ Moreover, it is observed that ‘there is a general confluence between the conferment of a lien and the exercise of a common calling (although liens are not confined to be the common callings).’¹³² To be clear, as held by Diplock LJ in *Tappenden (t/a English and American Autos) v Artus*¹³³, the lien is ‘a self-help remedy’,¹³⁴ but in mediaeval times, this self-help remedy reflected the notion of government intervention in public interest relating to business activities.¹³⁵ In the face of serious default in terms of public service, common service providers such as innkeepers, ferrymen and common carriers were granted a lien to facilitate repayment of their public services at common law.¹³⁶ Furthermore, it was difficult to enlarge the scope of such common callings together with their identification in business activities.¹³⁷ As a result, contracting parties were not at liberty to create a lien for a new type of creditor.

However, a review of the precedents in English law indicates that the application of the lien was not confined to common callings. In particular, since the eighteenth century, the development of commercial trade has instigated the advancement of the concept of the lien. Accordingly, the lien by usage or by contract is also recognised. Lord Mansfield in *Green v Farmer*¹³⁸ held that

‘[T]he convenience of commerce and natural justice are on the side of liens, and therefore of late years Courts lean that way: First, where there is an express contract; secondly, where it is implied from the usage of trade; or thirdly, from the manner

¹³¹ Michael Bridge, *Personal Property Law* (4th edn, Oxford University Press 2015)271

¹³² *Ibid*

¹³³ [1964] 2 QB 185, 194-195

¹³⁴ *Ibid* at 194-195 (Diplock LJ)

¹³⁵ Steven W Kopp and Mike Landry, ‘Clothed in the Public Interest: The Common Callings, Commerce, and Marketing’ (2000) 20 (1) *Journal of Macromarketing* 36, 36

¹³⁶ Michael Bridge, *Personal Property Law* (4th edn, Oxford University Press 2015)271

¹³⁷ *Ibid*

¹³⁸ (1768) 98 ER154

of dealing between the parties in the particular case; fourthly, or where the defendant has acted as a factor.’¹³⁹

After this case, in *Gladstone v Birley*¹⁴⁰, the court also held that ‘[T]o extend the lien, the party claiming it must show an agreement to that effect, or something from which an agreement may be inferred, -- such as a course of dealing between the parties, or a general usage of the trade.’¹⁴¹ As a result, it is clear that the creation of the lien is flexible and pragmatic. Both the express and implied terms in the contract may create the lien. Certainly, usage in trade may impliedly constitute a lien at common law.¹⁴² Following these two cases, a series of others all confirm the meaning of the contractual lien, express or implied.¹⁴³

In addition, when the contracting parties cannot find a lien at common law or by contract, they usually resort to the Court of Equity, as the plaintiffs of *Gladstone v Birley*¹⁴⁴ contended that ‘although a court of law has said that the clause does not give them a lien, a court of equity may say that it gives them what is precisely tantamount to a lien, namely, a right to have their demand satisfied out of the produce of the goods in preference to any other creditors of the bankrupt freighter.’¹⁴⁵ Furthermore, the case of *Rose v Watson*¹⁴⁶ pursued a legal idea of consideration of justice, which provided

¹³⁹ Ibid at 158 (Lord Mansfield); it is possible that *Green and Another v Farmer and others* is the first case in English law providing an overview of liens, as Grose J. argued that ‘the doctrine of liens was very fully discussed in the case of *Green v Farmer* by Lord Mansfield’; *Kirkman, Assignees of Walker, a Bankrupt v Shawcorss* (1794) 6 Term Reports 14; 101 ER 410

¹⁴⁰ (1817) 2 Merivale 401, 35 E R 994

¹⁴¹ Ibid

¹⁴² ‘To establish a general lien arising by usage in a particular case, for instance in a particular locality, the usage must be certain and reasonable and so universally acquiesced in that everyone in the trade knew of, or on inquiry could have ascertained, its existence’; see *Halsbury’s Law of England* (6th edn, 2016) Vol 68, para 41

¹⁴³ *Houghton v Matthews* (1803) 3 Bos & P 485, 494; *Kirchner v Venus* (1859) 12 Moo PCC 361; *Bock v Gorrissen* (1860) 2 De GF & J 434 (CA) 443; *Jowitt & Sons v Union Cold Storage Co* [1913] 3 KB 1; *United States Steel Products Co v Great Western Rly Co* [1916] 1 AC 189 (HL) 196 (Buckmaster LC); *Re Southern Livestock Producers Ltd* [1963] 3 All ER 801, 802; [1964] 1 WLR 24, 26 (Pennycuik J)

¹⁴⁴ (1817) 35 E R 993

¹⁴⁵ Ibid at 994; but in this case the court dismissed the plaintiff’s bill.

¹⁴⁶ (1864) 10 HL Cas 672, 11 ER1191

an understanding that the equitable lien played a supplementary role where common law liens could not provide an effective remedy.¹⁴⁷ Apart from arising by law, or from an express contract, or from a course of conduct or dealing in the earlier era,¹⁴⁸ in modern times, subrogation or estoppel can also create an equitable lien.¹⁴⁹

3.1.1 Characterization of Liens

Against the above background, it can be observed that the creation of a lien at common law is on a flexible and pragmatic basis. Thus, ‘liens’ can be classified as statutory liens, common law liens, consensual liens and equitable liens, depending on how they were created.

With regard to the shipowner’s lien, there is no statute law governing the shipowner’s lien on cargo or on sub-freights. Common law liens simply cover three types of debts:

‘for the recovery of a general average contribution due from cargo; for expenses incurred by the shipowner in protecting the cargo; and to recover the freight due on delivery of the cargo under either the charterparty or bill of lading contract of carriage’.¹⁵⁰

¹⁴⁷ In terms of the theory of an equitable lien, there are several viewpoints. For example, ‘equitable liens are founded upon the availability of specific performance and the maxim “equity regards as done what ought to be done”’; ‘equity may raise liens upon the principle that he who seeks the aid of equity in enforcing a claim must admit equitable rights of others associated with the same subject matter’; *Shirlaw v Taylor* [1991] 102 ALR 551, 557-558; Aust Fed Ct, Full Ct; *Lord Napier and Ettrick v Hunter* [1993] AC 713, 752; [1993] 1 All ER 385(HL) 409; *Halsbury’s Law of England*(6th edn, 2016) Vol 68, para 855, fn. 13

¹⁴⁸ *Fisher v Smith* (1878) 4 App Cas 1 (HL); *Halsbury’s Law of England* (6th edn, 2016) Vol 68, para 855-856

¹⁴⁹ *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385 (HL); *Orakpo v Manson Investments Ltd.* [1978] AC 95; *Hewett v Court* [1983] 149 C L R 639 (Gibbs CJ) 645-646

¹⁵⁰ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010)303; with regard to the recovery of a general average contribution, see *Hain SS Co v Tate & Lyle* (1936) 41 Com Cas 350; with regard to protecting the cargo, see *Hingston v Wendt* (1876) LR 1 QBD 367, this case treated salvage as the charge made by the shipowner for protecting the cargo; with regard to recovering the freight due, see *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209, 255. In terms of the three types of debts, also see Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)454-455; Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para.17.15; Richard W Williams, ‘The Effectiveness of Liens as a Self-help Remedy?’ in D Rhidian Thomas (ed) *Legal Issues Relating to Time Charterparties* (Informa Law 2008) 270

Furthermore, common law liens require the shipowner to possess the secured property so that the scope of the secured property is confined to the tangibles. Even if documentary intangibles and papers might constitute the subject matter of the possession,¹⁵¹ the claim, namely sub-freights cannot be regarded as the subject matter. In this connection, regarding the shipowner's lien in the charterparty, there are three types of liens in terms of how they are created. First, the shipowner's cargo lien may consist of the common law lien and/or the consensual lien. As mentioned above, the common law lien simply protects three types of debts. Other debts, such as demurrage, deadfreight, port charges and others, cannot be governed by the common law lien directly.¹⁵² If these debts are expected to be protected, they must be incorporated into the contract which constitutes the consensual lien. For example, Article 8 of GENCON (1994) issued by BIMCO provides that '[T]he Owners shall have a lien on the cargo and on sub-freights payable in respect of the cargo for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party Including costs of recovering same'.¹⁵³ Deadfreight and demurrage are protected by the consensual lien rather than the common law lien.

Secondly, as far as the shipowner's sub-freight lien is concerned, it might be the consensual lien and/or equitable lien. The subject matter of this lien is intangible and cannot be covered by the common law lien. Regardless of the consensual lien or the equitable lien, its nature must be substantially different from the shipowner's cargo lien because the former requires the shipowner to possess the secured property while the latter is not relevant to possession. Therefore, from the perspective of common law, the shipowner's lien in the charterparty can be incorporated into one clause; the cargo lien and the sub-freight/sub-hire lien reflect different characteristics. The precise nature of

¹⁵¹ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018) 146

¹⁵² *Phillips v Rodie* (1812) 15 East 547; *Faith v East India Co* (1821) 4 B. & Ald. 630; *Birley v Gladstone* (1814) 3 M. & S. 205; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 462-463

¹⁵³ BIMCO Uniform General Charter, GENCON 1994

this lien must depend on the secured object and its proper construction. This is the first challenge arising from the lien clause in the standard form.

3.2 Multiple Interpretations of the Same Term

The above section demonstrates that a pragmatic approach in common law contributes to the creation of a lien. In other words, to achieve the purpose of creating a lien, various modes can be used such as by operation of law, by contract or by equity. However, this pragmatic approach gives rise to a legal issue, as observed in Section 3.1.1, namely, that a shipowner's lien clause consists of two natures.

It is well-known that there are four types of security interests on property in English law including pledge, mortgage, charge and lien.¹⁵⁴ Depending on whether or not the creditor possesses the secured property, the general category of security interests contains possessory security interests and non-possessory security interests.¹⁵⁵ Possession or non-possession is one of the fundamental distinctions among security interests. The pledge and possessory lien are security interests based on possession while mortgage, the charge and equitable lien are deemed to be non-possessory security interests.¹⁵⁶ Thus, the lien can be divided into both the possessory lien as well as the equitable lien.

Whereas there is no doubt that the shipowner's cargo lien belongs to the possessory lien, a question arises as to whether the shipowner's sub-freights lien constitutes an equitable lien. In a strict sense, the answer is in the negative. The equitable lien is characteristic of the nature of equity and fairness making up for the deficiency of a possessory lien at common law or statutory law. To be precise, the equitable lien means

¹⁵⁴ Michael Bridge, *Personal Property Law* (4th edn, Oxford University Press 2015)269; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)93; John McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 879-883

¹⁵⁵ Bridge (n 154) 269; Beale and others (n 154) 93

¹⁵⁶ Bridge (n 154) 305; Beale and others (n 154)93; John McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 883

‘[A] right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property’.¹⁵⁷ ‘It arises by operation of equity, from the relationship between the parties, rather than by any act of theirs.’¹⁵⁸ In other words, it is created by operation of law rather than by contract. It is apparent that the shipowner’s sub-freight lien is created by contract rather than by operation of law. From this point of view, the shipowner’s sub-freight lien does not constitute an equitable lien.

It is arguable that courts of equity, in comparison with common law courts are more flexible so that all kinds of securities can be created by contract. Particularly, in modern commercial and maritime practice the contractual lien is quite common.¹⁵⁹ It is meaningless to stress that the equitable lien must be created by operation of law. However, this argument is derived from the meaning of a lien in a broad sense.

When it comes to a lien in this sense, it is said that ‘it is often convenient and proper to speak of the lien of a mortgage or the lien of a pledge’.¹⁶⁰ In this context, the term ‘lien’ simply refers to the charge or incumbrance of a mortgage, pledge, attachment, or judgment. As the definition provided by the *Black’s Law Dictionary*, a charge denotes ‘an encumbrance, lien or claim’¹⁶¹. It appears to imply that the lien or the charge in its nature is somewhat connected. Furthermore, a review of the literature indicates that this implied connection has been clearly understood. From the historical point of view, the connection between ‘the equitable lien’ and ‘charge’ can be traced back to the

¹⁵⁷ Bryan A Garner and others (eds), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1064

¹⁵⁸ John McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) 883

¹⁵⁹ David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para17.14; D Rhidian Thomas, ‘An Outline Analysis of Lien Clauses in Maritime Contracts for the Carriage of Goods’ in Jose Manuel Martin Osante (ed) *New Trends in Maritime Law: Maritime Lien, Arrest of Ships, Mortgages and Forced Sale* (Thomson Reuters 2017)56

¹⁶⁰ Leonard A Jones, *A Treatise, of The Law of Liens, At Common Law, By Statute, Equitable, and Maritime, Vol I* (2nd edn, Houghton, Mifflin 1894)2-3

¹⁶¹ Bryan A Garner and others (eds), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 282

nineteenth century. It is said that ‘the equitable lien functioned as a charge over specific property only’.¹⁶²

In modern commercial practice, the equitable lien can still be regarded as a ‘form of equitable charge’¹⁶³ or simply as a ‘charge’,¹⁶⁴ although the distinction cannot be overlooked because the former is created by operation of law whereas the latter arises by contract.¹⁶⁵ Furthermore, one commentator directly points out that the equitable lien ‘may initially be construed as a floating charge focused on a number of assets fastening on a particular asset (i.e. crystallising) on a specified event’,¹⁶⁶ and ‘ “equitable lien” is synonymous with “equitable charge” in respect of an expressly created security interest, but “lien” is perhaps more frequently used than “charge” to describe security interests imposed by law as, for example, on the basis of conduct’.¹⁶⁷

From the above discussion it can be concluded that the difference between the equitable lien and charge is that the former arises by law whereas the latter is from contract. The shipowner’s sub-freights cannot be regarded as the equitable lien in a strict legal sense because it is created by a contractual clause. It is not simply the term ‘lien’, but also the terms ‘mortgage’ and ‘charge’ which are often employed in more than one sense.¹⁶⁸ When it comes to the term ‘lien’, it does not simply refer to a type of security interest, but also might denote other types of security interests, such as the charge, depending on the specific context.

3.3 Proper Construction in a Specific Context

¹⁶² Fiona R Burns, ‘The Equitable Lien Rediscovered: A Remedy For The 21st Century’ (2002)25 (1) University of New South Wales Law Journal 1,1

¹⁶³ *Hewett v Court* [1983] 149 CLR 639, 663; Norman Palmer and Ewan Mckendrick, *Interests in Goods* (2nd edn, LLP Reference Publishing 1998) 976

¹⁶⁴ *Ibid* at 663 (Deane J); Palmer and Mckendrick (n 163) 976

¹⁶⁵ Palmer and Mckendrick (n 163) 93

¹⁶⁶ David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para 21.1

¹⁶⁷ *Ibid* at para 21.3

¹⁶⁸ John McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) 880; see generally Edward I Sykes and Sally Walker, *The Law of Securities* (5th edn, The Law Book Company 1993)

This section explores how the court disposes of a situation where the type of security is not consistent with its legal implication. The object of any legal system is to seek legal certainty. Even if the term refers to more than one sense, in legal practice, regardless of which term is used in a contract, the court may re-characterize it in terms of its proper implication and specific context.

For example, according to whether the creditor possesses the secured property, the general category of security interests comprises possessory and non-possessory security interests. Whereas the requirement of the former is to possess the property, its object should be ‘tangibles and old-fashioned certificated securities.’¹⁶⁹ However, the object of the latter can be intangible, because there is no requirement of possession. A possessory lien can be divided into a general lien and a particular lien. A general lien is mainly used where the property is possessed by creditors to claim general accounts against the owner.¹⁷⁰ In this connection, the object of the general lien should be confined to the scope of tangibles.

However, in *Re Lehman Brothers International (Europe) (in Administration) case*¹⁷¹ the parties to the Master Custody Agreement (MCA) agreed to create a general lien on ‘all other Property’ for a custodian. In accordance with the definition of ‘Property’ under the MCA, ‘Property’ consists of ‘mainly or almost exclusively of intangibles’ rather than ‘tangibles and old-fashioned’. In this context, the court held that

‘the documents purport to describe the security created as a ‘general lien’ with attendant rights of retention, sale and the application of proceeds, whereas in fact, as the parties would have known when the documents were created, the vast bulk

¹⁶⁹ The object of the lien traditionally refers to ‘tangibles and old-fashioned certificated securities’ rather than intangibles; *Re Lehman Brothers International (Europe) (in Administration)* [2012] EWHC 2997 (Ch), [2014] 2 BCLC 295, [34]; Michael Bridge, *Personal Property Law* (4th edn, Oxford University Press 2015)270-277

¹⁷⁰ Leonard A Jones, *A Treatise, of The Law of Liens, At Common Law, By Statute, Equitable, and Maritime, Vol I* (2nd edn, Houghton, Mifflin 1894)10; Halsbury’s Law of England (6th edn, 2016) Vol 68, para 817

¹⁷¹ [2012] EWHC 2997 (Ch)

of the property of LBF (Lehman Brothers Finance SA) to which the security related, held from time to time by LBIE (Lehman Brothers International (Europe)), consisted of intangibles, mainly de-materialised securities and money.’¹⁷²

In the end, in view of the unambiguous language of the MCA, the court held that the actual content of the ‘general lien’ was compatible with that of a charge. Therefore, in this case this ‘general lien’ by its nature was a charge.

The propagation of the doctrine of conceptual impossibility is particularly noteworthy in this context. It was presented in theoretical terms by the distinguished author Sir Roy Goode.¹⁷³ In practical terms, in *Re Charge Card Services Ltd.*,¹⁷⁴ Millett J held that a creditor could not create, in favour of a debtor, a charge over the debtor's own indebtedness to the chargor. To be clear, the doctrine of ‘conceptual impossibility’ has prompted some judges and practitioners to display a conservative attitude towards the recognition and application of security interests. However, the negative attitude against the doctrine of ‘conceptual impossibility’ has been quite vocal. Both Dillon LJ in the Court of Appeal case of *Welsh Development Agency v Export Finance Co. Ltd.*¹⁷⁵ and Lord Hoffmann in the House of Lords cases of *Morris and Others v Rayners Enterprises Incorporated and Another*, *Morris and Others v Agrichemicals Limited and Others*¹⁷⁶ cast doubt on this doctrine. In particular, Lord Hoffmann’s opinion generated a strong influence on later cases including the Lehman case. He pointed out that:

‘In a case where there is no threat to the consistency of the law or objection of public policy, I think that the courts should be very slow to declare a practice of the commercial community to be conceptually impossible. ... the law is fashioned

¹⁷² Ibid

¹⁷³ Roy Goode, *Legal Problems of Credit and Security* (2nd edn, Sweet & Maxwell 1982)86-87; in the sixth edition, Louise Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2017) 1-44; *Morris and Others v Rayners Enterprises Incorporated and Another*, *Morris and Others v Agrichemicals Limited and Others* [1997] WL 1104088, 7

¹⁷⁴ [1986] 3 All ER 289

¹⁷⁵ [1992] BCC 270

¹⁷⁶ [1997] WL 1104088 (HL)

to suit the practicalities of life and legal concepts like ‘proprietary interest’ and ‘charge’ are no more than labels given to clusters of related and self-consistent rules of law.’¹⁷⁷

The Australian judge, James Jacob Spigelman in *Cinema Plus Ltd (Administrators Appointed) and Another v Australia and New Zealand Banking Group Ltd* ¹⁷⁸ also commented (in *obiter dictum*) as follows: ‘[I]n my opinion, there is no reason why, in an appropriate case, equity could not find that the intention of the parties to create a charge between a debtor and creditor, overrides what would be regarded, as common law, as a “conceptual impossibility”’.¹⁷⁹ However, Sir Roy Goode contended that ‘at the conceptual level Lord Hoffmann’s analysis does not, with respect, withstand examination and is entirely result-driven’¹⁸⁰.

3.4 Closing Remarks

The above three sections have sufficiently demonstrated that the pragmatic approach contributes to the creation of the lien. A statutory, contractual or equitable lien are all operative in common law. Furthermore, in a broad sense, the use of the term ‘lien’ is flexible enough so that the so-called ‘lien’ by its very nature might refer to a charge or other encumbrance. For this reason, it is reasonable to use the term ‘lien’ in the standard charterparty form when it has an impact on common law. However, there is no doubt that in a strict sense, the lien clause in the standard form is inherently deficient. When a legal term in a research field can be construed in multiple ways, as a lien, charge or other concept, it is necessary to clarify the use of this legal term or to choose another term in order to avoid misunderstanding.

¹⁷⁷ Ibid at 7 (Lord Hoffmann)

¹⁷⁸ [2000] 49 NSWLR 513

¹⁷⁹ Ibid at 521 (James Jacob Spigelman)

¹⁸⁰ Roy Goode, ‘Charge-backs and Legal Fictions’ (1998) 114 (4) Law Quarterly Review 178, 178

4 The Lien in the Civil Law System

If it is said that the use of the term ‘lien’ in common law is acceptable despite its deficiency in some ways, its use in civil law will and has aroused some issues. In particular, the conceptual framework is the important part of civil law and the systematic and dogmatic approach to law does not provide any room to use a legal terminology in a broad sense. This situation is more serious when the relevant terminology concerns the law of property. In this section, it will be demonstrated that the term ‘lien’ cannot be given a uniform international connotation because of the absence of any exact concept in the civil law system, that is inconsistent with its counterpart in English common law.

4.1 Linguistic Anomalies

It is generally accepted that English law dominates shipping law and practice. It is also the case that the English language prevails in international chartering practice, which is evident from the use of English in standard charterparty forms. In contrast, most civil law jurisdictions have their own languages, such as China, Germany. For this reason, when the English term ‘lien’ is transplanted into a non-English jurisdiction, it is difficult to pinpoint the exact term that matches the English meaning of ‘lien’. Put another way, in English law, the concept of ‘lien’ is complex and various depending on the specific context. By contrast, in the civil law, there is no singular legal term that expresses or explains the complex concept of the lien. German law is a good example, because it is influential in the civil law system and convincing in terms of legal logic.

Before furthering the discussion, it is expedient to note that in civil law jurisdictions, there are two types of norms dealing with private law. One is the unified norm applied in the Swiss Civil Code and the Dutch Civil Code the purpose of which is to integrate the civil law and commercial law into one code where no clear distinction is discernible

between the two.¹⁸¹ The other is the so-called separate norm the object of which is to depict the civil law and the commercial law in two separate codes. The Civil Code applies to all stipulating the basic provisions; in contrast, the Commercial Code deals with specific groups and specific business. The two are meant to supplement each other.¹⁸² This norm is currently adopted in Germany, France and Japan.¹⁸³

In terms of the meaning of ‘lien’ in German law it is generally recognised that the English term ‘lien’ may include the German term ‘*zurückbehaltungsrecht*.’¹⁸⁴ The meaning of ‘*zurückbehaltungsrecht*’ is consistent with that of ‘right of retention’ in the German Civil Code, which means:

‘[I]f the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered’.¹⁸⁵

Conceptually, it is similar to the particular lien in English law. However, in the German Commercial Code, that explanation is not entirely accurate. In order to avoid confusion, it is necessary to examine the linguistic issue from the German language perspective. If the German and English versions are compared, ‘*pfandrecht*’ in the German Commercial Code translates into ‘lien’ in English whereas ‘*zurückbehaltungsrecht*’ simply refers to ‘right of retention’ which is irrelevant to ‘lien’ in the German Civil Code and German Commercial Code. This is apparent in the current quasi-official translation of section 585 of the German Commercial Code. The original section 585

¹⁸¹ Zhongyuan Xu, *Innovation of General Rules of the Civil Law of P.R.C.: From the Perspective of the Unified Norm*, (2017) 7, *The Jurist* 56, 56-67; Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003) 351; Benhan Chen, *Comparative Research on the Law of Security Interests* (Wuhan: Wuhan University Press, 2003)135

¹⁸² Ernest Joseph Schuster, *The Principles of German Civil Law* (The Clarendon Press 1907) 3

¹⁸³ Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press 2003)351; Benhan Chen, *Comparative Research on the Law of Security Interests* (Wuhan University Press, 2003)129-134

¹⁸⁴ Chen (n 183) 326

¹⁸⁵ German Civil Code, s 273. It can be seen that the concept of this term is almost compatible with that of the term ‘lien’ in the ancient Roman law; see Section 3.1

‘*pfandrecht; zurückbehaltungsrecht*’ is translated into ‘lien; right of retention’.¹⁸⁶ Consequently, the English term ‘lien’ may refer to any of the two legal terms in German law; namely, ‘*zurückbehaltungsrecht*’ and ‘*pfandrecht*’.

However, this viewpoint is not conclusive because ‘*pfandrecht*’ in the German Civil Code is usually regarded as ‘a right of pledge’ or ‘pledge’.¹⁸⁷ Furthermore, in reviewing the system of security interests in German law, ‘pledge’ is deemed to be a type of security interest, but there is no concept of ‘lien’.¹⁸⁸ In other words, ‘right of retention’ is considered to be clearly distinguishable from a security interest. In carrying out comparative research, the German scholar tends to compare the German pledge (*pfandrecht*) with the English lien, rather than treating them as the same thing.¹⁸⁹ However, in the German Commercial Code, the German pledge and the English lien are more likely to be interchangeable. In this connection, it is safe to say that ‘*pfandrecht*’ could be translated as either lien or pledge. However, interestingly enough, in section 495 – ‘Contractual Carrier’s Lien’ of the German Commercial Code, ‘*pfandrecht*’ is translated into ‘lien’. In section 495 (4) ‘sale of a pledged item’, the original German, ‘*pfandverkaufs*’, is not translated into ‘liened’.¹⁹⁰ This situation

¹⁸⁶ German Commercial Code, s 585 <http://transportrecht.org/wp-content/uploads/HGB_5_Buch_Uebersetzung_DGTR_2015_05_11.pdf> accessed 30 March 2017

¹⁸⁷ Ernest Joseph Schuster, *The Principles of German Civil Law* (The Clarendon Press 1907) 192, 245; German Civil Code, s 273; Andreas Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3(1) *Journal of Comparative Law* 197, 198; Bram Akkermans, ‘The Principle of Numerus Clausus in European Property Law’ (PhD Dissertation, Maastricht University 2008) 224

¹⁸⁸ Bram Akkermans, ‘The Principle of Numerus Clausus in European Property Law’ (PhD Dissertation, Maastricht University 2008) 224-235; Andreas Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3(1) *Journal of Comparative Law* 197; Moritz Brinkmann, ‘The Peculiar Approach of German Law in the Field of Secured Transactions and Why it has Worked (So Far)’ in Louise Gullifer and Orkun Akseli (eds) ‘*Secured Transactions Law Reform: Principles, Policies and Practice*’ (Hart Publishing 2016) 340. In relation to movables, at first sight in German law a pledge is the only, or at least the most important security interest. Nevertheless, in practice the situation is complex. However, here the author merely stresses that the ‘lien’ is not traditionally a type of security interest in German law.

¹⁸⁹ Andreas Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3(1) *Journal of Comparative Law* 197

¹⁹⁰ German Commercial Code, s 495 ‘Pfandrecht des Verfrachters’ is translated into ‘Contractual Carrier’s Lien’. s 495 (4) ‘Die in § 1234 Absatz 1 des Bürgerlichen Gesetzbuchs bezeichnete Androhung des Pfandverkaufs sowie die in den §§ 1237 und 1241 des Bürgerlichen Gesetzbuchs vorgesehenen Benachrichtigungen sind an den nach § 491 oder § 520 verfügbungsberechtigten Empfänger zu richten.

demonstrates that German scholars, on the one hand, cannot escape the fact that '*pfandrecht*' may refer to either pledge or lien; but on the other, they try to avoid using '*pfandrecht*' to refer to 'lien' and 'pledge' at the same time so that they use '*pfandverkaufs*' to refer to 'sale of a pledged item'.

It is apparent that in German law the English term 'lien' can be interpreted from two viewpoints because of linguistic anomalies. First, the translation of the English 'lien' might be the equivalent of 'right of retention'. However, the lawmaker is not inclined to reach this conclusion; secondly, because '*pfandrecht*' might denote either 'lien' or 'pledge', it is safe to say that the lawmaker in Germany is in favour of interpreting the English 'lien' as the German 'pledge'. However, whether the concept of the German 'pledge' is consistent with that of the English 'lien' is questionable. This example leads to the conclusion that because of linguistic anomalies, the German law cannot simply depend on translation to find the exact legal terminology. Lawmakers tend to follow their own security system to work out a proper security right.

The Dutch and French laws are also worth examining with regard to the issue of linguistic anomaly. In Dutch law, the English term 'lien' can be translated as '*retentierecht*'. The concept of '*retentierecht*' refers to 'right of retention' in section 3.10.4 of the Dutch Civil Code. However, compared with the German law, the difference is that 'right of retention' is directly regarded as 'possessory lien' in Dutch Civil Code. The definition of 'right of retention (possessory lien)' provides that:

Ist dieser nicht zu ermitteln oder verweigert er die Annahme des Gutes, so sind die Androhung und die Benachrichtigungen an den Befrachter zu richten' is translated into 'The warning regarding the impending sale of a pledged item provided for by Section 1234 (1) of the German Civil Code, as well as the notifications stipulated by Sections 1237 and 1241 of the German Civil Code, are to be addressed to the consignee, who has the right of disposal pursuant to Section 491 or Section 520. If the consignee cannot be located, or if the consignee refuses to accept the goods, then the warning and the notifications are to be addressed to the Contractual Shipper'.<http://transportrecht.org/wp-content/uploads/HGB_5_Buch_Uebersetzung_DGTR_2015_05_11.pdf.> accessed 20 June 2017

‘a right of retention is the right of a creditor, granted to him in situations specified by law, to withhold the performance of his obligation to return a movable or immovable thing to his debtor until his debt-claim has been fully satisfied’.¹⁹¹

Based on this, it is demonstrably clear that the English ‘lien’ is not thoroughly and completely comprehensible in Dutch law; it is simply construed as ‘possessory lien’ in a narrow sense. In addition, although ‘pledge’ is a type of security interest in the Dutch Civil Code, unlike German law, Dutch law does not attempt to connect the English ‘lien’ with the Dutch ‘pledge’.¹⁹²

Similarly, in French law, the English ‘lien’ can be translated into ‘droit de rétention’, namely ‘right of retention’ which is a statutory right. With the 2006 reforms of the French Civil Code, this right is officially regarded as a property right which is codified into Article 2286 providing that:

‘[T]he exercise of a right of retention on an object is possible by: 1. The person to whom the object was handed over until the payment of his debt; 2. The person whose outstanding debt results from the contract that binds him to deliver the object; 3. The person whose outstanding debt was created at the moment he started holding the object. A right of retention is lost through the voluntary release of power over the object’.¹⁹³

In light of this definition, it is compatible with the concept of ‘possessory lien’ in English law as well. But unlike the Dutch law, in the French Civil Code the lawmaker

¹⁹¹ Dutch Civil Code, Art 3:290

¹⁹² Dutch Civil Code, Title 3.9 ‘Real Security Rights: Pledge and Mortgage’

¹⁹³ French Civil Code 2006, Art 2286. See Bram Akkermans, ‘The Principle of Numerus Clausus in European Property Law’ (PhD Dissertation, Maastricht University 2008)150-151. It should be noted that after the 2006 reforms of the Civil Code, in 2008, Article 2286 was revised again. But the original Article reserves, just adding the fourth point ‘Celui qui bénéficie d'un gage sans dépossession’ in French (which may be translated as ‘the person who benefit from a non-possessory pledge’ in English; gleaned from conversations with Mr Jun Shen, a French qualified lawyer.); in addition, in terms of the question as to whether this is a property right, the strong debate still stands there.

does not clarify the relationship between ‘right of retention’ and ‘possessory lien’. In light of the above, it is concluded that in a technical sense, the English ‘lien’ may be translated into the different languages, but its original concept in English law cannot be transplanted into any civil law jurisdictions.

4.2 Conceptual Convolution

In tandem with the problems associated with linguistic anomalies, a more fundamental question arises with respect to divergence in the concept of the ‘lien’ in civil law as compared with common law. In this section, the concept of the lien in civil law will be presented in different ways to illustrate the complexity resulting from divergence in the understanding and portrayal of this phenomenon.

4.2.1 Right of Retention and Possessory Lien

Further to the above discussion on linguistic anomaly, it is necessary to point out that the term ‘lien’ can be translated into ‘right of retention’, however, in other civil law jurisdictions such as China and Japan, the notion of ‘right of retention’ is variously recognised and enforced.

In the Japanese Civil Code 1896, ‘right of retention’ and ‘statutory lien’ are coexistent. However, in accordance with Article 295 (1) ‘Contents of Rights of Retention’ providing that ‘if a possessor of a Thing belonging to another person has a claim that has arisen with respect to that Thing, he/she may retain that thing until that claim is satisfied; provided, however, that this shall not apply if such claim has not yet fallen due’.¹⁹⁴ The concept of ‘right of retention’ is similar to that of ‘possessory lien’. The ‘statutory lien’ is a legislative preferential right in accordance with Article 311 ‘Statutory Lien over Movables’ providing that ‘a person who has a claim that arose

¹⁹⁴ Japanese Civil Code 1896, Art 295 (1)

from the causes listed below shall have a statutory lien over certain movables of the obligor'.¹⁹⁵ In this list, no shipowner's statutory lien is covered.

It is to be noted, however, that the concept of 'right of retention' varies in different jurisdictions.¹⁹⁶ On the one hand, in many situations it is traditionally regarded as a seller's right in a sale contract which cannot be extended to other fields.¹⁹⁷ This right means that the sale contract constitutes a conditional sale. For example, Article 134 'conditional sale' in the Chinese Contract Law 1999 provides that 'the parties may prescribe in the sale contract that title to the subject matter remaining in the seller until the buyer has paid the price or has performed other obligations'.¹⁹⁸

Since the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 provides for the principle of 'right of retention', this clause is being widely used in sale contracts. Article 58 of the CISG provides as follows:

'(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.'¹⁹⁹

¹⁹⁵ Ibid at Art 311

¹⁹⁶ Benhan Chen, *Comparative Research on the Law of Security Interests* (Wuhan: Wuhan University Press, 2003) 381-383; Bram Akkermans, 'The Principle of Numerus Clausus in European Property Law' (PhD Dissertation, Maastricht University 2008) 148-149

¹⁹⁷ Chen (n 196) 381-383; Akkermans (n 196) 148

¹⁹⁸ Chinese Contract Law 1999, Chapter 9 'Sale Contract', Article 134 'Conditional Sale'

¹⁹⁹ CISG, Art 58 (1)(2)

This concept is also consistent with section 19 ‘Reservation of Right of Disposal’ of the Sale of Goods Act 1979 (UK) provides

‘Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled’.²⁰⁰

As such, the phenomenon is naturally confined to sale contracts. Furthermore, the creditor (seller) does not possess the object; in other words, this is a non-possessory right.²⁰¹

On the other hand, the understanding and use of ‘right of retention’ has been developed in different civil law jurisdictions based on their own considerations. In French law, ‘right of retention’ is described in the following words: ‘[W]hen one party is under an obligation to do something in order to benefit another party, that benefiting party may be entitled to retain possession of an object of the first party until the obligation is performed’.²⁰² In this connection, ‘right of retention’ can be incorporated into any contract, although its application in a sale contract is more commonplace.²⁰³ Its creation must be on the ground that parties to the contract have reciprocity of obligations.²⁰⁴ However, whereas such clause in a contract grants the creditor the right

²⁰⁰ Sale of Goods Act 1979 (UK) s 19

²⁰¹ Although it is a non-possessory right, it cannot be regarded as a charge because the buyer had never owned the cargo so that he could not grant the seller a charge on the cargo; *Armour and Another Respondent v Thyssen Edelstahlwerke AG Appellants* [1991] 2 AC 339 (HL) 353; Jason Chuah, *Law of International Trade: Cross-border Commercial Transactions* (6th ed, Sweet & Maxwell 2019) 173

²⁰² Bram Akkermans, ‘The Principle of Numerus Clausus in European Property Law’ (PhD Dissertation, Maastricht University 2008)148

²⁰³ *Ibid* at149

²⁰⁴ Xinmiao Jiang, Chang Cai and Fangyi Zhu, *Comparative Research on Lien* (Intellectual Property

to retain possession of the object, this right sits on the borderline between contract law and property law. For this reason, there has been lengthy debate in practice and academic circles on whether this right is a personal right or a property security right by nature.²⁰⁵ One commentator has pointed out that in the 2006 reforms of the French Civil Code, this right is officially regarded as a property right.²⁰⁶

Similarly, as discussed in Section 4.1, ‘right of retention’ and ‘possessory lien’ in section 3.10.4 of the Dutch Civil Code are also regarded as being conceptually the same.²⁰⁷ Furthermore, in Book 8 ‘Transport Law and Means of Transport’ of the Dutch Civil Code, the carrier or shipowner is entitled to exercise his right of retention (possessory lien) regarding the cargo on board.

To sum up, although the traditional viewpoint asserts that the right of retention is simply used in a sale contract, the fundamental development in certain civil law jurisdictions is that the concept of ‘right of retention’ is similar to the ‘possessory lien’ in English law. However, this right of retention does not extend to the sub-freight, because a sub-freight lien is not possessory so that the nature of the sub-freight lien is subject to other types of security interests.

Publishing House Co., Ltd 2007)27; Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. II (7th edn, Hart Publishing Ltd 2019) 473; see also Section 3.1.

²⁰⁵ Bram Akkermans, ‘The Principle of *Numerus Clausus* in European Property Law’ (PhD Dissertation, Maastricht University 2008)148-151

²⁰⁶ Ibid; however, professor Dalhuisen considered one question ‘whether upon a default under a sales agreement, the statutory retentos in ... France, where title passes upon the conclusion of the sales agreement, may appropriate the asset if not automatically returned to them upon a rescission of the sale agreement.’ His conclusion was that in France such a rescission is subject to judicial approval (except if waived in the agreement itself), title cannot revert earlier based on the right of retention. From this point of view, the right of retention does not amount at a security interest completely and thoroughly, see Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. II (7th edn, Hart Publishing Ltd 2019) 473

²⁰⁷ The Dutch Civil Code, Article 3:290 provides that ‘a right of retention is the right of a creditor, granted to him in situations specified by law, to withhold the performance of his obligation to return a movable or immovable thing to his debtor until his debt-claim has been fully satisfied’. But this right is not regarded as a property right; Dalhuisen (n 206) 473

4.2.2 Possessory Lien and its Extension

In reviewing the notion and application of ‘right of retention’, it is apparent that although most civil law jurisdictions apply this right, not every jurisdiction like the French or Dutch construes ‘right of retention’ as ‘possessory lien’. This is exemplified by the German and Chinese laws.

In terms of German law, the lien is not incorporated into legislation. In the German Civil Code although the concept of ‘right of retention’ is similar to that of French law,²⁰⁸ this German right is considered to be clearly distinguishable from a security interest.²⁰⁹ In reviewing the German Civil Code and Commercial Code in German and English, it is apparent that German law does not treat the English ‘lien’ as a ‘right of retention’ to deal with a commercial legal relationship, because in the German Commercial Code, a line is drawn between ‘lien’ and ‘right of retention’. For example, Section 585 of the German Civil Code states that ‘for his (creditor’s) claim to a salvage reward or to the costs of salvage, the creditor shall have a lien over other saved property; insofar as the creditor is the sole possessor of the property, he shall also have a right of retention’.²¹⁰ It can be seen that ‘lien’ and ‘right of retention’ are provided separately.

By contrast, the German Commercial Code describes the carrier and shipowner’s right to retain the cargo, by simply connecting ‘lien’ with ‘pledge (*pfandrecht*)’, rather than referring to ‘right of retention’. For instance, Section 495 ‘Contractual Carrier’s Lien (*pfandrecht*)’ in Subchapter 1 ‘Contracts for the Carriage of Goods by Sea’ and Section 566 ‘Disponent Owner’s Lien (*pfandrecht*)’ in Subchapter 2 ‘Time Charter’, do not use ‘right of retention’ to describe the carrier and shipowner’s right to retain the cargo. Clearly, a chartering ‘lien’ or ‘pledge’ is regarded as a type of security interest while

²⁰⁸ The German Civil Code, s 273 provides that ‘[I]f the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered.’

²⁰⁹ Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law Vol. II* (7th edn, Hart Publishing Ltd 2019) 471

²¹⁰ German Commercial Code, s 585

‘right of retention’ is simply a contractual right. Therefore, German commercial law attempts to clarify the difference between ‘lien’ and ‘right of retention’. In this context, German Commercial law in essence attempts to borrow the concept of the German ‘pledge’ to interpret the English ‘lien’.

Moreover, the scope of the German ‘pledge’ is extended. Traditionally, only the possessory pledge is recognised; not the non-possessory pledge. However, in the German Commercial Code, the term ‘lien’ is used to grant a disponent shipowner a right on cargo or claims of time charterers.²¹¹ In other words, claims of time charterers are intangibles which cannot become the object of a ‘pledge’ or ‘lien’ in German law. It goes without saying that in order to fit the application of the shipowner’s lien in the charterparty, the German law ventures to extend the application of the pledge.

It should be noted that in a voyage charterparty, only the cargo lien is stipulated; there is no non-possessory lien provided in the German Commercial Code.²¹² Whether the extension of the traditional lien in German law means that the concept of the German lien is compatible with that of English lien is an issue.

With regard to Chinese law, in the law of contract of P.R.C. (Chinese Contract Law 1999), the concept of ‘right of retention’ is construed in a narrow sense. This right simply refers to the seller’s right to retain title to the cargo.²¹³ However, the ‘lien’ is a type of security interest in Chinese law.²¹⁴ Furthermore, in accordance with Article 230 of the Property Law 2007 and Article 82 of the Guaranty Law 1995, the Chinese lien can be regarded as equivalent to a ‘possessory lien’ in English law in which the creditor is entitled to possess the debtor’s movables in response to the debtor’s default. Article

²¹¹ Ibid at s 566

²¹² Ibid at s 495; it is provided that ‘for all of his claims under the contract for the carriage of general cargo, the Contractual Carrier shall have a lien over the goods delivered to him for carriage...’. The further discussion can be found in Chapter 5, Section 4.1.1

²¹³ Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003)366-367

²¹⁴ Lien, pledge and mortgage constitute three types of security interests in accordance with Part four ‘real right for security’ in the law of property (2007); Ibid at 310

230 of the Property Law states that ‘if a debtor defaults, the creditor may retain the debtor’s movables which have been legally possessed by the creditor and shall have priority in being paid with the said property’.²¹⁵ Article 82 of the Guaranty Law stipulates that ‘lien as used in this Law means that the creditor shall possess the debtor’s movables according to the terms of the contract as provided by Article 84 of this Law. If the debtor defaults on his debt, the creditor shall be entitled to retain the property in accordance with the provisions of this Law and to the priority of having the debt paid with the money converted from the property or proceeds from sale or auction of the property’.²¹⁶

Therefore, in Chinese law, ‘right of retention’ and ‘possessory lien’ cannot be interchangeable and ‘possessory lien’ exists in the general system of security interests. However, like German Commercial Code,²¹⁷ the Chinese Maritime Code grants a shipowner in a time charterparty a lien on cargo and on sub-freight meaning that the non-possessory lien is acceptable. Notably and similarly, this exception is confined to the time charterparty.²¹⁸

It is apparent that traditionally the possessory lien or pledge has been incorporated into the system of security interests. Considering that the concept of the lien in English law is understood in a broad sense, certain civil law jurisdictions have extended that traditional application. Whether this extension is in line with the concept of the English lien is questionable. The fact that this extension is only applied in the particular case of a charterparty demonstrates that the English lien cannot generally be in line with the civil law lien. In addition, from the substantive point of view, perhaps the narrow concept of the lien cannot provide a sufficient remedy to the shipowner. That said, the procedural law may, to some extent, close the gap. This matter will be considered in more detail when the procedural law is discussed in Chapters 4 and 5.

²¹⁵ Chinese Property Law 2007, Art 320

²¹⁶ Chinese Guaranty Law 1995, Art 82

²¹⁷ German Commercial Code, Section 566

²¹⁸ See Chapter 5, Section 4.1.2

4.3 Closing Remarks

It is concluded that because of linguistic anomaly, the English ‘lien’ can be translated into ‘right of retention’. Also, the concept of ‘right of retention’ is traditionally similar to ‘Reservation of Right of Disposal’ in the Sale of Goods Act 1979 (UK). However, in many civil law jurisdictions this right has been interpreted as a ‘possessory lien’. At the same time this right is considered as a right of pledge, such as in the German Commercial Code. In addition, when the English ‘lien’ can be interpreted as ‘possessory lien’ in civil law, certain civil law jurisdictions start to consider extending the scope of the lien in the particular context. However, the English lien in a broad sense cannot be in line with any security in the civil law jurisdictions.

5 Conclusion: Use of the Term ‘Security’ to Eliminate Ambiguity

After examining the concept of the lien in common and civil law, it can be concluded that in common law it is complex and varied due to a pragmatic approach to law. The statutory, contractual and equitable lien are all operative in the common law. In a broad sense, the use of the term ‘lien’ is very flexible so that the so-called ‘lien’ by its very nature might refer to any types of ‘lien’ or the charge. However, in a narrow sense, what is the precise nature of a lien must depend on the specific context of a case, and the case law has shown that the court identifies the exact meaning of the lien on a case-by-case basis.²¹⁹ In other words, the term ‘lien’ might have the different meanings under different circumstances. Although it is reasonable in this context to use the term ‘lien’ in a standard charterparty form, its use has revealed inherent deficiencies because of its complexity and diversity.

By contrast, in the civil law context, the English ‘lien’ can be translated into ‘right of retention’ which can be regarded as a possessory lien in terms of English law. As discussed in Section 4.2, Dutch and French law provides ‘right of retention’, which is

²¹⁹ *Re Lehman Brothers International (Europe) (in Administration)* [2012] EWHC 2997 (Ch), [2014] 2 BCLC 295

a concept similar to the English ‘possessory lien’. However, in certain civil law jurisdictions, ‘right of retention’ and ‘possessory lien’ can be inconsistent. For example, in Chinese law, ‘right of retention’ can be regarded simply as a contractual right in a sale contract. In German law, as discussed in Section 4.1, the translation of ‘lien’ is complex. Even so, to make the domestic concept fit the English lien, particularly the non-possessory lien on sub-freight, German law and Chinese law have legislated to extended the scope of the lien in the particular contexts.

It is thus apparent that the word ‘lien’ in charterparties is a rather improper and imprecise legal terminology in so far as its use in the lien clause is concerned, since this has led to ambiguity. It is not only difficult to find the exact and equivalent English law concept through translation, but also the objects of the lien, namely, the cargo and sub-freight, relate to tangibles and intangibles that produce different characteristics and match different kinds of securities. In a pragmatic system, such as the English legal system, the term ‘lien’ may have different meanings. However, in a conceptual and dogmatic system, such as in any civil law system, this legal term cannot be construed flexibly. In the face of divergence, a review of the purpose of the shipowner’s lien leaves little doubt that it is intended to provide an effective security mechanism in response to the charterer’s possible default. This consensus in the two legal systems, it is submitted, supports the use of the term ‘security’ as proposed by the present author.

In researching the essence of the security right, the UNCITRAL has applied ‘a unitary, functional and comprehensive approach’ to diminish and eliminate the divergence.²²⁰ Indeed, this approach has been used in modern secured transactions law such as Australian Personal Property Securities Act 2009.²²¹ The unitary approach means that the research on secured transactions employs ‘a single, unitary concept of “security

²²⁰ Spyridon v Bazinas, ‘The UNCITRAL Legislative Guide on Secured Transactions and The Draft UNCITRAL Model Law on Secured Transactions Compared’ in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 484-485

²²¹ Federal Register of Legislation, ‘Personal Property Securities Act 2009 (Australia)’ <<https://www.legislation.gov.au/details/c2012c00151>> accessed 24 April 2017, the structure does not no longer follow the different types of rights, but follows the different types of movables.

right”²²² rather than an ambiguous term (lien) or several terms (e.g., pledge, right of retention).

It is also suggested that, together with the development of secured transactions law, the rationale regarding the system of security interests should also be improved. Historically, the object of security interests has been mainly confined to immovable property (land) and the mortgage is the most important security mechanism. Flexibility and accessibility of movable property has been embraced by commercial and financial interests, so that tangible property has become an object of security. More recently, intangible property, including receivables, intellectual property and stocks, has become more relevant, because its application is twofold. While intangible properties act as secured objects, their value in use is not affected. From this point of view, the development of the regime of security interests relates to the evolution of the secured object. It is not necessary to struggle with the type of the security, be it ‘lien’, ‘right of retention’ or any other form. The crucial aspect is to consider how effectively to use these secured objects. For this reason, the term ‘security’ can sufficiently illustrate the purpose of the shipowner’s ‘lien’ in charterparties.

However, it must be noted that even if this chapter spends sufficient space on the discussion of the different understandings of the term ‘lien’ and the proposed unitary approach is adopted, the purpose is simply to stress that in the context of doctrinal research, especially, the involvement of the comparative element, the use of the term ‘lien’ in a charterparty does not contribute to researching on the legal nature and effect of the shipowner’s right. By contrast, the use of the term ‘security’ in the current research is beneficial to understand the fundamental function of the shipowner’s right which is to promote the performance of the contractual obligation.

²²² Spyridon v Bazinas, ‘The UNCITRAL Legislative Guide on Secured Transactions and The Draft UNCITRAL Model Law on Secured Transactions Compared’ in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 485

Chapter Three: Overview of Salient Features of Shipowner's Security: From Principles of Secured Transactions Law Perspective

1 Introduction

The objective of this Chapter is to examine salient features of shipowner's security in the context of contract law and property law. A particular research question to be addressed concerns how the principle of secured transactions law impacts on the legal effect of shipowner's security. It should be clarified that property law governs secured transactions law. The enquiry in this chapter will adhere closely to property law principles as found more generally in secured transactions law.

The notion of shipowner security concerns the protective measures that can be put in place or be invoked at law against a commercial risk that a shipowner might face. To particularize this proposition, the risk in question may be what a shipowner may suffer under a charterparty if the charterer does not pay for freight or hire to the former shipowner under the contract.

In the law relating to securities in commercial transactions, the underlying subject is property or assets that need to be protected, that is, the mechanism through which this protection can be affected by means of the contract. This area of law therefore involves two major legal phenomena, namely, property and contract. In terms of contract law, it is well established that the principle of party autonomy derived from freedom of contract reigns supreme. In terms of property law or secured transactions law, it is contentious whether party autonomy should be limited by legislation. More forcefully in the civil law system, there is the doctrine of *numerus clausus* which projects the proposition that property matters should be governed by statute. Whether these two leading principles, party autonomy and *numerus clausus*, can coexist in the arena of

security interests is at the very centre of the discussion in this chapter. It is notable in this context that at common law contract and property are, in particular instances, inextricably intertwined and not always distinct and separable.²²³ In the common law tradition, it is possible for parties to a commercial transaction to freely create a wide range of security interests, ‘including security that extends to all of their assets.’²²⁴ By contrast, in the civil law system, there has traditionally been a boundary between the laws of contract and property manifested in the *numerus clausus* principle.²²⁵

Against the above background, this chapter will first argue that, in modern commercial law, the boundary between the law of contract and the law of property is becoming vague and so the different principles in the two legal fields may have impacted on the shipowner’s security clause. More specifically, party autonomy, as the overriding principle in contract law, means not only autonomy to create or not to create a wide range of shipowner’s security clauses, but also autonomy to decide the content of what the parties expect. This principle is regarded as overriding, even though it has since the twentieth century been widely attacked,²²⁶ and has certain limitations pursuant to which the content cannot violate public policy or legislation. In the context of property law governing the security clause, further limitations have to be considered. In particular, *numerus clausus* in the law of property constitutes an important principle in civil law.

²²³ Sjef Van Erp, ‘Contract and Property Law: Distinct, but not Separate’ (October 15 2013) Maastricht European Private Law Institute Working Paper Series No. 2013/2014 <SSRN: <https://ssrn.com/abstract=2340387> > accessed 07 April 2019

²²⁴ Eillis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (2nd edn, Oxford University Press 2014) 305

²²⁵ Sjef Van Erp, ‘Contract and Property Law: Distinct, but not Separate’ (October 15 2013) Maastricht European Private Law Institute Working Paper Series No. 2013/2014 <SSRN: <https://ssrn.com/abstract=2340387> > accessed 07 April 2019; Hao Ran, ‘Common Nature of the Structure of Property Law in two legal systems’ (2006) 01 Global Law Review 32, 32-41

²²⁶ Richard A Epstein, ‘Contracts Small and Contract Large: Contract Law Through the Lens of *Laissez-Faire*’ in Francis H Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 25; Francis H Buckley, ‘Introduction’ in Francis H Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 4; Grant Gilmore, *The Death of Contract* (Ohio State University Press 1994); Lawrence M Friedman, *Contract Law in America: A Social and Economic Case Study* (Quid Pro, LLC 2011); Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985)

In this context, it will be shown that secured transactions law would impact on the legal effect of the contractual clause. A single protection device to a shipowner's security is not therefore sufficient and combining the legal or statutory device with the contractual device should constitute a more effective approach to protect the shipowner.

Owing to their different legal environments, it is necessary to discuss the two legal systems from different viewpoints. In common law, the application of party autonomy does not cause difficulties because a pragmatic and practical approach to law does not intend to limit a party's will overtly in commercial transactions. In the common law section, the necessity of the contractual solution in response to cargo security will therefore be investigated, together with the necessity for a solution pursuant to the operation of law in response to sub-freight security.

In civil law, whereas by tradition *numerus clausus* is a fundamental principle in the law of property, a solution based on the operation of law always dominates the creation and legal effect of a security. Thus, the civil law section will mainly explore whether it is feasible to provide for a contractual security right in secured transactions law.

2. Shipowner's Security in Contract and Property Law

The law of contract and the law of property are two of the most important fields of private law. The fundamental difference between the two legal fields is that contract law focusing on the contractual parties establishing their relationship based on their mutual intentions and desires, whereas property law focuses on the rights of individuals and entities over property.

More specifically, with regard to the law of contract, because it governs the relationship between the contractual parties rather than binding a third party, even if the third party stands to benefit without undertaking any contractual obligations. Contract law grants the parties the maximum freedom to stipulate what they want in their contract. Thus,

party autonomy is the paramount principle in contract law and the contract itself constitutes the law governing the parties. In theory, therefore, contractual clauses may reach and address all rights and obligations of the parties.

By contrast, the law of property governs the relationship between persons and property, and the associated interests pertaining to property which are uncertain and diverse, potentially giving rise to disputes. Therefore, *numerus clausus* in civil law is an indispensable principle. Parties are entitled to deal with their tangible and intangible properties based on rights or interests in property, and, in this respect, the view has been expressed that certain features of property law point to that law being mandatory.²²⁷ However, it is not denied that parties are entitled to enjoy such freedoms as the right to dispose of their property in accordance with the law, or to enter into a security agreement.

However, if the freedom exercised by the party impinges on the rights or interests of a third party, legislative provisions can be used to limit the freedom in question to prevent any underlying dispute from materialising. In this context, the *numerus clausus* principle can be construed as ‘limiting number and content of property rights and the transparency principle, demanding that objects of property rights are clearly defined (specificity requirement) and that any property right resting on those objects is clear to the outside world (publicity requirement)’.²²⁸

In the law of property, the name and category of rights might be different. For example, property law can be divided into full real rights including civil law ownership and common law freehold, and restricted real rights including security rights and user

²²⁷ Huabin Chen, *Principles of Property Law* (5th edn, National Academy of Governance 2010); Yubo Zheng, *Rights in Rem* (18th edn, San Min Book 2012) 41

²²⁸ Sjeff Van Erp, ‘Contract and Property Law: Distinct, but not Separate’ (October 15 2013) Maastricht European Private Law Institute Working Paper Series No. 2013/2014 <SSRN: <https://ssrn.com/abstract=2340387> > accessed 07 April 2019; other scholars, for example Professor Andreas Rahmatian, has the similar description; Andreas Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3(1) *Journal of Comparative Law* 197, 201

rights.²²⁹ Alternatively, the full real rights and restricted real rights can be described as primary rights and secondary rights respectively.²³⁰ The diversity of rights give rise to the consequence that different parties enjoy different rights over the property in common. Sometimes a right can be regarded as a ‘visible’ right, because ‘the world’ may presume the existence of the right. A typical example is that of ownership or possession of the property, namely the shipowner’s cargo security. However, under most circumstances, apart from the interested parties themselves, no one has sufficient knowledge of the existence of the right, for example, the future claim²³¹ of a shipowner’s right against the charterer and subsequent sub-charterers.

Given this context, in comparison with contract law, the advantage of property law is that when a type of property right, regardless of that full or restricted real rights are created in accordance with the law, the legal effect including the *droit de preference* and *droit de suite*, can be applied without restriction. For this reason, as far as a shipowner’s security is concerned, it is an accessory to a charterparty, which is subject to both contract and property law. In order to enable this clause to operate optimally, combining a contractual solution with one emanating from the common law or otherwise, is perhaps the best approach to protect the shipowner. A contractual solution ensures party autonomy whereas a legal or legislative solution facilitates protection of the shipowner in the property law regime. Nevertheless, whereas the roles of party autonomy and *numerus clausus* in the two legal systems may impact on the application of the contractual solution and the legal solution engendered by common law or

²²⁹ Huabin Chen, *Principles of Property Law* (5th edn, National Academy of Governance 2010); Andreas Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3(1) *Journal of Comparative Law* 197, 201

²³⁰ Sjef Van Erp, ‘Contract and Property Law: Distinct, but not Separate’ (October 15 2013) Maastricht European Private Law Institute Working Paper Series No. 2013/2014 <SSRN: <https://ssrn.com/abstract=2340387> > accessed 07 April 2019; Apart from primary and secondary rights, Professor Sjef van Erp proposed tertiary rights as well. He contended that tertiary rights are ‘rights in the border area between contract and property law, e.g. the civil law lease agreement because of the maxim that a sale does not break a lease.’

²³¹ The future claim can also be described as book debts and account receivables. The detail will be discussed in Chapter 5.

legislation, the focus of discussion is mainly with regard to the necessity and feasibility of combining a contractual solution with a legal solution.

It should be noted that the security of the shipowner consists of the securities of both the cargo and the sub-freights, but the focus of their protection is different. Cargo security by its very nature can be regarded as protection arising from operation of law whereas the sub-freight security is dependent on the meeting of the minds of the parties. These two types of securities are discussed below from different perspectives.

3 Party Autonomy and the Role of Common Law

3.1 Necessity for a Contractual Solution

As discussed above, the security of the shipowner consists of the securities of both the cargo and the sub-freights, but the focus of their protection is different. These two types of securities are discussed about the necessity respectively.

In terms of a shipowner's security, the legal idea of this is to provide some benefits to the claimant over and above a simple legal claim for a remedy against a particular defendant. This idea is not a fundamental difference between civil and common law.²³² The difference between the two legal systems is that flexibility regarding the creation of the security in common law gives rise to courts recognising the security clause in a contract based on the parties' purpose.²³³ Although the right of the security in the primary sense is derived from the operation of law (herein referred to as 'legal security')²³⁴ rather than a contract,²³⁵ it is sufficient to say that the pragmatic philosophy stimulates the creation of the security by contract. Nevertheless, in the context of the charterparty, the legal security based on the law has the closest

²³² David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para 17.1

²³³ *Ibid* at para 17.10

²³⁴ Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 689

²³⁵ *Halsbury's Law of England* (6th edn, 2016) Vol 68, para 802

connection with this contract.²³⁶ Therefore, the question arises as to whether the legal security entrenched in the charterparty can satisfy all demands of contracting parties and whether it is necessary for the contractual security being an effective clause, to make up for the parties' demands. The answer can be derived from the two perspectives of cargo security and of sub-freight security.

With regard to cargo security, the scope of the secured debt is circumscribed; therefore, it is necessary to create an express contractual security to extend the remedial scope. If it is said that the cargo security can be regarded as a legally-implied security in that the shipowner and the charterer do not need to clarify its creation, a contractual cargo security may be described as an express security in the charterparty. There is no denying that the implied security is an effective tool to protect the aggrieved party even if the security clause is not express. However, the creation of an express security, along with the implied security, can contribute the contractual obligation to performing well. More specifically, as regards the charterparty, the contractual obligation is accompanied by the carriage of goods; namely, the shipowner transports the cargo while the charterer has an obligation to pay the carriage freight/hire and the relevant charges due. Therefore, at the beginning, the scope of the remedy in the legal/implied security is circumscribed to protect the certain debt in *transitu*, such as freights, general average contributions and special expenditures relating to the cargo.²³⁷ But other 'uncertain' debts, such as demurrage, deadfreight, port charges and others, cannot be directly governed by the legal security.²³⁸ The scope of 'uncertain' debts should be provided by the express contractual clause.

²³⁶ It should be noted that under American law, the shipowner's right on the cargo or on sub-freight, and the charterer's right on the vessel are regarded as the maritime lien.

²³⁷ Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 459

²³⁸ *Phillips v Rodie* (1812) 15 East 547; *Faith v East India Co* (1812) 4 B & Ald 630; *Birley v Gladstone* (1814) 3 M & S 205; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 462-463

Furthermore, even though the debts governed by the legal/implied security are clear, these debts need to be classified in order to see whether they can be covered by the legal security. For example, ‘freight is deemed to be earned as cargo loaded’.²³⁹ Based on this, it is generally accepted that advance freight and freight payable before the delivery of the goods cannot be governed by a legally-implied cargo security without the specific expression, because there is no natural justice to protect the freight at common law if the shipowner has not earned. Put another way, in the absence of an express contractual security, there is no security for the freight not due.²⁴⁰ By comparison, an express contractual security may succeed in supporting advance freight.²⁴¹

Apart from the above-mentioned different types of freights requiring express cargo security to protect the aggrieved party, commercial people in the long history of the chartering industry, have continuously explored more debts governed by expressly provided contractual security. For instance, traditionally, the shipowner is not entitled to exercise security on goods on different voyages under different contracts.²⁴² But in practice, the shipowner may venture to change the usage of trade. In *Moss Steamship Co v Whinney*,²⁴³ the shipowner stipulated in his bill of lading that ‘the shipowner should have a lien on the goods shipped not only for the freight and charges due thereon, but also for any previously unsatisfied freight ... and other charges due either from shippers or consignees to the shipowner.’²⁴⁴ Although it is debatable whether this kind of contractual security is valid since its occurrence, many common law judges are in favour of its application. Apart from this old English case, a recent American case

²³⁹ *Vagres Compania Maritima SA v Nissho-Iwai American Corpn, (The Karin Vatis)* [1988] 2 Lloyd’s Rep 330 (CA) 332 (Lloyd LJ)

²⁴⁰ *Robert How and John Walker v William Kirchner, Joseph Sharp, and Robert Waterston* (1857) 11 Moore P C 21; 14 ER 602; *William Kirchner, Joseph Sharp, and Robert Waterston v John Bourn Venus* (1859) 12 Moore P C 361; 14 ER 948; *Ex P Hyholm, re Child* [1873] 29 L T 634; *Nelson v Association for Protection of Wrecked Property* [1874] 43 LJCP 218; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 460

²⁴¹ *Wehner v Dene SS Co* [1905] 2 K B 92

²⁴² *Bernal v Pim* (1835) 1 Gale 17

²⁴³ [1912] AC 254

²⁴⁴ *Ibid* at 254

*World Imports, Ltd., et al. v OEC Group New York*²⁴⁵ involves the validity of the extension of the cargo security. The disputable provision is that ‘this general lien and security interest shall be in addition to any other rights [OEC] has or may acquire under other agreements and/or applicable law, and shall survive delivery or release of any specific property of [World Imports]...’²⁴⁶ The court held that ‘the parties’ general freedom to modify or extend existing liens by contract was accepted.’²⁴⁷

It can be seen that in order to achieve the remedial and security functions it is necessary for the contractual security to expand the scope of the legal security. This conclusion is in line with the pragmatic approach of the common law.

With regard to sub-freight security, the legal security cannot voluntarily play a role in protecting the shipowner. To clarify this, a provision such as ‘all sub-freights for any amounts due under this charter’ must be created by express agreement instead of simply relying on the operation of law.²⁴⁸ Nevertheless, after the creation of the sub-freight security, its legal effect is affected by legislation.²⁴⁹

On the basis of the above two aspects, it is clear that a legal solution cannot provide a comprehensive protection to the shipowner, and it is necessary to use a contractual solution to make up for the gap in the shipowner’s protection.

²⁴⁵ *World Imports, Ltd., et al. v OEC Group New York* US 526 BR 127 (2015); Although this case is irrelevant to a charterparty directly, the legal argument may be applied in the charterparty’s lien.

²⁴⁶ *Ibid* at 2

²⁴⁷ *Ibid* at 12

²⁴⁸ Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 463-464

²⁴⁹ See Chapter 5 Registration

3.2 Party Autonomy and Legal Intervention

3.2.1 Party Autonomy

In Section 3.1, the necessity of a contractual solution is examined, but its feasibility is left unaddressed. The reason is that party autonomy has been characterized as ‘perhaps the most widely accepted private international rule of our time’²⁵⁰ which constitutes the common cornerstone of the two legal systems.²⁵¹ In particular, as far as common law is concerned, party autonomy is highly respected in commercial transactions even though there is no denying that the debate on the extent of party autonomy has never disappeared.²⁵² The common law system pursues a pragmatic and concrete approach to create, recognise and address a legal relationship or a legal issue. Furthermore, the contracting parties are to a great extent granted the right to create their own legal relationships and contents as long as their agreement does not violate the mandatory law or public policy. Moreover, in reviewing recent developments, additional public policy can no longer obtain the special consideration so that it can be said that party autonomy is less affected by public policy.²⁵³

It is anticipated that flexibility of party autonomy in the creation and performance of the security clause grows with the development of the financial market. This viewpoint

²⁵⁰ Russell J Weintraub, ‘Functional Developments in Choice of Law for Contracts’ (1984) 271 (187) *Recueil Des Cours* 239; see also, Thomas M de Boer, ‘Party Autonomy and Its Limitations in the Rome II Regulation’ (2008) 19 (9) *YBK, PRIV. INT’L L.* 19; Shaokun Fang and Hongping Wang, ‘On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*’ (2005) 5 *Law Science Magazine* 11, 12

²⁵¹ In the EU, party autonomy has been articulated both in EU private international law (Regulation <EC> No 593/2008 of European Parliament and of The Council on the law applicable to contractual obligation <Rome I> OJ 2008, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>) and the EU Explanation relating to the Charter of Fundamental Rights (Explanation on Article 16 ‘freedom to conduct business’ providing that ‘this Article is based on Court of Justice case law which has recognised freedom to exercise an economic or commercial activity, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29>) accessed 19 December 2018. Although English law and continental European law are governed by different legal systems, the recognition of party autonomy is unitary. In Chinese and Japanese law, this is a general principle under contract law as well.

²⁵² Stephen A Smith, *Atiyah’s Introduction to the Law of Contract* (6th edn, Clarendon Press 2005) 5-9

²⁵³ *Re ASRS Establishment Ltd (in administrative receivership and liquidation)* [2000] 2 BCLC 631 (CA) 642; Eillis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (2nd edn, Oxford University Press 2014)306

can be examined through the practice in English law. For example, to illustrate the legal validity of a particular type of security arrangement, Lord Hoffmann held that '[I]n a case in which there is no threat to the consistency of the law or objection of public policy, I think that the courts should be very slow to declare a practice of the commercial community to be conceptually impossible'.²⁵⁴ This opinion was acknowledged in a later case.²⁵⁵ Also, it encourages practitioners to design a more feasible security clause.

Although over several decades more and more statutory laws are issued to direct the contracting parties' conduct in the field of property, commerce and finance, the fundamental purpose of these statutory laws is to regulate the commercial and financial order rather than refraining from the development; thereby, the ideal of party autonomy is not affected substantially. Based on this foundation, a contractual solution plays an important role in the protection of the shipowner. It is sufficient to say that regardless of whether legal security provides protection to the shipowner, contractual security must offer him a self-help remedy. However, it does not mean party autonomy in common law is absolute.

3.2.2 Legal Intervention and Its Necessity

In this section, legal intervention refers to the limitation of party autonomy. From the legislative point of view, legislation provides the requirement to create and apply the security. The creation and legal effect of a contractual security must satisfy the legal requirement. This means legal intervention.

In modern society, the importance of secured transaction law to economic development is widely recognised and accepted, following which, the law of personal property security has been developing increasingly and has instigated many common law

²⁵⁴ *Re Bank of Credit and Commerce International SA* (No 8) [1998] AC 214 (HL) 228

²⁵⁵ *Re Lehman Brothers International (Europe)* [2012] EWHC 2997 (Ch) [34]

jurisdictions to enact legislation governing the content of security interests.²⁵⁶ Apart from the USA,²⁵⁷ some commonwealth countries including Canada,²⁵⁸ New Zealand²⁵⁹ and Australia²⁶⁰ have enacted Personal Property Security legislation demonstrating that these traditional common law jurisdictions are attempting to utilise a legislative solution to deal with legal issues in the field of security interests. Although the UK has not enacted any Personal Property Security Act so far, a Secured Transaction Law Reform Project is under way.²⁶¹ This legislative approach is a limitation to party autonomy. Furthermore, limitation or legal intervention is necessary and inevitable. On this point, security on sub-freights is singled out as an example to stress the necessity of legal intervention.

To start with, modernisation of the law of secured transactions stimulates legal intervention on the shipowner's sub-freight security. There is no denying that the shipowner's sub-freight security has a long history since the English court in *Paul v Birch*²⁶² held that a master (shipowner) could obtain hire from the bankrupt factors' (charterers') shippers. For a long time, there was no comprehensive understanding of

²⁵⁶ Louise Gullifer, 'Introduction', in Louise Gullifer and Orkun Akseli (editors) *Secured Transactions Law Reform: Principles, Policies and Practice* (Oxford: Hart Publishing, 2016) 1-2

²⁵⁷ The Uniform Commercial Code (UCC) of the United States First published in 1952 is to deal with the law of sales and other commercial transactions. Article 9 (2001) governs security interests in personal property as collateral to secure a debt.

²⁵⁸ Personal Property Security Act (Canada) 1996

²⁵⁹ Personal Property Securities Act (New Zealand) 1999

²⁶⁰ Personal Property Securities Act (Australia) 2009

²⁶¹ Oxford Law School, 'Secured Transactions Law Reform Project' <<https://securedtransactionslawreformproject.org>> accessed 29 April 2019, 'The aim of the project is to examine the English law relating to secured transactions and to consider the need and shape of future reform. Many leading practitioners, academics and policymakers are already involved in the project as well as representatives of lenders and other financial institutions.' In addition, the City of London Law Society also participates in the task of the Secured Transaction Law Reform; Louise Gullifer and Magda Raczynska, 'The English Law of Personal Property Security: Under-reformed?' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 273; John de Lacy, 'The Evolution and Regulation of Security Interests over Personal Property in English Law' in John de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge-Cavendish 2010) 1

²⁶² (1743) 2 Atkyns 621, 26 ER 771

the nature of the sub-freight security. Also, it is neither necessary nor important to discern and understand its nature, because in practice it seems to operate well.

However, along with the development of security interests, the understanding of sub-freight security, particularly, its object has gradually changed for the better so that the tradition of contractual security needs to be governed by legislation. More specifically, in historical terms, the object of security interests is mainly confined to immovable property (land) and the mortgage is the most important security mechanism. Subsequently, attention has been paid to the flexibility and accessibility of movable property by the commercial and financial community so that tangible property is considered to be in need of security. Thus, more security devices including the pledge, lien and charge are now used widely.

In relatively recent times, security for intangible property such as receivables, intellectual property and stocks has become more important and popular because of its flexibility and practicability. Thereby, the scope of security has been greatly enlarged.²⁶³ In other words, there is a process in place to understand how to create and utilise the kind of security right to protect a creditor. Legislatures have thus seen it fit to develop a more rational system for implementing workable regulation in place to ensure that security interests are not exploited or abused to the detriment of the wider society. In the course of regulating these interests, legislatures have also defined and clarified the scope of the meaning of security interests. In this context, it goes without saying that sub-freights, as future claims, and book debts or receivables²⁶⁴ have been

²⁶³ Louise Gullifer, 'Introduction', in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016) 1-2

²⁶⁴ 'Book debts' are regarded as the old expression defined by *Shipley v Marshall* as 'debts that could or would, in the ordinary course of a business, be entered in well-kept books relating to the business'; *Shipley v Marshall* (1863) 14 CB NS 566; In *Independent Automatic Sales Ltd v Knowles and Foster* [1962] 1 WLR 974, 'book debts' are defined as 'a debt arising in the course of a business and due or growing due to the proprietor of that business that such a debt would or could in the ordinary course of such a business be entered in well-kept books relating to that business'. 'Receivables' are treated as the more modern and wider expression so that the Diamond report suggested that the relevant legislation

effectively incorporated into the intangible property category. Furthermore, many Personal Property Security Acts comprehensively provide a registration system for these secured receivables. Even if this is still absent as a specific Act in English law the Companies Act 2006 (Amendment of Part 25) Regulation 2013 exemplifies a major substantive change in the registration of charges since 1900.²⁶⁵ This registration system involves sub-freights but it must be noted that sub-freight security is not like the maritime lien which is subject to a unique regime in the maritime law domain. Thus, sub-freight security is inevitably affected by the legislation effectuating a modern security system, and traditional contractual security is no longer a pure contractual right.

Secondly, in consideration of the purpose of the security, the legal intervention to the sub-freight security is also necessary. The security system is to control and reduce the risk rather than creating or transmitting risk. When the sub-freight security, as a non-possessory security, operates on the claim or receivables of the debtor without registration, this means that a hidden right might exist against the third party. Therefore, in essence, the purpose of the legal intervention is to display this right to the third party and to avoid transmitting the risk to the third party.

Thirdly, as discussed in Chapter 2, although this thesis is confined to the chartering industry, the shipowner's security is subject to the general commercial law, in particular, financial law. Where receivables become important property/assets for small and medium-sized businesses, since the 1980s, receivables financing has become an important mechanism²⁶⁶ so that which has led to the adoption of the United Nations

should replace 'receivables' for 'book debts'; see Aubrey Diamond, *A Review of Security Interests in Property* (HMSO 1989)109-110; Gerard McCormack, *Secured Credit under English and American Law* (Cambridge University Press 2014) 222

²⁶⁵ Louise Gullifer and Magda Raczynska, 'The English Law of Personal Property Security: Under-reformed?' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016)273

²⁶⁶ Orkun Akseli, 'The United Nations Convention on the Assignment of Receivables in International Trade and Small Business' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016) 465

Convention on the Assignment of Receivables in International Trade in 2004.²⁶⁷ This Convention provides a model for the registration of security interests for the purpose of obtaining priority.²⁶⁸ This device is useful in that it provides a reminder to the shipowner to register sub-freight claims to obtain priority. Especially, under multiple charterparties, the shipowner's sub-freights cover the charterer and subsequent sub-charterer's debts. The longer the chartering chain, the higher is the risk to which a non-registered sub-freight security may be exposed.

From the other point of view, in the context of the debtor's bankruptcy, if the creditor performs the registration, legal intervention will play a protective role for the creditor which means that entitling the creditor to exercise the registered right against the bankruptcy. In other words, legal intervention gives the sub-freight security the right to trace claims. Otherwise, the security clause which is similar to other contractual clauses in charterparties cannot reflect its priority as a property right.

It should be noted that although the legal intervention in this section has been shown to be necessary, it cannot be concluded that legislative solution based on secured transactions law is mandatory. The purpose of this section is simply to demonstrate that there is no barrier to applying the legislative solution in common law.

3.3 Closing Remarks

In Section 3.1, it was demonstrated that, with regard to cargo security, the contractual solution should play an important role in protecting the shipowner where the legal solution cannot provide sufficient protection. By contrast, in Section 3.2, it is suggested that, with regard to sub-freight security, where there is legal intervention, although party autonomy in the commercial context is predominant. In addition, legal intervention may contribute to the legal effect of sub-freight security against a third

²⁶⁷ United Nations Convention on the Assignment of Receivables in International Trade 2004

²⁶⁸ Ibid at Section I 'Priority Rules Based on Registration' of Annex to the Convention

party. In theory, under multiple charterparties the legislative solution in secured transactions law may provide a more effective protection for the shipowner against all charterers who use his vessel. However, whether combining the contractual solution with the legislative solution affords a more effective protection for a shipowner, or, alternatively, whether the intervention of the legislative solution is reasonable in the chartering industry will be explored in the next two chapters.

4 *Numerus Clausus* and Feasibility of a Contractual Solution in Civil Law

4.1 *Numerus Clausus*

In comparison with common law, civil law countries always emphasise the principle of *numerus clausus* which is generally regarded as the foundation of the closed system of property law,²⁶⁹ so that a traditional civil law lawyer who is asked whether party autonomy may contribute to the creation and application of the security clause would answer ‘no’ without hesitation. The reason is that civil law lawyers and academics strongly affected by the systematic civil code or legislation are used to considering a legal issue in the conceptual framework. In civil law, the law of contract and the law of property respectively, concentrate on different purposes. The former encourages fair trade and efficiency of the transaction while the latter is mainly used to protect and achieve the safety of the transaction.²⁷⁰ Therefore, the law of contract provides sufficient free space to the contracting parties; but the law of property imposes a greater variety of restrictions or mandatory provisions. It is generally accepted in many civil

²⁶⁹ Since the nineteenth century, continental European countries one after the other issued the Civil Code. In the field of property law, *numerus clausus* are widely recognised a fundamental principle; Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003)41; Vincent Sagaert, ‘Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law’ in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 120; Weixing Shen, *Numerus Clausus* and Party Autonomy: Two Keys to Understand Property Law, (2013) 5 (113) *Law and Social Development* 134,141

²⁷⁰ Shen (n 269)134

law jurisdictions that the law of property is regarded as mandatory law.²⁷¹ Furthermore, the feature of the mandatory law is in line with the principle of *numerus clausus*.²⁷²

Although the use of the term *numerus clausus* may be traced back only to 1930 in Germany,²⁷³ its concept of the ‘closed system’ in the law of property can be derived from continental European countries, though which country is its exact ancestor is somewhat controversial. One author has postulated as a general proposition that ‘French private law provides for the foundations of the closed system of property law (*numerus clausus*) throughout Europe... This principle would... be the result of a revolutionary reaction against the feudal system at the end of the Eighteenth Century’.²⁷⁴ However, this principle is not found in the Napoleonic Code, which came into force in 1804. Furthermore, from the perspective of French case law, judgments in French law in the nineteenth century seemed to accept an open system of property rights, or at least the French *Cour de Cassation* had adopted a flexible viewpoint with regard to the closed system of property rights. In the middle of the nineteenth century, the closed nature of property law was reconsidered in most French legal handbooks. However, case law was still opposed to a strict application of the *numerus clausus* principle. Only in recent years has the Article 516 of the Civil Code stated that ‘the provisions of the new book on “property” are part of the public order, except if they provide otherwise’.²⁷⁵

In the end, it is perhaps fair and reasonable to state that ‘the restrictions on party autonomy in the law of property formed an essential part of the model for private law

²⁷¹ Shaokun Fang and Hongping Wang, ‘On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*’ (2005) 5 Law Science Magazine 11, 11; Zaiquan Xie, *The Principles of Real Law* Vol.I (5th edn, New Study Publication, 2010) 2

²⁷² Fang and Wang (n 271) 11

²⁷³ THD Struycken, ‘The *Numerus Clausus* and Party Autonomy in the Law of Property’ in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 60

²⁷⁴ Ibid at 64-65; Vincent Sagaert, ‘Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law’ in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 122-125

²⁷⁵ French Civil Code 2006, Art 516

that was developed by Friedrich Carl von Savigny (1779-1861) and his followers’;²⁷⁶ although it is also assumed that ‘the *numerus clausus* is a German invention that was developed by the Pandectists in the 19th century and incorporated it in the 1900 draft of the BGB as one of its fundamental principles’.²⁷⁷ However, in light of an investigation of Dutch sources, this principle was apparently ‘incorporated in very clear words in early drafts for a new Dutch civil code around 1800, most articulately in an 1816 draft by Joan Melchior Kemper (1776-1824)’.²⁷⁸

The above brief account of origin of *numerus clausus* and the concept of ‘closed system’ demonstrates that *numerus clausus* is not a fresh principle in comparison with party autonomy. Therefore, although it is generally accepted for its implication that ‘the number of property rights is limited, and these rights cannot be expanded or modified by individual parties according to their specific wishes and needs,’²⁷⁹ behind this implication, what is the specific scope of *numerus clausus* is still controversial. In a narrow sense, scholars consider that the principle of *numerus clausus* indicates that the type and content of security interests are subject to the law of property and the contracting parties are not entitled to create a new type of security or to modify the content of the security.²⁸⁰ But viewed broadly, some scholars contend that apart from the type of content, *numerus clausus* is also binding on the legal validity of a security and the procedure of registration.²⁸¹ Viewed from this vantage point, although *numerus clausus* is a fundamental principle in the law of property, the understanding of its application is not unified or harmonised.

²⁷⁶ THD Struycken, ‘The *Numerus Clausus* and Party Autonomy in the Law of Property’ in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 64-65

²⁷⁷ *Ibid* at 64-65

²⁷⁸ *Ibid* at 64-65

²⁷⁹ *Ibid* at 59

²⁸⁰ Shaokun Fang and Hongping Wang, ‘On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*’ (2005) 5 *Law Science Magazine* 11, 13; Zaiquan Xie, ‘Development and Change of the System of Security Interests’ (2019) 1 *The Jurist* 36, 55

²⁸¹ Qiong Fu, ‘Three Topics on *Numerus Clausus*’ (1999) 1 *Law and Social Development* 30, 30-32; Shaokun Fang and Hongping Wang, ‘On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*’ (2005) 5 *Law Science Magazine* 11, 13

In reviewing the legislation in civil law jurisdictions, controversy might result from the absence of the unitary concept. Some jurisdictions expressly stipulate the principle of *numerus clausus* by legislation. For example, Article 5 of the Chinese Property Law 2007 and Article 116 of the General Rules of the Civil Law of P.R.C. 2017 refer to *numerus clausus* and provide that ‘types and contents of real rights shall be stipulated by law’²⁸². But Article 175 of the Japanese Civil Code provides that ‘[N]o real rights can be established other than those prescribed by laws including this Code.’²⁸³ It is clearly shown that the Chinese law stipulates the scope of the limitation including the types and contents while the Japanese law provides a broad description only. It goes without saying that the latter, due to the ambiguous provision, generates different explanations. However, this does not mean that the former concept is watertight. In fact, in China the debate on the scope of the application of *numerus clausus* can be described as fairly drastic. Many commentators contend that Article 5 cannot be interpreted in a literal sense. It should be construed in a broad sense, for example, the approach of acquisition of the property right, the recognition of legal validity and the procedure of publicity should all be subject to this principle.²⁸⁴ Because of the absence of a uniform concept, some literature discusses *numerus clausus* without a precise definition.²⁸⁵

Apart from the above examples of Chinese and Japanese law, some jurisdictions do not codify the concept of *numerus clausus* into their legislation. More strangely, in reviewing French and German law, these two civil law pioneers, it is evident that the principle of *numerus clausus* is not found in their civil codes.²⁸⁶ However, the principle

²⁸² Article 5 of Chinese Property Law 2007 and Article 116 of the General Rules of the Civil Law of P.R.C. (2017) are completely same.

²⁸³ Japanese Civil Code 1896, Art 175; in addition, the Civil Code of Taiwan Province 2010, Art 757 stipulates that ‘[N]o rights in rem shall be created unless otherwise provided by the statutes or customs’.

²⁸⁴ Liming Wang, *Property Law* (China University of Political Science and Law Press 2008) 88-90; Baoshu Liu, *Property Law* (China Legal Publishing House 2007) 60; Weixing Shen, *Numerus Clausus and Party Autonomy: Two Keys to Understand Property Law*, (2013) 5 (113) *Law and Social Development* 134, 137-138

²⁸⁵ For example, Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. I (7th edn, Hart Publishing Ltd 2019) 37; Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. II (7th edn, Hart Publishing Ltd 2019) 374-376, the notion of *numerus clausus* is mentioned and described repeatedly, however, no exact notion is provided.

²⁸⁶ Shaokun Fang and Hongping Wang, ‘On the Dialectic Relationship between Party Autonomy and

of *numerus clausus* impliedly directs or affects the specific statutory provisions.²⁸⁷ For example, it has been ‘given statutory basis with regard to property security rights’ in the French Civil Code.²⁸⁸

In the above context, there is no denying that *numerus clausus* plays a crucial role in the creation and application of property rights, even though the absence of unification in concept is conspicuous. Therefore, when common law jurisdictions attempt to utilise the legislative solution to address the legal issue of a shipowner’s sub-freight security, the interrelation between the legislative solution and the contractual solution is discernibly cooperative. Conversely, thanks to *numerus clausus*, the civil law jurisdictions have to depend on the legislative solution. If the contractual solution in civil law is not operative, it is difficult for the shipowner’s security in all standard charterparty forms to achieve the remedial function comprehensively in some civil law jurisdictions.

Using German law and Chinese law as examples, secured cargoes only refer to cargoes belonging to the charterer. For instance, Article 141 of the Chinese Maritime Code provides that ‘the shipowner shall have a lien on the charterer’s goods.’²⁸⁹ Section 566 of the German Commercial Code stipulates that ‘the owner (shipowner) shall have a lien on the property on board the ship, including the fuel, insofar as such property is owned by the time charterer.’²⁹⁰ The scope of secured cargoes is clearly limited in the legislation of these two jurisdictions.

Numerus Clausus’ (2005) 5 Law Science Magazine 11,13; Vincent Sagaert, ‘Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law’ in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011)121-122; Zhibo Zhang, ‘Feasibility and Borderline of *Numerus Clausus* Relaxation’ (2017) 149 (01) Journal of Comparative Law 157, 161

²⁸⁷ Sagaert (n 286) 122; Zhang (n 286) 161

²⁸⁸ For example, Article 2285 of the French Civil Code is regarded as be on the basis of *numerus clausus*. Article 2285 provides that ‘the property of a debtor is the common pledge of his creditors; and the proceeds of it shall be distributed among them pro rata, unless there are legal causes of priority between the creditors’; Vincent Sagaert, ‘Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law’ in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 122

²⁸⁹ Chinese Maritime Code 1992, Art 141

²⁹⁰ The German Commercial Code, s566 ‘Shipowner’s Lien’ provides that ‘(1) To secure its amounts

In Chinese legal practice, in accordance with the notion of *numerus clausus*, the shipowner and charterer are not entitled to extend the scope of secured cargoes to cargoes of third parties²⁹¹. The only exception is that the shipowner, as a carrier, issues a bill of lading. As such, the shipowner is an actual carrier who is entitled to exercise a security over the bill of lading holder's cargoes. However, in this situation, the legal foundation is based on the carriage contract rather than the charterparty.

Similarly, the literal meaning of Section 566 of the German Civil Code demonstrates that secured cargoes merely belong to the time charterer. However, like Chinese law, Section 495 'Carrier's Lien' of the German Civil Code stipulates that secured cargoes may extend to third parties' properties. This means that the shipowner, as a carrier can exercise security over the third party's property.²⁹² However, if the shipowner and the carrier during this voyage are not the same party, in theory, *numerus clausus* will lead to the invalidity of the shipowner's security on the third party's cargoes directly. In order to avoid this situation, the only approach might be to amend the legislation to make up for the gap. For example, the Dutch Civil Code directly stipulates the corresponding Article to deal with 'effect of a right of retention (possessory lien) against third parties.'²⁹³

However, this approach to law does not address the fundamental underlying legal issue. The law always lags behind practice. If an amendment to the Chinese Maritime Code or the German Commercial Code provides for a similar article as in the Dutch Civil

receivable under the time charter contract, the owner shall have a lien on the property on board the ship, including the fuel, insofar as such property is owned by the time charterer. The provisions governing the acquisition of ownership in good faith under Sections 932, 934 and 935 of the Civil Code (Bürgerliches Gesetzbuch, BGB) shall not apply.'

²⁹¹ *Xiamen Liangxiang Shipping Company v Jiangsu Weitai Logistics Company* [2016] MMZ No.1393; *Jiangsu Weitai Logistics Company v Guangxi Xinminhang Shipping Industry* [2016] M72 M C No. 227; *QinZhou Xiangli Logistics Company v Xiamen Yichengda Shipping Operator Company* [2016] M72 MC No. 960; *Xiamen Liangxiang Shipping Company v Jiangsu Weitai Logistics Company* [2017] ZGRMS No. 1698

²⁹² The German Commercial Code, s 495 provides '(1) For all of his claims under the contract for the carriage of general cargo, the contractual carrier shall have a lien over the goods delivered to him for carriage, whether they belong to the contractual shipper, the documentary shipper, or a third party that has consented to the carriage of the goods.'

²⁹³ Dutch Civil Code, Art 3: 291

Code addressing the third party's legal issue, another legal issue, such as whether the shipowner is entitled to detain the cargo for the previous debt during the previous voyage, might arise. In this context, without the relevant legislation, *numerus clausus* determines that the parties are not entitled to enlarge the scope of the security.

4.2 Decline of *Numerus Clausus* and the Feasibility of a Contractual Solution

This section will look at whether the negative effect of *numerus clausus* can be resolved in the modern secured transactions law. Before going further, it should be clarified that one misunderstood proposition is that *numerus clausus* and party autonomy are fierce competitors. It is contended that there is no basis for these to operate together.²⁹⁴ In addition, although some commentators' viewpoint on the application of *numerus clausus* is not a negative one, when they indicate the relationship between *numerus clausus* and party autonomy, they tend to emphasise that the cornerstone of property law is *numerus clausus* rather than party autonomy. Thereby, the application of party autonomy is bound by the principle of *numerus clausus*.²⁹⁵ In other words, the feasibility of party autonomy in the law of security interests relies on *numerus clausus*. This conservative viewpoint is especially popular in Asian civil law jurisdictions. In European continental jurisdictions, *numerus clausus* can be regarded as the second leading principle in the law of property.²⁹⁶ In the observation of the present author, the duality of the leading principle means that the shipowner's security clause is subject to both party autonomy and *numerus clausus*. The question simply arises as to how the contractual and the legislative solution can work cooperatively.

²⁹⁴ Shaokun Fang and Hongping Wang, 'On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*' (2005) 5 Law Science Magazine 11,11-12; Huabin Chen, *Principles of Property Law* (5th edn, National Academy of Governance 2010) Chapter 2(1)

²⁹⁵ Huixing Liang (ed), *Study on Chinese Real Law Vol. I* (Law Press China 1998)66; Qiong Fu, 'Three Topics on Numerus Clausus' (1999) 1 Law and Social Development 30, 34; Shaokun Fang and Hongping Wang, 'On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*' (2005) 5 Law Science Magazine 11, 12

²⁹⁶ Sjeff Van Erp, 'Contract and Property Law: Distinct, but not Separate' (October 15 2013) Maastricht European Private Law Institute Working Paper Series No. 2013/2014 <SSRN: <https://ssrn.com/abstract=2340387> > accessed 07 April 2019

4.2.1 Decline of *Numerus Clausus*

The debate on whether the principle of *numerus clausus* should be abolished is not a fresh topic. In particular, along with the development of security interests, there is a clear and strong tendency to allow contracting parties greater flexibility in their relationship.²⁹⁷ This tendency attempts to break the closed system of property law (*numerus clausus*) laid down by French law as the result of a revolutionary reaction by the end of eighteenth century which has been regarded as an essential foundation of property law throughout civil law tradition.²⁹⁸ The break from *numerus clausus* can meet the practical requirements of modern legal transactions. In particular, in the face of financial crises and shortage of capital, the commercial community seeks to maximise asset utilisation. The new model and application of the security needs to be considered. Therefore, under the current circumstances, there are mainly three propositions regarding this principle: affirmation, negation and compromise.

Affirmation of *numerus clausus* refers to the viewpoint that the principle of *numerus clausus* should be strictly applied without exception. This outdated proposition simply represents the minority view in modern society. But its justification is worth contemplating; particularly, in China, where it still stands because its supporters have incorporated the provision of *numerus clausus* in the Chinese Property Law. The main argument for this proposition is that the law of property is to address the dispute between an owner/creditor and other parties/debtors based on the interests of property. When the owner/creditor has an interest in the property to which it is entitled, against

²⁹⁷ Axel Flessner, 'Choice of Law in International Property Law—New Encouragement from Europe' in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 23-25; Jeroen Van Der Weide, 'Party Autonomy in Dutch International Property Law' in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 49-50

²⁹⁸ THD Struycken, 'The *Numerus Clausus* and Party Autonomy in the Law of Property' in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 64-65; Vincent Sagaert, 'Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law' in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 122-125

other parties around the world, the content of the property cannot be decided by the owner/creditor and/or the minority debtors. If this were to occur, their decision might be unfair to other majority debtors. Only legislation can provide the content of the property.²⁹⁹

Negation of *numerus clausus* denotes the standpoint that this principle should be abolished. The argument is based on the demonstration of the function of *numerus clausus* and the development of the economy. As mentioned earlier, the traditional civil law rationale is to distinguish the law of contract from the law of property. The former is intended to encourage free trade so that party autonomy should be applied, while the latter is intended to protect the safety of transactions so that the limitation is mandatory. But a civil law scholar points out that the above division comes from an untenable premise. The law of contract and the law of property cannot by nature be separate. Their relationship is interlinked, and both are components of private law. Therefore, when the premise is untenable, the principle of *numerus clausus* is absent from the foundation.³⁰⁰ Furthermore, encouraging the utility of property is becoming the tendency in modern transactions. The purpose of *numerus clausus* is to limit free transaction against this tendency.³⁰¹ Therefore, arguably it is meaningless to continue to embrace this principle.

Compromise related to *numerus clausus* is a prevailing proposition in European and Asian civil law countries. Scholars contend that the traditional *numerus clausus* can be described as ‘hard’ *numerus clausus* where the parties have no flexibility to decide the content of property. In modern property law, *numerus clausus* should be labelled as ‘soft’ *numerus clausus* or *quasi-numerus clausus*.³⁰² With regard to security interests,

²⁹⁹ Peng Zhang, ‘Affirmation and Negative of Numerus Clausus: Analysis on the Latest Revision of Numerus Clausus in the Draft of Property Law’, (2006) 12 Legal Science 19; Kangsheng Hu (ed), *Interpretation of Property Law of P.R.C.* (Law Press China 2007) 31; Lixin Yang, ‘Embracing the Quasi-Numerus Clausus within the Bill’ (2017) 11 (2) Tsinghua University Law Journal 14, 16

³⁰⁰ Yongqin Su, *Exploration of New Civil Law* (Angel Press 2008)

³⁰¹ Ibid

³⁰² Lixin Yang, ‘Embracing the Quasi-Numerus Clausus within the Bill’ (2017) 11 (2) Tsinghua

a major contribution of this proposal is expansion of the source of law to create the security. Traditionally, only the legislation directs and regulates types of security interests. But this proposal suggests that custom and usage play equal roles, similar to legislation, in creating new security.³⁰³ Many civil law jurisdictions, including Germany and Japan, are starting to recognise in their respective laws, that it is sufficient to create a new security depending on custom and usage rather than legislation.³⁰⁴ One distinguished Japanese scholar, Qirong Wo contends that it is not necessary to follow *numerus clausus* at all if the custom and usage contributes to a new security. The purpose of this proposition is to suggest revising the existing legislation with custom and usage.³⁰⁵

However, with regard to the application of ‘soft’ *numerus clausus*, the different jurisdictions have provided the different model. For example, when German scholars are generally in favour of a loose interpretation of *numerus clausus* rather than abolishing it entirely, they assert that *numerus clausus* merely excludes the ‘creation’ of security freely, but the judge is entitled to interpret and develop the *numerus* application to the new era.³⁰⁶ This means that security interests in Germany can be created through judge-made law.

University Law Journal 14, 14; Zaiquan Xie, ‘Development and Change of the System of Security Interests’ (2019) 1 The Jurist 36, 55

³⁰³ Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003)41; Weixing Shen, *Numerus Clausus* and Party Autonomy: Two Keys to Understand Property Law, (2013) 5 (113) Law and Social Development 134,139; Pengao Chang, ‘Diversified Legal Sources of Property Rights and Rules on Their Application Multiple Sources of Law and Its Application’ (2014) 36 (4) Chinese Journal of Law 114, 118; Lixin Yang, ‘Embracing the Quasi-Numerus Clausus within the Bill’ (2017) 11 (2) Tsinghua University Law Journal 14,17

³⁰⁴ Kuang Duan, ‘*Numerus Clausus* in German Law, French Law and Japanese law’ in Huixing Liang (ed) *Civil and Commercial Law Review Vol. 7* (Law Press China 1997) 262, 264; Zhibo Zhang, ‘Feasibility and Borderline of *Numerus Clausus* Relaxation’ (2017) 149 (01) Journal of Comparative Law 157, 161

³⁰⁵ Zaiquan Xie, *The Principles of Real Law* Vol. I (5th edn, New Study Publication, 2010) 54; Weixing Shen, *Numerus Clausus* and Party Autonomy: Two Keys to Understand Property Law, (2013) 5 (113) Law and Social Development 134, 139

³⁰⁶ Shen (n 305) 138

In comparison with the application of ‘soft’ *numerus clausus* in Germany, Chinese ‘soft’ *numerus clausus* is merely proposed by the academic circle. From the legislation point of view, this standpoint cannot substitute the ‘hard’ *numerus clausus* at all. Chinese law is a good example as illustrated below.

In China, the Property Law was adopted in 2007 after the Standing Committee of China’s National People’s Congress scrutinized it for the seventh time.³⁰⁷ In the course of discussion about the Property Law, affirmation, negation and compromise of *numerus clausus* arose in a fierce debate. Before the submission of the final draft, Article 5 of the draft Property Law still provided that ‘the types and contents of real rights shall be stipulated by law; *without the relevant provision, if the right is in line with the feature of property law, it can be regarded as the property right.*’ (emphasis added).³⁰⁸ The second half of the provision was deemed to be subject to party autonomy. But as it was eventually finalised, Article 5 merely kept the first half of the provision which is regarded as the strict or ‘hard’ *numerus clausus*. The argument was won by the conservatives in the 2007 legislation.

Subsequently, during the drafting of the General Rules of the Civil Law of P.R.C. 2017, many scholars expected to correct the conservative proposition on the ‘hard’ *numerus clausus*. They did not suggest providing the principle of *numerus clausus* in order to leave the feasibility of party autonomy.³⁰⁹ Unfortunately, the conservatives prevailed again. While the General Rules of the Civil Law of P.R.C. was issued in 2017 after being scrutinized three times, the principle of *numerus clausus* replicated the content of Property Law 2007. No ‘soft’ *numerus clausus* is recognised. However, the positive aspect is that currently, the draft of the Division of the Civil Law is under way in China. In order to diminish the impact of *numerus clausus*, a distinguished expert in China has

³⁰⁷ In accordance with Legislation Law of P.R.C. (2015 Amendment), Article 7 states that ‘National People’s Congress and its Standing Committee shall exercise the legislative power of the state’.

³⁰⁸ Huixing Liang, ‘Legal Issues on the Draft of Property Law (the Sixth version)’ (2007) 89 (01) Journal of Comparative Law1, 3-4

³⁰⁹ Lixin Yang, ‘Embracing the Quasi-Numerus Clausus within the Bill’ (2017) 11 (2) Tsinghua University Law Journal14, 23

submitted a proposal to take this opportunity to clarify and extend the application of this principle.³¹⁰ Moreover, the proposal has received wide support in academic circles.³¹¹

According to the present author's observation, there is still debate over whether the principle of *numerus clausus* should be abolished; even so, its power has been challenged. There is no denying that some jurisdictions, such as China and Japan have not provided a broad explanation of *numerus clausus* so far. But the life of the law is dependent on the demands of reality. When the parties' mutual agreement extends the content of the security interest, in legal practice, people normally rely on the legal loophole to make the extension valid. For example, when the definition and concept of *numerus clausus* in legislation is not sufficiently clear, the parties are entitled to contend that without a provision to the contrary, *numerus clausus* can be regarded as a valid right if the right of a security clause is consistent with the features of security interests.

In conclusion, in the face of an inevitable tendency, unless the legislation is extremely plain, strictly speaking, it is possible to oppose *numerus clausus*. Furthermore, it is reasonable to limit the application of *numerus clausus*.

4.2.2 Feasibility of a Contractual Solution

Whereas the foregoing section seeks to explore the development of *numerus clausus*, this section probes into the feasibility of a contractual solution, as far as the shipowner's security is concerned. In a broad sense, the sub-freight security itself may constitute the contractual solution to protect the shipowner, although there is no non-possessory lien in civil law jurisdictions. In the system of security interests in civil law, the contractual security always stands, for example, the creation of a mortgage or a pledge is derived from the contracting parties' agreement. It means that a creditor and a debtor may enter

³¹⁰ Ibid at 26-27

³¹¹ Fangjun Zheng, 'Reasonability of Soft Numerus Clausus' (2007) 4 Journal of Guangdong University of Technology (Social Sciences) 57, 57

into a security agreement or insert a security clause into a contract to create a right of mortgage or pledge. The difference between them is that whether the debtor is still entitled to possess the secured property. In a right of mortgage, the debtor still possesses the secured property while in a right of pledge, the possession of the secured property should be transferred to the creditor. It is generally accepted that the sub-freight security amounts to the pledge. Its creation is based on the contracting parties' agreement. But whether this contractual security is valid against the third party is dependent on the legislation.

In a narrow sense, a contractual solution in civil law refers to the question of whether the contracting parties are entitled to enlarge the scope of the application of the security when the legislation does not expressly stipulate the relevant right.

In a sophisticated domain such as the shipping industry, in order to keep up with the development of international trade, civil law scholars suggest the adoption of special regulations regarding security in specified business fields, promoting the concept of a special security. In continental European jurisdictions, the range of security rights has gradually expanded and the increase in contractual devices combined with title-based security rights facilitates the recognition of certain security rights.³¹² That is why a non-possessory lien over freight in charterparties, as a non-traditional security has been incorporated into the German Commercial Code.³¹³ Moreover, German law has developed several forms of security rights outside legislation by utilising judge-made law.³¹⁴

³¹² Eva-Maria Kieninger, 'Evaluation: a common core? Convergences, Subsisting Differences and Possible Way for Harmonisation' in Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Oxford University Press 2004) 649, 654

³¹³ German Commercial Code, Chapter 3 'Charter Contracts for Ships', Subchapter 2 of 'Time Charter', s566 (2)

³¹⁴ Ulrich Drobnig, 'Is Article 9 of the Uniform Commercial Code exportable? A German View' in Jacob S. Ziegel and William F Foster (eds), *Aspects of Comparative Commercial Law: Sales, Consumer Credit, and Secured Transactions* (L Oceana Publications 1969) 69; Andreas Rahmatian, 'A Comparison of German Moveable Property Law and English Personal Property Law' (2010) 3(1) *Journal of Comparative Law* 197, 199; Moritz Brinkmann, 'Security Rights and Law Reform in Continental Europe:

As mentioned above, a misunderstood proposition is that *numerus clausus* and party autonomy are fierce competitors. Following this rationale, when *numerus clausus* is widely regarded as the fundamental principle in the law of property, there is no opportunity to argue that party autonomy is in existence. However, this rationale by its very nature is not in line with the foundation of private law. Both the law of contract and the law of property are constituent parts of private law; as well, there is no doubt that party autonomy is the cornerstone of private law. More specifically, the development of private law is attributed to party autonomy. To trace back to the French revolution, the purpose of the creation of *numerus clausus* is to limit party autonomy rather than abolishing the force of party autonomy.³¹⁵ The development of the modern law of moveable property security is on the basis of party autonomy.³¹⁶ Therefore, there should be no theoretical barrier to applying the contractual solution to protect the shipowner's cargo security under modern secured transactions law. The only barrier, in this author's opinion, is derived from the perception of the scholars and lawmakers, and from the legal framework and policy consideration in a jurisdiction. Therefore, this author argues that a contractual solution arising from the principle of party autonomy is feasible in civil law.

4.3 Closing Remarks

In comparison with common law, the principle of property law, namely *numerus clausus* generates strong influence on the protection and legal effect of shipowner's security. Traditionally, legislation only determined to what extent the shipowner's security should be protected and secured transactions law does not leave autonomy to

The German Perspective' (Security Rights and the European Insolvency Regulation Conference, London, May 2015)

³¹⁵ Shaokun Fang and Hongping Wang, 'On the Dialectic Relationship between Party Autonomy and *Numerus Clausus*' (2005) 5 Law Science Magazine 11,12; Vincent Sagaert, 'Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law' in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 120; Weixing Shen, *Numerus Clausus* and Party Autonomy: Two Keys to Understand Property Law, (2013) 5 (113) Law and Social Development 134, 142

³¹⁶ Zaiquan Xie, 'Development and Change of the System of Security Interests' (2019) 1 The Jurist 36, 55

contracting parties. The development of secured transactions law has led to a gradual weakening of the principle of *numerus clausus*. The weakening of a strict ordering of property rights has also given cause to shipping parties to adopt contractual devices to reflect better their security interests.

5 Conclusion

In this chapter it has been pointed out that with regard to the shipowner's security, two major legal phenomena, namely, property and contract are involved. While the principle of party autonomy reigns supreme in the law of contract, its limitations and *numerus clausus* under property law, impact on the shipowner's protection and legal effect. From secured transactions law perspective, it is indisputable that the applicable principles of in the two legal systems arise in distinctively different ways. Even so, what the two legal systems have in common is that their security rights are intended to have a stronger effect on third parties than contractual rights. Furthermore, stronger effect cannot be simply relied on through contractual rights because such rights can only bind parties to a contract and not third parties. Behind the security clause, there is an 'invisible legal hand' that must play a crucial role in protecting the shipowner against third parties. This may be a security right derived from operation of law rather than from a contract,³¹⁷ or it may be the universal effect of the security right subject to requirements of registration in secured transactions law which in effect is tantamount to giving notice to the public. In this vein, the shipowner's security right may extend to actions against third parties. Under multiple charterparties, this is the crucial basis that contributes to the shipowner exercising his security rights against sub-charterers, bill of lading holders or even liquidators.

Against this backdrop, modern secured transactions law can be the basis of a combined solution to protect the shipowner. More specifically, combining a contractual solution based on party autonomy with a legal solution based on the limitation of party

³¹⁷ *Halsbury's Law of England* (6th edn, 2016) Vol 68, para 802

autonomy and *numerus clausus* constitutes an approach to protect the shipowner and to achieve the legal effect of shipowner's security. However, whether combining the contractual solution with the legislative solution affords effective protection to a shipowner, or, alternatively, whether the use of a legislative solution is reasonable in the chartering industry, will be explored in the next two chapters. In other words, this chapter demonstrates simply that principles of secured transactions law, namely party autonomy and *numerus clausus*, can impact on the protection and legal effect of shipowner's security. However, whether this influence should exist and to what extent this is influence, are questions dealt with in the next two chapters. It may be argued in addition that, in order to achieve the protection for the shipowner, the clarification of the legal nature of shipowner's security plays a crucial role. This is because the absence of an exact nature directly impacts on the scope and degree of protection and of legal effect. The forthcoming chapters will therefore mainly concentrate on the legal nature and the corresponding legal effect of shipowner's security.

Chapter Four: The Legal Nature and Effect of Shipowner's Cargo Security under Multiple Charterparties

1 Introduction

In the previous chapter, it was demonstrated that principles of secured transactions law, namely party autonomy and *numerus clausus* can impact on the protection and legal effect of shipowner's security. The objective of this chapter is to examine to what extent the legal nature and effect of a shipowner and disponent shipowner's cargo security should be influenced by modern secured transactions law.

In the shipping industry, the nature of the shipowner's cargo security appears to be unquestionable, given that it is generally accepted to be a legal possessory security. Unlike a pure contractual security, the creation of cargo security is not depended on mutual agreement between the shipowner and the charterer. If only the condition precedent is satisfied, including possession of the cargo and the debt is due, the law will give the shipowner a security interest on the cargo in both legal systems.³¹⁸ In this context, the legal protection to the shipowner is inevitable. This situation is different from the shipowner's sub-freight security and other types of security interests including the mortgage, pledge and charge, because other security interests are created through contractual terms. Certainly, with regard to the scope of the application of the shipowner's cargo security in common law, the contracting parties have a sufficient right to negotiate the details of the cargo security, while in civil law the decline of *numerus clausus* has also driven the feasibility of parties' negotiation beyond the legislation.

³¹⁸ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)92; in civil law, such as Chinese Maritime Code, Article 87; German Commercial Code, Section 566; Dutch Civil Code, Article 8:954; Japanese Maritime Code, Article 757

In this context, as far as the shipowner's cargo security is concerned, the interrelation between the legal and the contractual solution might be described as a combined product of primary and secondary security mechanisms. The legal cargo security plays a primary role in protecting the shipowner while the contractual cargo security plays a secondary role in strengthening the protection of the shipowner.

From the perspective of the origin of the shipowner's cargo security, this interrelation is inevitable, because traditionally the shipowner must possess the charterer's cargo during the performance of the charterparty. In response to the charterer's default, the usage of trade and the law grant the shipowner the legal security on the cargo. However, in the modern chartering industry, a single charterparty model has been replaced by a string of charterparties, namely multiple charterparties. A vessel may involve multiple charterparties, including bareboat, time and voyage charterparties.³¹⁹ In this connection, the different parties to multiple charterparties inevitably interlink with the cargo on the same vessel.

A question arises as to whether the legal cargo security may contribute all creditors including a shipowner, a disponent shipowner and sub-disponent shipowners under multiple charterparties to claiming against the debtor. After all, the condition precedent of the legal cargo security for the creditor is to possess the cargo physically. However, it is obvious that not all creditors may possess the cargo physically and the condition of the legal possessory security cannot be satisfied. For this reason, the legal cargo security is untenable unless the legislation persists in granting a shipowner a legal right. Accordingly, the objective of this chapter is first to examine whether and how the shipowner's legal cargo security under multiple charterparties is still tenable; if the legal solution cannot sufficiently protect the shipowner, whether and how the

³¹⁹ Lars Gorton and others, *Shipbroking and Chartering Practice* (7th edn, Informa 2009) 126

contractual solution may play an important role in multiple charterparties. Nevertheless, prior to addressing this objective, it is helpful to look at the history and nature of the shipowner's cargo security.

2. Overview of Shipowner's Legal Security on the Cargo³²⁰

With regard to the formation and evolution of a shipowner's security on cargo in a charterparty, it might be divided into two stages: pre-standard forms and post-standard forms. As mentioned in the introductory chapter, Section 2.2, the charterparty is a commercial device of ancient vintage and the expression is derived from the Latin term *carta partita* literally meaning 'divided instrument'. The instrument so-called was written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other (hence the term 'indenture'). Whereas the term 'charterparty' was first used in 1539, the concept of a contract between a shipowner and a charterer for the use of a ship had already been in existence since the time of Code of Hammurabi.³²¹ While the Hammurabian Code did not reflect the notion of the charterparty as it evolved in subsequent times, it is notable that some 2000 years later, the Rhodian Sea Law recognised by the Byzantine Empire provided the legal framework for use and hire of a vessel for carriage of goods by sea.³²²

In modern time, the term 'charterparty' is used to describe a particular kind of shipping document,³²³ which refers to a standard form of chartering. The standard charterparty form came into use with the advent and development of the chartering industry. Even

³²⁰ There are many forms of legal securities which are created by operation of law in common law. There are five main categories: 'the lien, the statutory charge, the equitable right of set-off, the equitable right to trace and a group of what may be conveniently termed procedural securities'; Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 689

³²¹ Evidence of this is found in the Babylonian Code of Hammurabi; see Chapter 1, Section 2.2, fn 31

³²² William Tetley, *Maritime Liens and Claims* (2nd edn, International Shipping Publications 1998) 7-11; Xiaobo Wang, *A Study of The Rhodian Sea-Law* (China University of Political Science and Law Press 2011) 1 and 103.

³²³ Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 5

though the word ‘charterparty’ can be traced back to the sixteenth century, the chartering industry did not appear and perception of the two parties, namely, the shipowner and the charterer, was absent. In the early period, the charterparty merely referred to the contract, but latterly, it acquired the meaning of a standard charterparty form. This section will be divided into two parts based on the different period of a charterparty to examine the creation and development of the legal possessory security.

2.1 Pre-standard Forms Era of Legal Cargo Security

All relevant literature stresses that a shipowner must continuously possess the cargo physically to assert his security rights. Physical possession is the essential foundation of the right of cargo security. However, the origin of this foundation does not seem to have been explored.

In reviewing the English cases, as far as the element of possession is concerned, the old *Hostler’s* case of 1605 is probably the earliest case to consider the creditor’s right to retain the property in question, but without any right to sell it.³²⁴ Approximately 100 years later, the notion of a creditor’s right to retain the property in question was extended to the sea. In *Hartfort v Jones*³²⁵, Lord Raymond ruled in favor of the defendant who had salvaged the vessel and retained the goods until the plaintiff (claimant) paid salvage.³²⁶ Subsequently, in *Skinner v Upshaw*³²⁷, the court held that ‘a (common)

³²⁴ In the *Hostler* case, Popham CJ held that ‘[I]f a man bring an horse to an inn, and he leave him in the stable, without any special agreement to pay, the innkeeper is not bound to deliver the horse until the owner has paid his charges, but is justified in detaining him for his food and keeping; and when the horse has eaten as much as he is worth, the innkeeper, at a fair valuation may sell him, and the sale will be good at law. But in this case, though the horse had eaten double his value, the innkeeper could not sell him; for he had agreed for the rate of sixpence per day and night, and must abide by his agreement’; Basil Montagu, *A Summary of The Law of The Lien* (Portugal Street, Lincoln’s Inn 1821) 2 in Appendix of Cases

³²⁵ (1699) 1 *Ld Raym* 393

³²⁶ *Ibid*; in this case, after a vessel caught fire, the defendants on board risked their lives to save the ship after which they detained the cargo on the vessel pending payment of salvage; Basil Montagu, *A Summary of The Law of The Lien* (Portugal Street, Lincoln’s Inn 1821) 4 in Appendix of Cases

³²⁷ (1702) 92 ER 3

carrier may retain the goods for his hire.’³²⁸ These a series of cases did not, however, identify the concept of the possessory lien as a security. Although during the period from the end of the seventeenth to the early eighteenth century, the concept of the possessory lien as security began to sprout, it had not yet been fully formed. At that time, no comprehensive theory existed to allow retention of the cargo as a condition precedent for the possessory lien to operate as a security. When the creditor claimed against the debtor, he simply went into possession of the debtor’s property and detained the property until the debt was paid. The court recognised and accepted this method adopted by the creditor to realise his claim.

As discussed in Chapter 2, the concept of the lien as a security mechanism is derived from *lex mercatoria*. In the earliest English case *Green v Farmer*³²⁹, Lord Mansfield also concluded that the usage of trade was the way to create the lien as a security.³³⁰ The condition precedent of possession of property as a rationale is primarily derived from commercial convenience and its use as a self-help remedy. Usage of trade confirmed this condition precedent, which in modern times, the courts recognised and transformed it into a form of legal security. Why physical possession is essential for the shipowner to exercise his cargo security is steeped in shipping history with which the role of the shipowner is intertwined.

Historically, the shipping industry was, and still is, an inextricable part of seaborne trade. However, seaborne trade and the chartering industry did not appear simultaneously on the horizon. More specifically, the commercial shipowner as we know today, did not emerged until the later eighteenth century. Prior to that, usually the

³²⁸ *Skinner v Upshaw* (1702) 92 ER 3; The fact was that the plaintiff brought an action of trover against the defendant being a common carrier whereas the defendant did not deliver goods to him. But the defendant claimed that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused to pay for the hire.

³²⁹ (1768) 98 ER154

³³⁰ *Ibid* at 158 (Lord Mansfield)

trader invested in ships to carry his own cargoes. The trader was thus a kind of investor and such investors comprised widows, gentlemen, farmers and colliery owners who bought one or more of sixty-four shares of the vessel. The ultimate purpose of this device was to spread the risk of a maritime adventure among several investors. If the cargo was delivered to the destination safely, the investors would gain a return on their investment and turn a profit as well.³³¹ Notably, the notion of the corporate shipowner as we know today, was virtually unknown. The early ‘shipowner’ who were shareholders of a ship was undertook all operations relating to their ship including manning, technical and commercial operations, and use of the ship for trade.³³²

From the late eighteenth century, traders and shipowners gradually emerged as separate sectors. In 1786, when the Shipping and Navigation Act was enacted in Britain, the appellation ‘shipowner’ became formal and official.

The shipowner then also came to be known as carrier who transporting cargo against payment of freight.³³³ From thereon, the shipowner was no longer the owner of the cargo on the ship. The aim of the shipowner, as it pertains up to present times, is to earn freight rather than trading his own cargo from one port to another as he did previously. The role of the shipowner at the time was relatively clear, the shipowner contracted with the charterer to make his ship available for a single voyage or for an agreed period of time to transport the latter’s cargo. In this context, it was not necessary for the shipowner to consider whether he physically possessed the cargo. In the event of a dispute between the shipowner and the charterer, the shipowner, being the physical

³³¹ Simon Ville, *English Shipowning During the Industrial Revolution: Michael Henly and Son, London Shipowners 1770-1830* (Manchester University Press, 1987) 2-3

³³² Thomas J Pagonis, *Chartering Practice Handbook* (5th edn, Thomas Pagonis 2009) 8

³³³ C Ernest Fayle, ‘shipowning and Marine Insurance’ in C Northcote Parkinson (ed), *The Trade Winds: A Study of British Overseas Trade during the French Wars, 1793-1815* (Routledge 1948)25; Simon Ville, *English Shipowning During the Industrial Revolution: Michael Henly and Son, London Shipowners 1770-1830* (Manchester University Press, 1987) 9

carrier would exercise his traditional right to possess and retain the cargo. Physical possession is an essential element of the shipowner's right to exercise his cargo security because if the shipowner parts with the cargo voluntarily, normally he would be giving up the remedial mechanism afforded by usage of trade. In such situation he would be depriving himself of the legal protection he would have otherwise enjoyed.

The historical development of ownership as known today, verifies the rationale for possession of property as a condition precedent for the application of the shipowner's cargo security. In order for the shipowner to be able to claim the freight or hire due, he retained the cargo which afforded him a security for his claim. In view of the shipowner possessing the cargo and the charterer being indebted to the shipowner for the freight or hire, it is not necessary for both parties to insert a security clause into their contract. The law may directly grant the shipowner the legal right to detain the cargo until the freight or hire is paid. It is the oldest and best way to give notice to the world at large that the shipowner,³³⁴ regardless of whether he is the cargo owner, has a right to the cargo by virtue of the debt owed to him.

Possession is also the crucial difference between the shipowner's cargo security and the sub-freight security. Whereas cargo security gives legal protection to the shipowner, protection of the entity who is owed sub-freights only stems from a contractual arrangement because the shipowner cannot directly possess and detain the sub-freights. The law cannot grant the shipowner a right on the sub-freights without the contractual clause.

However, along with the development of the chartering industry, the role of the shipowner has become increasingly complex characterized by the fact that he no longer

³³⁴ Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 718

manages the vessel himself; this function is assigned to a third party.³³⁵ In this situation, whether the shipowner's physical possession on the cargo is still tenable and whether the legal security is still an effective approach to protect the shipowner will depend on the change of the relationship between the shipowner and the charterer. In the next section, the different standard forms will reveal some changes.

2.2 Post-standard Form Era

2.2.1 Introduction

At the beginning of the twentieth century, along with the growth of maritime transport the Baltic and White Sea Conference was established in Denmark in 1905.³³⁶ The first President of BIMCO proposed in 1905 that 'uniform terms of charter' be drafted.³³⁷ In the same year, the first standard time charterparty form, namely, the BALTIME was issued. In subsequent years, the standard forms of charterparties issued by BIMCO have been accepted and employed worldwide. For example, the earliest versions of the three standard forms issued in 1922 (GENCON),³³⁸ 1909 (BALTIME)³³⁹ and 1974 (BARECON) respectively, are regarded as highly successful instruments and have achieved widespread acceptance.³⁴⁰ These standard forms have reached the '3Cs' objectives of BIMCO which are 'clarity, consistency and certainty'.³⁴¹ A lien, as a security clause can be found from the earliest standard form. It can be seen that a shipowner's right on the cargo has been confirmed expressly, although the different versions of the standard charterparty forms provide distinctive clauses. For example,

³³⁵ Thomas J Pagonis, *Chartering Practice Handbook* (5th edn, Thomas Pagonis 2009) 10

³³⁶ The Baltic and White Sea Conference was to become the Baltic and International Maritime Council (BIMCO) later on.

³³⁷ Baris Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (Informa Law from Routledge 2014)

³³⁸ Paul Todd, *Principles of Carriage of Goods by Sea* (Routledge 2015) 1.10.1

³³⁹ Grant Hunter, 'Standard Forms- the BIMCO Experience' in Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008)8

³⁴⁰ BULLETIN 2013, Volume 18, 'A Century of BIMCO Documents' 6; apart from these three well-known standard forms, many well-known forms are issued by BIMCO independently or cooperatively such as NYPE, GASTIME and INTERTANKVOY.

³⁴¹ Grant Hunter, 'Standard Forms- the BIMCO Experience' in Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008)2

Article 8 of GENCON 1994 clarifies the scope of the debts due;³⁴² by contrast, Article 17 of BALTIME 1989/2001 simply states ‘for all claims.’³⁴³

Standard forms do not only provide precise provisions governing charterparty contracts in the chartering industry, but also clarify, under certain circumstances, the nature of charterparties. The nature of a charterparty is derived from the parties’ rights and obligations rather than the extent to which they have been exercised in fact. Most importantly, the nature of a charterparty impacts on the nature of the shipowner’s cargo security.

Although a bareboat charterparty is not the object matter of this thesis, it provides an understanding of the notion of possessory security because it is based on transfer of possession of the ship from the owner to the charterer. In the BIMCO Standard Bareboat Charter (hereinafter referred to as ‘BARECON’) 2001, for example, it is provided that the vessel shall be delivered by the shipowner and taken over by the charterer.³⁴⁴ More specifically, the bareboat charterparty is regarded as a lease, which in property law means passing of possession from the lessor to the lessee, and that is exactly what happens in law and practice in a bareboat charterparty.³⁴⁵ Thus, in a bareboat charterparty, the shipowner having leased his vessel out to the charterer, surrenders his right of possession or control over the cargo in favour of the charterer. For this reason, the shipowner’s cargo security in the bareboat charterparty is regarded as an equitable charge.³⁴⁶

³⁴² Article 8 of GENCON (1994) is provided that ‘[T]he Owners shall have a lien on the cargo... for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party Including costs of recovering same’

³⁴³ Article 17 of BALTIME (1989/2001) is provided that ‘[T]he Owners shall have a lien upon all cargoes ...belonging to the time-charterers and any bill of lading freight for all claims under this Charter Party...’.

³⁴⁴ BARECON 2001, provision 3 (1); see also BARECON 1989, provision 2

³⁴⁵ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para1.1-1.2; Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para 1.1

³⁴⁶ *Ellerman Lines Ltd. v Lancaster Maritime Co. Ltd. and Others* [1980] 2 Lloyd’s Rep 497, 500-501; Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para 18.2

2.2.2 The Standard Cargo Lien Clause as a Combination of Legally-implied Security and Contractual Security in Secured Transactions Law

As far as the voyage and time charterparties are concerned, unlike the bareboat charterparty, the relationship between the shipowner and the charterer does not appear as a fundamental change in comparison with the pre-standard form era. The shipowner still provides the vessel for a voyage or a period of time to the charterer, but the possession of the chartered vessel remains with the shipowner.³⁴⁷ Both voyage and time charterparties are characteristic of service contracts. In this situation, it is implied that the shipowner actually possesses the cargo on the vessel while exercising his remedy. Therefore, regardless of whether the lien clause is incorporated into the standard form, the shipowner is entitled to exercise the legal possessory security. This is the position at common law. However, it should be noted that this paragraph simply refers to the view of the common law; the civil law position is discussed in Section 3.

The interrelationship between the implied legal security and the contractual security might be described as a combined product of primary and secondary security mechanisms. The legal cargo security plays a primary role in protecting the shipowner while the contractual cargo security plays a secondary role to strengthen the protection afforded to the shipowner. More specifically, in a number of leading English cases of the nineteenth century, the shipowner's cargo security has been separated into two categories, namely the common law lien and contractual lien.³⁴⁸ The common law lien involves the right to claim freight, general average contributions, specific expenses with respect to the cargo during the voyage, while the contractual lien is an express lien which arises from debts, such as demurrage, dead freight, port charges and hires.³⁴⁹

³⁴⁷ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para1.1-1.2; Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para 1.1

³⁴⁸ *Hingston v Wendt* [1876] 1 QBD 367; *The Hibernian* [1907] P 277 (CA); David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para17.13; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 459, it is stated that 'By common law he has a lien for: (i) freight; (ii) general average contributions; (iii) expenses incurred by the shipowners or master in protecting and preserving the goods'.

³⁴⁹ *Rederiactieselskabet 'Superior' v Dewar & Webb* [1909] 1 KB 948; *Gardner v Trechmann* [1984] 15

Thus, the standard form lien clause has expended the scope of the implied lien to protect the shipowner.

2.2.3 Underlying Issue in Multiple Charterparties

In a single charterparty, regardless of the type, the nature of the shipowner's cargo security is sufficiently clear. Both voyage and time charterparty cargo securities are of a possessory nature, and the possessory security operates together with the contractual clause to protect the shipowner. But in the modern chartering industry, multiple charterparties are not a new thing. A shipowner may grant to a time charterer the responsibility of managing the vessel for a fixed period. During that period, the time charterer may sub-charter the vessel to another time charterer or a voyage charterer. When the shipping industry is in a good commercial position, such as it was in 2007 and 2008, a shipowner through the mechanism of a bareboat or time charter earned earnings from sub-charterparties which give him a high return. In such instances, multiple charterparties of various kinds may be in operation.

Multiple charterparties stemming from a head charterparty, which may or may not be a bareboat charterparty, where the head charterer is a disponent shipowner, are usually back to back contracts. In a single charterparty, the shipowner is the possessor of the cargo, but in the case of multiple charterparties where the shipowner invokes the cargo security clause to claim the right, the question arises as to who is the possessor of the cargo. A further question arises in such a situation as to whether each charterer who stands in the position of a disponent shipowner *vis-à-vis* a sub-charterer has the right to invoke the cargo security clause in the standard form. If that is to be answered in the affirmative, perhaps the shipowner's security clause should be redrafted. The notion of security on the movable property has developed with the fundamental purpose of

QBD 154; *Faith v East India Co* (1821) 4 B & Ald 630; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 463-464

ensuring the performance of the obligation rather than creating an unrealistic remedial clause. The issues arise as to whether the disponent shipowner's cargo security remains as a possessory lien; and whether the legal nature of the disponent shipowner's cargo security can be construed as a new type of security in the law of secured transactions.

3 Shipowner's Cargo Security Under Multiple Charterparties at Common Law

3.1 Deficiency of the Legal Protection of the Shipowner in Secured Transactions Law

3.1.1 Importance of Possession

The cargo security as legal protection for the shipowner is by operation of law. It grants the shipowner a security provided he possesses the cargo, subject to other conditions such as performance of his obligation which makes him a creditor.³⁵⁰ As mentioned earlier, possession is, in essence, a self-help remedy which operates as a condition precedent for the exercise by the shipowner of legal protection. In this context, there is an interaction between the possession of property and the achievement of the legal protection. In other words, in order for the shipowner to exercise his cargo security, he must be in possession³⁵¹ and 'the possession on which retention or lien depends must be actual, legitimate, and subsisting at the time where the security is claimed.'³⁵² Furthermore, '[A]s a lien is a right to retain possession, it follows of course that, where there is no possession, there can be no lien.'³⁵³ On the basis of these classic theories, a line of cases stresses the significance of physical possession and its retention.³⁵⁴

³⁵⁰ In terms of the conditions, there are four aspects collected in *The Law of Security and Title-Based Financing*; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)143

³⁵¹ *Lickbarrow v Mason* 6 East 27 (D Buller J)--Liens at law only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone; Leonard A Jones, *A Treatise, of The Law of Liens, At Common Law, By Statute, Equitable, and Maritime*, Vol I (2nd edn, Houghton, Mifflin 1894) 4

³⁵² George Joseph Bell, Commentaries on The Laws of Scotland and on The Principles of Mercantile Jurisprudence Vol. II (5th edn, William Blackwood 1825) 91

³⁵³ George Morly Dowdeswell (ed), *A Compendium of Mercantile Law by John William Smith* (4th edn, William Benning & Co., Law Booksellers 1848)512

³⁵⁴ 'He (the shipowner) must not give up possession of the cargo to a claimant nor waive his right of

For instance, a time charterparty which is head charterparty and which grants the shipowner a security on the cargo is a possessory security. Subsequently, a time charterer under this charterparty acting as a disponent shipowner may charter out the vessel on a voyage charterparty. In accordance with that charterparty, the disponent shipowner should be able to enjoy the cargo security as well. However, that disponent shipowner's cargo security is not a physical possessory security, compared with the shipowner's security right, because the disponent shipowner does not possess the vessel. A time charterparty, plus one voyage charterparty is the simplest model. In practice, it is quite common for the vessel to be chartered under two additional charterparties. Furthermore, there could be a non-vessel common carrier rather than the disponent shipowner, who issues a bill of lading so that this disponent shipowner is not entitled to exercise the carrier's rights on the cargo.

In all such cases, a vessel may be used for multiple charterparties. In a typical situation, a time charterparty as a head charterparty grants a security on the cargo which is possessory in nature and benefits the owner. The time charterer may then sub-charter out under a voyage charterparty which may provide the voyage charterer cargo security as well. In such case, whether the time charterer will be considered to be in physical possession of the cargo is one question; the other being whether he will be considered to have a lien on the cargo for failure of the voyage charterer to pay him freight. The tentative conclusion is that the disponent shipowner under multiple charterparties enjoying a possessory security on the cargo is merely utopian unless the implication of the possession in this possessory security clause is construed in a broad sense.

lien' in *Tamvaco v Simpson* [1866] LR a CP 363; 'he (the shipowner) must deny possession to someone who wants it' in *The Mihailios Xilas* [1978] 2 Lloyd's Rep 186; Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014)para17.28

3.1.2 Non-possession and Constructive Possession

As mentioned above, possession in this context is restricted to be ‘physical’ possession. Regardless of the numbers of charterparties involved in multiple charterparties situation, there is only one lien holder with respect to the lien on cargo under a lien clause, namely the cargo security clause. In reality, the shipowner who physically possesses the cargo has no intention to exercise this security; however, the charterer of the head charterparty may attempt to employ it.

The exception would be where legislation may provide for the security of such charterer without his physical possession. In such case, the non-possessory security may be regarded as the legal security, to protect the disponent shipowner, or it may be contended that the charterer without physical possession has constructive possession.

In the current system of security interests, it is not feasible for a non-possessory security interest to be created other than through legislation. If perchance legislation is enacted granting one party a right, it may detrimentally affect the free market. This would be the basis for requiring contractual security to be subject to registration assuming it will be enforceable against a third party.

It is generally recognised, at least in common law, that there is physical possession by the creditor and there is constructive possession, in this case vested in a charterer in a multiple charterparty situation.³⁵⁵ In theory, constructive possession does not impact on the exercise of the legal security. However, constructive possession at large refers to the possession of the documents of title.³⁵⁶ In the chartering industry, the document, namely, a bill of lading or a similar instrument will be held by the charterer, shipper or

³⁵⁵ Richard Aikens, Richard Lord and Michael Bools, *Bill of Lading* (2nd edn, Informa Law from Routledge 2015) 9.42; Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 719; in addition, symbolic possession is regarded as one type of possession

³⁵⁶ McKendrick (n 355) at 718; Duncan Sheehan, *The Principle of Personal Property Law* (2nd edn, Hart Publication 2017) 269

a third party rather than the shipowner. As such, constructive possession in the present context is not rationalized. The most important reason should be that in the common law sense possession in a physical context is highlighted even if ‘constructive delivery’ being an exceptional rule is accepted and recognised in some instances.³⁵⁷ Normally, the application of ‘constructive delivery’ is to grant the owner at the end of a bailment to avoid forfeiture of the reclaimer’s rights.³⁵⁸ Accordingly, constructive possession is there simply in theory. This situation means that the exercise of the legal protection cannot depend on the constructive possession. In other words, the theory of constructive possession is no help to demonstrate that the disponent shipowner may possess the cargo by way of constructive possession.

3.1.3 Disponent Shipowner’s Bill of Lading and Right to Cargo

While legal protection cannot be afforded to a disponent shipowner in a charterparty through the mechanism of possession, in his capacity as a carrier issuing a bill of lading, the disponent shipowner can exercise a carrier’s lien over the cargo. In such a circumstance, the shipowner would be the entity in physical possession of the cargo in the capacity of a bailee where the disponent shipowner would be in the position of bailor.

For example, A as (shipper/charterer) enters into a voyage charter with B (disponent shipowner/ contractual carrier) and B issues a bill of lading to A. B time charters the vessel to C (real shipowner/ actual carrier). In such case, even though possession of the cargo is transferred from A to C without B having actual possession of the goods, an English court will consider that the shipment was by way of bailment to the disponent shipowner and sub-bailment to the shipowner.³⁵⁹ In other words, A is bailor, B is bailee

³⁵⁷ Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law Vol. II* (7th edn, Hart Publishing Ltd 2019)399

³⁵⁸ Ibid at 407

³⁵⁹ *The Starsin* [2003] 1 Lloyd’s Rep 571; Richard Aikens, Richard Lord and Michael Bools, *Bill of Lading* (2nd edn, Informa Law from Routledge 2015) 9.65

and C is sub-bailee. Alternatively, the relationship between A and B would be treated as a quasi-bailment. Where A directly transfers possession to C,³⁶⁰ B becomes a quasi-bailee.

Whereas the bailment and quasi-bailment characterizations may be regarded by some as being largely academic,³⁶¹ it is notable that the application of the bailment theory was confirmed by the Court of Appeal in *The Okehampton*³⁶². In that case, a sub-time charterer issued bills of lading in his own name but did not possess the cargo physically. The court held that the sub-time charterer had sufficient possessory interest in the cargo to sue the defendants for the bill of lading freight which (but for the negligence of those in charge of the defendants' vessel) they would have earned if the voyage had been completed. Hamilton LJ in justifying the grounds for this decision stated:

‘I think that it may be inferred as a matter of fact that the goods were in the possession of the (plaintiffs), the contracting carriers, performing their contract by means of a hired ship, so long as they were discharging their obligation with regard to the payment of hire; but the passage cited from Pollock and Wright on Possession in the Common Law, at p.166 par.4 is, I think quite sufficient authority for saying that even if the shipowners had possession so as to make them sub-bailees to (the plaintiffs), such bailment was revocable at pleasure, and there was no adverse right in the shipowners, so long as the time-hire was paid by (the head charterers). Accordingly, there was interest enough in the plaintiffs to entitle them to bring this action.’³⁶³

³⁶⁰ Norman Palmer, *Quasi-Bailment* (1988) LMCLQ 34

³⁶¹ Richard Aikens, Richard Lord and Michael Bools, *Bill of Lading* (2nd edn, Informa Law from Routledge 2015) 9.65, fn. 156

³⁶² [1913] P 173

³⁶³ Ibid at 182 (Hamilton LJ)

Two points were proposed in this decision. First, as long as the sub-time charterers were paying for hire, the cargo was in essence in their possession rather than in the possession of the shipowner; secondly, the shipowners were actually in possession of the cargo, but only as sub-bailees from the sub-time charterers; and that bailment was at will as long as the head time charterers were paying hire. Accordingly, the sub-time charterers had title to sue because they had an immediate right of possession from the party with actual possession. However, the learned judge did not adhere to the first point of which he was seemingly not convinced.

In the final analysis, the disponent shipowner in his capacity as carrier creates the relationship of bailment with the actual carrier/shipowner. Where the possession of the shipowner is for the interest of the disponent shipowner. Thus, there is no barrier to the disponent shipowner exercising his lien.

3.1.4 Closing Remarks

Again, the condition precedent for legal protection is that the shipowner (creditor) physically possesses the secured property so that his self-help remedy is feasible. Under multiple charterparties, the legal protection to the shipowner does not give rise to a fundamental impact because he is still the actual possessor of the cargo regardless of whether or not he is a contractual carrier. But with regard to the protection of the disponent shipowner, unless the disponent shipowner is the contractual carrier, the legal protection cannot play a role in the exercising of cargo security. It is demonstrated above that the disponent shipowner's cargo security is not a legal possessory security anymore because there is no reasonable ground to grant a creditor, who does not possess the cargo physically, a legal right against the other party. Therefore, the disponent shipowner's cargo security can only be regarded as a contractual right. But the nature of the contractual right is in question as to how this right protects the disponent shipowner.

3.2 Legal Effect of a Disponent Shipowner under Multiple Charterparties

Since quite some time, the classic textbooks, such as *Cooke's Voyage Charter and Coghlin's Time Charter* have given sufficient consideration to discussing the nature of the shipowner's cargo security. Authorities regarding its nature are considerable as well. But the research on the nature of the shipowner's cargo security is normally restricted to a single charterparty. Although multiple charterparties appear in the facts of case, courts have not paid adequate attention to the legal status of the disponent shipowner.

Incidentally, two recent cases touched the application of the disponent shipowner's cargo security. In this section, we will probe into how and whether the current judgments have provided reasonable protection to the disponent shipowner.

3.2.1 *The Clipper Monarch*:³⁶⁴ Disponent Shipowner Claims Independently

3.2.1.1 Case Study

In *The Clipper Monarch*,³⁶⁵ a sub-charterer, Silver Rock Investments (defendant) voyage chartered the vessel, *CLIPPER MONARCH*, but failed to make a payment of freight and demurrage due to a disponent shipowner, Castleton Commodities Shipping (CCS) (claimant) who time chartered from the superior disponent shipowner, Clipper Bunker who had a long-term charterparty with the shipowner, was the carrier under the bill of lading. CCS, in accordance with the voyage chartering lien clause providing that 'owners shall have a lien on the cargo for freight, deadfreight, demurrage and damages for detention', ordered the vessel to wait in international waters until Silver Rock paid the outstanding debt.

³⁶⁴ [2016] 1 Lloyd's Rep 1

³⁶⁵ Ibid

Silver Rock had bought cargoes from Grupo Minero who was the shipper under the bill of lading. The original buyer was Max Coal who was the consignee under the bill of lading as well.³⁶⁶

In this case, there were five contracts involved as follows:

- 1) a sale contract among a seller (shipper), Grupo Minero, a buyer (voyage charterer) Silver Rock, and an original buyer, Max Coal (see below);

Grupo Minero Sale Contract → Silver Rock Sub-sale Contract → Max Coal
 (Seller/ Shipper) (Buyer) (original buyer/consignee)

- 2) a head time charterparty between a shipowner (carrier) and a head time charterer (a superior disponent shipowner) Clipper Bunker;
- 3) a sub-time charterparty between a superior disponent shipowner, Clipper Bunker and a sub-time charterer (disponent shipowner) CCS;
- 4) a voyage charterparty between a disponent shipowner, CCS and a voyage charterer (buyer), Silver Rock; and

Shipowner T/C³⁶⁷ → Clipper Bunker sub-T/C → CCS V/C³⁶⁸ → Silver Rock
 (carrier) (superior disponent shipowner) (claimant) (defendant)

- 5) a contract of carriage evidenced by a bill of lading between a carrier (shipowner) and, a shipper (seller), Grupo Minero and a consignee (an original buyer), Max Coal.

Prior to the litigation, CCS brought arbitration proceedings against Silver Rock claiming freight under the voyage charterparty. Meanwhile, CCS brought another arbitration proceeding against the shipper, Grupo Minero, claiming an almost identical amount based on the assignment of the shipowner/carrier's right under the bill of lading.

³⁶⁶ There was no further information about Silver Rock's role in the transaction. Perhaps it was a freight forwarder. But its real position did not impact on the decision in this case; it is therefore not necessary to elaborate any further.

³⁶⁷ T/C refers to time charterparty.

³⁶⁸ V/C refers to voyage charterparty.

The two Arbitration Awards were given in favour of CCS. Subsequently, CCS asked for an order for sale of the cargo, because the voyage charterer, Silver Rock had failed to pay for the freight and other charges. Owing to the situation that there was some uncertainty as to whether the cargo was still owned by the shipper, Grupo Minero, or the buyer, Silver Rock, the question arose as to what kind of right CCS enjoyed in asking for an order for sale of the cargo, in particular, whether it was a lien over its voyage charterer's cargo. In terms of two possibilities, the English court held as follows:

'If, as was probable, the cargo was owned prior to sale by Grupo Minero, CCS relied on the voyage charter "lien" clause as incorporated into the bills of lading as a true possessory lien, CCS having taken an assignment of the rights of the carrier. If, however, the cargo was owned by Silver Rock, CCS relied on the voyage charter "lien" clause as giving it a right with similar effect to a possessory lien, namely a right to procure that the cargo be withheld from Silver Rock by directing the employment of the vessel in its capacity as time charterer.'³⁶⁹

The above statement is perhaps somewhat equivocal. The explanation below better clarifies the rationale given by the court for protecting the disponent shipowner's cargo security.

'CCS is the beneficiary of a lien conferred by the voyage charterparty as against Silver Rock, although in practice, it is well established that that lien would not entitle it to take possession of the cargo as such as it is a mere time charterer. Instead, it would have a similar but not identical right, which is to direct the vessel, effectively, not to unload the cargo. In truth this is what happened here.'³⁷⁰

³⁶⁹ *The Clipper Monarch* [2016] 1 Lloyd's Rep 1, 2

³⁷⁰ *Ibid* at 4

It can be seen that the court discriminated the different liens (security) based on CCS's different roles:

- 1) Prior to resale of cargo on board the vessel, the cargo was owned by the shipper Grupo Minero.³⁷¹ Under this circumstance, CCS relied on the voyage charterparty 'lien' clause as incorporated into the bills of lading as a true possessory lien, CCS having taken an assignment of the rights of the carrier; and
- 2) If the cargo was owned by Silver Rock, CCS, as the voyage disponent shipowner, claimed freight, dead freight, demurrage and other charges against the voyage charterer Silver Rock, relying on the voyage charterparty's lien (security) on the cargo.

The former situation was regarded as a true possessory lien, while the latter situation given that CCS the disponent shipowner, unlike the real shipowner, was not entitled to take possession of the cargo at all, the court did not hold that the nature of the disponent shipowner's right was a possessory lien. However, the court recognised that the disponent shipowner enjoyed the right of a 'lien' on the cargo, because under a time charterparty, this disponent shipowner was entitled to direct the vessel. The 'implied' meaning was to direct the real shipowner to assist the disponent shipowner to possess the cargo so that the effect was equivalent to exercising the right of the lien on the cargo.

In the author's opinion, the contribution of this decision contains the points stated below. First, the condition precedent of the legal security as to the possession of the cargo is unshakable. When this condition cannot be satisfied, the disponent shipowner has no right to exercise the legal cargo security; secondly, it is recognised that the disponent shipowner enjoys the contractual cargo security which is similar to the possessory cargo

³⁷¹ The detail of the fact was absent in the judgment. According to the international trade custom, the shipper may depend on 'the retention of right' clause before the buyer Silver Rock or the original buyer Max Coal. But it is arguable that CCS may take an assignment of the rights of carrier, because at common law lien, the lien is not a proper subject of assignment except that the lien-holder transfers the lien debt to the third party. See Leonard A Jones, *A Treatise, of The Law of Liens, At Common Law, By Statute, Equitable, and Maritime* Vol I (2nd edn, Houghton Mifflin 1894)678-680

lien. Therefore, the implied obligation of the real shipowner is to assist the exercising of the disponent shipowner's contractual cargo security. Thirdly, the complexity of the way the shipping industry operates in practice creates the alternative approach for the disponent shipowner to exercise the cargo security, as opposed to the chartering cargo security. For example, the shipowner assigns its right in the bill of lading to the disponent shipowner. Certainly, the second and third different approaches are based on the strategy of dispute resolution whereby CCS brought two arbitration proceedings against Silver Rock under the voyage charterparty and against Grupo Minero under the bill of lading. Nevertheless, the reason why CCS has to take the different approaches is that the disponent shipowner forfeits the legal right on the cargo under the voyage charterparty. If he seeks to exercise the right on the cargo, either he is still dependent on the contractual cargo security under the voyage charterparty, or he has to pursue the other legal relationship, as opposed to the relationship of the voyage charterparty. In the forthcoming two sections, the recognised two approaches to protect the disponent shipowner will be discussed.

3.2.1.2 Protection of Disponent Shipowner: Assignment of Debt Under a Shipowner's Bill of Lading

Although a bill of lading, in the traditional sense, is not regarded as the contract of carriage of goods by sea, but is only evidence of the contract³⁷² and it is stressed that the title of a disponent shipowner is derived from a time charterparty, in practice, the bill of lading could be deemed to be the contract between the shipowner (carrier) and the holder when the holder and this shipowner do not enter into a charterparty. In this context, the two forms of the contract of affreightment are embodied in the charterparty and the bill of lading respectively. Therefore, the disponent shipowner does not participate in the bill of lading contract in light of the original facts of the case, but the

³⁷² *Crooks v Allan* [1879] 5 OBD 38, 40; *Sewell v Brudick* [1884] 10 App Cas 74,105; John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010)129

law of assignment provides an opportunity to him to be party to the bill of lading contract.

More specifically, in this case, the shipowner initially had a right to receive freight from the shipper, Grupo Minero, under the bill of lading contract. He also had a possessory lien over the cargo, which entitled him to retain possession of the cargo until Grupo Minero paid them that freight. This is the first legal strand.

The second legal strand requires looking at multiple charterparties. Under multiple charterparties, the shipowner received hire from the head charterer, Clipper Bunker (the superior charterer above CCS in the chartering chain); and Clipper Bunker received hire from CCS under the sub-time charterparty, but those payments did not affect the shipowner's right to claim freight from Grupo Minero under the bill of lading contract unless the bill of lading stipulated something different. According to the current background, no contrary clause had been drafted.

Certainly, if the shipowner received bill of lading freight from Grupo Minero, he would not be able to keep it. Rather, he would have to account to Clipper Bunker.³⁷³ Similarly, Clipper Bunker, having received hire from CCS, would have to account to CCS for any bill of lading freight which he received from the shipowner.

In light of the above situation, the shipowner assigned the right to bill of lading freight to CCS directly in accordance with a statutory assignment under section 136 of the Law of Property Act 1925.³⁷⁴

³⁷³ *Wehner v Dene SS Co* [1905] 2 K B 92

³⁷⁴ Although the judgment did not mention this legislation, it should be evident.

An assignment under section 136 transfers the legal right, and ‘all legal and other remedies for the same’, to the assignee which means CCS acquired the shipowner’s legal right to claim bill of lading freight from Grupo Minero, and ‘all legal and other remedies’ which the shipowner would have been able to exercise in order to enforce payment of freight themselves. Those ‘legal and other remedies’ included the shipowner’s possessory lien over the cargo.

Apart from the Law of Property, the shipowner’s assignment is also supported by an old English case³⁷⁵ and a recent Australian authority.³⁷⁶ These two cases held that ‘it is possible for a lienholder to assign the benefit of a lien when assigning the underlying debt at the same time’.³⁷⁷ On the basis of these decisions, the arguable point is where the whole of the benefit of the contract giving rise to the debt is assigned, whether possession of property over which a lien is claimed is also transferred. In *The Clipper Monarch*³⁷⁸, the court did not provide a plain answer. However, based on the facts of the case, the court did not consider that possession of property was transferred.

The facts showed that the cargo was sold and delivered to the new buyers, pursuant to the order of the Court, and the proceeds of sale were paid to CCS’ solicitors. The Court order provided that CCS should have the same rights over those proceeds of sale as they had in respect of the cargo prior to the sale. After the cargo was sold with the permission of the Court, the secured property changed from goods to money. Correspondingly, CCS’ right assigned by the shipowner was transformed into an equitable charge over the proceeds of sale, which it could exercise by paying the money to itself.

³⁷⁵ *Bull v Faulkner* (1848) 2 De Gex & Smale 772, 64 E R 346

³⁷⁶ *Vered v Inscorp Holdings Ltd* (1993) 31 NSWLR 290 (NSW SC); *Halsbury’s Law of England* (6th edn, 2016) Vol 68, para 820

³⁷⁷ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)92

³⁷⁸ [2016] 1 Lloyd’s Rep 1

In this context, whether possession of property, along with the assignment of the debt, has been transferred to CCS does not matter. However, it matters if the cargo owner's other creditors appear. If the assignment of debt couples with the assignment of possession of property, no matter whether CCS possesses the cargo physically, for example, the shipowner, on behalf of CCS, possesses the cargo, CCS enjoys a security interest. It is possible for CCS to obtain the privileged right to obtain the money after the proceeds of sale. By contrast, if only the assignment of the benefit of a lien is transferred, in theory, CCS has no privilege to obtain the money. This situation might result in a problem for CCS if other creditors claim the right as well.

In this author's opinion, the security interest, such as the possessory security in this case, which constitutes the subordinate right is attached to the contractual right, namely the right to take the bill of lading freight in the bill of lading contract. This subordinate right is not assignable independently. However, where it attaches to the contractual right, it must automatically, without any provision to the contrary, be transferred to the assignee along with the assignment of the bill of lading right. Furthermore, after the completion of the assignment, the type of security interests should not be changed. Therefore, this disponent shipowner should have the possessory security on the cargo. Nevertheless, there is no denying that from a practical point of view, it would have been difficult for CCS to take physical possession of the cargo, and they may possibly not have wanted to do so. On the one hand, when the cargo was on board the vessel, CCS had no intention to take possession to take care of the cargo; on the other hand, CCS should not have been willing to receive the cargo ashore, as that would have meant arranging for discharge and storage and incurring all associated costs and risks. However, there is no legal barrier for the shipowner in the head charterparty for becoming the bailee for CCS.

Even so, the English authority seems to hold a different view. The basis for the decision is derived from the law of assignment. More specifically, where the lienholder (shipowner) is a bailee, as opposed to a bailor, the bill of lading holder, would thereby be subject to the consequence that ‘any parting with possession is usually in breach of the terms of the bailment, and will be wrongful’.³⁷⁹ Based on this, the court contends that ‘the transfer of possession would have to be with the consent of the owner, so that it was not a breach of contract or a conversion’.³⁸⁰ Furthermore, ‘such consent would not be implied merely because there is provision for a lien in the contract’.³⁸¹

In this author’s observations, the above English authorities seem to overlook the legal status and function of the possessory security. As mentioned above, the possessory security which attaches to the contractual right is not an independent right. Its function is to secure the exercise of the contractual right. This is the mutual understanding between the original creditor and the original debtor. The assignment of the contractual right does not impact on the amount of the debt. The original debtor does not need to pay more for the debt. Therefore, there is no reasonable ground to keep the contractual right and throw away its subordinate right.

As far as the protection of the disponent shipowner by the way of assignment is concerned, the real problem is the reason why the shipowner must or is willing to transfer the contractual right to the disponent shipowner. In this case, this is not a problem. But it does not mean that the shipowners have an obligation to assign the bill of lading freight in other cases. From a practical point of view, it seems that this is not significant, because there is no reason for the shipowners not to do so, as they cannot enforce that right for their own benefit after they receive the payment from the head

³⁷⁹ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)152

³⁸⁰ *M’Combie v Davies* (1805) 7 East 5; *Ibid* at 157

³⁸¹ *Donald v Suckling* [1866] LR 1 (QB) 585; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)157

charterer or the sub-charterer. However, a similar rationale is that, based on the specific consideration, in practice, there is probably no reason for the shipowners to do so.

In a nutshell, although assignment is not the perfect solution, assignment of debt under a shipowner's bill of lading in *The Clipper Monarch*³⁸² is a reasonable solution to protect the disponent shipowner under multiple charterparties. It might be regarded as the utilisation of the legal solution in accordance with the Law of Property in conjunction with the contractual solution in light of the agreement between the shipowner and the disponent shipowner. But its achievement is dependent on the original creditor's consent. Whether the original debtor must permit this assignment is absent of the authority, even if the author has demonstrated that the debtor's consent is absent of the authority. Also, whether the assignee simply enjoys an equitable charge over the money rather than a privileged right is in question.

3.2.1.3 Legal Nature and Effect of Disponent Shipowner's Cargo Security: Similar Possessory Security under a Charterparty

As far as the contractual cargo security is concerned in this case, the court held that this right gave the similar effect to a possessory lien so that some commentators have directly pointed out that the court considered the disponent shipowner had a non-possessory lien under a voyage charterparty.³⁸³ However, the nature of the disponent shipowner's cargo security has not been resolved at all. When the nature is in question, the scope of the right is questionable. In this context, when the court opined that 'CCS(disponent shipowner) relied on the voyage charter 'lien' clause as giving it a right with similar effect to a possessory lien, namely a right to procure that the cargo be withheld from Silver Rock (sub-charterer/debtor) by directing the employment of the

³⁸² [2016] 1 Lloyd's Rep 1

³⁸³ Baptiste Weijburg, 'Clipper Monarch Liening on Silver Rock Investments' (Shipping Bulletin by Holman Fenwick Willan, February 2016)5 <<http://www.hfw.com/downloads/HFW-Shipping-Bulletin-February-2016.pdf>> accessed 6 June 2018

vessel in its capacity as time charterer’,³⁸⁴ it is sufficient to assume that employment of the vessel points to the Employment Clause in the time charterparty. But whether the employment clause should be applied should be ascertained as described below.

It should be recalled that there is no employment clause in the agreement between the disponent shipowner and its own charterer. Therefore, if the disponent shipowner seeks to exercise the security clause in his charterparty, because he does not have direct control over the cargo, he must resort to another contractual relationship to do so. That contractual relationship being the one between himself and the shipowner or a superior disponent shipowner.

As far as an Employment Clause in a time charterparty is concerned, it is an elusive provision because its scope is too ambiguous. Apart from the situation that the parties amend the standard employment clause, the original Employment Clause does not articulate the scope, content or nature of the charterer’s right to order the master. One typical employment clause is Clause 8 of NYPE 46 which provided ‘The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency...’³⁸⁵. It can be seen that the limitation of the charterer’s right is not clear.

In this context, case law clarifies the limitation of the charterer’s right that ‘the captain, within the limits of obviously grave danger, to follow (the charterer’s) instructions without undue question’.³⁸⁶ As regards the object of ‘danger’, Lord Hobhouse held that ‘[T]he master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners

³⁸⁴ [2016] 1 Lloyd’s Rep 1, 2

³⁸⁵ In *The Clipper Monarch*, the current Lloyd’s Report does not disclose which time charterparty has been used. But in *Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervenor)*, NYPE 46 was employed.

³⁸⁶ *Portsmouth Steamship v Liverpool & Glasgow Salvage Association* [1929] 34 LIL Rep 459

have not agreed to bear, the master is entitled to refuse to obey it...'³⁸⁷ In other words, if the master assesses that a charterer's order may throw the vessel, the cargo or the crew into danger or risk, the master is lawfully entitled to refuse to perform this order. Because of this general rule laid down by the courts, in a series of cases they have demonstrated support in favour of the master who may delay the vessel for a reasonable time³⁸⁸ or may refuse to deliver cargo to a person not entitled to receive it.³⁸⁹

Therefore, the Employment Clause is a double-edged sword. On the one hand, it provides a broad right to the charterer to order the master without specific limits; on the other hand, in consideration of the safety of navigation and the cargo, the master enjoys a discretionary right.

In *The Clipper Monarch*³⁹⁰, the court utilised one edge of the sword to extend the interpretation of the scope of the order, because even if the master obeyed the charterer's (disponent shipowner) order to detain the cargo, there would have been no grave danger to the cargo. Furthermore, in such case, as far as the master/shipowner is concerned, it seems that the advantages far outweigh the disadvantages if he complies with the charterer's order. If the charterer's order is recognised by the court lawful, and the master/shipowner refuses to follow it, the shipowner will inevitably face a claim; conversely, even if the order is wrong or unlawful, the shipowner is entitled to rely on the express or implied indemnity clause to recover damages.³⁹¹

³⁸⁷ *The Hill Harmony* [2001] 1 Lloyd's Rep 147

³⁸⁸ In *The Houda* [1994] 2 Lloyd's Rep 541, the court held that 'Delay may, for instance, be justified in the face of orders which could expose the ship or the cargo to potential peril'.

³⁸⁹ In *The Sagona* [1984] 1 Lloyd's Rep 194 (Staughton J) 205, it held that '[T]he master is not obliged to obey orders of go to the charterers to deliver cargo to a person not entitled to receive it'.

³⁹⁰ [2016] 1 Lloyd's Rep 1

³⁹¹ In certain standard forms, the indemnity is express. For example, Clause 9 'master' of the BALTIME form provides that '[M]aster shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The 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, as well as from any irregularity in the Vessel papers or for over carrying goods'. But in other standard forms, the indemnity clause is not clear such as in the NYPE.

However, it is difficult for the above decision to address adequately the questions posed below in that application of the Employment Clause to exercise the disponent shipowner's right on the cargo is not convincing.

To start with, the employment clause is derived from the time charterparty rather than a voyage charterparty. In this case, it is coincidental that the disponent shipowner is referred to as the time charterer. But if he is a voyage charterer who does not have the right given by the employment clause, the question remains as to whether he still has the right to direct the shipowner.

Secondly, uncertain indemnity arising from the disponent shipowner's wrong instruction cannot protect the real shipowner against losses. Along with the employment clause, the indemnity serves to compensate the shipowner's losses. However, because of the wide and uncertain scope of the employment clause, the corresponding indemnity is uncertain. Usually, the standard to claim indemnity is to consider whether the risks or costs suffered by the shipowners are on the basis that the shipowner has not expressly or implicitly agreed to undertake in the charterparty.³⁹²

By contrast, if the risks or costs are derived from the shipowner's negligence or breach of contract, whether the shipowner is entitled to claim indemnity is at issue. There are at least two problems affecting the shipowner's right. One problem is that the disponent shipowner requests the shipowner to assist in the exercising of the lien (security) arising from a sub-charterparty rather than arising out of the head charterparty. More specifically, with regard to the *Clipper Monarch*³⁹³ case, there was no direct contractual relationship between CCS and the shipowner. Based on the facts of the case,

³⁹² *Petroleo Brasileiro SA v ENE Kos I Limited* [2012] UKSC 17 (Lord Sumption)

³⁹³ [2016] 1 Lloyd's Rep 1

the shipowner time chartered the vessel to Clipper Bunker; subsequently, the Clipper Bunker sub-time chartered the vessel to CCS. Therefore, whether the shipowner has an obligation to investigate the validity of the lien (security) is in question. If not, there remains the question of whether the shipowner acted negligently. If the disponent shipowner exercised his security on the cargo erroneously, there would also be the question of whether the shipowner failed to claim indemnity because of his failure to investigate the validity of the lien (security).

Another problem is relevant to the shipowner's failure to perform his carrier's obligation. If the shipowner issues a shipowner's bill of lading, but detains the cargo based on the disponent shipowner's order, the risk would be that he becomes a defaulting party between the bill of lading holder and himself.

In the event that either problem occurs, the shipowner will lose the right to claim the indemnity. Under this circumstance, whether the shipowner would be willing to assist the disponent shipowner to exercise the security, and whether there is a rationale for pushing the actual possessor to obey the disponent shipowner is surely an issue to be addressed.

In addition, not every case recognises the application of the employment clause. In *The Mathew*³⁹⁴, the Commercial Court did not resort to an employment clause to grant a time charterer the right of direction. Moreover, the court did not consider that there was an implied term to grant the time charterer the right. Although there were no further detailed arguments presented, Steyn J was of the opinion that:

‘the submission that the time charterers would have been able to enforce payment by causing the cargo to be liened would be rejected; there was no basis on which a

³⁹⁴ [1990] 2 Lloyd's Law Rep 323

Court, applying the proper tests could have found such a term established and any implied term regarding the use of the lien was also a matter which was not raised in the arbitration’... ‘the implied term put forward by Miss Bucknall was unsustainable. The suggestion that the time charterers would have been able to enforce payment by causing the cargo to be liened is equally unsustainable ‘.³⁹⁵

This opinion may show that no implied term in the charterparty may grant the time charterer the right to direct the shipowner to lien the cargo.³⁹⁶ In other words, Steyn J had no intention to rely on the employment clause to grant the disponent shipowner the right of direction against the shipowner.

Both *The Clipper Monarch*³⁹⁷ and *The Mathew*³⁹⁸ were decided by the Commercial Court. Although *the Clipper Monarch*³⁹⁹ is a more recent case, there is no clear sign that the decision in *the Mathew*⁴⁰⁰ has been overruled. Nevertheless, an implied rule in common law is that the latter decision should be followed by subsequent cases. Even so, in *The Clipper Monarch*,⁴⁰¹ the court does not provide a convincing ground for application of the Employment Clause or an implied term to exercise the disponent shipowner’s lien (security). In other words, the ground for exercising the disponent shipowner’s right is left unclear in these cases.

3.2.1.4 Observations

The complexity of the shipping industry is exemplified by the changes in a party’s role in different legal relationships. When the disponent shipowner does not possess the cargo physically, the law of assignment creates an opportunity to resort to the bill of lading contract to secure the right over the cargo. But this approach by itself raises some

³⁹⁵ Ibid at 324 and 328 (Steyn J)

³⁹⁶ Simon Baughen, *Shipping Law* (7th edn, Routledge 2018)220, fn.34 and 223

³⁹⁷ [2016] 1 Lloyd’s Rep 1

³⁹⁸ [1990] 2 Lloyd’s Rep 323

³⁹⁹ [2016] 1 Lloyd’s Rep 1

⁴⁰⁰ [1990] 2 Lloyd’s Rep 323

⁴⁰¹ [2016] 1 Lloyd’s Rep 1

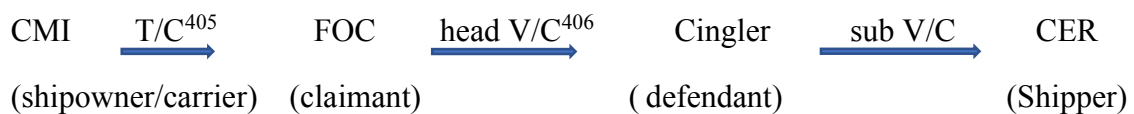
arguable points as discussed above. The most important thing is that this approach is not derived from the disponent shipowner's positive right under the charterparty. It strongly depends on the shipowner's, even the debtor's consent. Therefore, the protection of the disponent shipowner must look to the disponent shipowner's cargo security in its own charterparty.

It is apparent that the courts resort to the pragmatic approach to interpret and protect the disponent shipowner's right. On the one hand, the court has no intention to treat the disponent shipowner's cargo security as the possessory lien (security), because the condition of possession to the cargo cannot be satisfied; on the other hand, the court is not willing to deny the cargo security, because it is there. Therefore, the court provides a vague answer to interpret the nature of the disponent shipowner's cargo security, namely, a similar possessory lien (security). There is no doubt that this is a contractual right. But it should be clarified that the nature of this contractual right is not consistent with that of the contractual possessory right. It has been stressed this previously. The contractual possessory right, as the subordinate right, is derived from the legal cargo security. In this case, when there is no legal cargo security, the contractual possessory right is untenable. Thus, although this case supports the sub-disponent shipowner (CCS)'s contractual right, the nature of this right is uncertain and convoluted. There appears to be no convincing ground for granting the sub-disponent shipowner a right to direct the shipowner in the head charterparty. The following Singapore case demonstrates how this contractual right is construed.

3.2.2 *Five Ocean Corporation v Cingler Ship Pte Ltd*:⁴⁰² Real Shipowner and Disponent Shipowner Exercise the Lien (Security) Together

3.2.2.1 Case Study

The difference with *The Clipper Monarch*⁴⁰³ is that *Five Ocean Corporation v Cingler Ship Pte Ltd*⁴⁰⁴, in respect of multiple charterparties, involves the operation of cargo security based on the association of the real shipowner with the disponent shipowner. In this case, Corrina Maritime Inc (CMI), a shipowner time chartered his vessel to Five Ocean Corporation (FOC) as the head time charterparty on a NYPE 1946 form with a cargo security clause in multiple charterparties. Subsequently, FOC, as the disponent shipowner voyage chartered the vessel to Cingler Ship Pte Ltd (Cingler) on a Gencon 1994 form with a cargo lien (security). Then Cingler voyage chartered the vessel to PT Commodities & Energy Resources (CER) who was the shipper holding a Master's bill of lading. The charterparty chain was as follows.



The dispute arose from the fact that Cingler, the sub-charterer, failed to pay for the freight to FOC, the disponent shipowner. Both the shipowner CMI and the disponent shipowner FOC gave notice of lien and the exercise of the lien to Cingler and CER. But it was apparent that there was no dispute between CMI and CER, and CMI and FOC. The reason for CMI being involved in this dispute was because he was the physical possessor. Put another way, FOC had realized that the condition precedent of the exercise of the cargo security was that he should have physical possession of CER's cargo. However, although the head voyage charterparty lien (security) provided a right

⁴⁰² [2015] SGHC 311

⁴⁰³ [2016] 1 Lloyd's Rep 1

⁴⁰⁴ [2015] SGHC 311

⁴⁰⁵ T/C refers to time charterparty.

⁴⁰⁶ V/C refers to voyage charterparty.

to detain the cargo on board the vessel in response to Clingler's default, he did not physically possess the secured cargo leading to the consequence that he could not perform his right at all.

The Singapore High Court disposed of this case by adopting the reasoning of *The Clipper Monarch*⁴⁰⁷ given by Waksman J. In particular, the opinion of the right of 'direction' was accepted and recognised by the Singapore court. The court held that 'as physical possession of the Cargo was with CMI, the right to detain the Cargo by directing CMI not to discharge the same was all it could do'.⁴⁰⁸

However, because the court clarified the disponent shipowner FOC's right of 'direction', the nature of FOC's cargo security was different from that of the security interest. As the court stated that '[T]his right as described is strictly not the same as the conventional understanding of a security interest granted by a "lien". Hence, it was inaccurate for FOC to claim to assert a contractual lien over the Cargo because it was CMI, the owner, and not FOC, the time charterer, which was in possession of the Cargo'.⁴⁰⁹

On the basis of *The Clipper Monarch*,⁴¹⁰ this case further declares that: first, under multiple charterparties only the real shipowner enjoys possessory security; secondly, in the consideration of the fact that the disponent shipowner cannot physically take possession of the cargo, the court held that the disponent shipowner's cargo security was not the conventional security interest, but it is implicit that this cargo security is still a security interest. The exercise of the disponent shipowner's cargo security is

⁴⁰⁷ [2016] 1 Lloyd's Rep 1

⁴⁰⁸ *Five Ocean Corporation v Clingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener)* [2015] SGHC 311 [32]

⁴⁰⁹ *Ibid* at [32]

⁴¹⁰ [2016] 1 Lloyd's Rep 1

dependent on the exercise of the right of ‘direction’ the real shipowner to detain the cargo.

3.2.2.2 Subsequent Development

Although this Singapore case follows the English case, it is expedient to further explore the content and object of the disponent shipowner’s right. This clarification may contribute to a better understanding the nature of this right.

The court considered that the content of the FOC’s right contained ‘ (a) a right to postpone discharge and delivery of the Cargo *vis-à-vis* Cingler; and (b) an equitable or beneficial right derived from CMI’s exercise of its lien (as trustee for FOC’s benefit) under the Bill of Lading over the Cargo against CER’.⁴¹¹ As far as the second right mentioned by the court is concerned, it also added the point that ‘CMI had willingly exercised as trustee for FOC’s benefit’.⁴¹²

With regard to the object of FOC’s right, in comparison with that of the legal cargo security, the court concluded that

‘the FOC’s right to detain possession of the Cargo, that is to say its right as against Cingler under the head voyage charterparty to postpone discharge and delivery of the Cargo until it received payment coupled with its derivative right in the benefit of CMI’s security in the Cargo (see [36] above) culminated in and crystallised FOC’s right to detain possession. Both of these rights were and of themselves *choses in action*, and taken together amounted to an interest similar, though not equivalent to a security interest like CMI’s contractual lien... FOC’s right to detain

⁴¹¹ *Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener)* [2015] SGHC 311, [36]

⁴¹² *Ibid* at [46]

possession is a *chose in action* and qualifies as an ‘asset’ within the meaning of s 12A(4) of the IAA’.⁴¹³

More specifically, the object of FOC’s contractual right is an interest in the cargo, as opposed to the physical cargo. This argument is reasonable. Unfortunately, this case did not eventually provide an affirmative conclusion regarding the nature of the FOC’s right. Furthermore, the applicable scope of this right is not clear. In other words, it did not resolve the question if the shipowner to the head charterparty is not willing to assist the disponent shipowner, whether this right would apply to the head shipowner. In the following section, a comprehensive argument about the nature of the disponent shipowner’s contractual right is provided.

3.2.3 Legal Nature of the Disponent Shipowner’s Cargo Security under Modern Secured Transactions Law: Floating Charge

In the above two cases, it is found that under multiple charterparties, the requirement of possession is only workable in respect of the shipowner to a head charterparty. Therefore, the disponent shipowner and subsequent disponent shipowners (hereinafter simply refer to ‘disponent shipowner’) cannot be protected by a legal cargo security. The disponent shipowner may choose to leap from the charterparty into the bill of lading contract. But this approach makes the disponent shipowner fall into a passive position because he would have to depend on the shipowner or carrier’s consent. Therefore, the approach to address this disponent shipowner’s protection is fundamentally to explore the legal nature of the disponent shipowner’s cargo security when he is not the possessor of the cargo. Based on this, the disponent shipowner’s right must be determined in secured transactions law.

⁴¹³ Ibid at [46]

3.2.3.1 Floating Charge

It has been stated in case law that ‘A charge amounts to an appropriation of property by the charger in favour of the charge as security for the payment of a debt or performance of another obligation.’⁴¹⁴ A charge consists of a fixed charge which can be described as follows: ‘a specific charge... is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined’⁴¹⁵ and a floating charge which can be described as ‘ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.’⁴¹⁶ Based on this, it is submitted that the disponent shipowner’s cargo security is a floating charge over an interest in cargo. Therefore, only the floating charge will be discussed.

In comparison with a lien, mortgage and pledge, a charge, as a comparatively new form of security interests is created and accompanied by the growth of the limited liability company and the demand of the company’s capital in the nineteenth century.⁴¹⁷ At that time, in order to induce the sufficient capital from investors, companies, especially a large number of unincorporated companies had to seek better security for their loans. However, the forms of security available at common law were the mortgage of land or goods and the pledge of goods. Because of the disadvantages of these securities, a company was expected to create more forms of security. A charge, especially, a floating charge was not operative at common law. It is safe to say that the development of the floating charge witnessed the innovation of security based on the principle of party autonomy.

⁴¹⁴ *National Provincial Bank v Charnley* [1924] 1 KB 432 (CA) 449-450 (Arkin LJ); Michael Bridge, *Personal Property Law* (4th edn, Oxford University Press 2015) 284-285

⁴¹⁵ *Illingworth v Houldsworth* [1904] AC 355 (HL) 358

⁴¹⁶ *Ibid*

⁴¹⁷ Robert R Pennington, ‘The Genesis of the Floating Charge’ (1960) 23 (6) *The Modern Law Review* 630, 630; Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 751

Whereas the greater part of a company's assets including fixed and floating assets usually consists of equipment, 'raw materials, manufactured or semi-manufactured goods, stock in trade and trade debts payable to it',⁴¹⁸ but the common law did not recognise a proposed assignment of future property; therefore, following the decisions of the courts of equity, in *Holroyd v Marshall*⁴¹⁹ Lord Chelmsford held that

'At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence, the agreement operates on it'.⁴²⁰

Although this case does not provide a clear concept of the floating charge, it recognises that the law of equity may intervene to remedy the deficiency of the common law by way of an equitable mortgage on after-acquired property. Eight years later, the first floating charge case, *Re Panama, New Zealand and Australian Royal Mail Co*⁴²¹ was made by the Court of Appeal. In this case, the debtor company charged its 'undertaking and all sums of money arising therefrom' with repayment of the amount payable under its debenture. The Court of Appeal held that when the company was wound up, the charge became a specific charge on the assets. Therefore, the debenture holders, as the

⁴¹⁸ Robert R Pennington, 'The Genesis of the Floating Charge' (1960) 23 (6) *The Modern Law Review* 630, 631; Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 751

⁴¹⁹ [1862] 10 Cas 191 (HL)

⁴²⁰ *Ibid* at 220; it should be noted that one commentator asserts that this case could be regarded as an early form of floating charge, although it was too early to recognise in this case; see Robert R Pennington, 'The Genesis of the Floating Charge' (1960) 23 (6) *The Modern Law Review* 630, 634; but both professor Goode and professor Gough contend that this security proposed by this case was a fixed equitable mortgage; Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 751, fn.4

⁴²¹ [1870] 5 Ch App 318

secured creditor ranked for payment before the general creditor.⁴²² In this decision, Giffard LJ made an important statement that:

‘the word “undertaking” had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company. And I take the object and meaning of the debenture to be this, that the word ‘undertaking’ necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and, furthermore, that during the interval the debenture holder would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business. I do not refer to such things as sales or mortgages of property, but to the ordinary application of funds which came into the hands of the company in the usual course of business. I see no difficulty or inconvenience in giving that effect to this instrument. But the moment the company comes to be wound up, and the property has to be realized, that moment the rights of these parties, beyond all question, attach’.⁴²³

Although the above *obiter dictum* does not explain the concept of the floating charge, it clarifies at least three points regarding this new form of security interests. First, the scope of the secured undertaking contains not only the current property, but also the future property; secondly, the debtor is entitled to dispose of the secured undertaking without the creditor’s intervention; thirdly, when it is time to exercise the charge, the creditor’s rights attach to the secured undertaking.

⁴²² [1870] 5 Ch App 318

⁴²³ Ibid at 322 (Giffard LJ)

After this case, in *re Colonial Trusts Corporation*⁴²⁴ Jessel MR officially referred to this form of security as a floating security.⁴²⁵ Since then, the term ‘floating charge’ had been firmly recognised and used regularly. This new type of security interest sufficiently reflects the principle of party autonomy because its creation is based on the meeting of the contracting parties’ minds rather than by operation of law or statute. Nevertheless, the concept of the floating charge is bred by ‘equity lawyers and judges out of the needs of the commercial and industrial entrepreneurs of the time.’⁴²⁶ As Nolan asserts:

‘this is nothing more than a contemporary iteration of the very processes which created floating charges in the first place: that is, developments by innovative practitioners, in response to their clients’ commercial demands and the existing state of the law, followed by reaction from a judiciary largely composed of those who were, a mere decade or so earlier, amongst those very practitioners.’⁴²⁷

It is apparent that this new form of security interest is accompanied by the development and demand of business; thus, there is no exact definition provided by law. In the course of the development of this security, the classic description of the floating charge was proposed by Romer LJ in a landmark case, *Re Yorkshire Woolcombers Association, Ltd.*⁴²⁸ He held that

‘I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1.) If it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the

⁴²⁴ [1879] 15 Ch D 465

⁴²⁵ Ibid at 468, 469 and 472; in *Moor v Anglo-Italian Bank* [1879] 10 Ch D 681, 687 Jessel MR contrasted the new form of security, namely ‘floating charge’ with a ‘specific charge’ on the property of the company.

⁴²⁶ *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, [97]

⁴²⁷ Richard C Nolan, ‘Property in a Fund’ (2004) 120 Law Quarterly Review 108; Richard C Nolan, ‘A Spectrum of Opinion’ (2005) 64 (3) the Cambridge Law Journal 554, 555-556

⁴²⁸ [1903] 2Ch 284 (CA)

business of the company, would be changing from time to time; and (3.) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.’⁴²⁹

The three characteristics of a floating charge which are similar to Giffard LJ’s opinion are widely accepted. Subsequently, these three characteristics have been often cited. However, it should be noted that they do not provide the definition of a floating charge. Romer LJ prefaced these characteristics with the following explanation

‘I certainly do not intend to attempt to give an exact definition of the term “floating charge,” nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention’.⁴³⁰

Although the description of a floating charge is various, no comprehensive and plain definition has yet been provided.⁴³¹ According to one commentator, the reason is because the term ‘floating charge’ is a legal concept invented by the court to satisfy the demand of the new form of security.⁴³² The author observes in this context that the function of the floating charge is similar to that of miscellaneous clause in a contract drafted by practitioners. To cover all items of which the practitioners are not aware when they draft the contract, the miscellaneous clause seems like an appropriate remedy to rectify the deficiency of the contract.

⁴²⁹ Ibid at 295 (Romer LJ)

⁴³⁰ Ibid

⁴³¹ Gabriel Moss, ‘Fictions and Floating Charges: Some Reflections on the House of Lords’ Decision in *Spectrum*’ in Joshua Getzler and Jennifer Payne (eds), *Company Charge: Spectrum and Beyond* (Oxford University Press, 2006) 2

⁴³² Ibid

From the viewpoint of the development of the floating charge, this security plays a role in protecting the creditor to a great extent. First, its creation is to satisfy the demand of financing. But in reviewing the characteristics discussed above, its application is not confined to the financing contract. Therefore, as far as the different types of contracts are concerned, if the contracting parties are willing to insert a security clause, this floating charge can be one option. Secondly, with regard to the scope of the secured property, no authorities have addressed this legal issue, an argument for any new scope may be made. Although the House of Lords in *Re Spectrum Plus Ltd*⁴³³ addressed a range of legal questions regarding the floating charge including its characterisation, this case simply referred to the charge on book debts rather than other charged property.⁴³⁴ In this situation, what property may be covered in the charged scope is an issue. Some commentators contend that the charged property should not be construed in a broad sense. Based on this opinion, charge on land and a proprietary right in land, charge on shares, charge on intellectual property rights and charge over lease of chattel should all be excluded from the floating charge.⁴³⁵ By contrast, other commentators assert that the argument in *Re Spectrum Plus Ltd*⁴³⁶ can be applied to other charged property.⁴³⁷ In this context, it is submitted that under multiple charterparties, the charged property of the disponent shipowner is an interest in cargo. Where the disponent shipowner cannot possess the cargo physically, the interest in essence amounts to a right of possession.

⁴³³ [2005] UKHL 41

⁴³⁴ Ibid

⁴³⁵ Nicholas Frome and Kate Gibbons, 'Spectrum- An End to the Conflict or the Signal for a New Campaign?' in Joshua Getzler and Jennifer Payne (eds), *Company Charge: Spectrum and Beyond* (Oxford University Press, 2006)111-115

⁴³⁶ [2005] UKHL 41

⁴³⁷ Sarah Worthington, 'Floating Charges: the Use and Abuse of Doctrinal Analysis' in Joshua Getzler and Jennifer Payne (eds), *Company Charge: Spectrum and Beyond* (Oxford University Press, 2006)33; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)

3.2.3.2 An Interest in Cargo Creates a Right of Possession

In the cases mentioned above, the disponent shipowner's cargo security is regarded as a non-conventional security or a non-possessory lien. This vague proposition needs to be further elaborated to determine its implied right to other parties under multiple charterparties.

This author suggests that the disponent shipowner's cargo security can be regarded as an equitable charge by reference to the bareboat shipowner's security,⁴³⁸ because the position of the disponent shipowner amounts to that of a bareboat shipowner who does not possess the cargo anymore. The conclusion is firstly on the basis of the consideration of the object of disponent shipowner's security. The author agrees with the proposition laid down by the Singapore court that its object is an interest in the cargo. But a question arises as to whether an interest in the cargo constitutes the floating charged property in light of the existing system of the security on the movable property.

Movable property comprises tangibles and intangibles. If tangible cargo is the object of the security, in law there are two ways to possess the secured property. Either the secured creditor possesses the property physically; or the secured creditor possesses the document of title. In shipping, the document of title is the bill of lading which cannot belong to the disponent shipowner. This means that the disponent shipowner's secured object, namely, an interest in the cargo, is not tangible property.

In terms of intangibles, what kind of intangibles constitutes the object of the floating charge is the absence of the authoritative argument, as discussed in Section 3.2.3.1. In theory, as long as intangibles are valuable and contracting parties are willing to accept

⁴³⁸ *Ellerman Lines Ltd. v Lancaster Maritime Co. Ltd. and Others* [1980] 2 Lloyd's Rep 497, 500-501; Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para 18.2

this kind of property, there is no reason to deny it. In this context, it is proposed that an interest in the cargo amounts to right of possession, namely, the intangible property.

In seaborne trade, the charterer's role and rights are based on the different contracts which change at different stages. For example, when a charterer in light of an FOB contract enters into a voyage charterparty, he has no proprietary right in the cargo at the beginning. But during the voyage, after he pays for full price for the cargo, he would become a bill of lading holder, namely, the cargo owner. Conversely, a charterer might be a shipper and seller based on a CIF contract. As a cargo owner, this charterer has proprietary income, user and enjoyment rights on the cargo. But during the course of the voyage, a bill of lading holder may become the cargo owner in theory and accordingly, the original seller is disposed of the property right in the cargo so that the question remains as to what right remains.

Thus, along with the change of role, there is a change in the charterer's right as well resulting in the charterer's right in the property being unstable. But the stable aspect is that the charterer, regardless of his role, when he enters into the charterparty, he has or will have an interest in the secured cargo. His interest derives from either absolute proprietary right on the cargo or contractual right based on the contractual relationship with the cargo owner. He uses this interest in the cargo as security for the performance of his obligation. Furthermore, this interest in the cargo creates a right of possession in the cargo. Therefore, in the cargo security clause, the charterer in fact grants the right of possession in respect of the cargo to the shipowner in response to the charterer's default.

From the perspective of equity law, the disponent shipowner enjoys equitable interests which are required by charge or assignment⁴³⁹. In precise terms, it is an equitable

⁴³⁹ Apart from charge or assignment, this interest may be derived by statute or operation of law; Ewan

floating charge where the secured subject matter is the interest in the cargo including current and future interests. Again, the charterer's role in maritime transactions determines that he has and/or will have the interests in the cargo. When he is a party to a sale contract, he has the interests in the cargo directly; alternatively, he will have the interests in the cargo based on the legal relationship between himself and the cargo owner or apparent cargo owner.

When the charterer contracts with the disponent shipowner, the latter, in accordance with the security clause, might have the interests in the cargo. An underlying right of possession is thus created. The disponent shipowner's interest in the cargo is not only based on the charterer's promise in the charterparty, but he also relies on the cargo owner's implied words, to be precise, he relies on the legally implied words. In *The Clipper Monarch*,⁴⁴⁰ for example, the legal relationship is as follows:

- 1) Carriage of Goods Relation: A head disponent shipowner --- CCS, a disponent shipowner (claimant) --- Silver Rock, a voyage charterer (defendant);
- 2) Sale Relation: Max Coal, original buyer and consignee--- Silver Rock (defendant) --- Grupo, seller.

In terms of the charterparty, when Silver Rock entered into the voyage charterparty with CCS, a disponent shipowner, Silver Rock was neither the cargo owner, nor the possessor of the cargo. But the common law does not deprive him of his right to create a remedial clause by way of the future interests in the cargo. This is the foundation of validity of future interests in the cargo. In the context of a sale connection, regardless of the real legal interrelationships among Max Coal (original purchaser and original consignee), Silver Rock and Grupo (the seller to Silver Rock), Silver Rock was an

McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 44 and fn.105
⁴⁴⁰ [2016] 1 Lloyd's Rep 1

accepted and recognised bailee or trustee of Max Coal and Silver Rock. Thus, Silver Rock had an interest in the cargo after the creation of the bailment and trust. The object of the CCS, disponent shipowner's security was simply the interest in the cargo provided by Silver Rock. This interest was coupled with a right of possession in the cargo. Certainly, for this proposal to be recognised and applied, at least two condition precedents would have to be satisfied. First, this interest in law could be assigned to CCS; second, Max Coal and Silver Rock recognised the implied assignment of this interest to the disponent shipowner.

3.2.3.3 Identification and Assignability of an Interest in the Cargo

At common law, it is said that intangibles are divided into pure intangibles and documentary intangibles.⁴⁴¹ 'A pure intangible is a right which is not in law considered to be represented by a document.'⁴⁴² Considering that secured property should be characteristic of identification to enable the public, as potential participants, to know the transaction risk, publicity is always highlighted. In terms of the intangible, possession or registration of a document is a possibility to identify the secured property. However, the question arises as to how identification of a pure intangible can be addressed.

To start with, as far as the pure intangible is concerned, it is apparent that possession or constructive possession is impossible. Secondly, perfection of registration is dependent on a proper 'thing', such as a document. While the pure intangible, namely an interest in cargo cannot attach to a document, this means that it cannot be identified. Furthermore, its assignability is in question because no one can confirm its assignment

⁴⁴¹ Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016) 236

⁴⁴² Ibid at 50

if it cannot be identified. In this context, at common law, this kind of pure intangible is regarded as a non-assignable right.⁴⁴³

Nevertheless, from the point of equity law, this is not a significant issue. To trace back to 1707, the Court of Equity in *Crouch v Martin & Harris & Al*⁴⁴⁴ had recognised that the right of a seaman to claim wages could be assignable.

In addition, the Law of Property Act 1925 also provides that any debt and other legal things in action can be assignable. To be precise, section 136 stipulates that:

‘[A]ny absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal things in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claimed such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action; (b) other legal remedies for the same; and the power to give a good discharge for the same without the concurrence of the assignor.....’⁴⁴⁵

Certainly, in accordance with the requirements of this provision, it may be argued that the assignment of the charterer’s interest in the cargo does not satisfy one of the requirements of the statute law which is that the object of the assignment must be

⁴⁴³ Ibid; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018) 9

⁴⁴⁴ (1707)2 Vernon’s Cases in Chancery 595, 23 ER 987. The fact of this case was that a seaman assigned his wages, as a security for money. This assignment specifically bound the wages. Therefore, the court held that the money secured thereby should be paid in preference to all other debts. Although the object of the security points to wages, the material object should be a right to claim wages, namely a kind of pure intangible. *Ryall v Rowles* (1750) 1 Vesey Senior 348 27 ER 1074

⁴⁴⁵ Law of Property Act 1925 (UK), s 136

absolute without any conditions. The condition is ‘on the being debts due from the charterers to the owners.’⁴⁴⁶ However, it should be noted that this legislative provision has not been cited here so as to demonstrate the possibility and validity of assignment of a pure intangible. Whether this assignment satisfies all requirement is not relevant to the present theme of inquiry.

All in all, although at common law the *chose in action* is not recognised, from the equity law and statute law perspectives, a pure intangible, an interest in the cargo may constitute the subject matter of the security because of its assignability. There is no impediment to the charterer assigning his interest in the cargo to the shipowner.

3.2.3.4 Legal Effect

In terms of legal effect of a floating security on an interest in the cargo, two aspects should be clarified—a legal effect to the shipper, the cargo owner or the bill of lading holder and a legal effect to the competing creditor.

With regard to a legal effect to the shipper, the cargo owner or the bill of lading holder, whether the shipowner may exercise his security on the cargo belonging to the shipper, the cargo owner or the bill of lading holder rather than the charterer’s cargo has been an uncertain issue for a long time. As far as the application of shipowner’s cargo security is concerned, it is rare that the cargo still belongs to the charterer when the shipowner intends to exercise his security on the cargo. Although an incorporation clause provides the mechanism through which the charterparty and the bill of lading

⁴⁴⁶ *The Halcyon the Great* [1984] 1 Lloyd’s Rep 283. In this case, the court held that ‘the assignment was not an absolute assignment and did purport to be by way of charge; this was consistent with the evidence of what happened from 1969 to 1974 in that during that period the owners had claimed from the builders the excess interest and the builders had paid it; the bank had not put forward any claim; and there was therefore no legal assignment’; Terence Coghlin and others, *Time Charters* (7th edn, Informa Law 2014)30.45;

are linked in order to extend the shipowner's right to the bill of lading holder, it is not always operative. Normally, the incorporation clause in a bill of lading provides that 'All terms and conditions, liberties and exceptions of the Charter Party'.⁴⁴⁷ It is obvious that the purpose of this clause is to create a possibility for the shipowner to exercise his cargo security against the bill of lading holders. This approach to extend the shipowner's right will be effective as long as this bill can sufficiently identify the charterparty the terms and conditions of which are intended to be incorporated. However, in the context of the absence of an identified charterparty, the authorities consider that the head voyage charterparty in a string of voyage charterparties is regarded as the incorporated charterparty.⁴⁴⁸ Similarly, the head time charterparty in a string of time charterparties can be deemed to be the incorporated charterparty.⁴⁴⁹ With regards to a string of charterparties involving a head time charterparty and voyage charterparties, the head voyage charterparty is prioritized as the courts have held that even though the time charterparty is the head charterparty, the voyage charterparty is in fact incorporated into the bill of lading, because the word 'freight' could only have referred to a voyage charterparty rather than to a time charterparty.⁴⁵⁰

Thus, as far as a shipowners' security on the cargo is concerned, its recognition and application are dependent on an examination of whether this clause can be incorporated into the bill of lading to bind the cargo owner, because the principle of privity of contract dictates that the contractual obligation provided in a charterparty cannot be imposed on the third party. Nevertheless, this solution of an incorporation clause may only contribute to the shipowner, as the carrier. When the disponent shipowner is not a party to the bill of lading, it is not operative.

⁴⁴⁷ CONGENBILL

⁴⁴⁸ *The San Nicholas* [1976] 1 Lloyd's Rep 8; *The Sevonina Team* [1983] 2 Lloyd's Rep 452

⁴⁴⁹ *Quark Ltd v Chiquita Unifrutti Japan Ltd and Others (The Vinson)* QBD (Com Ct) (677 Lloyd's Maritime Law Newsletter 1, 25 April 2005) < <https://www.lmln.com/charterparty/charter-interpretation/article21952.ece> > accessed 13 July 2017

⁴⁵⁰ *Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co. Ltd. and Tex-Dilan Shipping Co. Ltd (The SLS Everest)* [1981] 2 Lloyd's Rep 389

It is submitted that whether the remedial mechanism may directly act on the real cargo owner depends on the cargo owner's knowledge. To ensure certainty and safety of the transaction and trigger the development of the transnational trade, protection of a *bona fide* party, in particular, a *bona fide* purchaser is normally a priority in most jurisdictions. Accordingly, it is necessary to avoid the penetration of privity of contract. Also, based on it, in the system of security, the establishment of publicity is regarded as an effective approach to protect the *bona fide* party and to confirm the impact of the security clause on this party. In this connection, it is important to think of the shipper, cargo owner or bill of lading holder's position when the charterer employs their cargo's interests to create the security. In order to address this issue, the particularity of shipping industry and basic commercial knowledge must be considered thoroughly. It is generally accepted that the merchant in commercial quarters should have sufficient knowledge to evaluate and judge the commercial risk, no matter whether he is familiar with the domain in which he is participating.

As far as a shipper is concerned, before he chooses a charterer or a freight forwarder to be in charge of carriage of cargo, he should not only have sufficient knowledge of the charterer, being the qualified bailee or trustee, but also have sufficient awareness of the legal result based on bailment or the fiduciary relationship where the charterer will himself control the cargo or choose sub-bailment to control it. We are reminded in an old NZ case, that is a 'necessity for shippers to trust carriers'.⁴⁵¹ This exhorts shippers to choose a reliable carrier, who is ultimately a trusted bailee of his cargoes. While the charterer disposes of the cargo, including using the cargo to remedy his obligation based on his legal role, as far as the charterer's creditor is concerned, the law should treat him as a *bona fide* third party instead of the shipper.

⁴⁵¹ *Coggs v Bernard* (1703) 2 Ld raym 909; Tom Broadmore, 'Ethics in Maritime Law—New Zealand' (2014) 28 (2) *Austl & NZ Mar LJ* 58, 61, fn. 8

As far as a bill of lading holder (the cargo owner) is concerned, although the situation is different from that of the shipper because he has no knowledge of charterer's qualification, his duty is to consider the transaction risk in different ways including the reputation of the previous holder of a bill of lading, shipping risk during the voyage and the possible interest in the cargo before transfer of a bill of lading. Therefore, even if the bill of lading holder can be regarded as a *bona fide* third party, he should still take the responsibility to his own awareness and judge.

Certainly, the question arises which kind of third party should have the priority even if the charterer is entitled to employ the interest in the cargo to security his obligation. As Donaldson J held that

‘... the 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. 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’.⁴⁵²

The learned judge recognised the validity of the shipowner's security on the cargo not belonging to the charterer, but he considered that the bill of lading holder (cargo owner)'s right prevails. The court may provide the answer from the law of tort perspective. After all, there is no doubt that the bill of lading holder is the owner of the cargo.

⁴⁵² *Aegnoussiotis Shipping Corporation of Monrovia v. A/S Kirstian Jebsens Rederi of Bergen (The Aegnoussiotis)* [1977] 1 Lloyd's Rep 268, 276 (Donaldson J)

However, it is submitted that the condition precedent of protection of *bona fide* third parties regardless of tort or contract law should be based on the fact that the third party ‘has no actual knowledge of prior contractual interests which they otherwise would have to respect’.⁴⁵³ In the shipping industry, even if the shipper or the bill of lading holder has no professional knowledge of the charterparty’s security clause, at least being a participant in this industry, the relevant party should hold general knowledge of seaborne or multimodal trade where different parties have interests in the cargo. If the parties make use of their interests in the cargo, the potential risk is inevitable. For example, A’s movable cargos are lawfully possessed by B, but subsequently B sells these cargos to C at market price. Except where C’s conduct is contrary to good faith during the process of transaction with B, A has no reason to go against C. Among the shipowner, the charterer and the shipper/bill of lading holder, the shipper/bill of lading holder acts on A, the charterer represents B and the shipowner is C. The consideration which C may exercise is the interests in the cargo is the service of carriage or use of the vessel without payment.

It should be noted that from the shipper/bill of lading holder’s point of view, there is reason to suspect the shipowner’s motive to take the charterer’s interests, because the shipowner, being a professional should take the more responsibility to consider that the secured cargo does not belong to the charterer. However, this question should be evaluated and addressed after taking into consideration the shipowner’s role and function in shipping.

As mentioned before, the secured cargo involves different participants’ interests as follows:

⁴⁵³ Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol. II (7th edn, Hart Publishing Ltd 2019) 333

- 1) A shipowner/ carrier claims the carrier's lien in order to remedy his freight or hire to the bill of lading holder;
- 2) A disponent shipowner who is not a carrier invokes the charterparty's security to remedy his freight or hire to the charterer;
- 3) A bill of lading holder (cargo owner) is against the carrier and disponent shipowner's claim and pursues a counterclaim for the delivery of the cargo;
- 4) An unpaid seller asserts the retention of title.

In addition, other parties might have a bank who is the creditor of the bill of lading holder or seller, an underwriter and the carrier or disponent shipowner's creditor. But these parties are normally successors of the above parties, in light of the general rule that a recipient has no way to obtain more rights than the previous one, it is not necessary to put these parties together to discuss. Therefore, the above four types of parties will be examined. These competing rights just verify Sir Gerard Brennan's commentary that '[M]any problems of commercial law relate to the exercise of intangible legal rights'.⁴⁵⁴ In the face of the competing rights, after the fact is precise, the standard of the judicial decision might be dependent on 'legal rules, morality or idiosyncrasy'.⁴⁵⁵

As far as the first and second type of parties are concerned, actually, the competing rights can be addressed through the domestic contractual relationships or bailment which need no further discussion.

The crucial competing rights come from the third and fourth type of parties with the shipowner's right. This conflict has been extended to the scope of the shipowner, not

⁴⁵⁴ Gerard Brennan, 'Commercial Law and Morality' (1989) 17 Melbourne University Law Review 100,103

⁴⁵⁵ Ibid 102

just the disponent shipowner, because even if the shipowner is quite often in the face of the challenge of a bill of lading holder.

As just-discussed above, the incorporation clause is always regarded as an effective way, perhaps an only approach to address the competing rights between the shipowner's right and the bill of lading holder's right. The rate of success may be split in half. There is no doubt that the specific facts of a case may give rise to a reverse result. However, it must be considered whether there is a commercial rule to provide a plain approach to address the competing rights beyond the law itself. If a participant in shipping industry has actual knowledge of assessing the transaction risk, it is possible for him to choose a feasible secure way to protect himself as well rather than claiming his right against a shipowner who provides a service for carrying goods by sea.

As far as a competing right between a shipowner's security and retention of an unpaid seller's title is concerned, the foundation is similar. It is inadvisable to overemphasize the unpaid seller's right otherwise the whole system of security on the cargo is not operative and even the entire cross-board transaction might be destroyed. It is necessary to clarify that retention of title is different from a proprietary right, such as a floating charge. The House of Lords stated in one case that it was

‘...unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right to security in favour of the seller. Such a provision does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer’.⁴⁵⁶

⁴⁵⁶ *Armour v Thyssen Edelstahlwerke AG* [1990] 3 WLR 810

In other words, a floating charge is regarded as a proprietary right which enjoys priority compared with the retention of title clause. Particularly, as far as the movable property is concerned, if the original seller's right is always put into priority, the entire transaction model around the world will be absent of transaction security. The ultimate consequence is inevitably to destroy the transaction system. No one will win.

3.2.3.5 Registration

In accordance with the Companies Act 2006, it is necessary for a floating charge to be registered to give notice to any third parties. It is generally accepted that without registration the charge may be valid against a subsequent buyer or a subsequent charge holder who registers. But it is commercially unrealistic to require the shipowner to register.⁴⁵⁷ Especially, where the creation of a legal cargo security between a shipowner and a charterer is general knowledge in the shipping industry. A new type of security, namely, the floating charge on an interest in cargo between a disponent shipowner and its charterer is derived from the development of the modern multiple charterparties and its creation is still general knowledge. Furthermore, the purpose of registration under a floating charge is to give notice of the existence of security for the protection of a *bona fide* third party. Just as under a single charterparty it is not necessary for the legal cargo security to be registered because the fact of the cargo security is well known. Under multiple charterparties, it is similarly not necessary to register because from a public viewpoint multiple charterparties are not relevant to the creation of the cargo security.

3.2.4 Closing Remarks

It was demonstrated that in a single charterparty, a shipowner's cargo security is a legal possessory lien. But under multiple charterparties, a disponent shipowner's cargo security is short of the element of the legal security in the law of secured transactions.

⁴⁵⁷ In terms of the registration, it will be discussed in detail in Section 3 of Chapter 5.

A traditional legal solution to the cargo security is not operative. As discussed in the two cases above, the courts utilise the employment clause to grant the disponent shipowner the right of direction, but they do not thoroughly reflect the origin of that right. According to the courts' rationale, the disponent shipowner enjoys a special contractual lien under a sub-charterparty. However, because the disponent shipowner does not physically possess the cargo, he exercises his special contractual lien through the actual possessor's legal position. The argument that the employment clause extends the charterer's right to direct the master or shipowner to detain the cargo for exercising the contractual security on the cargo is not persuasive. Nevertheless, that courts are inclined to recognise the shipowner's remedy by way of security.

It is submitted that under multiple charterparties, apart from the shipowner in the head charterparty, other disponent shipowners in other charterparties forfeit the possibility of enjoying a legal cargo security because the requirement of possession of the cargo cannot be satisfied. Although possession can be interpreted in a loose sense, such as constructive possession, this interpretation may impact on legal securities in other commercial transactions. A feasible approach would be to understand and redefine the object of the disponent shipowner's security. Based on this, it is considered that the disponent shipowner's cargo security is no longer a legal possessory security; rather an floating charge over an interest in cargo, because of which the disponent shipowner has a right of possession. The origin of the interest in cargo emanates, a right in a closed circle, including right associated with multiple charterparties and bill of lading contracts which can be deemed to be quasi-legal rights, because all parties who have a connection with the cargo directly or indirectly have and should have known of the existence of this right. Following this rationale, the disponent shipowner is entitled to request the shipowner's cooperation. In order to avoid the exposure of risk to the shipowner, the consequence of the burden of the wrongful direction of cargo should be borne by the disponent shipowner.

4 Overview of Nature of Charterparties in Civil Law

In the common law context, the development of the shipowner's legal cargo security is discussed in detail. In terms of the civil law perspective, an attempt is made to focus on the controversial point pertaining to the shipowner's legal cargo security, because it may impact on the structure of the relevant Code.

4.1 Nature of the Three Types of Charterparties

It is generally acceptable that the nature of voyage and time charterparties is different from that of a bareboat charterparty. As regards voyage and time charterparties, they are both characteristic of service contracts. As a result, the possession of the chartered vessel remains with the shipowner who provides the vessel for a voyage or a period.⁴⁵⁸ Therefore, the legal status of the shipowner is to possess and control the vessel. In this situation, when the shipowner is granted the security on the cargo based on these two types of standard charterparty forms, it is implied that the shipowner actually or constructively possesses the cargo while exercising his remedy. The shipowner's security remedy is meaningful and feasible based on the premise in both the common law and civil law jurisdictions stress that it is necessary for the shipowner retains possession of the cargo. Otherwise, the shipowner will lose this right.⁴⁵⁹

By contrast, a bareboat charterparty is regarded as a lease contract so that the possession of the chartered ship is given to a charterer in law and practice.⁴⁶⁰ Naturally, a shipowner loses possession and control of the cargo on board the vessel. In this situation,

⁴⁵⁸ Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014) para1.1-1.2; Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para1.1

⁴⁵⁹ *Bags of Linseed* [1861] 66 US 108, 1 Black; *The Mihaios Xila* [1978] 2 Lloyd's Rep 186; Acquisition and Loss of Shipowner's Lien for Freight (1917) 17 (1) Columbia Law Review 628, 629; Terence Coghlin and others, *Time Charters* (7th edn, Informa Law 2014) 30.20; Cooke and others (n 458) para 79.2; In civil law, there is no non-possessory security. Therefore, the possession of the cargo is the precondition of exercise the security on the cargo.

⁴⁶⁰ Mark Davis, *Bareboat Charters* (2nd edn, Informa Law 2005) para1.1; Cooke and others (n 458) para1.1-1.2

although the bareboat shipowner, like the voyage and time charterparty's shipowner, enjoys the remedy by way of security on the cargo, the premise on which it is exercised is not possession or control of the cargo on board the vessel. Therefore, the nature of the bareboat shipowner's remedy is different compared with the other two types of shipowner's remedy.

4.2 A Controversial Viewpoint on the Nature of the Time Charterparty

With respect to the nature of voyage and bareboat charterparties, in general, no question arises as to their natures, but as regards the time charterparty, it does. Because in the two types of standard forms the rights and obligations of the shipowner and charterer are cast differently. More specifically, in the voyage charterparty the voyage shipowner has no obligation to deliver the vessel while the time shipowner in the time charterparty lets out and delivers the vessel to the charterer who pays hire.

In terms of the nature of the time charterparty, it is submitted that voyage and time charterparties are both characteristic of service contracts. Thus, the possession of a time chartered vessel remains with the shipowner. This conclusion does not give rise to controversy in common law.⁴⁶¹ However, in some civil law countries, the nature of the time charterparty is controversial, mainly because of the differences in the legal framework and linguistic connotations. The term 'hire' in a time charterparty is regarded as a 'rental' or 'lease' of a vessel in civil law countries, so that the time charterparty is merged with the bareboat charterparty. Correspondingly, it is supposed that the nature of the time shipowner's cargo security is similar to that of the bareboat

⁴⁶¹ In common law, it is generally accepted that the shipowner under a time charterparty retains possession of the vessel and the master and crew are employed by this shipowner; *Port Line v Ben Line* [1958] 1 Lloyd's Rep 290; *The Scaptrade* [1983] 2 Lloyd's Rep 253; *Cascade Shipping Inc v Eka Jaya Agencies (Pte) Ltd* [1993] 1 SLR 980, [1993] SGCA 7

shipowner's cargo security. However, whether this assumption is correct is discussed in the section.

4.2.1 The Origin and Nature of a Time Charterparty in Common Law

In order to examine the origin and nature of a time charterparty, it is necessary to look at the contract of affreightment and the carriage of goods by sea contract in advance, because their implications impact on the understanding of the time charterparty.

Currently, the traditional and authoritative viewpoint on the nature of the time charterparty is derived from common law.⁴⁶² In many common law countries, the time charterparty is incorporated into the contract of affreightment which is a generic term used in respect of all contracts of carriage of goods by sea.⁴⁶³ More specifically, 'whenever a shipowner, or some other person, agrees to carry goods by sea in return for the payment freight or hire, such a contract is a contract of affreightment.'⁴⁶⁴ However, whether a contract of affreightment and a contract for the carriage of goods by sea are the same and what is the exact scope of the contract of affreightment is controversial.

On the one hand, apart from the above definition of the contract of affreightment provided by Stephen Girvin, in *Scrutton on Charterparties and Bills of Lading* (23rd

⁴⁶² In common law, the nature of the time charterparty is also somewhat controversial. However, the mainstream is consistent.

⁴⁶³ *Cook Island Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422 (Mahon J) 440; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)20; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 1; It is noted that in modern American law, the notion of contract of affreightment is not employed anymore. Furthermore, the voyage charterparty which is regarded as a special type of contract of carriage is different from the time charterparty; Grant Gilmore and Charles L Black, *The Law of Admiralty* (New York 1975) 193-194. However, because the commonwealth countries normally follow the English rule, it is not necessary and no more space to discuss about the American law in this thesis.

⁴⁶⁴ Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)20, it is noted that the contract of affreightment can also be used as the technical term which refers to 'volume contracts', see Girvin, p. 20

edition), the contract of affreightment is also defined as ‘when a shipowner, or person having for the time being as against the shipowner the right to make such an agreement, agrees to carry goods by sea, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a contract of affreightment (or a contract for the carriage of goods by sea) and the sum to be paid is usually called freight’.⁴⁶⁵ The first edition of *Scrutton* had clarified ‘ “Contracts of Affreightment as Expressed in Charterparties and Bills of Lading” and dealing with voyage, but not time charterparties’.⁴⁶⁶ From this point of view, the carriage of goods by sea contract simply refers to the voyage charterparty; meanwhile, only the voyage charterparty can be regarded as the contract of affreightment.

On the other hand, the contract of affreightment can be deemed to be a generic term for all contracts of carriage by sea which contain voyage and time charterparties.⁴⁶⁷ Meanwhile, both contracts of affreightment and carriage of goods by sea contracts can be understood in a broad sense depending on the specific case. For example, in Gorton’s *Shipbroking and Chartering Practice*, the meaning of a contract of affreightment differs depending on commercial needs. Its meaning is described as ‘where a shipowner may make an agreement with a charterer to carry for the charterer during a specified period a large quantity of goods between certain ports’.⁴⁶⁸ In the classic book *Carriage of Goods by Sea*, professor Wilson also described that ‘when a shipowner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract affreightment.’⁴⁶⁹

⁴⁶⁵ Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) 1; it should be noted that in modern chartering industry the freight is merely used in the voyage charterparty. The more discussion can be found in Section 2 of Chapter 5.

⁴⁶⁶ Johanna Hjalmarsson, ‘Contracts: Time and Voyage Charterparties and Their Hybrid Forms’ in Jason Chuah (ed), *Research Handbook on Maritime Law and Regulation* (Edward Elgar Publishing 2019) 204; *Scrutton on Charterparties and Bills of Lading* (1st edn, 1886)

⁴⁶⁷ Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011)20

⁴⁶⁸ Lars Gorton and others, *Shipbroking and Chartering Practice* (7th edn, Informa 2009)108

⁴⁶⁹ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 3

Although no decisive conclusion on the meaning and scope of the contract of affreightment and the carriage of goods by sea contract has been recognised and affirmed, in reviewing the history of the development of the chartering industry, it is supposition that there is no fundamental distinction between the contract of affreightment and the contract for the carriage of goods by sea in history. It has been mentioned that historically, the chartering industry, was not independent and was simply a subordinate player in shipping. In the early period of chartering, there were no professional shipowners. The shipowner carried his own cargo and accepted cargoes of others if the vessel had extra space.⁴⁷⁰ Even after the Shipping and Navigation Act 1786 was enacted in Britain and the term 'shipowner' came into vogue, he was the carrier who undertook transportation of cargo for freight rather than the professional shipowner as in subsequent times.⁴⁷¹ Furthermore, the shipowner, as the carrier, tended to serve the cargo owner directly. Thus, the cargo owner quite often appointed a supercargo to follow this vessel in order to sell the cargo and purchase the proper cargo on the return home anytime.⁴⁷² The origin of the chartering industry was based on the service of carriage of goods. From this point of view, the time charterparty did not intentionally be separate from the carriage of goods by sea contract. As a result, it is easy to understand that the contract of affreightment is a generic term for all contracts of carriage by sea and the types of contracts of affreightment are various. Apart from the three basic types -- time, voyage and bareboat charterparties, other main types of contracts of affreightment still contain time trip charterparties, consecutive voyage charterparties, slot charterparties and volume contracts which are developed from the

⁴⁷⁰ See generally, Simon Ville, *English Shipowning During the Industrial Revolution: Michael Henly and Son, London Shipowners 1770-1830* (Manchester University Press, 1987) 2-3; Thomas J Pagonis, *Chartering Practice Handbook* (5th edn, Thomas Pagonis 2009) 8

⁴⁷¹ C Ernest Fayle, 'shipowning and Marine Insurance' in C Northcote Parkinson (ed), *The Trade Winds: A Study of British Overseas Trade during the French Wars, 1793-1815* (Routledge 1948) 25; Ville (n 471) 9

⁴⁷² Supercargo refers to as 'A person specially employed and authorized by a cargo owner to sell cargo that has been shipped and to purchase returning cargo, at the best possible prices'. This occupation was derived from the late seventeenth century. As the development of the chartering industry, this occupation dropped out the shipping industry; Bryan A Garner and others (eds), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1665

three basic types.⁴⁷³ Among these types, only bareboat charterparties are fundamentally different from others, because in these bareboat charterparties ‘possession and control of the vessel passes to the charterer, which vessel is supplied “bare” to them’.⁴⁷⁴ The legal nature of time, voyage and other charterparties is in common which is that the shipowner provides the charterer with the services of the vessel.⁴⁷⁵ More precisely, the fundamental purpose of the time charterparty is that the time shipowner provides the charterer with the service of the vessel and its crew over an agreed period, but the possession and control of the vessel remain with the shipowner.⁴⁷⁶

Although the shipowner's remuneration is referred to as ‘hire’ in the time charterparty, like in the bareboat charterparty, the term does not explain the substantive legal nature of the time voyage charterparty. Even if the standard time charterparty forms retain some peculiar terms or expressions, such as ‘the Owners agree to let, and the (time) Charterers agree to hire’;⁴⁷⁷ ‘where the vessel is on-hire’,⁴⁷⁸ they do not change the nature of the time charterparty. Even 200 years ago, the term ‘let’ did not mean transfer of possession.⁴⁷⁹ Therefore, when we delve into the nature of the time charterparty, it is not meaningful to stress the specific term, but to ignore the historical background.

⁴⁷³ Jan Lopuski, *Maritime Law in the Second Half of the 20th Century: Selected Articles* (Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika 2008) 60; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) 20-24

⁴⁷⁴ Girvin (n 473) 2

⁴⁷⁵ Ibid at 20-21

⁴⁷⁶ Ibid at 21

⁴⁷⁷ NYPE 46, Line 13; NYPE 93/2015; Art 1; GENTIME 99 Art 1

⁴⁷⁸ NYPE 93/2015, Art 7

⁴⁷⁹ Terence Coghlin and others, *Time Charters* (7th edn, Informa Law 2014) 1.12; it is described that two hundred years ago, it may be that the word ‘let’ lacked any necessary connotation of the transfer of possession. In the first edition of *Abbott on Shipping* (1802) it forms part of the general definition of ‘charter-party’, perhaps to emphasise that under any normal charter-party, by contrast to a bill of lading, it is ‘an entire ship, or some principal part thereof’ that is ‘let to a merchant’.

Mackinnon LJ clarified in *Sea & Land Securities v William Dickinson & Co*⁴⁸⁰ held as follows:

‘But certain phrases which survive in the printed form now used are only pertinent to the older form of demise charterparty. Such phrases, in the charterparty now before the court, are: “the owners agree to let”, and “the charterers agree to hire” the steamer. There was no “letting” or “hiring” of this steamer’.⁴⁸¹

Lord Mackinnon also restated the real nature of the time charterparty in the following words:

‘A time charterparty is, in fact, a misleading document, the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago, which was appropriate to a contract of a different character then in use. At that time a time charterparty (now known as a demise charterparty) was an agreement under which possession of the ship was handed by the shipowner to the charterer for the latter to put his servants and crew in her and sail her for his own benefit. A demise charterparty has long been obsolete. The modern form of time charterparty is, in essence, one by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer’.⁴⁸²

Similarly, Lord Denning MR also considered the original meaning of ‘freight’ and ‘hire’ in *The Nanfri*⁴⁸³. This learned judge’s opinion was summarized by Terence’s *Time Charters* as follows:

⁴⁸⁰ [1942] 2 KB 65 (CA)

⁴⁸¹ Ibid at 69 (Lord Mackinnon)

⁴⁸² Ibid

⁴⁸³ [1979] 1 Lloyd’s Rep 201

‘it was at one time common to describe the owners’ remuneration under a time charter as “freight” – later “time chartered freight” or “time freight”. But for many years now, the word “freight” has been reserved for all forms of voyage charter (and bills of lading) and the word “hire” used, by way of distinction, in time (and demise) charters. Time charter hire is typically payable in advance at set intervals throughout the course of the charter’.⁴⁸⁴

All in all, the nature of the time charterparty is that the time shipowner provides the charterer with the service of the vessel and its crew over the agreed period, but the possession and control of the vessel remain with the shipowner. Some peculiar terms such as ‘hire’, and ‘let’ in time charterparties, like in the bareboat charterparty, do not hinder the nature of the time charterparty which is to provide carriage of goods services.

Against the above discussion, although the contract of affreightment in *Scrutton* (1st edition) was simply considered as the voyage charterparty; furthermore, in the modern chartering forms, the distinction between the voyage charterparty and the time charterparty is very apparent which is that the former is to purely transport the cargo from the loading port to the destination, while the latter is to stress the use of the ship in a specific period; no authoritative conclusion is to affirm that the contract of affreightment does not contain the time charterparty. In addition, the different meanings of the contract of affreightment do not impact on the legal nature of the time charterparty which is to use the vessel. Thus, this author is of the opinion that the modern meaning of the contract of affreightment may need further research in a specific project. According to the current controversial opinions on the meaning and scope of the contract of affreightment and the contract for the carriage of goods, this author

⁴⁸⁴ Terence Coghlin and others, *Time Charters* (7th edn, Informa Law 2014) 1.15; see also *The Nanfri* [1978] 2 Lloyd’s Rep 132, 140

simply argues that although their meanings and scope are still somewhat nebulous in common law, this ambiguity does not impact on the legal nature and effect of the shipowner's security on cargo in the time charterparty.

4.2.2 Theoretical Controversy on the Nature of the Time Charterparty in Civil Law

~~As just discussed, a time charterparty is a basic type of contract of affreightment or carriage of goods contract on the basis of the historical background in common law.~~ In civil law, the understandings of the contract of affreightment and the carriage of goods by sea contract resulted in more controversial viewpoints in theory and practice. It should be noted that because the fundamental purpose of discussing the meanings of contracts of carriage, contracts of affreightment and time charterparties is to demonstrate that the different understandings in the different jurisdictions arise the difficulty to identify the nature of the time charterparty; furthermore, it impacts on the legal nature of the shipowner's security on cargo in the time charterparty, this author, therefore, focuses on the different understandings of these terms rather than providing a conclusive answer.

4.2.2.1 Loyal Followers of English Law

In civil law jurisdictions, Scandinavian countries (Sweden, Denmark, Norway and Finland) might be described as loyal followers of common law.⁴⁸⁵ In these countries, the understanding of a contract of affreightment and a contract of carriage of goods by sea is similar with that of English law.⁴⁸⁶ It is said that there are various contracts of

⁴⁸⁵ It should be noted that the legal system in Scandinavian countries cannot to some extent be regarded as the civil law system as one commentator argues that these countries have not codes like the civil codes of France or Germany. However, generally speaking, 'it would be right to attribute the Nordic laws to the Civil Law'; see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 277

⁴⁸⁶ These four Scandinavian countries maritime code is highly uniform, particularly, on the viewpoint of the contract of affreightment; Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (2nd edn, Universitetsforlaget 2008) 26-27; Jan Lopuski, *Maritime Law in the Second Half of the 20th Century: Selected Articles* (Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika 2008) 61-62

affreightment. Chartering agreements are primarily of two types: voyage and time charterparties; three special types of contracts of affreightment are made up of the charterparty for consecutive voyages, the quantity contract (variations of a voyage charterparty), and the bareboat charterparty.⁴⁸⁷ Also, to a great extent, English law has had a direct and important impact on the legal implication and viewpoints on the standard charterparty forms, and the approach to address the dispute quite often is borrowed from English law.⁴⁸⁸ Thus, it can be seen that although the legal system in Scandinavian countries is different from that of the common law, they have firmly transplanted the implication of traditional contracts of affreightment, particularly, charterparties from the common law without reservation.

4.2.2.2 Quasi-Followers of English Law

In the Netherlands, the conception of a contract of affreightment is not codified into the legislation whereas a contract of carriage of goods by sea is in an independent Section in the Netherlands Civil Code--Traffic Means and Transport. By way of observing the structure and the relevant articles of New Netherlands Civil Code Book 8: Traffic Means and Transport, the nature of three types of charterparties can be clarified. Both the time and voyage charterparties are codified in Section 2 'The Contract of Carriage of Goods by Sea'.⁴⁸⁹ Furthermore, both definitions are described as 'a time- or voyage-charter is a contract of carriage of goods whereby the carrier binds himself to carriage the things on board a vessel which he puts at the disposal of the consignor for the purpose, other than by way of a bareboat charter, in whole or in part, and whether or not on a time basis (time- or voyage- chartering)',⁴⁹⁰ while the definition of a bareboat

⁴⁸⁷ Falkanger, Bull and Brautaset (n 486) 240-246, 242 and 434

⁴⁸⁸ Falkanger, Bull and Brautaset (n 486) 242 and 415

⁴⁸⁹ The Dutch Civil Code, Art 2:370 provides that 'The Contract of Carriage of Goods by Sea within the meaning of this title is a contract of carriage of goods, whether or not being a time-voyage charterparty, whereby one party (the carrier) binds himself towards the other party (the consignor) to carry the things on board a vessel exclusively by sea'.

⁴⁹⁰ Ibid Art 8: 373

charterparty is not clear. Nevertheless, there is no question as to the definition of the bareboat charterparty which is referred to as ‘a lease of the ship itself’.⁴⁹¹

It should be noted that the term ‘shipowner’ is superseded by the term ‘lessor’ in the section of the contract of carriage of goods. It is provided that ‘[I]n this section, the “lessor” means the carrier and the “charterer” means the consignor’.⁴⁹² Obviously, the term ‘lessor’ does not impact on the understanding of the nature of the time charterparty, because the Dutch Civil Code has expressly implied that the term ‘lessor’ is not relevant to the meaning of ‘lease’ and ‘hire’.⁴⁹³ In addition, under Dutch law, a charterer to a voyage and time charterparties is not a possessor. Even a bareboat charterer is not regarded as a possessor. All charterers are merely detendors (or holders and custodians).⁴⁹⁴

In accordance with the French Transport Code, three types of charterparties have been incorporated into the same Chapter ‘Chartering’. However, their natures are different. A time charterparty is regarded as a contract of affreightment which is different from a contract of carriage of goods by sea. The element of hiring the vessel in former contract is highlighted, while the latter contract is to stress that the carrier is in charge of transporting the cargo against freight.⁴⁹⁵ Although the scope of the contracts of affreightment consists of voyage, time and bareboat charterparties, and the element of hiring the vessel does not suit for the voyage charterparty, French scholars consider that the voyage charterparty is a contract of affreightment of special judicial nature.⁴⁹⁶

⁴⁹¹ Herman Boonk, ‘PPT, LLM programme in Maritime and Transport Law’ (Erasmus School of Law 2017)

⁴⁹² Dutch Civil Code, Art 8: 373

⁴⁹³ Ibid Art 8: 374; it is provided that ‘[T]he statutory provisions regarding lease and hire, deposit and loan for use do not apply to the putting at disposal of a vessel, other than by way of a bare-boat charter’.

⁴⁹⁴ Herman Boonk, ‘PPT, LLM programme in Maritime and Transport Law’ (Erasmus School of Law 2017)

⁴⁹⁵ Jan Lopuski, *Maritime Law in the Second Half of the 20th Century: Selected Articles* (Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika 2008) 61

⁴⁹⁶ Ibid; Jan Lopuski in his book cited the opinion proposed by R Rodiere. R Rodiere contended that the voyage charterparty was neither the contract of hiring nor the contract of carriage, just a contract of

As regards the nature of the time charterparty, this present author does not find an authoritative answer. Nevertheless, the French law has established the theory of Manoeuvring-Business separation (Gestion nautique: nautical management and gestion commerciale: commercial management)⁴⁹⁷ under the 1966 Charter Party and Contract for Carriage by Sea Act and Decree,⁴⁹⁸ this means that a shipowner to a time charterparty has the responsibility of the nautical management and a charterer has the responsibility of the commercial management. From this point of view, it seems that the charterer should control the cargo. However, in light of the meaning of ‘a time charterparty’ in the French Transport Code, the time charterparty cannot be regarded as a pure lease contract.⁴⁹⁹ Furthermore, a Dutch scholar clearly states that Dutch law is based on French law.⁵⁰⁰ Therefore, this author considers that the ‘lessor’ in the French Transport Code does not demonstrate that the shipowner and the charterer are subject to the law of lease.

It can be seen that the Dutch law and the French law do not deeply explore the relationship between contracts of affreightment and contracts for carriage of goods by sea, but they do consider that the fundamental purpose of voyage and time charterparties is to provide the service of carriage of goods. Therefore, the peculiar

affreightment of special judicial nature.

⁴⁹⁷ The Manoeuvring-Business separation theory refers to as ‘the shipowner has the right and obligations respecting the ship’s navigations while the time charterer has the same concerning the ship’s commercial operation’; see In Hyeon Kim, *Transport Law in South Korea* (Wolters Kluwer Law & Business 2011) 71; Herman Boonk, ‘PPT, LLM programme in Maritime and Transport Law’ (Erasmus School of Law 2017)

⁴⁹⁸ 1966 Charter Party and Contract for Carriage by Sea Act No.66- 420, Arts. 8&9 and Decree Arts 20&21. The Decree of 1966 has been replaced by the French Transport Code 2016 (Chapter 3 ‘Chartering’, Part 2 ‘contracts’, Book 4 ‘ Maritime Transport’, Fifth Part). However, the content is still applicable; see ‘France’ (The Shipping Law Review--Edition 3, 16 August 2016) <<https://thelawreviews.co.uk/chapter/1136082/france>> accessed 30 July 2018

⁴⁹⁹ Article 5432-10 of the French Transport Code provides that ‘ in the contract of a time charter, the lessor agrees to put an crewing vessel at the disposal of the charterer for a defined period.’(translated by Mr Jun Shen, a French qualified lawyer)

⁵⁰⁰ Herman Boonk, ‘PPT, LLM programme in Maritime and Transport Law’ (Erasmus School of Law 2017)

terms ‘hire’ and ‘let’ in the time charterparty do not change the nature of the shipowner’s possession to the ship.

4.2.2.3 Distinctive Followers of English law

Other civil law countries, in particular, Asian civil law countries, because of the element of ‘hiring the vessel’ in the time charterparty, the legislation and academia always struggle with the nature of the time charterparty.

In terms of China, it is a relevant observation that at one time there was scholarly opinion pursuant to which all three types of charterparties were viewed as contracts of affreightment or carriage of goods by sea contracts, but this seems to have lost support in Chinese academia and faded away in relatively recent times.⁵⁰¹ The most important reason is that the Maritime Code implies authoritatively that the voyage charterparty is a carriage of goods contract, but the time charterparty is not. In this regard it is pertinent to note that the time charterparty, along with the bareboat charterparty, is provided for in Chapter 6 of the Maritime Code, the title of which is ‘Charterparties’. By contrast, the voyage charterparty is considered to be a contract of carriage of goods by sea and is provided for in Chapter 4 of the Maritime Code, the title of which is ‘Contract of Carriage of Goods by Sea’. This is the position as far as the legislation is concerned. Recently, in the course of the revision of the Maritime Code, some experts have proposed adjusting this proposition, but that has failed.

Based on this, in terms of the nature of a time charterparty, there are two main viewpoints expressed in Chinese academic literature. The minority view is that it is in the nature of a lease of property⁵⁰², while the majority view is that it is a hybrid contract

⁵⁰¹ Wanda Wei, *Maritime Law* (Law Press China 1984); For a contrary opinion, see Yongjun Song, ‘The Nature of the Charterparty’ in Ying Yong (ed), *Judicial Idea and Development of Maritime Law* (Law Press China 2013) 265

⁵⁰² Zuoxian Zhu, ‘Study on the Nature of a Time Charterparty’ in Si Yuzhuo and Li Zhiwen (eds), *Study on the Theories of Chinese Maritime Law* (Peking University Press 2009)381-384, 393

comprising both a lease of property as well as a contract for the carriage of goods by sea.⁵⁰³ Those scholars who subscribe to the view that the time charterparty is, in one way or another in the nature of a lease of property, argue that it possesses the qualities of a lease agreement where the vessel is utilised essentially as a warehouse or for other such business rather than for carriage of goods. If the conception of the lease contract is followed, in theory, the time charterparty may give rise to the transfer of possession of the chartered vessel. Accordingly, the shipowner will lose possession of his vessel. This proposition can be easily accepted where the charterer or his agent issues a bill of lading in his own or his agent's name.

Although there is no authoritative case to clarify the nature of the time charterparty, in *Tianjin Iron & Steel Group Co Ltd, Tianjin Branch, PICC v Niagara Maritime SA*⁵⁰⁴, the SPC's Judge Xiwu Huang opined that 'the function of the voyage charterparty is to transport cargo. That is the reason that the charterer is required to pay "freight". Therefore, the voyage charterparty should be regarded as a contract of carriage of goods by sea. By contrast, the purpose of the time charterparty is to rent or lease a vessel for transportation and "hire" is the shipowner's remuneration'.⁵⁰⁵ In accordance with Chinese Contract Law, if a time charterparty is regarded as a lease contract, it means that the time charterer possesses or controls the vessel for the duration of the charterparty.⁵⁰⁶ From this point of view, the SPC is in favour of the charterer being in possession of the vessel. Nevertheless, again there is no authoritative case law providing any decisive judgment on the nature of the time charterparty. Furthermore, with regards to the application of the time shipowner's security on the cargo, the

⁵⁰³ Ibid at 381-384

⁵⁰⁴ [2011] MSTZ No. 12

⁵⁰⁵ Xiwu Huang, 'The Validity of an Arbitration Clause in the Contract of Carriage of Goods by Sea' (*Tianjin Iron & Steel Group Co Ltd Tianjin Branch, PICC v Niagara Maritime SA*) <<http://bmla.chinalawinfo.com/newlaw2002/slc/slc.asp?db=fnl&gid=118315807>> accessed 7 February 2017

⁵⁰⁶ Chinese Contract Law 1999, Art 229; Mingrui Guo and Yi Wang, *New Contract Law: Special Provisions* (China University of Political Science and Law Press 1997)95; Zuoxian Zhu, 'Study on the Nature of a Time Charterparty' in Si Yuzhuo and Li Zhiwen (eds), *Study on the Theories of Chinese Maritime Law* (Peking University Press 2009)387

Chinese courts do not unequivocally hold that the shipowner's security is a possessory lien (security). In other words, the court applies double standards to deal with the time charterparty. While a case is relevant to the incorporating clause, the court is inclined to consider that its nature is a lease contract, or at least, a hybrid contract in order to draw a line between it and the nature of the voyage charterparty. By contrast, in the case where it is directly connected with the lien (security) clause, the traditional possessory lien (security), being independent in theory, does not impact on the nature of the time shipowner's cargo security. However, whether the court is in favour of the shipowner's security remains an issue.

Similarly, in South Korea,⁵⁰⁷ the majority view on the legal nature of the time charterparty is that it is a kind of lease, while the minority contends that it is a kind of contract for the carriage of goods by sea.⁵⁰⁸ Although the nature of the time charterparty has been long debated in Korean academic circles, the Korean Supreme Court held in 1991 that the legal nature of the time charterparty is very similar to that of the bareboat charterparty.⁵⁰⁹

In the Japanese case, compared with Chinese and South Korean law, it is clear that the time charterparty is a lease contract. 'The time charterer's position under the law of Japan is akin to that of a lessee under a lease contract'.⁵¹⁰ The latest Marine Transportation Act of Japan also puts a time charter into the business of leasing a

⁵⁰⁷ Korean maritime law belongs to the civil law system which is modeled on German and Japanese maritime law; In Hyeon Kim, 'An Overview of Korean Maritime Law' (2012) 10 *The Asian Business Lawyer* 35

⁵⁰⁸ Ibid 45; In Hyeon Kim, *Transport Law in South Korea* (Wolters Kluwer Law & Business 2011) 70

⁵⁰⁹ *The Polsa Dos* case (Korean Supreme Court) Docket No 91 da 14215 (25 February 1992)

⁵¹⁰ *The Shoei Maru v The Shinko Maru* (The Osaka District Court 15th Civil Division Decision) (S58)9 (12th August 1983); T Hosoi, 'Third Party Liabilities of Voyage and Time Charterers Under Japanese Law' (Hosoi Law Office, 6 oct 2009) < <http://www.gard.no/web/updates/content/52400/third-party-liabilities-of-time-and-voyage-charterers-under-japanese-law> > accessed 30 July 2017

vessel.⁵¹¹ However, the Japanese Supreme Court eventually clarified the shipowner's possession of the vessel in a time charterparty by stating that:

‘...under the lease of a vessel, the lessee who has taken possession of the vessel outfits the vessel, appoints a Master and employs crew members, and has the complete control and possession of the vessel through the direction and supervision of all crew members below the Master. Hence, there is no scope for the lessor owner to become party to a contract for the carriage of cargo on the vessel in the role of carrier ... however, under such a time charter contract, it is the owner of the vessel who provides the outfit of the vessel, the appointment of the Master and the employment of the crew and, leaving aside the fact that the time charterer has authority to give orders and directions in relation to certain commercial matters, the fact that the owner retains the authority to direct and supervise all crew members below the Master means that the owner can still remain in control and possession of the vessel’.⁵¹²

It is apparent that Asian civil law jurisdictions struggle with the element of ‘hiring the vessel’ in the time charterparty so that the time shipowner’s possession on the vessel raises uncertainties.

⁵¹¹ The Japanese Marine Transportation Act (2012 amendment), Chapter I ‘General Provisions’, Article 2 (7) ‘Definition’ provides that ‘[T]he term “ship-leasing Business” in this Act means a business of leasing a vessel (including time charter; hereinafter the same) or entrustment of ship-operation’.

⁵¹² *Toyo Kasai Kaijo Hoken KK v Kanki Gaiko KK* (*‘the Jasmin’*) Minshû vol.52, no.2 527, Japanese Supreme Court (27 March 1998); Mika Takahshi and Souichirou Kozuka, ‘The Outline of the Japanese Maritime Law’ <<http://www.law.tohoku.ac.jp/kokusaiB2C/overview/maritime.html>> accessed 30 July 2017; The statement of Japanese Supreme Court is compatible with some Chinese celebrated scholars; see generally Zuoxian Zhu, ‘Study on the Nature of a Time Charterparty’ in Si Yuzhuo and Li Zhiwen (eds), *Study on the Theories of Chinese Maritime Law* (Peking University Press 2009)

Nevertheless, it should be noted that although Germany is a European continental jurisdiction, the structure of German Commercial Code is very similar to that of the Chinese Maritime Code. A voyage charterparty is incorporated into the contract of carriage of goods by sea; while a time and bareboat charterparties are codified into ‘contract for the use of ships’ or ‘charterparties’. From this structural point of view, under German law, a time charterparty is not a contract for the carriage of goods. However, while the parties to the time charterparty participate in the carriage of goods, for example, if the shipowner issues a bill of lading, the time charterparty is a transport contract and the parties are bound by it.

4.2.3 Closing Remarks

As discussed above, the English law exported the foundation of contracts of affreightment and contracts of carriage of goods by sea to the world. The nature of the voyage and time charterparties are comparatively plain, although whether both constitute contracts of affreightment and/or contracts for carriage of goods is short of the uniform answer in common and civil law countries. The former one, as a typical contract for carriage of goods, provides the service of carriage so that the possession of the vessel remains with the shipowner; while the latter one, as a special contract of affreightment and a contract for carriage of goods, is that the shipowner withdraws the service of carriage, alternatively, he indirectly participates in the service, but passes on the possession of the vessel to the charterer.⁵¹³

However, because of linguistic nuances and different legal traditions, the civil law jurisdictions present a different perspective on the understanding of contracts of affreightment and contracts of carriage which directly impacts on the understanding of the nature of the time charterparty.

⁵¹³ Under the Dutch law, the possession of the vessel remains with the shipowner; Herman Boonk, ‘PPT, LLM programme in Maritime and Transport Law’ (Erasmus School of Law 2017)

Scandinavian countries take advantage of the English language to successfully transplant English law into their own legal systems.⁵¹⁴ Furthermore, there is no impediment in applying the understanding of English law about the nature of charterparties.

In some continental European jurisdictions, although they keep themselves at a distance from the common law, the element of ‘hire’ under the time charterparty does not sway their view and understanding of the original nature of the time charterparty which is that historically, the difference between the voyage and time charterparties merely lies in one voyage or a certain period, but is not relevant to the letting of the vessel. This situation could contribute to a geographical advantage. After all, the English Channel is not far from the continental European countries. The development of seaborne trade between the UK and continental European countries is substantial which helps in their understanding of the history and nature of charterparties established by English law.⁵¹⁵

In Asian countries, the controversy about the nature of the time charterparty may be difficult to reconcile because of the linguistic differences. Although English is the acknowledged international language of shipping, Asian scholars well-versed in the English language are relatively few. Much-needed expertise required in the drafting of

⁵¹⁴ The author lived in Sweden for two years. As she noted, in terms of their understanding of the English language, the citizens of Scandinavia countries are much more competent than those of other European countries or of Asian countries. Local television channels never need to dub or subtitle English Programmes into their own respective languages. People and educational institutions in Scandinavian countries are also happy to accept news from its original source in English.

⁵¹⁵ It should be noted that Charterparties, as a very distinctive type of commercial maritime contract, is derived from and explained by the notion of the *carta partita*, the origins of which are embedded in the *lex mercatoria* and the *lex maritima* historically rooted in Roman law; See Proshanto K. Mukherjee, *Maritime Legislation* (WMU Publications 2002)7, 22; Proshanto K Mukherjee, ‘Maritime Law and Admiralty Jurisdiction: Historical Evolution and Emerging Trends’ < <http://www.jtighana.org/links/trainingmaterials/Maritime%20Law%20&%20Admiralty%20Jurisdiction.pdf>> accessed 3 February 2018. But along with the British sea power, the nature, character and rules of charterparties are gradually impacted and dominated by English law.

legislation is in short supply. In this situation, it is difficult for Asian scholars to understand the origins and legal connotations of charterparties from the historical point of view. Also, in the process of transplanting the law, the exporting countries' legal history and culture are not adequately understood. Thus, the element of hire perplexes the traditional Asian law scholars. They are unable to abandon the notion of 'hire' under the time charterparty. The conceptual philosophy drives them to enjoin hire with lease in civil law terms and make no distinction. However, if the explanation of hire always follows the fixed model in civil law, in the lease contract, the possession of the vessel will pass on to the charterer which is contrary to the general understanding of possession of the shipowner. To address this contradiction, the Japanese courts have ventured to distinguish the traditional opinion in civil law with the peculiar situation in the chartering industry.

In addition, no contrary position in most civil law jurisdictions consider that the time shipowner is entitled to possess the cargo even if the time charterparty might be regarded as a lease contract. In other words, the nature of the time charterparty does not impact on the shipowner's possession on the cargo, even if the shipowner lets and delivers the vessel to the charterer leading to civil law scholars and courts questioning the nature of the time charterparty. From this point of view, although in civil law the nature of the time charterparty raises controversy on whether the shipowner still possesses the vessel, eventually civil law jurisdictions comply with the traditional common law proposition that the shipowner possesses the vessel even if some understand the time charterparty to be a lease. This situation reflects the traditional civil law view that international chartering was established by English law and practice over centuries but has also generated conflict between the 'imported' and domestic systems. But a global industry still stimulates the civil law to give way to its achievements and directly apply the possessory lien (security).

5 Legal Nature and Effect of a Shipowner's Cargo Security Under Multiple Charterparties in Civil Law

From the civil law perspective, the answer regarding the nature of the disponent shipowner's security on the cargo is either simple and plain or complex and elusive. The two extremes are based on the developed and emerging legal systems in civil law. The former is represented in German and Dutch law; the latter in Chinese law.

5.1 Comprehensive Legislative Protection in Developed Jurisdictions: German Law

It is generally knowledgeable that the German legal system is one of the most important foundations of modern civil law.⁵¹⁶ The German Civil and Commercial Codes are followed by many civil law countries such as Greece, Austria, Portugal, China and Japan.⁵¹⁷ The German maritime law incorporated into the German Commercial Code (HGB) was fundamentally revised in 2013. The latest German maritime law discards the outdated concepts and completes and updates definitions and rules making the whole system comprehensive.⁵¹⁸

German law provides comprehensive security on the cargo pursuant to the types of transport contract against whom the security on the cargo is to be exercised. In this section, it is expected to put the disponent shipowner into the full picture of the transportation to consider its right rather than just discussing it within the charterparty. In addition, it should be noted that the German law complying with the principle of

⁵¹⁶ Both the laws of Germany and France are subject to a wide variety of influences from Roman law. The German Civil Code and Napoleonic Civil Code take the different structures to codify which impact on the different civil law countries respectively.

⁵¹⁷ It should be noted that although many countries follow German law, this does not mean that these countries' legislation, like German law is developed. In the following section, Chinese law, as an emerging representative, will be discussed.

⁵¹⁸ Tobias Eckardt, 'The Major Changes of the Recent Reform of German Maritime Law' (2015) 4 *Tijdschrift Vervoer & Recht* 58, 58-61

numerus clausus provides statutory security on the cargo and its nature. Although German law permits contracting parties to modify the details of the security, the nature of the security on the cargo provided by law cannot be changed. However, in Chapter 3, in the discussion on the decline of the *numerus clausus*, it was pointed out that the system of the security on movable property in Germany is also regarded as judge-made law to a great extent because ‘the rules applicable to securities over movables are to a great extent not codified’.⁵¹⁹ In terms of the shipowner’s security on cargo, judge-made law appears to be rather limited. This is mainly because the legislation provides a comprehensive approach to address the relevant legal issues. This section attempts to focus first on the legislation and explore the approach behind it.

5.1.1 Review of the Cargo Security Based on the Voyage and Time Shipowner’s Role

First, under a contract for the carriage of goods by sea evidenced by a bill of lading, the party who is under the obligation to transport the cargoes has a statutory security (lien) on the cargo on board the vessel. This security is directed against the shipper or other interested parties having a right to the cargoes. The contractual carrier’s security⁵²⁰ is set out in Section 495 (1) of the German Commercial Code in the following words:

‘For all of his claims under the contract for the carriage of general cargo, the Contractual Carrier shall have a lien over the goods delivered to him for carriage, whether they belong to the Contractual Shipper, the Documentary Shipper, or a third party that has consented to the carriage of the goods. The Contractual Carrier shall also have a lien over the goods of the Contractual Shipper for all undisputed

⁵¹⁹ Moritz Brinkmann, ‘The Peculiar Approach of German Law in the Field of Secured Transactions and Why it has Worked (So Far)’ in Louise Gullifer and Orkun Akseli (eds) ‘*Secured Transactions Law Reform: Principles, Policies and Practice*’(Hart Publishing 2016) 340

⁵²⁰ In the title of the provision ‘the contractual carrier’s lien’, ‘contractual’ does not refer to the agreed contractual terms between contracting parties. It just points out this statutory lien is derived from a type of transport contract.

claims under other contracts concluded with the Contractual Shipper for the carriage of goods by sea, for the carriage of goods by other means, for freight forwarding and for warehousing. The lien extends to the accompanying documents'.⁵²¹

This provision grants to a contractual carrier, statutory cargo security. Moreover, it does not matter whether the contractual carrier is a charterer or a shipowner or a charterer by demise, or a time charterer or a voyage charterer; even a freight forwarder can be a contractual carrier.

Furthermore, in accordance with Section 496, a contractual carrier does not merely point to one party. In the process of carriage of goods, a series of participating carriers constitute contractual carriers who have a security on the cargo. But, because of the secured cargo pointing to the property in common, the exercise of the right has been provided in Section 496 as follows:

‘(1) Where carriage is performed by several carriers and where it is incumbent on the last of them to collect, at delivery, the payments owing to the preceding carriers, he has to exercise the rights of the preceding carriers, in particular to enforce the lien. The lien of each preceding carrier shall persist for as long as the lien of the last carrier is in force.

(2) If a preceding carrier is paid by a subsequent carrier, the claim and the lien of the former shall devolve to the latter’.⁵²²

⁵²¹ German Commercial Code, s 495 (1)

⁵²² Ibid at s 496

Although Sections 495 and 496 do not state the indirect possession of cargoes,⁵²³ suffice it to say that possession does not need to be direct in German law. In accordance with the two Sections, let us suppose that there are a chain of transport contracts among a shipper, a freight forwarder, a time charterer and a shipowner. A freight forwarder, as a contractual carrier, issues a bill of lading to a shipper. However, it is impossible for him to hold the cargoes to transport by himself. He may pass on the cargo to a time charterer who holds the cargoes in possession for the freight forwarder. Subsequently, a shipowner to a time charterparty holds cargoes for the time charterer. Under this circumstance, the freight forwarder is the first carrier. Subsequently, the time charterer and the shipowner are the second and the third contractual carriers, but only the shipowner, the last carrier, is the actual carrier who has obligation to collect the payment at discharge for the previous carriers including the time charterparty and the freight forwarder who do not possess the cargoes physically. Thus, the requirement of possession of cargoes is not confined to direct or physical possession.

The foundation of indirect possession has been explicitly provided under Section 868, the German Civil Code that:

‘(indirect possession) [I]f a person possesses a thing as a usufructuary, a pledgee, a usufructuary lessee, a lessee, a depositary or in a similar relationship by virtue of which he is, in relation to another, entitled to possession or obliged to have possession for a period of time, the other person shall also be a possessor (indirect possession)’.⁵²⁴

⁵²³ Ibid at s 495 (2); it provides that ‘[T]he lien shall persist for as long as the Contractual Carrier has possession of the goods, and in particular for as long as he has the right of disposal over them by means of a bill of lading, a consignment bill (Ladeschein), or a warehouse warrant’.

⁵²⁴ Ibid at s 868

Multilevel indirect possession, like a chain of transport contracts or a string of charterparties, has been provided for and recognised by Section 871 as follows:

‘(multilevel indirect possession) [I]f the indirect possessor is in a relationship with a third party of the nature set out in section 868 above, the third party is also an indirect possessor’.⁵²⁵

Secondly, under a contract of carriage laid down in a voyage charterparty, a shipowner is regarded as a contractual carrier who may apply to the contractual carrier’s lien provided by Section 495 (2). Equally, regardless of how many voyage charterparties are involved in the carriage of goods and how many shipowners do not possess the cargoes physically, it does not impact on the consequence that the voyage shipowner, the disponent shipowners may exercise the security on the cargo, because in a chain of transport contracts they are granted contractual carrier’s right.

Thirdly, as far as a time charterparty is concerned, the situation is different. When the nature of the time charterparty was discussed, it was observed that under the German Commercial Code, a voyage charterparty is incorporated into the contract of carriage of goods by sea; while a time and bareboat charterparties are codified into ‘contract for the use of ships’ or ‘charterparties’. That is to say, a time charterparty does not a contract for carriage of goods. Therefore, the time shipowner, unlike the voyage shipowner, is not regarded as the contractual carrier. Actually, the time shipowner is called a disponent shipowner who merely has a security (lien) on the cargo owned by the time charterer.⁵²⁶ In other words, the disponent shipowner only has a right in the cargo belonging to the time charterer.

⁵²⁵ Ibid at s 871

⁵²⁶ The German Commercial Code, s566 (1) provides that ‘Disponent Shipowner’s Lien’ provides that ‘[F]or his claims under the time charter contract, the Disponent Owner shall have a lien over the property on board the ship, including the fuel, insofar as such property is owned by the time charterer’.

This situation was explained by the legislator with the prevailing role of the disponent shipowner to the time charterparty. To be precise, in accordance with the payment of hire section providing that '[H]ire is to be paid every fifteen days in advance, unless otherwise agreed',⁵²⁷ the legislator considered that 'the charter hire is normally due in advance, which the disponent shipowner could enforce and he therefore does not require protection to the same degree as the carrier who can obtain a lien over goods of any person who agreed on the carriage, albeit only for carriage connected claims'.⁵²⁸

Even so, the legislator takes an alternative approach to protect the disponent shipowner. The legislation grants the disponent shipowner the right of retention, which has the same effect, like the lien (security). The specific provision can be seen that:

'[T]he Disponent Owner may refuse performance of his obligations, including the loading and stowage of the goods and the issue of bills of lading, for as long as the time charterer is in default with payment of hire that is due'.⁵²⁹

It can be seen that the exercise of the cargo security is not on the basis of the precondition that the creditor physically possesses the cargoes, because the security can be enforced by way of indirect possession. Therefore, whether or not the disponent shipowner indeed possesses the cargoes do not impact on the exercise of the security. On the one hand, while the disponent shipowner acts as the role of a contractual carrier or acts as a voyage shipowner, he simply relies on the contractual carrier's lien achieve his right; on the other hand, while he is merely a time shipowner, he may exercise his statutory lien on charterer's cargo or exercise the right of retention to achieve the same purpose to force the charterer to pay for hire.

⁵²⁷ Ibid, s565 (1)

⁵²⁸ Simone Lamont-Black, 'The Carrier's Lien: English and German Law' in Olga Fotinopoulou Basurko and Jose Manuel Martin Osante (eds), *New Trends in Maritime Law: Maritime Liens Arrest of Ships, Mortgages and Forced Sale* (Thomson Reuters 2017) 441

⁵²⁹ German Commercial Code, s 568

5.1.2 Observations

From the perspective of a comprehensive legal system, German Commercial Code and the theory of secured transactions law such as indirect possession theory operate together to determine the legal nature and effect of disponent shipowner's security. More specifically, the theory of secured transactions law merges into the German Commercial Code to provide the legal nature and effect of disponent shipowner's security. Meanwhile, these provisions in relation to disponent shipowner's security reflect inclination of the German legislator on the basis of the feature of the shipping industry. It is generally acceptable that the legal nature and effect of shipowner's cargo security tend to impact on different participants in the shipping industry including but not limited a shipowner, disponent shipowners, sub-charterers, cargo owner and financiers. If the lawmaker is inclined to protect the carrier and disponent shipowners under multiple charterparties, this means that the carrier and disponent shipowners who supply the service of transportation will find a comprehensive remedial mechanism by legislation. In light of the above provisions, it has demonstrated that German law stipulates a number of approaches to affirm the legal effect of the shipowner and disponent shipowner's cargo security.

First, a voyage shipowner, regardless of real or disponent shipowner, can be regarded as an actual or contractual carrier based on the theory that the voyage charterparty is a kind of carriage of goods by sea contract and the shipowner in the voyage charterparty acts as a carrier. To secure payment of freight, the voyage shipowner enjoys a carrier's statutory lien. As a result, the actual possessor must comply with the carrier's (voyage shipowner) orders to assist the carrier in exercising security on the cargo. This obligation to assist is derived from the law, as opposed to a contractual right. The actual possessor is exonerated from liability arising from the other contractual relationship when he complies with the carrier's order in accordance with the statutory security. For

example, multiple charterparties constitute a time charterparty (A, a head shipowner and B, a time charterer) and a voyage charterparty (B, a time charterer and a disponent shipowner, and C, a voyage charterer). A issuing a bill of lading is not only an actual carrier, but also a physical possessor on the cargo. In accordance with the German law, B can be regarded as a contractual carrier and a non-possessor on the cargo. In this scenario, B does not possess the cargo is because he transfers the right of possession to A. In other words, A, on behalf of B, possesses the cargo physically. It is therefore obvious that A has an obligation to comply with B's order. This is the ground on which B is entitled to exercise his security even if he does not control the secured property.⁵³⁰

The special protection to the carrier under German law can also be demonstrated by the extension of possession. In accordance with Section 495, in the event that the cargo is still in the consignee's possession after delivery, the carrier is entitled to exercise his lien up to 10 days.⁵³¹ In other words, the remedy to the carrier is more important than the traditional philosophy behind the meaning of possession. From this point of view, the German legislator has expanded the exercise of *numerus clausus*.

Secondly, a time shipowner, in light of the nature of the time charterparty, has not incorporated the carriage of goods contractual relation so that he cannot be regarded as a carrier directly. However, from the practical point of view, German law recognises his function in the course of maritime transport. Therefore, in his role, as disponent shipowner, he enjoys the lien on the time charterer's cargo and may invoke a right of

⁵³⁰ The author's observations are not inconsistent with some German scholars. For example, in one commentary it is contended that 'the sea carrier's lien under German law, whether for a contract of carriage of general cargo or under voyage charter, is also similar to the English common law lien, first of all possessory in nature... The carrier has a lien over the goods and accompanying documents while they are in his possession'; Simone Lamont-Black, 'The Carrier's Lien: English and German Law' in Olga Fotinopoulou Basurko and Jose Manuel Martin Osante (eds), *New Trends in Maritime Law: Maritime Liens Arrest of Ships, Mortgages and Forced Sale* (Thomson Reuters 2017) 439

⁵³¹ The German Commercial Code, s495 (3) is provided that '3) The lien shall persist even after delivery, provided the Contractual Carrier asserts the lien by means of a court action within ten days after delivery, and provided the goods are still in the consignee's possession'.

retention on the cargo on board the vessel by way of refusing performance of his obligation including unloading the cargo. If it is said that the former lien (security) is to limit the disponent shipowner's right to extent to the cargo owner beyond the time charterer, the latter right will release this limitation, even if the way to security is somewhat different between the lien and the right of retention. Indeed, the lien on cargo under German law is commonly construed as a function of the right of retention in practice.⁵³²

Thirdly, unlike common law, the disponent shipowner's cargo security is always a possessory lien. All parties under multiple charterparties have direct or indirect legal relation provided by legislation. Therefore, direct or indirect possession provided by legislation does not impact on the nature of the disponent shipowner's cargo security. It should be noted that prior to the adoption of the new maritime code, the old version did not provide a comprehensive system to protect the shipowner.⁵³³ Particularly, the provisions of Time Charterparty, including the disponent shipowner's lien were short of the old version. It is presumable that a dispute on a charterparty is always subject to common law jurisdictions rather than civil law jurisdictions in accordance with the law and jurisdiction clause in a standard form, so that it seems that it is not necessary for the legislation to build up a comprehensive system in relation to the charterparty. But the reform of the new German Commercial Code has shown that German law provides a comprehensive system to deal with the charterparty dispute. This is a necessary step to challenge common law.

In addition, this reform mirrors the legislator's inclination. If the logistics is regarded as more crucial than commodity exchange, it is apparent that the creditor

⁵³² Steffen Maelicke and Marco G Remiorz, 'Carrier's Lien Due to New Transportation and Shipping Law' (International Law Office, 26 March 2014) <<https://www.internationallawoffice.com/Newsletters/Shipping-Transport/Germany/Dabelstein-Passehl/Carriers-lien-due-to-new-transportation-and-shipping-law> > accessed 8 May 2017

⁵³³ Yan Wang, 'Revolution and Review on German Maritime Law' (Maritime Law Online Newsletter, 3 June 2016) <<https://news.hsdhw.com/357945>> accessed 8 May 2017

(carrier/shipowner)'s interests arising from the logistics relationship is paramount. Therefore, in order to remedy the shipowner's right, the cargo owner's interest has to be sacrificed and *vice versa*. In accordance with the provisions in relation to the cargo security discussed above, the legislator is inclined to satisfy the shipowner's interests first, even if the cargo owner's interests are not overlooked by legislation.

In conclusion, because the theory of indirect possession has been incorporated into the law of property, physical possession to cargo is not mandatory. Both the voyage and time disponent shipowners without physical possession to cargo can still be regarded as a statutory possessory lien and be protected by the existing theory of secured transactions law and maritime code.

5.2 Deficiency and Remedy in an Emerging Jurisdiction: Chinese Law

Although Chinese maritime law has adopted several international conventions and some common law concepts into its legal regime, the essential principles and philosophy are from German law. Furthermore, like German law, the theory of secured transactions law has been incorporated into the Maritime Code. Even so, in comparison with German law, because of the absence of a comprehensive civil code and undeveloped secured transactions law, some theories, like indirect possession, are only present in academic literature making it difficult to discern and determine the value orientation of the legislator. As discussed in the above section, a series of Sections about the carrier and the disponent shipowner indicate that the German law is inclined to protect the carrier and disponent shipowner's interests to achieve the commodity exchange by way of logistics. But in the context of an emerging system, the absence of some provisions results in that the legislator's real purpose not being readily discernible. Therefore, it is anticipated that the controversy in terms of the legal nature and effect of shipowner's cargo security is evident in practical and academic circles. For this

reason, this section will be explored through legislation, scholarly opinions and judicial decisions.

5.2.1 Brief Account of the Chinese Maritime Code

As mentioned earlier, the structure of a contract for carriage of goods and charterparties under Chinese law is very similar with that of German law. A voyage charterparty and a bill of lading have been codified into a Chapter entitled ‘contract of carriage of goods’ under the Maritime Code where all provisions for a voyage charterparty are not mandatory, while time and bareboat charterparties have been incorporated into a Chapter captioned as ‘charterparties’ where the provisions are regarded as be elective and only binding when parties have not provided for them in the relevant agreement. Based on this, under the Chapter ‘contract of carriage of goods’, a voyage shipowner, as a carrier, enjoys a (contractual) security (lien) provided by legislation which states that:

‘If freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien, to a reasonable extent, on the goods’.⁵³⁴

Similarly, under the Chapter entitled ‘charterparties’, a time shipowner is entitled to invoke a security on the cargo belonging to the time charterer. Article 141 provides ‘in case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer’s goods, other property on board and earnings from the sub-charter’.⁵³⁵

⁵³⁴ Chinese Maritime Code 1992, Art 87

⁵³⁵ Ibid

In essence, Article 87 provides for a carrier's statutory security on the cargo. As discussed earlier, in Chinese law, a voyage charterparty is deemed to be a contract of carriage of goods and a voyage shipowner's rights and obligations provided by legislation are compatible with those of a carrier. In this connection, although the legislation does not expressly point out that a voyage shipowner acts on a carrier, after this kind of a charterparty is deemed to be a contract of carriage of goods, the corresponding shipowner's role is deemed to be that of a carrier. Subsequently, take into consideration the notion of 'carrier' in Chinese law, it is recognised that the carrier may invoke a statutory lien.⁵³⁶ Furthermore, from the entire legal system in China, a statutory lien is provided not only by property law which is to concentrate on the protection of an owner's security over his property, but also by the law of contract, which is to stress the protection of the obligatory right to enhance the dynamic transaction.⁵³⁷ Therefore, in the context of a voyage charterparty, the voyage shipowner as a carrier actually enjoys a statutory lien and the purpose of the carrier's lien is to remedy an obligatory right.⁵³⁸

In addition, in accordance with the Chinese Maritime Code, the carrier has been divided into 'carrier' and 'actual carrier'. The former indicates that 'the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper',⁵³⁹ while the latter refers to 'the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract'.⁵⁴⁰ In this connection, a voyage shipowner may be a contractual or actual carrier.

⁵³⁶ The Chinese Contract Law 1999, Art 315 provides that '[W]here the consignor or consignee fails to pay the freight, storage fees and other carriage expenses, the carrier is entitled to lien on the relevant carried cargoes, except as otherwise agreed upon by the parties'.

⁵³⁷ Ziming Weng and Xiaohan Yu, 'Carrier's Lien—Study on Article 315, Contract Law of P.R.C.' (2001) 1 People's Court Daily

⁵³⁸ Ibid; But this point always gives rise to the controversial proposition.

⁵³⁹ Chinese Maritime Code 1992, Art 42 (1)

⁵⁴⁰ Ibid at Art 42 (1)

In terms of a time charterparty, the foundation is different. The legislation does not precisely provide for a time charterer being a carrier. Furthermore, because the majority proposition in China is that the time charterparty reflects the nature of a ‘lease’ contract, some Chinese scholars directly assert that only the time charterer may act as the carrier, because he ‘has leased the ship from the shipowner’.⁵⁴¹ This rationale is untenable. The nature of the time charterparty has been discussed earlier. Whether a disponent shipowner under a time charterparty may count as a carrier depends on whether he issues the bill of lading.

5.2.2 Deficiency of Substantive Law Protection

Following the above brief account, this section will be divided into two aspects to explain the deficiency of the Chinese substantive law. One aspect is to look at the general deficiency regarding shipowners, disponent shipowners and carriers; another is to look at the impact of the deficiency on the disponent shipowner.

5.2.2.1 Deficiency under a Single Charterparty

The current legislation cannot provide sufficient legislative protection to all shipowners when they resort to exercising their right to cargo security. Because the purpose of this chapter is to demonstrate that the contractual solution should be used to protect the shipowner’s cargo security, the object here is to illustrate how the deficiency of the substantive law impacts on the protection of the shipowner.

As noted above, the Chinese Maritime Code is a special law to deal with maritime disputes; whereby, the shipowner’s cargo security is firstly subject to the Maritime Code. With regard to the scope of the secured cargo, both Articles 87 regarding the voyage shipowner’s cargo security and 141 regarding the time shipowner’s cargo

⁵⁴¹ Meirong Zhou, Yi Yang and Wei Tan, ‘An Analysis of the Legal Issues in Lien Clause in the Time Charter Party’ (2009) 1 China Ocean Law Review 365, 365

security of the Maritime Code, do not extend the scope of the secured cargo to the third party's property.⁵⁴² More specifically, the provision of the scope under the Chinese Maritime Code follows that of the BALTIME Form which is that the shipowner shall have a lien on all cargos belonging to the time-charterer.⁵⁴³ In addition, it should be noted that, in comparison with Article 141 expressly providing for 'a lien on the charterer's goods',⁵⁴⁴ Article 87 of The Maritime Code provides:

'if the freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien, to a reasonable extent, on the goods'.⁵⁴⁵

Although this Article in the official English translation does not limit the scope of the secured cargo belonging to the charterer, in the Chinese version, prior to the term 'goods', the word 'its' has been inserted. The meaning of 'its' in terms of Chinese practice and in academic circles has been hotly debated. Chinese Maritime Courts for Presidents 2001 and Judgment of the Supreme People's Court involving Foreign-related Commercial and Maritime Legal Issues 2008 have provided a definitive response by stating that in the internal water transport, regardless of whether or not the cargo belongs to the charterer, the shipowner is entitled to exercise his legal cargo security on any cargos on board; but in accordance with the Maritime Code, in the

⁵⁴² Chinese Maritime Code 1992, Art 87; In the draft of revision of the Chinese Maritime Code, the scope of the cargo has been extended to the third parties' cargo. But this revision has not been issued officially so far.

⁵⁴³ The BALTIME 2001 form, Art 16 provides that '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'.

⁵⁴⁴ The Chinese Maritime Code, Art141 provides that 'in case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the (time) shipowner shall have a lien on the charterer's goods, other property on board...'

⁵⁴⁵ Ibid at Art 87

international water transport, the secured cargo should be confined to the debtor's cargo.⁵⁴⁶ The debtor signifies the charterer. Therefore, from the point of view of the legislation, apart from the charterer's property, the shipowner is not entitled to detain the third party's cargo.

Notably, the legislation is contrary to the Chinese general law. In the Chinese Contract Law 1999, the carrier is entitled to detain the cargo regardless of whether this cargo belongs to the consignee or the consignor while under the Maritime Code the specific provision stresses that the secured cargo must belong to the charterer.⁵⁴⁷ But as mentioned previously, the general law is only applied when the special law is inadequate in terms of relevant provisions.

Nevertheless, Articles 94 regarding the voyage charterparty and 127 regarding the time charterparty in the Maritime Code provide the alternative approach to addressing the issue of the scope of the secured cargo.⁵⁴⁸ In accordance with the above two Articles, Articles 87 and 141 are not mandatory; they are only to be applied when in the charterparties used by the parties, the relevant clauses are absent. In addition, when there are no different clauses in the chosen charterparties by parties, Articles 87 and 141 can be applied. From the viewpoint of literal interpretation, Articles 94 and 127 imply two meanings. First, the parties to voyage and time charterparties are entitled to negotiate the contractual rights and obligations; secondly, the parties are entitled to

⁵⁴⁶ Chinese Maritime Courts Seminar for Presidents (全国海事法院院长座谈会纪要), July 2001, Art 4; Judgment for Foreign-related Commercial and Maritime Legal Issues (涉外海事商事审判实务问题解答) 2008, Art 138; It should be noted that decisions laid down by 'Chinese Maritime Courts Seminar for Presidents' and 'Judgment for Foreign-related Commercial and Maritime Legal Issues' can be regarded as judicial interpretations which should be applied by all Chinese courts; Xuyu Hu, 'Research on International Carrier's Cargo Lien by Sea' (2013) 175 (8) Jinan Journal (Philosophy and Social Sciences) 62

⁵⁴⁷ The Chinese Contract Law 1999, Art 315 provides that '[W]here the consignor or consignee fails to pay the freight, storage fees and other carriage expenses, the carrier is entitled to lien on the relevant carried cargoes, except as otherwise agreed upon by the parties'.

⁵⁴⁸ The Chinese Maritime Code 1992, Art 94 provides that 'the other provisions in this Chapter (a contract of carriage of goods) regarding the rights and obligations of the parties to the contract shall apply to the shipowner and the charterer under voyage charter only in the absence of relevant provisions or no different provisions in the voyage charter'. And Art 127 stipulates that '[T]he provisions concerning the rights and obligations of the shipowner and the charterer in this Chapter (charterparties) shall apply only when there are no stipulations or no different stipulations in this regard in the carter party'.

draft a clause which may not be compatible with Articles 87 and 141. In other words, if the parties draft a cargo security clause in their voyage or time charterparties; or they choose to use the NYPE Form which does not limit the scope of the secured cargo, regardless of which option will be compliance with the legislation. Articles 87, 141 and other Articles are only regarded as backup contractual clauses. In light of this rationale, the legislation in essence grants party autonomy to parties when they draft the cargo security clause. But this conclusion gives rise to strong debate.

The prevailing view is that the principle of *numerus clausus* is unshakable. Even if Articles 87 and 141 are not mandatory provisions, the cargo security, in accordance with the Chinese Property Law 2007 and the Chinese Guarantee Law 1995, is a legal security right. The scope of the secured cargo, the requirement of exercise this clause and other conditions must be subject to the Property Law 2007 and the Guarantee Law 1995. Party autonomy is excluded. Whereas the scope of the secured cargo in both the Property Law 2007 and the Guarantee Law 1995 simply refers to the debtor's movable property,⁵⁴⁹ the shipowner's cargo security cannot apply to the third party's property. From the carrier's perspective, the bill of lading holder is the carrier's debtor; therefore, it is possible to detain the consignor's property. But from the shipowner point of view in a charterparty, there is no possibility for the shipowner to detain the consignor's property.

In the author's opinion, the above prevailing view appears to be fundamentally defective which reflects the Chinese legal profession's deep-rooted rationale that in the first instance, the cargo security, as a security interest should be subject to the Property Law 2007 and the Guarantee Law 1995. Rarely do people think that this is also a legal remedy in the Law of Contract. Therefore, they do not explain why the provisions under

⁵⁴⁹ The Chinese Property Law 2007, Art 230 provides that 'in case an obligor (debtor) fails to pay debt due, the obligee (creditor) may take the lien on the obligor's movable property which he lawfully possesses and be entitled to seek preferred payments from these movable property'; The Chinese Guarantee Law 1995, Art 82 provides that 'the lien described in the law refers to the acts of the creditor, in line with the provisions in Article 84 of this law, to own the debtor's movable property in accordance with the arrangements of the contract and if the debtor fails to pay the debts before the agreed deadline...'.

the Property Law 2007 and the Guarantee Law 1995 being in conflict with the Contract Law 1999. In light of the legal framework, these three Laws stand in the same tier. When a conflict appears, there should be a reasonable argument to explain why the Property Law 2007 and the Guarantee Law 1995 should take priority. But normally in the Chinese civil law philosophy there is insufficient awareness to put the cargo security into the contractual system.

There is no denying the principle of *lex posterior derogat priori* determines that the Property Law 2007 should be applied rather than the Contract Law 1999. In accordance with the Property Law 2007, Art 230 provides that ‘in case an obligor (debtor) fails to pay debt due, the obligee (creditor) may take the lien on the obligor’s movable property which he lawfully possesses and be entitled to seek preferred payments from these movable property.’⁵⁵⁰ The cargo is confined to the charterer’s property. However, it is not convincing in this conflict. In light of this principle, the process of the revision regarding the scope of the secured property is that, first, the Guarantee Law 1995 limited the scope of the secured property; secondly, the later law, namely the Contract Law 1999 cancelled the limitation; finally, the Property Law 2007 revised the Contract Law 1999 again and limited the scope again. But the Law of Contract has been divided into two divisions: General Provisions and Specific Provisions. Chapter 17 ‘Transport Contracts’ are incorporated into the Specific Provisions. As discussed earlier, under transport contracts, the legislation grants the carrier to retain all cargoes no matter who are the cargo owners. There is no reasonable ground for this Special Provision under the Law of Contract to not apply to maritime law.

Although the narrow scope of the secured cargo has given rise to strong criticism of the legislation, Chinese judicial practice normally takes a conservative and cautious approach to exercising of the shipowner’s cargo security. More specifically,

⁵⁵⁰ Chinese Property Law 2007, Art 230

traditionally the cargo lien (security) is a legal security interest which must be subject to the legislation. It does not matter whether the legislation is reasonable or not.

In the typical Chinese cases reported officially, all relevant courts are not in favour of shipowners claiming cargo security against consignees. Furthermore, all shipowners have to be liable for damages because they detain the consignees' cargo. The foundation of the courts is completely uniform which is that the scope of the secured cargo in the Maritime Code is simply to identify the charterer's cargo, not including the cargo of others, and pointing out that the broad scope provided by the Contract Law cannot be applied. Most importantly, although there is no judgment made by the SPC in an application for a shipowner's retrial, the SPC rejected the shipowner's application. In other words, the SPC is in favour of applying a narrow scope to the secured cargo.⁵⁵¹

It can be seen that a legislative remedy for any shipowners is limited. The legal cargo security is not useful in China from the viewpoint of the scope of the secured cargo because in practice the possibility for the charterer's cargo being on board is nearly zero.

5.2.2.2 Deficiency under Multiple Charterparties

The purpose of the above section was to look at the deficiency of a shipowner's cargo security in a single charterparty. This section will examine what is the dilemma of the disponent shipowner under multiple charterparties.

With regard to the voyage charterparty chain, as discussed in the Section 5.2.1, although the legislation does not expressly point out that a voyage shipowner acts as a carrier,

⁵⁵¹ *Xiamen Liangxiang Shipping Company v Jiangsu Weitai Logistics Company* [2016] MMZ No.1393; *Jiangsu Weitai Logistics Company v Guangxi Xinminhang Shipping Industry* [2016] M72 M C No. 227; *QinZhou Xiangli Logistics Company v Xiamen Yichengda Shipping Operator Company* [2016] M72 MC No. 960; *Xiamen Liangxiang Shipping Company v Jiangsu Weitai Logistics Company* [2017] ZGRMS No. 1698

after a voyage charterparty is deemed to be a contract of carriage of goods and a voyage shipowner's rights and obligations provided by legislation are compatible with those of a carrier, his role is deemed to be that of a carrier. Furthermore, under the voyage charterparty chain, both a head shipowner and a disponent shipowner are carriers. Just the head shipowner is the actual carrier, and the disponent shipowner and sub-disponent shipowner are contractual carriers. In accordance with Article 87 of the Maritime Code, these carriers enjoy the statutory cargo security. The limitation of this statutory cargo security is discussed above in Section 5.2.2.2.

With regard to the time charterparty chain, regardless of the shipowner's cargo security or the disponent shipowner's cargo security, both are difficult to achieve the remedy. To start with, the foundation is different. The legislation does not provide a precise answer for a time charterer being a carrier. Furthermore, because the majority proposition in China is that the time charterparty reflects the nature of a 'lease' contract, a deep-rooted idea is that this time charterparty cannot have any connections with a carriage of goods by sea contract. Even if in practice there is no doubt that under a time charterparty, either a shipowner or a time charterer may issue the bill of lading, but after examining Chinese cases, it is found that Chinese parties often worry about the time shipowner' or the disponent shipowner's legal status. Therefore, when time shipowners claim the cargo security, they tend to persuade the judge to consider that their time charterparties are in fact voyage charterparties rather than time charterparties. In other words, if the disputed charterparties can be deemed to be voyage charterparties, the shipowners, as the carriers are entitled to detain the consignee's cargo, not just to detain the charterer's cargo.

For example, in *Xiamen Yichengda Shipping Company v Qinzhou Xiangli Logistic Company*⁵⁵², Yichengda time chartered his vessel to Xinminhang Company. After

⁵⁵² [2017] MMZ No 419

Xinminghang Company stopped all business and could not pay for the hire, Yichengda detained Xiangli Logistic' cargo. However, during the litigation proceedings, Yichengda simply contended that he voyage-chartered his vessel to Xinminghang Company. Although Yichengda did not express his intention for this contention, the court pointed out that Yichengda ventured to demonstrate this contract was the voyage charterparty so that he was a qualified actual carrier. In the end, at the first instance and the second (final) instance, both Xiamen Maritime Court and Fujian Higher Court held that Yichengda and Xinminghang Company entered into the voyage charterparty rather than the time charterparty. Therefore, Yichengda was simply entitled to claim the hire against the charterer, Xinminghang, rather than the consignee, Xiangli Logistic.⁵⁵³

It can be seen that in theory, Yichengda is the actual carrier who is entitled to claim the freight against Xiangli Logistic. However, because of the clear line between the time charterparty and the carriage of goods by sea contract, if Yichengda was a voyage charterparty shipowner, he was entitled to claim the freight against the consignee; by contrast, if he was a time charterparty shipowner, he forfeited his right against the consignee.

Apart from the time head shipowner, the time disponent shipowner encounters more difficult. This is because although the head shipowner cannot lawfully detain the consignee's cargo, in practice, he takes possession of the cargo and often forces the consignee to sign a contract with him before unloading the cargo. Otherwise, he refuses to proceed to port. By contrast, the disponent shipowner has no right to control the cargo physically.

In the author's opinion, in the current legal framework, as far as a time disponent shipowner is concerned, the crucial issue is whether, like German law, the indirect

⁵⁵³ *QinZhou Xiangli Logistics Company v Xiamen Yichengda Shipping Operator Company* [2016] M 72 MC No 960; *Xiamen Yichengda Shipping Operator Company v QinZhou Xiangli Logistics Company* [2017] MMZ No 419

possession or constructive possession can be applied under Chinese law. Because the disponent shipowner does not possess the cargo physically, he has to claim constructive possession in order to exercise his lien. However, the Property Law does not provide the theory of indirect possession even though this theory is generally accepted in practical and academic circles.⁵⁵⁴ In practice, there is no decided case applying the theory of indirect possession to support the time shipowner's lien. However, in a recent dispute between a freight forwarder and a principal, the SMC applied the provision of Property Law regarding 'possession' to recognise the application of indirect possession on the cargo in legal practice.⁵⁵⁵ However, this case was heard the Shanghai Maritime Court. It is an underlying viewpoint in China that academics, the judiciary and practitioners in the southern coastal provinces are inclined to hold a broad view. In this context, the local court very often renders a decision compatible with commercial reality even if the legislation does not provide a clear answer. In contrast, courts in the northern and western provinces, tend to maintain a conservative attitude towards the recognition and creation of a new legal rule even if this new rule can find support in legal theory.

In short, from the point of view of substantive law, the protection of both shipowners and disponent shipowners is limited. Although the legislation seems to stipulate specific provisions for the exercising of the shipowner and the voyage disponent shipowner's cargo security, and only protection of the time disponent shipowner's cargo security, it is arguable that the legal requirement of the secured charterer's cargo gives rise to the legal barrier to exercising the cargo security. A positive factor is that the legislator has noted this legal barrier and accepted the proposal provided by Chinese scholars. In the revision of the Maritime Code (draft) 2018, the secured cargo is not

⁵⁵⁴ Guang Sun, 'Research on Legal System of Possessory Lien on Goods Carried by Sea' (PhD Dissertation, Dalian Maritime University 2014)27-28

⁵⁵⁵ *Shanghai TOPFOR Logistics International Co., Ltd v Shanghai Xuntonggroup* [2016] No. 331, Hu No. 72Civil Division I, (dispute over Shipping Agency Contract); Chan Yang, 'A Freight Forwarder's Lien on Movable Property Based on Indirect Possession' (2017) 5 Navigation 17, 17-22

confined to the charterer's property.⁵⁵⁶ It is anticipated that the revision of the Maritime Code may contribute to the application of cargo security. However, the revision will only improve matters partially. There is no disponent shipowner's provision appearing in the revision of the Maritime Code (draft) 2018.

5.2.3 Remedy in Procedure Law: Arrest of Cargo

In the context of deficiency of substantive law, the procedure law quite commonly plays an important role in protecting the parties. Although the protection of the procedure law normally is temporary and relies on the decision of the competent court, as opposed to the self-help remedy, it is to some extent an effective approach to protect the parties.

With regard to the protection of the disponent shipowner, Article 44 of Special Maritime Procedure Law provides that 'a maritime claimant may apply to arrest the goods on board for ensuring the fulfilment of his maritime claim'.⁵⁵⁷ This special provision grants the parties a right to apply for property preservation which is similar with the concept of interim measure in common law.⁵⁵⁸ In terms of the scope of a maritime claimant, the legislation does not stipulate any limitation. Therefore, in theory, all parties, before or during the litigation or arbitration proceedings, are entitled to apply for the arrest of cargos. In practice, after the litigation or arbitration proceedings, whether the application is proper and lawful is subject to the substantive law. In addition, whether the applicant possesses the cargo physically will not impact on the creation of the application for the arrest of cargo.

However, the scope of the arrested cargo on board, in accordance with Article 44, is confined to the counterpart. There is no judicial interpretation to clarify what the

⁵⁵⁶ 'The Revision of the Maritime Code (draft)' <http://xxgk.mot.gov.cn/jigou/fgs/201811/t20181105_3109896.html> accessed 19 December 2018

⁵⁵⁷ Chinese Special Maritime Procedure Law, Art 44

⁵⁵⁸ There is no specific definition of interim measure under Chinese law. However, the property preservation and the evidence preservation provided by Chinese law exert the similar function, like interim measure in common law.

meaning of ‘counterpart’ is. Whether the ‘counterpart’ simply refers to parties to a contract, alternatively it may refer to parties in any underlying legal relationship is an issue. To this present author’s observations, in legal practice, the ‘counterparty’ in the procedure law can be construed in a broad sense. Therefore, a maritime claimant may choose its counterpart. Even if in accordance with the charterparty, in most situation the disponent shipowner’s charterer is chosen to be the counterpart, Article 44 provides an opportunity to choose the bill of lading holder/ cargo owner to be the co-counterpart. Furthermore, the application of the arrest of cargo by itself may drive the charterer to pay for debt.

In this context, the nature of the disponent shipowner’s cargo security is immaterial under procedural law. This procedural protection indeed makes up for the deficiency of the substantive law. However, the deficiency of procedural law is evident.

First, the remedy by way of the arrest of cargo is not a self-help remedy. It is a judicial remedy. Whether a competent court will approve this application and issue an order cannot be controlled by the applicant. Furthermore, in accordance with Article 16 of the Special Maritime Procedure Law providing that ‘a maritime court may, in accepting a maritime preservation application, order the claimant to provide a deposit. Where the claimant fails to provide the deposit, his application shall be rejected’,⁵⁵⁹ the applicant, the shipowner, disponent shipowners or others, all may be required to pay for the deposit. Although this is not a mandatory provision, in practice, the court, in most situations will require the applicants to do so to avoid risk. In addition, the court will require the applicants to submit the relevant evidence regarding the application, in order to decide whether the application is proper. After the counterpart applies for a maritime injunction and provides the deposit, it is possible for the court to reject the claimant’s

⁵⁵⁹ Chinese Special Maritime Procedure Law, Art 16

application.⁵⁶⁰ In short, the feasibility of this legal remedy to a great extent depends on the court's discretion.

Secondly, in comparison with the legal cargo security in the substantive law, the crucial shortcoming in the procedure law is that this protection cannot provide the privileged right. Under Chinese law, with regard to whether the cargo security can be regarded as the property-based lien is in question in academic circles.⁵⁶¹ However, the majority viewpoint is that cargo security is treated as an independent security right which is derived from the real property rights that retain the dominance of *in rem*, even though the creation of the cargo security might rely on the clause of an agreed contract.⁵⁶² For this reason, the creditors relying on the cargo security can claim against the debtors and the true owner of the secured property. Even if the cargo is destroyed, the creditor has the privileged right to obtain the cargo damages. The most important thing is that the privileged right due to the cargo security takes priority over other security interests including the mortgage, pledge and others. The reason is that the cargo security counts as the legal right while other security interests are contractual rights.⁵⁶³

However, the procedure law cannot provide this kind of privilege before the disponent shipowner's cargo security is recognised. The cargo owner's other debtors are also entitled to apply for an order to arrest the cargo. In other words, if the disponent

⁵⁶⁰ In accordance with the Chapter IV, Maritime Injunction of Special Maritime Procedure Law of P.R.C, the maritime claimant may apply for an injunction. In practice, when the shipowner detains the cargo, the cargo owner often applies for a maritime injunction. Although in theory the shipowner or the disponent shipowner, as the maritime claimant applies for an order to arrest the cargo, it cannot exclude the counterpart to apply an injunction.

⁵⁶¹ Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003)351; Yulin Fu, 'Comparative Research on The Function of the Cargo Lien by Sea' in Huixing Liang (ed) *Civil and Commercial Law Review* Vol. 16, (Law Press China, 2000); According to the theory of the source of the right, 'liens' are divided into property-based liens and claim-based liens. More specifically, some jurisdictions, such as China, Switzerland, Japan and Taiwan Province contend that liens, as the property-based security, are derived from the real property rights that retain the dominance *in rem* while some countries, such as Germany and France, think that liens stem from the claim against the debtors' default; therefore, they are called the claim-based liens.

⁵⁶² Liang and Chen (n 561) 351

⁵⁶³ Yinbo Xu, 'Application and Rethinking of Liens under Property Law' (2017) 2 Science of Law 88

shipowner's cargo security cannot be provided by legislation, this disponent shipowner simply counts as the general creditor.

In light of the above discussion, it can be found that the procedural approach for protecting the disponent shipowner may make up for the deficiency of the substantive law. However, its application is dependent on the judicial remedy, as opposed to the self-remedy. Furthermore, the feature of the shipowner or the disponent shipowner's cargo security is to provide the privileged right to the shipowner or the disponent shipowner through the secured cargo. However, when the cargo security cannot be recognised by legislation, the procedural law merely provides a general protection to the shipowner or the disponent shipowner, like other debtors.

5.2.4 Observations

It is apparent that the approach to protecting a disponent shipowner's cargo security, as in German law⁵⁶⁴ has been provided by legislation. However, this protection or remedy is only suitable for the voyage charterparty chain instead of the time charterparty chain, because the time charterparty is not relevant to the carriage of goods by sea. However, the Chinese legal framework, unlike German law, is not comprehensive. Even if the head shipowner who possesses the cargo physically cannot be protected well, because the Chinese Maritime Code merely provides for the secured cargo belonging to the charterer, not belonging to the cargo owner. Furthermore, there is no provision regarding the disponent shipowner's cargo security. Apart from the substantive law, the remedy of the procedure law is the alternative. For the disponent shipowner, this remedy is very useful because lack of possession is no longer a legal barrier. However, the disadvantage is also obvious.

⁵⁶⁴ See Section 5.1

In practice, owing to the deficiency of the legislative remedy to the shipowner's cargo security, both the shipowner and the disponent shipowner quite often refuse to seek access to the port before the charterer, the consignee or other relevant party promises to pay the freight or hire. An Agreement on Payment between the shipowner/disponent shipowner and consignee is a general form to ensure the performance of the promise. However, after unloading the cargo, it is quite common that the consignee may bring arbitration or litigation proceedings against the shipowner/disponent shipowner. The convincing argument is that the Agreement is signed under duress. In most situations, this consignee's argument can be accepted by Chinese courts because the scope of the secured cargo is derived from the *numerus clausus*. The Agreement on Payment itself violates the principle of *numerus clausus*.

In short, the legislative solution to the shipowner and the disponent shipowner's cargo security is not sufficient and the contractual solution, as discussed in the Chapter 3, is feasible only in theory, but fails to achieve it in China.

6 Conclusion

This chapter examined to what extent the legal nature and effect of a shipowner and disponent shipowner's cargo security should be influenced by modern secured transactions law. To start with, from the origin and development of the legal cargo security perspective, it is examined how the creation of shipowner's legal cargo security in a single charterparty is derived from usage of trade and then operation of law. Along with the development of the shipping industry, multiple charterparties also develop dramatically. Under multiple charterparties, the shipowner's cargo security in a head charterparty is not impacted. However, the condition precedent of the disponent shipowner's cargo security cannot be satisfied, because apart from the shipowner, it is impossible for others to have physical possession of cargo. Although the bill of lading contract provides an opportunity for the disponent shipowner to become a contractual

carrier who enjoys a legal carrier's lien, in the chartering chain it is difficult to guarantee each disponent shipowner to become a contractual carrier. In this situation, they have to depend on the charterparty's cargo security clause. However, given that possession is untenable and legal cargo security is utopian, how this disponent shipowner's cargo security is to be interpreted and applied becomes a difficult legal issue. When two legal systems encounter the same issue, based on the different legal frameworks, they offer the different solutions.

In common law, the latest cases show that the disponent shipowner's cargo security, as a special contractual right may have the same function, as the conventional possessory security by way of directing the shipowner's assistance. Because if the condition precedent to exercising the security remedy is to examine whether the disponent shipowner physically possesses the cargo, it will be commercially unrealistic. Based on this, common law courts are of the view that the disponent ownership should invoke a lien or similar right by directing the employment of the vessel, the security remedy can be achieved. However, there is no further demonstration of the nature of this contractual right. In this situation, it is submitted in accordance with the law of secured transactions that this disponent shipowner's contractual right can be regarded as a floating charge in English law. The object of the security is an interest in cargo which provides a right of possession to the disponent shipowner. Furthermore, in the closed circle including multiple charterparties' parties and bill of lading contracts, all parties should have sufficient knowledge of the disponent shipowner's charge on the cargo. Therefore, the right of direction to the shipowner can be taken for granted in law. Although this charge is different from the legal security, in the closed circle, the function is not much different.

Be that as it may, this floating charge is relevant only in respect of the disponent shipowner under multiple charterparties. Under a single charterparty, a legal cargo security is still a possessory lien.

Compared with the common law, many civil law countries hold different opinions on the nature of the voyage and time charterparties. To some extent, these opinions impact on the legal nature and effect of the shipowner and disponent shipowner. The typical example is that the voyage charterparty counts as the carriage of goods contract so that all shipowners in voyage charterparties count as carriers. When the voyage disponent shipowners wish to exercise their cargo security, regardless of whether they possess the cargo physically, the legal cargo security is feasible in theory. However, as far as a time disponent shipowner is concerned, the same approach for protection cannot be used.

Because civil law countries mainly depend on legislation to provide the legal nature and effect, the developed and emerging legal frameworks must give rise to the different consequence. In terms of the commercial code and secured transactions law of developed jurisdictions, such as under German law, the theory of indirect possession has been incorporated into legislation so that either the shipowner or the disponent shipowner may resort to the relevant provision to exercise the legal cargo security. Given the judge-made law philosophy developed in German jurisdiction, it is sufficient to assume that the law of secured transactions does not limit the creation of contractual cargo security.

However, under the emerging legal framework, such as Chinese law, the legislation in the context of both a single charterparty and multiple charterparties is deficient. Because of the application of *numerus clausus* in secured transactions law, parties have no room to provide the contractual cargo security. Although combining the substantive with procedural law generates to a great extent the legal effect of the shipowner and the

disponent shipowner's cargo security, the procedural law cannot secure the shipowner and the disponent shipowner for them to exercise their privileged rights. To some extent, the advantage of security interests disappears. For this reason, this author argues that if Chinese law sticks to the principle of *numerus clausus* in a strict sense, the possession requirement in secured transactions law should be construed in a broad sense. Like German law, possession should contain direct possession and indirect possession. In this case, it is possible for the disponent shipowner to exercise the cargo security. Alternatively, the legislation provides the disponent shipowner's cargo security as a statutory right.

In conclusion, with regard to the cargo security, the development of chartering industry gives rise to some legal issues. In particular, the legal nature and effect of disponent shipowner's cargo security become uncertainty. In this context, the secured transactions law should provide a solution to these legal issues. However, due to the different legal frameworks and philosophies in two legal systems, the solution should rely on their individual legal environment. In common law, a pragmatic approach to law should contribute to the reconsideration of legal nature and effect of disponent shipowner's cargo security from the theory of a floating charge point of view; conversely, in civil law the first question is to address or reconsider the natures of voyage and time charterparties in the chartering industry to reduce the gap between common law and civil law. Subsequently, in order to identify the legal nature of the disponent shipowner's security, it is necessary to evaluate the application of secured transactions theory including indirect possession and *numerus clausus*.

Chapter Five: The Legal Nature and Effect of Shipowner's

Sub-freight security: From Chartering Industry and

Secured Transactions Law Perspectives

1 Introduction

Chapter 4 examined to what extent the legal nature and effect of a shipowner and disponent shipowner's cargo security should be influenced by modern secured transactions law. This chapter will continue to explore the impact of secured transactions law on the sub-freight security.

It should be noted that 'freight' refers to money payable by a voyage charterer to a shipowner for the voyage charterparty of a vessel; 'sub-freight' means money payable by a voyage sub-charterer to a charterer to a sub-voyage charterparty; 'sub-sub-freight' means money payable by a sub-sub-charterer to a sub-charterer for the sub-sub-charter of the vessel, and so forth. Similarly, 'hire' denotes money payable by a time charterer to a shipowner for the time charterparty of a vessel, 'sub-hire' refers to money payable by a time sub-charterer to a charterer for the sub-time charterparty of a vessel, and so forth. Even though the topic of this chapter is about 'sub-freights', the subject matter of security also involves sub-hires, sub-sub-freights or sub-sub-hires.⁵⁶⁵

As discussed in the introductory chapter, similar to the cargo, sub-freights are a type of maritime property that can be used to create a contractual security for the shipowner.

⁵⁶⁵ 'Freight: The remuneration payable in respect of the carriage of goods by sea under a voyage charterparty or bill of lading. Hire: A sum of money to be paid to the shipowner by a charterer under a time charter-party for the use of the vessel', *The Cebu (No.2)* [1990] 2 Lloyd's Rep 316, 320; Edward Richard Hardy Ivamy, *Dictionary of Shipping Law* (Butterworths Law 1984) 44 and 56; 'Freight is the consideration payable to the carrier for the carriage of goods from the port of shipment to the agreed destination. The obligation to pay freight can arise either under a voyage charter or a bill of lading contract but must be clearly distinguished from the obligation to pay hire under a time charter.' John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 289

The difference between the cargo security and the sub-freight security is that the former is by its very nature created by operation of law; the latter is produced by contract. From the law of security point of view, a significant difference is derived from the type of secured property. The former's property is traditional tangibles; the latter's property is intangibles. In the modern time, the intangibles, as a secured property in the secured transactions law have dramatically developed. It is anticipated that, in comparison with the cargo security, the legal nature and effect of sub-freight security should be further impacted by the development of the law. However, whether the impact of the modern law is in line with the commercial reality of the chartering industry is a key issue. Therefore, compared with Chapter 4, apart from the development of the legal nature of this security, this Chapter will also pay attention to the commercial reality. In addition, this chapter will display how the development of the modern secured transactions law is attributed to the innovation of common law and whether the law of security in civil law keeps pace with that of common law should be evaluated.

2 The Scope of 'Sub-freight' Security Under Multiple Charterparties

In comparison with the cargo, sub-freights are an intangible property. This means that, unlike the physical possession of cargo, the shipowner has no opportunity to show his right to the world. Meanwhile, whether the sub-freight security can impact on the sub-charterer or sub-sub-charterer cannot be shown by way of possession. In this section, there is an examination whether the scope of sub-freights may extend to any sub-freights and/or any sub-hires in the subsequent charterparties through a contractual clause.

As far as the shipowner's security on sub-freights is concerned, 'sub-freights' denote the collateral security that the shipowner may claim against any default by the charterer. In comparison with tangible property, namely cargo, 'sub-freights' are intangible. Security on intangible property is nowadays widely accepted. Thus, 'sub-freights', being collateral security, are no longer an innovation. However, under multiple

charterparties, it is supposed that A charters the vessel to B; subsequently, B charters A's vessel to C; in the end, C charters A's vessel to D. There is no doubt that in this situation A's contractual sub-freight security under the head charterparty between A and B may be valid against B's debtor, C; the question is whether A's sub-freight security under the charterparty between A and B may be effective against C's debtor, D. In this section, it is contended that 'sub-freights' in a standard form should amount to a collective term that includes any sub-freights and/or any sub-hires in the subsequent charterparties.

2.1 Do Sub-freights Cover Sub-hires? The Wide Interpretation v The Narrow Interpretation

2.1.1 Common Law from the Case Law Perspective

In Chapter 4, during the course of examination of the nature of a time charterparty, it was clarified that 'freight' and 'hire' from the natural point of view are of no substantial difference. Thus, in an early English case, the court enunciated that 'freight' covered the time charterparty hire.⁵⁶⁶ This decision provides a sufficient foundation for a wide interpretation of 'freight'. As a result, although in the early standard form, there was no clarification between sub-freights and sub-hires, the judicial decision took a wide approach in construing the scope of 'sub-freight'. For example, in *The Cebu (No.1)*,⁵⁶⁷ a shipowner and a charterer/a disponent shipowner time chartered a vessel with the NYPE 46. Clause 18 of the NYPE 46 generally provided that 'the Owners shall have a lien on ... all sub-freights...'⁵⁶⁸ In answer to the question whether sub-freights could contain sub-hires, Lloyd J held that 'sub-freights' did not only include sub-sub-freight,

⁵⁶⁶ *Inman Steamship v Bischoff* [1882] 7 App Cas 670 (HL), in this case, Lord Blackburn quoted Lord Tenterden in *Flint v Fleming* 1 B & Ad 48: 'Freight as used in the policy of insurance, imports the benefit derived from the employment of the ship' to support the above conclusion; *Seven Seas Transportation v Atlantic Shipping Co SA* [1975] 2 Lloyd's Rep 188, Donaldson J held that 'Hire was to be treated in the same way as freight... Hire was formerly referred to as "time freight" or "time chartered freight"...

⁵⁶⁷ [1983] 1 Lloyd's Rep 302

⁵⁶⁸ NYPE 1946, Clause 18

but also contained sub-time charter hire, whether due to the charterers directly or not, on basis of *Inman Steamship v Bischoff*.⁵⁶⁹

However, this wide interpretation was questioned by the commercial court in the latter case, *The Cebu (No. 2)*.⁵⁷⁰ This case also involved Clause 18 of the NYPE 46. The court reconsidered the scope of ‘sub-freights’ from the respective points of view of freight and hire. Owing to the fact that *Inman Steamship v Bischoff*⁵⁷¹ reflected the less specific usage in the nineteenth century, meanwhile, this case disposed of the scope of freight through an insurance issue, Steyn J decided not to follow Lloyd J’s approach to refer to *Inman Steamship v Bischoff*.⁵⁷² He ventured to seek another approach by delving into the advent and development of the two terms ‘freight’ and ‘hire’.

First, as observed by Lloyd J, Steyn J recognised that the term ‘freight’ in the nineteenth century could be construed in a wide sense. This kind of wide interpretation was reflected not only in shipping practice through the expression ‘time freight’ or ‘time chartered freight’, but also in legal textbooks, including the earlier editions of *Scrutton on Charterparties* (12th edn, 1925) and *Carver’s Carriage of Goods by Sea* (8th edn, 1938).⁵⁷³ Subsequently, the development of the two terms in practice triggered the updated editions of these classic textbooks in the 1960s to point out that ‘remuneration under a time charter is more usually called hire rather than freight’.⁵⁷⁴ Along with the updating of these legal textbooks, in the 1980s the specialist dictionaries including Ivamy’s *Dictionary of Shipping Law*⁵⁷⁵ and Brodie’s *Dictionary of Shipping Terms*⁵⁷⁶

⁵⁶⁹ *The Cebu (No.1)* [1983] 1 Lloyd’s Rep 302; Terence Coghlin and others, *Time Charters* (7th edn, Informa Law 2014)30.29

⁵⁷⁰ [1990] 2 Lloyd’s Rep 316

⁵⁷¹ [1882] 7 App Cas 670 (HL)

⁵⁷² *Ibid*

⁵⁷³ *The Cebu (No.2)* [1990] 2 Lloyd’s Rep 316, 320

⁵⁷⁴ *Ibid* at 320; W L McNair and A A Mocatta, *Scrutton on Charterparties and Bills of Lading* (15th edn, Sweet & Maxwell 1948) 391; Thomas Gilbert Carver, *Carver’s Carriage of Goods by Sea* (9th edn, Stevens 1952)804;

⁵⁷⁵ *The Cebu* (n 573) at 320; Edward Richard Hardy Ivamy, *Dictionary of Shipping Law* (Butterworths Law 1984) 44, 56

⁵⁷⁶ *The Cebu* (n 573) at 320; Peter R Brodie, *Dictionary of Shipping Terms* (Lloyd’s of London Press 1985) 61, 71

also distinguished the usages of ‘freight’ and of ‘hire’. The former was restricted to referring to a ‘bill of lading freight and freight payable under a voyage charter’,⁵⁷⁷ whilst the latter merely referred to ‘sums payable under time charters’.⁵⁷⁸

In considering that legal textbooks and dictionaries tend to lag behind the development of commercial society, the learned judge inferred that even if the specialist dictionaries published only after the dispute in 1979 might contain the change, legal textbooks might reflect the shipping industry’s acceptance of the divergent meanings of ‘freight’ and ‘hire’ prior to this 1979 case. Under this circumstance, although the NYPE 46 did not expand the scope of ‘all sub-freights’, the contracting parties might take an opportunity to clarify the scope in light of the development of sub-freights and sub-hires while bargaining about the charterparty. The preceding examination provided sufficient grounds for Steyn J to decide the scope of ‘all sub-freights’ in a narrow sense. In addition, he examined the impact of this remedial mechanism on the third party, namely a sub-time charterer. It was submitted that ‘[O]nly a clear lien clause should be enforceable against the third party’.⁵⁷⁹ In the end, Steyn J proclaimed that “‘sub-freights” in cl. 18 do not include sub-time charter hire.’⁵⁸⁰

From the judicial point of view, the construction of ‘all sub-freights’ is developed from a wide approach to a narrow approach. Although the above two conflicting decisions are both based on the same tier court at the first instance and there is no an implied rule in common law is that the latter decision should be followed by subsequent cases, the narrow approach is regarded in the UK as a better viewpoint.⁵⁸¹ Even so, controversial discussion still continues. For example, Andrew Smith J in *Dry Bulk Handy Holding Inc v Fayette Internal Holdings Ltd*⁵⁸² revealed his personal preference for the wider

⁵⁷⁷ *The Cebu* (n 573) at 320

⁵⁷⁸ *Ibid* at 320

⁵⁷⁹ *Ibid* at 323; In terms of this point rendered by Steyn J this author holds an opposite view. However, because this is not relevant to the key point of this section, it is not necessary to provide some space to enunciate.

⁵⁸⁰ *Ibid* at 320

⁵⁸¹ Terence Coghlin and others, *Time Charters* (7th edn, Informa Law 2014)30.30

⁵⁸² [2012] EWHC 2017 (Comm)

interpretation of sub-freights, even if he felt constrained to follow the narrow interpretation presented by Steyn J.⁵⁸³

One may note that, although there is no authority in the English courts to render a decisive answer in relation to the scope of sub-freights, it is sufficient to say that the narrow interpretation of sub-freights has priority. However, it is noted too that the English courts do not provide space to consider the background of the NYPE form, which is its issue by the Association of Ship Brokers and Agents (USA) Inc.⁵⁸⁴ In consideration of the rationale of American law, it is found that the meaning of ‘freights’ in American law is different from its English counterpart. As an Australian court in *Daebo Shipping Co Ltd v The Ship Go Star*⁵⁸⁵ pointed out, ‘there are substantive differences between English and United States maritime law, not least over the ambit of what a lien is...’⁵⁸⁶ and, in light of a leading American textbook, ‘subfreights are the hire under a subcharter as well as bill of lading freight payable by shippers and consignees.’⁵⁸⁷ Based on this, although the development of terms ‘freight’ and ‘hire’ requires drawing a clear line between the two legal terms, in the scope of American law whether this line exists does not impact on the application of the sub-freights covering the hire.⁵⁸⁸

2.1.2 Civil law

⁵⁸³ Ibid; Andrew Smith J was held that ‘[I]n the absence of authority I should have given clause 18 the wider interpretation and concluded that the term “sub-freights” covers ‘sub-hire’. However, given that there are two conflicting decisions at first instance and the later fully considered the earlier decision, I must follow the later decision unless there are cogent and convincing reasons to do otherwise’.

⁵⁸⁴ From the jurisdiction and governing law perspectives, the English court has a sufficient ground to interpret sub-freights under English law because the NYPE 46 in *The Cebu (No. 2)* is subject to English law. It is stressed here that other common law jurisdictions influenced by American law might present a different view on the interpretation of ‘freight’ and ‘hire’.

⁵⁸⁵ [2012] FCAFC 156

⁵⁸⁶ Ibid

⁵⁸⁷ Ibid; Thomas J Schoenbaum, *Admiralty and Maritime Law* Vol 2 (3rd edn, West Group 2001) 236

⁵⁸⁸ The above Australian case merely pointed out the different views on the meanings of freights in English law and American law, but did not make a clear decision regarding the scope of sub-freights. In considering that American law is not the object of this research, the different view is simply provided without further discussion.

In civil law jurisdictions, as discussed in Chapter 2, the sub-freights ‘lien’ cannot traditionally be subject to the law of security. However, some jurisdictions, such as China and Germany, provide for this form of ‘lien’ in their maritime codes. For this reason, this section will use Chinese and German law for examples.

In accordance with the legislation, it is safe to say that these two jurisdictions take a functional approach to define the scope of sub-freight security. To be clear, Article 141 of the Chinese Maritime Code provides that ‘[I]n case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer's goods, other property on board and earnings from the sub-charter.’ It is obvious that in Chinese law earnings replace the term ‘sub-freights’. It is generally recognised in Chinese academic circle that ‘earnings’ is a loose and flexible word in a literal sense, because the legislation does not draw a clear line between earnings and non-earnings arising from sub-charterparty.⁵⁸⁹ The scope of ‘sub-freights’ can therefore be construed in a broad sense.

Similarly, under the German Commercial Code, no specific ‘sub-freights’ are defined. Article 566 (1) provided that ‘[F]or his claims under the time charter contract, the Disponent Owner shall also have a lien over the claims of the time charterer under contracts of carriage or sub-charter contracts which the time charterer has concluded and which are performed by using the ship.’⁵⁹⁰ In a literal sense, this expression under German law, as with Chinese law, is broad and flexible. If there is no contrary judicial decision, *prima facie* the scope of ‘sub-freights’ by law contains sub-freights and sub-hires. In other words, even if the parties select the NYPE 46, as long as Chinese or German law is the governing law, ‘sub-freights’ will be construed as ‘sub-freights’ and/or ‘sub-hires’.

⁵⁸⁹ Hengsi Wang, ‘The Owner’s Lien on “Earnings from the Sub-charter” in China: Its Puzzle and Solution—Interpretation from the View of CMC Article 141’ (2011) 22 (4) Annual of Chinese Maritime Law 70, 71

⁵⁹⁰ The German Commercial Code, s566 (1)

Nevertheless, two questions should be illustrated. First, the above provisions under Chinese and German law simply apply to a time charterparty, and do not include a voyage charterparty. The reason for this has been discussed in Chapter 4; the voyage charterparty is deemed to be merely a carriage of goods contract. Secondly, there is fundamental difference between Article 141 of Chinese Maritime Code and Article 566 of the German Commercial Code. The former Article simply provides ‘earnings from sub-charter’. This means, first, that earnings from a voyage charterparty might not be covered, because, in a narrow sense, a voyage charterparty in Chinese law amounts to a carriage of goods by sea rather a ‘charter’; secondly, due to the use of singular ‘sub-charter’, it is presumable that not earnings under any sub-charterparties can be covered by this Article. In reviewing the original version in Chinese, one sees that only earnings in one sub-charterparty are subject to this Article. By contrast, Article 566 of the German Commercial Code is more reasonable. The term ‘the claims of the time charterer under contracts of carriage or sub-charter contracts’ uses the ‘plural’. It is unambiguous that the number of charterparties is not restricted.

2.2 Development of Sub-freights: From Standard Forms Perspective

As far as standard forms are concerned, their purpose is to provide a model for the parties; thereby, even if the scope of sub-freights is not clear, as with NYPE 46, the parties may draft rider clauses or provide amendments to fix the gap in light of the specific circumstance of each case. It is contended, however, that rider clauses and many amendments will diminish the certainty and credibility of standard forms. This is why it is necessary to amend charterparties to reflect the demand of the chartering market. Apart from the demand of the free market, the requirement of judicial practice more actively triggers amendment of charterparties. As just discussed in *The Cebu* (No.2),⁵⁹¹ the court reviewed the fact that where the dispute happened in 1979, practitioners in the chartering market should have had sufficient knowledge about the usage of freight and hire. In the event that the intention of parties was to extend the

⁵⁹¹[1990] 2 Lloyd’s Rep 316

scope of ‘all sub-freights’ to ‘sub-hire’, the reasonable approach should be to clarify the application of the security on all sub-freights in Clause 18 of the NYPE 46 form. Therefore, on the basis of the fact that the contracting parties gave up the opportunity to clarify a specific scope of ‘all sub-freights’, the court strictly imposed the narrow interpretation of ‘all sub-freights’ on to the parties’ own ‘negligence’.

Following this case, the chartering industry provided a solution in 1993, when the NYPE form was revised. In the new version, the secured scope was clarified. Lien Clause 23 provided that ‘[T]he Owners shall have a lien upon all ... sub-freights and/or sub-hires for any amounts due under this Charter Party.’⁵⁹² Since then, the chartering industry and the judicial decision impliedly reach an agreement on this matter. Choosing the NYPE 46 form means restricting the scope of sub-freights, not to extend to hire.⁵⁹³ By contrast, choosing the NYPE 93 form means that the secured scope contains sub-freights and sub-hires in any sub-charterparties.

In comparison with the NYPE 1993 form, the scope in the NYPE 2015 form is further extended. ‘Deadfreight and Demurrage’ have been incorporated into the scope of sub-freights.⁵⁹⁴ In addition, ‘the Charterers or *any* sub-charterers’ may constitute the associated parties in this security clause (emphasis added). It means that it is not limited to one sub-charterparty. In terms of this change,⁵⁹⁵ the NYPE 2015 Explanatory Notes restates that:

⁵⁹² NYPE 1993, Clause 23

⁵⁹³ There is no doubt that, even if the contracting parties, based on their preference, choose the NYPE 46 form, they may amend the lien clause, or they may clarify the scope of sub-freights by way of rider clauses. Here the situation is merely that the contracting parties have no intention of extending the scope of sub-freights, and so they choose to use the NYPE 46 form.

⁵⁹⁴ The GENTIME 1999, Clause 14 (d) provides that ‘The Owners shall have a lien on... all sub-freights and/or sub-hire including deadfreight and demurrage’.

⁵⁹⁵ The NYPE 2015, Clause 23 provides that ‘[T]he 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.’

‘[T]he lien provision from NYPE ’93 has been extended to cover “sub-hires” from sub-time charters – it previously referred only to “sub-freights” which could be construed as voyage charter freight only. Sub-freights now expressly include demurrage and deadfreight components due to the charterers or their sub-charterers, over which the owners can exercise a lien – not possessory but in the form of “intercepting” a payment due to the charterers.’⁵⁹⁶

It is clear that this further extension is more beneficial to shipowners.

Apart from the NYPE form, it is noted that other important standard forms drafted by BIMCO, namely, the BALTIME form and the GENTIME form, are somewhat divergent. In terms of the BALTIME form, from the early version in 1939 to the latest one in 2001, the scope of ‘sub-freights’ has not changed. The security clause still provides that ‘[T]he Owners shall have a lien upon all ... sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter...’.⁵⁹⁷ However, prior to the issue of the BALTIME 2001 form, BIMCO in 1995 established a sub-committee for revising the BALTIME form. As a result, due to the strong opposition from the BIMCO Documentary Committee, it was impossible to reach an agreement to fundamentally revise the BALTIME form. A new standard form, the GENTIME 1999 form was issued based on a modest revision of some of the BALTIME’s terms.⁵⁹⁸ In the GENTIME 1999 form, Clause 14 provided that ‘the Owners shall have lien ... on all sub-freights and/or sub-hire including deadfreight and demurrage’.⁵⁹⁹ It is obvious that, like the NYPE 2015 form, the GENTIME form attempts to create more opportunities for shipowners to exercise a remedy about security.

⁵⁹⁶ ‘NYPE 2015 Explanatory Notes’ <<http://www.smf.com.sg/pdf/NYPE%202015%20Explanatory%20Notes.pdf>. > accessed 17 June 2017

⁵⁹⁷ BALTIME 1939, Clause 18; BALTIME 2001, Clause 17

⁵⁹⁸ ‘Current Developments In Charterparties Clauses’ (Specialist Professional Indemnity Insurance 2 November 1998) <<https://www.itic-insure.com/resources/publications/intermediary/article/current-developments-in-charterparty-clauses-2863/>> accessed 17 June 2017

⁵⁹⁹ GENTIME 1999, Clause 14

The revision of the NYPE form and of other forms may at least reflect two facts. First, the chartering industry is a highly international market. As mentioned in Section 2.1, the NYPE form should have been directly affected by American law, because under American law, it is not necessary to clarify the scope of sub-freights since ‘hire’ can be incorporated directly into sub-freights. However, considering that the NYPE form is widely employed around the world, the expressed distinction in the revised form between sub-freights and sub-hires seems to be more necessary and sensible. Secondly, the revision shows that shipowners expect to invoke these standard forms of sub-freight security in order to remedy any loss sustained. The extension of the scope of sub-freights is therefore taken for granted in certain standard forms. However, at the same time, if shipowners have no power to bargain with charterers, they may have to use a standard form, such as the BALTIME form, which is subject to the narrow scope of sub-freights in the interest of the charterer.

2.3 Closing Remarks

2.3.1 Party Autonomy as to the Scope of Sub-Freights

With respect to the scope of sub-freights, along with the development of the shipping industry and, particularly that of multiple charterparties, if the secured sub-freights are simply construed as earning in a sub-charterparty rather than in any sub-charterparties, this cannot satisfy the demand of commercial interests. In these circumstances, the understanding of sub-freights needs to be changed, and this change impacts on the judicial decision. Equally, the judicial decision triggers the revision of a standard form from ‘all sub-freights’ via ‘all sub-freights and/or sub-hires’ to ‘all sub-hires and/or sub-freights including deadfreight and demurrage’, even if it is not necessary in certain jurisdictions such as USA to enunciate the meaning of ‘sub-freights’.⁶⁰⁰ On that basis, parties are at liberty to choose or to decide the scope of sub-freights. This means that, if they are willing to create a broader scope of sub-freights, they may provide sub-freights that include sub-hires and sub-freights in any sub-charterparties. Alternatively,

⁶⁰⁰ See Section 2.1.1

they may choose a standard form providing the narrow scope of sub-freights, such as the NYPE 1946 form rather than the NYPE 1993/2015 one.

Although *numerus clausus* is the leading principle in civil law, if the sub-freight security is consistent with the concept of pledge, the contractual pledge is valid as long as there is no contrary legislation. In this case, it is reasonable that the parties governed by civil law are entitled to decide the scope of sub-freights.

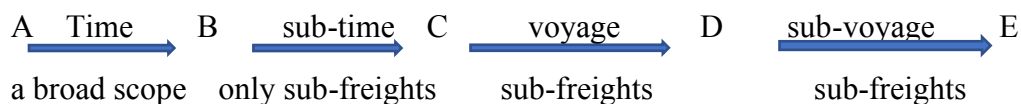
2.3.2 An Interest in the Use of the Vessel

The term ‘sub-freight’ is sometimes given a wide scope of coverage. Naturally it is for the parties to decide on the frame of words they prefer. However, it is argued that the term sub-freight should not be given an unduly restrictive scope of coverage. ‘Sub-freights’ in essence belong to an interest in the use of the vessel and should not refer to a specific term or a general scope. This author argues that it can be regarded as a collective term that refers to all earnings under any sub-charterparties based on the use of the vessel. More specifically, ‘sub-freights’ may be regarded to some extent as earnings of the shipowner, where the charterer and subsequent sub-charterers use the shipowner’s vessel. It is supposed that, under multiple charterparties, a charterer and subsequent sub-charterers use the same vessel owned by the shipowner. In response to the charterer’s default, if the shipowner (based on the agreed scope of ‘sub-freights’ in a narrow sense) is not entitled to claim against subsequent sub-charterers’ freights, whilst the charterer (based on the broad scope of ‘sub-freights’) is entitled to claim against all subsequent sub-charterers’ freights, the consequence will be that the shipowner cannot earn the hire or freight after the charterer uses the vessel; however, this same charterer earns all hires or freights after using the shipowner’s vessel. Based on this, it is sufficient to argue that the earnings of the charterer are unjust interests⁶⁰¹ through the use of the vessel, while the shipowner loses the deserved amounts by way

⁶⁰¹ Here this author refers to ‘unjust interest’ instead of ‘unjust enrichment’, because the condition precedent of the creation of ‘unjust enrichment’ is that there is an absence of a lawful ground. In this case, however, the charterer is entitled to earn the sub-freights and other earnings based on the legal contractual relationship.

of allowing the charterer to use the vessel. Even though the contracting parties based on their own bargaining balance have the right freely to choose the scope of ‘sub-freight’, from the perspective of good faith and fair dealing,⁶⁰² it is reasonable in a commercial sense that ‘sub-freights’ should be understood in a broad sense regardless of whether a charterparty simply provides for a narrow scope.

In addition, it is supposed that A time charters a vessel to B and the scope of ‘sub-freights’ in light of the security clause may cover all earnings under any sub-charterparties; B sub-time charters the vessel to C and the ‘sub-freights’ simply refer to ‘sub-freights’; C voyage charters the vessel to D and the ‘sub-freights’ are the scope of the security; D sub-voyage charters to E with a ‘sub-freights’ security. The chartering chain can be described below:



It can be seen that, in light of the A’s security clause, the right of the debt claim may reach C, D and E; in light of the B’s security clause, the right simply reaches D without

⁶⁰² Good faith and fair dealing in this context denote an implied rule when contracting parties negotiate in common law. As Steyn LJ contended in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194(CA) 196 that ‘[A] theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract... if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous examination of the problem to as ascertain whether the law does indeed compel demonstrable unfairness.’ Under English law, good faith cannot be regarded as a principle when the contract does not provide an express term about duties of good faith. However, in most of common law jurisdictions and civil law countries, the principle of good faith has been affirmed such as *Bhasin v Hrynew* [2014] SCC 71; *Renard Constructions (ME) Pty v Minister for Public Works* [1992] 33 Con LR 72 (NSWCA). It should be noted that George Leggatt in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) adopted the principle of good faith. However, this principle does not be recognised widely in the subsequent authority. In terms of further discussion on good faith, see the present author’s article ‘Shipowner’s Implied Obligations in a Charterparty Relating to Lien on Cargo: English and Chinese Law perspectives’ in Proshanto K Mukherjee (ed), *Maritime Law in Motion* (Springer-Verlag Berlin-Heidelberg, 2019 (forthcoming))

E. That is to say, there is no legal relationship between B and E. In this situation, how does A claim against E?

Furthermore, under multiple charterparties the number of charterparties is uncertain when the shipowner or the disponent shipowner enters into the charterparties. It is unrealistic to provide an exact scope of 'sub-freights' in any charterparties, if the preceding parties have no knowledge of how many charterparties will be signed in the future and what scope of 'sub-freights' can to a great extent protect them.

Therefore, since the creation of 'sub-freights' is based on the use of vessel and a shipowner or disponent shipowners are expecting to obtain earnings, treating 'sub-freights' as a collective term referring to all earnings based on the use of the vessel should be compatible with commercial rules and it is not necessary to understand the meaning of 'sub-freights' in a literal sense. Nevertheless, from practical point of view, party autonomy is more reasonable.

3 Development of Legal Nature of Sub-freight Security with Development of Security Law in Common Law

The concept of 'lien' governs not only the security on cargo, but also on sub-freights, but the latter has been incorporated into the right as a lien, leading to criticism in both legal systems. In common law, a 'lien' on sub-freights, which is regarded as a misnomer in this context,⁶⁰³ is far away from the traditional concept of lien. The standard clause under a charterparty does not distinguish the special 'lien' from the traditional concept, so that one commentary points out that 'the uncertainty through the use of the undefined "lien" is underlined by the use of "lien" in one context in a standard charterparty form to refer to a relationship similar to a possessory lien, i.e. not a lien but something like

⁶⁰³ *The Lancaster* [1980]2 Lloyd's Rep 497, 501; John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010)307, this kind of lien is a misnomer, because the sub-freights cannot be regarded as the possession of the shipowner.

it'.⁶⁰⁴ Based on the undefined 'lien', as the lien on sub-freights is construed, it is normally called 'a contractual non-possessory right'.⁶⁰⁵

It is contended that the consequence of the undefined 'lien' to a great extent should be derived from the undeveloped secured transaction law. In Chapter 2, it was demonstrated that 'lien' can be regarded as a 'collective' concept. When it is difficult to find a property concept to construe a kind of security, the security can be described as 'lien'. For this reason, at the beginning, the security on sub-freights is described as 'lien' as well. However, accompanied by the development of modern secured transactions law, the security on sub-freights can be understood through a more exact concept. There are different theories to interpret the concept and nature of this right. Prior to the discussion about theories, a brief development of this clause will be given.

3.1 Advent and Development of Sub-freight security

In common law, the advent and development of a security on sub-freights, unlike the security on cargo, may be traced back along a clear route, although it also has a long history. Tracing back to 1743, the English court in *Paul v Birch*,⁶⁰⁶ indirectly recognised that a master (shipowner) could obtain the hire from the bankrupt factors' (charterers') shippers, even if the decision in this case did not identify the concept of security on sub-freight. The facts of this case were that a factor time-chartered a vessel with a master for £48 a month. The factor was bound by the time charterparty, providing the master with a specific lien on the cargoes belonging to the merchants, who were not liable to pay for the hire to the master but were liable to pay the factor for the freight of the cargo. After the factor went bankrupt, the master claimed the lien on the merchant's cargo. The court held that the merchants were not liable to satisfy the master's hire demand with £48 a month by way of the security on the cargo, but they were

⁶⁰⁴ David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para 22.3

⁶⁰⁵ Fidelis Oditah, 'The Juridical Nature of a Lien on Sub-freights' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 191, 192

⁶⁰⁶ (1743) 2 Atkyns 621, 26 ER 771

undoubtedly liable to pay the factor for the freight at £9 per ton.⁶⁰⁷ In other words, the master stood in the place of the factor to get the freight at £9 per ton. It can be seen that the function of this precedent recognised the shipowner's remedy through the exercise of the charterer's freight. However, it does not identify the legal nature of sub-freight security so that this case is not reported as a case of a lien on sub-freight.⁶⁰⁸

In the late nineteenth century and the early twentieth century, although the standard charterparty form was not officially published, the security on sub-freights was incorporated into certain charterparties.⁶⁰⁹ In the early twentieth century, a series of cases regarding its understanding and application were brought into English and American courts, which reflected the fact that the shipowner in practice expected to depend on this remedial clause to claim any unpaid hire due. Among the series of judicial decisions, although the security on sub-freights has been regarded as an effective remedial mechanism, its legal nature was controversial. The controversial reason may arise from inadequate exploration. Prior to the early twentieth century, the discussion of the security on sub-freights came merely out in a textbook, such as *Carver on Carriage by Sea* stating that '[I]t is a contractual right to have the sub-freight paid to the shipowner instead of the charterer or other person entitled to it, but it can only be exercised so long as there is freight to be paid.'⁶¹⁰ No authority has been reported to delve into the nature of the security on sub-freights, although the early English case, *Tagart Beaton & Co v James Fisher & Sons*,⁶¹¹ did indeed state the extent of this security as follows:

⁶⁰⁷ Ibid; In light of the limited fact of this case, no bill of lading was mentioned. This author thus assumes that the master was not entitled to bring a claim for bill of lading freight.

⁶⁰⁸ In *Tagart Beaton & Co v James Fisher & Sons v West Hartlepool Steam Navigation Company, Limited, Third Parties* [1903] 1 KB391, it mentioned that '[I]t is true that no case of lien on sub-freight has been reported, and the question is treated in the text-books as an open one: *Carver on Carriage by Sea*, 3rd ed. p. 655. It is a contractual right to have the sub-freight paid to the shipowner instead of the charterer or other person entitled to it, but it can only be exercised so long as there is freight to be paid'.

⁶⁰⁹ Graeme Bowtle, 'Liens on Sub-hire and Freight: *The Western Moscow*' [2013] Lloyd's Maritime and Commercial Law Quarterly 142; Fidelis Oditah, 'The Juridical Nature of a Lien on Sub-freights' [1989] Lloyd's Maritime and Commercial Law Quarterly 191, 196

⁶¹⁰ *Tagart Beaton & Co v James Fisher & Sons v West Hartlepool Steam Navigation Company, Limited, Third Parties* [1903] 1 KB391; Thomas Gilbert Carve, *Carver on Carriage by Sea* (3rd end) 655

⁶¹¹ [1903] 1 KB391

‘... a lien for sub-freight means a right to stop the freight and receive it as such. It does not give a right to follow, wherever the fund may be found, a sum of money merely because it is the proceeds of a debt due for freight’.⁶¹²

Generally speaking, the above statement can be treated as a description of the security on sub-freights rather than an exploration of its nature. In Section 4, the nature of the sub-freight security will be examined in detail.

3.2 Interpretation of Equitable Lien

Before exploring sub-freight security, the implication of an equitable lien is first examined as the term ‘lien’ is employed to refer to the shipowner’s right over sub-freights.

As discussed in Chapter 2, the distinction between an equitable lien and a common law lien is dependent on the possession of property. In English and Commonwealth countries, an equitable lien may be regarded as ‘a floating charge focused on a number of assets fastening on a particular asset (i.e. crystallising) on a specified event’⁶¹³ and it ‘gives the licensee rights in the nature of a charge upon property until certain claims are satisfied’.⁶¹⁴ Simply speaking, an equitable lien and an equitable charge are interchangeable without difference in substance.⁶¹⁵

However, with regard to their creation, controversial standpoints have been proposed. One position contends that an equitable lien creates an equitable interest in the property

⁶¹² Ibid

⁶¹³ David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para 21.1

⁶¹⁴ John McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) 1004; see also *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* [1880] 16 Ch D 411; *Hewett v Court* [1983] 149 C L R 639, 663

⁶¹⁵ *Waitomo Wools Ltd v Nelson Ltd* [1974] 1 NZLR 484 (CA) 493; David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para 21.3; Matthew Woolley, ‘The Shipowner’s Lien on Sub-freights and Personal Property Securities Regimes’ (2014) 28 ANZ Mar LJ 73

by an express contract to security for a claim, but it does not possess the property;⁶¹⁶ while another view points out that '[T]here is no distinction between an equitable charge and an equitable lien, so far as regards their effect; but the word "lien" is generally used to denote an equitable security which does not arise under an express contract.'⁶¹⁷ In other words, an equitable lien is simply created by operation of law.⁶¹⁸

On the basis of this, although the nature of both an equitable lien and an equitable charge makes little difference in substance, whereas the sub-freight security is created by the agreement rather than by operation of law, in a strict sense, the sub-freight security cannot be construed as the equitable lien.

3.3 Evolution of Legal Nature⁶¹⁹

3.3.1 Privity of Contract Theory

Just two years after *Tagart Beaton & Co v James Fisher & Sons*,⁶²⁰ an English court dealing with a similar case, *Wehner v Dene Steam Shipping Co*⁶²¹ relied on the contractual relationship between a shipowner and the holder of a shipowner's bill of lading to examine the nature and application of the security on sub-freights. In *Wehner v Dene Steam Shipping Co*,⁶²² a shipowner time-chartered a vessel to a time charterer, who voyage-chartered the vessel to a sub-charterer. The master of the vessel issued a bill of lading to the sub-charterer and endorsed by a shipper. In the time charterparty, a

⁶¹⁶ David Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005) para 21.1

⁶¹⁷ Walter Ashburner and Denis Browne, *Ashburner's Principles of Equity* (2nd edn, Butterworth & Co 1933)249; in Snell's Equity, it is examined that the equitable lien is different from other types of security as 'they arise by operation of law rather than because the parties consensually created a security interest', John McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 1004

⁶¹⁸ McGhee (n 608) 1004

⁶¹⁹ In this section, only five main legal theories regarding the nature of a lien on sub-freights are discussed. Apart from these, a mandate theory is also submitted through the legal argument in case law. For example, in *The Annangel Glory* [1988]1 Lloyd's Rep 45, 47, Mr Richard Aikens, on behalf of the shipowners submitted that the lien on sub-freights was 'simply a contractual right, by way of an authority given to the owners to act as the charterer's agents to collect the sub-freights when amounts were due to owners under the head charter'. However, it is carefully observed that this theory is the subordinate of a contractual right. It is not therefore necessary to leave space to discuss.

⁶²⁰ [1903] 1 KB391

⁶²¹ [1905] 2 KB 92

⁶²² Ibid

lien clause like Clause 18 of the NYPE form provided that '[T]he owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned.' In the face of the insolvent time charterer, the shipowner claimed to exercise the security on the bill of lading freight due to the sub-charterer from the shipper. Mr Justice Channell pointed out that it was difficult for the shipowner to exercise his lien depending on the lien clause under the charterparty because there was no direct relationship between the shipowner and the sub-charterer. In these words of Mr Justice Channell, it was stated that:

'In ordinary cases, where the charterparty does not amount to a demise of the ship, and where possession of the ship is not given up to the charterer, the rule is that the contract contained in the bill of lading is made, not with the charterer, but with the owner, and that will, I think, explain away and accounts for all the difficulties which would otherwise arise as to the existence of the shipowner's lien. When there is a sub-charterparty there is no direct contract between the sub-charterer and the owner, and if the contract in the bill of lading were made, not with the owner, but with the sub-charterer, how is the shipowner's lien to be accounted for as against the holder of the bill of lading? It would be very difficult to deal with the question upon any logical or intelligible footing unless one starts with the proposition that the bill of lading contract is made, as it appears upon its face to be made, with the shipowner.'⁶²³

Against the above statement, on the ground that a shipowner has a contractual relationship with the holder of his bill of lading, this shipowner is entitled to collect bill of lading freights directly from the shipper.⁶²⁴ In other words, the shipowner's right

⁶²³ Ibid at 98 (Justice Channell)

⁶²⁴ Kenneth R 'O'Rourke, A Shipowner's Lien on Sub-Sub-Freight in England and the United States: New York Produce Exchange Time Charter Party Clause 18' (1984) 1 Loyola of Los Angeles International and Comparative Law Review 73, 80

over sub-freights cannot depend on the security clause itself, because the court proclaims that this security clause, as a contractual clause, cannot bind the third party.

Mr Justice Channell's statement was treated as privity of contract theory regarding the exercise of sub-freight security.⁶²⁵ In the author's observation, this theory merely seeks another remedial approach to achieve the shipowner's purpose and in essence it denies the application of sub-freight security. Furthermore, the principle of privity of contract indirectly overrules the parties' mutual agreement so that the shipowner's self-help cannot impact on the interest of the third party. Most importantly, this theory cannot satisfy the demands of the modern chartering industry. Under multiple charterparties, a shipowner does not always act as the contractual carrier who is in charge of issuing a bill of lading. In light of the theory of privity of contract, the shipowner is not entitled to claim the bill of lading freight. In addition, it is supposed that the shipowner issues the bill of lading, but the true creditor is the disponent shipowner rather than the shipowner. Based on this theory, the disponent shipowner still lacks the ground to claim the bill of lading freight. This early theory is therefore obviously inconsistent with the demands of the modern chartering industry.

3.3.2 Subrogation Theory

In the same era, an American court took a leading case to hold the legal nature of sub-freight security. In *American Steel Barge Co v Chesapeake & O Coal Agency*,⁶²⁶ the facts were similar to those in *Wehner v Dene Steam Shipping Co*.⁶²⁷ After a time charterer became insolvent, a shipowner claimed a security on sub-freights due to the time charterer from a shipper. Judge Putnam held that a shipowner 'holding a lien on subfreight becomes subrogated to all the remedies of the charterer...'⁶²⁸ However, this legal nature was questioned in both English and American law. In English law, the

⁶²⁵ Ibid at 83

⁶²⁶ 115 F 669 (1st Cir 1902)

⁶²⁷ [1905] 2 K B 92

⁶²⁸ *American Steel Barge Co v Chesapeake & O. Coal Agency* 115 F 669 (1st Cir 1902) 674 (Judge Putnam)

concept of subrogation is construed from the narrow point of view.⁶²⁹ It is generally acceptable that the application of subrogation is regarded as an equitable remedy used to prevent unjust enrichment.⁶³⁰ Although preventing unjust enrichment is not the single purpose of subrogation, it is generally accepted that only a specific situation may involve the application of subrogation. Currently, apart from the well-known indemnity contract, such as an insurance contract, only two specific circumstances can apply subrogation. First, a person discharges the debt of another person to be subrogated to any security for that debt;⁶³¹ secondly, a lender may expect to receive security claiming subrogation to another secured lender's security if he does not get the security that he expects.⁶³² As regards the sub-freight security, it is separate from the concept of subrogation. As Lloyd J held in *The Cebu (No.1)*,⁶³³ he did not fully understand the reference to subrogation. '[T]he facts are too far removed from any which would fit our ordinary doctrine of subrogation, based, as it is, on an underlying contract of indemnity' under English law.⁶³⁴

In terms of American law, a practitioner points out that the condition precedent that an shipowner is entitled to proceed against the freight owed is that each charterer under multiple charterparties owes hire/freight to the party from whom the vessel was chartered.⁶³⁵ However, if one sub-charterer has performed his sub-freight due to the charterer, the shipowner will forfeit the right to collect sub-sub-freight owed the sub-charterer owing to the fact that 'no remedy would exist against the sub-charterer.'⁶³⁶

⁶²⁹ Fidelis Oditah, 'The Juridical Nature of a Lien on Sub-freights' [1989] Lloyd's Maritime and Commercial Law Quarterly 191, 192

⁶³⁰ *Orakpo v Manson Investments Ltd* [1978] AC 95, 104

⁶³¹ *Wylie v Carlyon* [1922] 1 Ch 51; *Orakpo v Manson Investments Ltd* [1978] AC 95

⁶³² *Orakpo v Manson Investments Ltd* [1978] AC 95

⁶³³ [1983] 1 Lloyd's Rep 302

⁶³⁴ *Ibid* at 310 (Lloyd J)

⁶³⁵ Kenneth R 'O'Rourke, A Shipowner's Lien on Sub-Sub-Freight in England and the United States: New York Produce Exchange Time Charter Party Clause 18' (1984) 1 Loyola of Los Angeles International and Comparative Law Review 73, 87

⁶³⁶ *Ibid* at 87

In the author's view, the fundamental reason why this subrogation theory cannot be applied is that the right of subrogation is derived from the doctrine of 'the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.'⁶³⁷ It means that the condition precedent for the application of subrogation is that the creditor repays another debt in order to obtain the right against the sub-charterer.⁶³⁸ It is therefore the fundamental right of a creditor based on the subrogation to claim indemnity. As *Batsell v Richards*⁶³⁹ proclaimed, it is the general rule that 'subrogation gives indemnity and no more.'⁶⁴⁰ Even though English law presents the exception, the exception still comes from the concept of indemnity. However, the relationship between the shipowner and the subsequent charterers does not comply with the above doctrine, because the shipowner has not paid a debt owed by the charterer. Thus, the basis of subrogation theory is not suitable for explaining the nature of sub-freight security under the charterparties.

3.3.3 The Right of Interception Theory

A security on sub-freights is regarded as a personal contractual right to intercept sub-freights, as argued by Mr Oditah in his early article⁶⁴¹ and by Lord Millett in *Agnew v IRC*.⁶⁴² Although this theory does not prevail in judicial decisions in recent years, it is more persuasive in comparison with the two theories stated above. This theory concentrates on the right itself of the shipowner under a charterparty. On the basis of Mr Oditah's view, Lord Millett examined the scope of this right provided by Lord Alverstone CJ in *Tagart, Beaton & Co v James Fisher & Sons*⁶⁴³ and proposed that

⁶³⁷ Bryan A Garner and others (eds), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1654

⁶³⁸ 'Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has [already] paid a debt owed by the defendant'; see Dan B Dobbs, *Law of Remedies: Damages-Equity-Restitution* (2nd edn, West Publishing Co 1993) 604

⁶³⁹ 80 Tex 505 (Tex 1891)

⁶⁴⁰ Ibid at 507; *Phipps v Fuqua* 32 SW 2d 660, 663 (Tex. Civ. App. – Amarillo 1930, writ ref'd); *Am Centennial Ins Co v Canal Ins Co* 843 SW 2d 480, 485 (Tex. 1992).

⁶⁴¹ Fidelis Oditah, 'The Juridical Nature of a Lien on Sub-freights' [1989] Lloyd's Maritime and Commercial Law Quarterly 191, 191

⁶⁴² *Agnew and Another v Commissioner of Inland Revenue* [2001] UKPC, 28 [2001]2 AC 710

⁶⁴³ [1903] 1 KB391

this right ‘is the creation of neither the common law nor equity. It originates in the maritime law, having been developed from the ship owner’s lien on the cargo. It is a contractual non-possessory right of a kind which is *sui generis*.’⁶⁴⁴ This viewpoint is strongly consistent with that of Mr Oditah in his article stipulating that this right ‘gives the shipowner a *personal* right to intercept the sub- freights before they are paid. In this sense, the right conferred by the lien clause is analogous to a right of stoppage in transit.’⁶⁴⁵

The theory of an equitable assignment by way of a security that creates an equitable charge has been established through a number of cases.⁶⁴⁶ To demonstrate the theory of the right to forceful interception in comparison with an equitable charge, Mr Oditah and Lord Millett assert that a ‘charge’ as a kind of a proprietary interest is characterised as a right to trace, namely, *droit de suite*. Put another way, a right of a charge is a kind of property right that can be asserted against a third party. However, the sub-freight security arising from the charterparty is not binding directly upon the third party. This security cannot therefore be regarded as a kind of property right. The underlying argument is that this right arising from the contract is not giving to the shipowner any extra power beyond the pure contractual right between contracting parties. In this case, where there is no extra right to claim against the third party, there is no tracing remedy for the shipowner. This security cannot therefore be regarded as a charge, as a proprietary interest.⁶⁴⁷

⁶⁴⁴ *Agnew and Another v Commissioner of Inland Revenue* [2001] UKPC; 28 [2001]2 AC 710, 727

⁶⁴⁵ Fidelis Oditah, ‘The Juridical Nature of a Lien on Sub-freights’ [1989] Lloyd’s Maritime and Commercial Law Quarterly 191, 193. This author contacted Mr Oditah during drafting this section to ask his latest opinion. He ‘prefers the opinion of Lord Millett in *Agnew*’. At the same time, in considering the development of the recent case law, he contends that ‘the lien is a hybrid lying somewhere between a personal and a proprietary right, not merely personal and not entirely proprietary’, quoting the Mr Oditah’s email drafted on 12 July 2018.

⁶⁴⁶ See Section 3.3.4; *The Cebu (No.1)* [1983] 1 Lloyd’s Rep 302; *The Uglund Trailer* [1986] Ch 471; *The Annangel Glory* [1988] 1 Lloyd’s Rep 45

⁶⁴⁷ *Agnew and Another v Commissioner of Inland Revenue*, [2001] UKPC, 28 [2001]2 AC 710; Fidelis Oditah, ‘The Juridical Nature of a Lien on Sub-freights’ [1989] Lloyd’s Maritime and Commercial Law Quarterly 191, 191

In an Australian case of *Baebo Shipping Co Ltd v The Ship Go Star*,⁶⁴⁸ Lord Millett's proposition is also considered, although there is no determinative decision on the nature of this security. The Australian court, through the *obiter dictum* in this case, is in favour of Lord Millett's opinion. The Australian court provides two reasons why Lord Millett's opinion is reasonable. First, Lord Millett sat with Lords Bingham and Hobhouse, both of whom had rich admiralty experience, and neither refuted Lord Millett's opinion. The underlying point is that two experienced maritime experts agreed with Lord Millett; secondly, Lord Millett and his colleagues provided a comprehensive origin of the concept of lien from maritime law instead of from common law or equity. Behind it, it seems that the viewpoint based on the roots of lien is more reliable.⁶⁴⁹

In addition, Hong Kong law⁶⁵⁰ is in favour of this theory in its legislation. In accordance with Section 334(4) of the HK Companies Ordinance (Cap 622), it is provided that:

'For the purposes of subsection (1)(d) and (j), if a company charters a ship from a shipowner, the shipowner's lien on the subfreights for amounts due under the charter is not to be regarded as a charge on book debts of the company or as a floating charge on the company's undertaking or property.'⁶⁵¹

The meaning of this provision is construed as the sub-freight security, simply amounting to the contractual right rather than the charge proposed by the Hong Kong Financial Services and the Treasury Bureau in 'Second Public Consultation on Companies Ordinance Rewrite' dated 2 April 2008. In this public consultation, it is asserted that:

⁶⁴⁸ [2012] FCAFC 156

⁶⁴⁹ *Baebo Shipping Co Ltd v The Ship Go Star* [2012] FCAFC 156

⁶⁵⁰ Hong Kong is a special administrative region of the People's Republic of China, but the legal system is inherited from English law, namely the common law system, as Hong Kong was a colony of the British Empire between 1842 and 1997.

⁶⁵¹ *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another* [2018] SGCA 26 [73]

‘Regardless of whether the term “book debts” is to be defined in the CO (Companies Ordinance), we recommend that it be clarified that a lien on subfreights is not within this head or indeed any other head of registrable charge. Essentially a lien on subfreights is a provision in the charterparty (lease) of a vessel stating that the shipowners shall have a claim upon all amounts due under sub-charterparties for payments in respect of the head charter. The provision gives the shipowner the personal right to intercept sub-charter payments before they reach the charterer but the provision nevertheless seems to lack the proprietary characteristics of a charge. Registration is also inconvenient from a commercial perspective since charterparties are usually negotiated by shipbrokers and not by lawyers and are normally of a relatively short duration’.⁶⁵²

Behind this assertion is in essence reference to Lord Millett’s proposition in *Re Brumark Ltd, Agnew v Commissioner of Inland Revenue*.⁶⁵³ In the common law system, Hong Kong might be the first and only jurisdiction to illustrate the position by legislation that the sub-freight security is a personal contractual right.

It may be argued, however, that this theory raises two legal issues that cannot so far be addressed. First, in light of this theory, how may a shipowner’s contractual right break the privity of contract to claim against the third party – a sub-charterer or subsequent sub-charterers? Mr Oditah, in his later article of *Legal Aspects of Receivables Financing*, attempts to address this issue with two arguments. The first argument is that he considers the shipowner to be a joint promisee with the head charterer and the sub-charterer to be the promisor. The alternative argument is that the head charterer keeps

⁶⁵² Financial Services and the Treasury Bureau, ‘Second Public Consultation on Companies Ordinance Rewrite’ (FSTB, April 2008) 5.17 < https://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2'ndPCCOR_e.pdf >accessed 19 December 2018

⁶⁵³ [2001] UKPC, 28 [2001] 2 AC 710 [41]; Financial Services and the Treasury Bureau, ‘Second Public Consultation on Companies Ordinance Rewrite’ (FSTB, April 2008) 5.17 < https://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2'ndPCCOR_e.pdf >accessed 19 December 2018

the interest of the lien clause in the charterparty on trust for the shipowner.⁶⁵⁴ However, this explanation overlooks the fundamental purpose and function of this clause. The creation of this security is to carve out a remedial mechanism for the shipowner, who may exercise the remedy by himself, namely self-help. If a charterer defaults, the shipowner, as the creditor, certainly needs a sufficient legal nature to exercise his remedy. For this reason, the condition precedent of the joint promisee should depend on the application of an implied term that the charterer forfeits the title of the promisee in response to his default. Otherwise, the shipowner's self-help might be challenged by its joint promisee. Moreover, as to the theory of trust presented by Mr Oditah, no comprehensive argument has been discussed. In the event that the head charterer is regarded as the shipowner's trustee, there is no further discussion about what the trusted property is. In light of Mr Oditah's proposal that the shipowner can hold an interest in sub-freights so that he may be regarded as a beneficiary under a trust. However, in consideration that the 'three certainties' laid down by Lord Langdale MR in *Knight v Knight*,⁶⁵⁵ the 'trust' relationship between the shipowner and the head charterer cannot meet the criteria of certainty of intention, certainty of subject and certainty of object. If the implied trust can exist, it appears that Mr Oditah's argument is not persuasive.

Secondly, apart from the privity of contract, this theory does not also provide a clear rationale to the shipowner as to whether he may exercise the security on sub-freights in any sub-charterparties. As discussed several times, in practice, multiple charterparties are very common. As Lord Millett said '[T]he lien is the creation of neither the common law nor equity. It originates in the maritime law, having been developed from the ship

⁶⁵⁴ Fidelis Oditah, 'Legal Aspects of Receivables Financing' in Fidelis Oditah (ed), *Legal Aspects of Receivables Financing* (Sweet & Maxwell 1991) 88

⁶⁵⁵ *Knight v Knight* (1840) 3 Beav 148; Lord Langdale MR held that '... the recommendation, entreaty, or wish shall be held to create a trust. First, if the words were so used, that upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain'; Mohamed Ramjohn, *Sourcebook on Law of Trusts* (2nd edn, Cavendish Publishing Limited 1998) 61; Philip H Pettit, *Equity and the Law of Trusts* (12th edn, Oxford University Press 2012) 48

owner's lien on the cargo'.⁶⁵⁶ Now that this security on sub-freights is derived from an industry custom, it is unreasonable for a professional shipowner not to extend the scope of sub-freights to sub-sub-hires or sub-sub-freights. If so, several promisees and several promisors might be in coexistence. The issue will be more complex.

In the end, in Hong Kong law, it seems that the right of interception arising from the sub-freight security has been recognised and accepted by legislation. However, the outcome is no better than Mr Oditah's proposition. Because legislation affirms the sub-freight security as a personal contractual right, but does not grant any special right to this security. This means that this security lacks of *droit de suite* against the subsequent sub-charterers and *droit de preference* against the charterer's other secured creditors. One may imagine that this outcome is a 'nightmare' for shipowners.

All in all, although this theory suggested officially by Lord Millett in 2001 still stands, the proposition of a pure contractual right cannot be recognised as the majority view because of the foregoing insurmountable legal issues. Based on this theory, even if the scope of sub-freight security covers all sub-freights and/or all sub-hires in any sub-charterparties, it is not reasonable that the right of interception in the law of contract can give rise to legal consequences against the subsequent sub-charterers and liquidator.

3.3.4 Equitable Assignment⁶⁵⁷ by Way of a Floating Charge

As opposed to the above three theories, the theory of equitable assignment by way of a floating charge prevails in the commonwealth of nations. Furthermore, since the 1980s,

⁶⁵⁶ *Agnew and Another v Commissioner of Inland Revenue* [2001] UKPC 28; [2001]2 AC 710 [41]

⁶⁵⁷ The history of assignment of debt-claim in English law can be traced back to the twelfth century as a result of Jewish influence. From the thirteenth to the seventeenth century, the consequence of doctrines hostile to assignment gave rise to its retrogression. In modern times, the development of the assignment in common law and equity law is different. In common law, its development was obstructed and eventually statute law in relation to assignment replaced common law assignment. In equity law, freedom of assignment is to a great extent protected; see Standley J Bailey, 'Assignment of Debts in England from the Twelfth to the Twentieth Century I' (1931) 47 LQR 516, 516-517 and 'Assignment of Debts in England from the Twelfth to the Twentieth Century III' (1932) 48 LQR 547, 579-580; John McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 30

this theory has been very much developed and improved along with a number of authorities in common law jurisdictions.

The Queen's Bench Division in *The Nanfri*⁶⁵⁸ was the first to render an opinion on the security on sub-freights operating as an equitable assignment. However, after this case was submitted to the House of Lords, Lord Russell contended that '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.'⁶⁵⁹ What the difference is between an equitable assignment and an equitable charge is not clarified by Lord Russell. Furthermore, *The Nanfri*⁶⁶⁰ did not provide more space to discuss the nature of this security.

Subsequently, in *The Cebu (No.1)*,⁶⁶¹ Lloyd J was satisfied that this security was an equitable assignment through the construction of the clause and the intention of the parties. It was held that:

'[O]n the true construction of Clause 18 I would hold that Naviera Tolteca (charterer) has assigned to the owners by way of equitable assignment, not only sub-freights due to it as charterers, but also any sub-freights due under any sub-sub-charter of which it is equitable assignee. In my view that is the clear intention of the parties to be derived from the language they have used in clause 18. I can see no reason why the law should not give effect to that intention by virtue of a chain of equitable assignments such as I have attempted to describe.'⁶⁶²

⁶⁵⁸ [1978] 2 Lloyd's Rep 132; in this case, the standard form referred to the BALTIME Charterparty form, which is similar to Clause 18 of NYPE.

⁶⁵⁹ [1979] 1 Lloyd's Rep 201, 210 (Lord Russell)

⁶⁶⁰ Ibid

⁶⁶¹ [1983] 1 Lloyd's Rep 302

⁶⁶² Ibid at 309

However, in Lloyd J's observation, although this security might take effect as an equitable charge as provided by Lord Russell in *The Nanfri*,⁶⁶³ Lloyd J did not think that it was necessary to explore it further.

With the cases of *The Ugland Trailer*⁶⁶⁴ and *The Annangel Glory*,⁶⁶⁵ the relationship between an equitable assignment and an equitable charge has been gradually developed. Nourse J in *The Ugland Trailer*⁶⁶⁶ held that, compared with a possessory lien on cargos at common law or by operation of law, the security on sub-freights 'was the creature of an express contract; its effect was to give the shipowner a limited right to require payment from the shipper of money which was owed by the shipper to the charterer; the charterer had a chose in action against the shipper and the limited right to that chose could only be acquired by the owner by virtue of some assignment necessarily equitable made by the charterer.'⁶⁶⁷

In understanding this statement, this author considers that Nourse J's proposition is that the shipowner's security on sub-freights is derived from the express term providing the assignment of a charterer's right to the third party. In terms of the form of this equitable assignment, Nourse J contended that 'an equitable assignment of a chose in action by way of security creates an equitable charge on the chose...which, as it happens, was a case where the charge was held to be void for non-registration...'⁶⁶⁸ Pursuant to this *obiter dictum*, it is anticipated that the equitable assignment itself does not inevitably constitute the equitable charge, but this security clause creates a possibility to constitute a charge only if the shipowner satisfies the requirement in light of the creation of a charge. If the requirement, such as registration, is not satisfied, the charge is invalid, and this security simply constitutes an equitable assignment.⁶⁶⁹

⁶⁶³ [1979] 1 Lloyd's Rep 201

⁶⁶⁴ [1986] Ch 471

⁶⁶⁵ [1988] 1 Lloyd's Rep 45

⁶⁶⁶ [1986] Ch 471

⁶⁶⁷ Ibid at 478 (Nourse J)

⁶⁶⁸ Ibid

⁶⁶⁹ In the latest Singapore court case, the judge did not hold with the similar observation.

Just two years later, Saville J in *The Annangel Glory*⁶⁷⁰ reconfirmed and demonstrated Nourse J's argument in a detailed discussion. First, Saville J held that:

‘to assign a chose in action means to transfer a right from one person to another... in equity the effect of making such an agreement is that when a chose in action answering the description in the agreement does come into existence, the assignor automatically and immediately becomes a trust and the assignee the beneficiary (the beneficial owner) of that chose in action’.⁶⁷¹

Against the above foundation, Saville J further enunciated that:

‘the relevant words of cl. 18 do constitute an agreement by the charterers to assign (i.e. to transfer) to the owners by way of floating security the right to payment of sub-freights falling due under contracts to be made by the charterers in respect of the vessel the subject of the head charter.’⁶⁷²

In *The Western Moscow*,⁶⁷³ Justice Christopher Clarke presented an opinion similar to those in *The Uglad Trailer*⁶⁷⁴ and *The Annangel Glory*.⁶⁷⁵ He opined that the security on sub-freights could be regarded as ‘amounting to an agreement to assign future debts by way of security, which gives rise to rights in equity’.⁶⁷⁶ Furthermore, as far as an English company was concerned, the assignment might be registrable. Without registration, the assignment could be void against any claims of a liquidator and creditors.⁶⁷⁷ Subsequently, *The Bulk Chile*⁶⁷⁸ followed *The Western Moscow*.⁶⁷⁹ The

⁶⁷⁰ [1988] 1 Lloyd's Rep 45

⁶⁷¹ Ibid at 47 (Saville J)

⁶⁷² Ibid at 49 (Saville J)

⁶⁷³ [2012] EWHC 1224 (Comm)

⁶⁷⁴ [1986] Ch 471

⁶⁷⁵ [1988] 1 Lloyd's Rep 45

⁶⁷⁶ *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS, Oceantask Corp, Seatask Corp (The Western Moscow)* [2012] EWHC 1224 (Comm) [49]

⁶⁷⁷ Ibid [49]

⁶⁷⁸ [2012] EWHC 2017 (Comm)

⁶⁷⁹ [2012] EWHC 1224 (Comm)

court quoted the proposal presented in *The Law of Personal Property Security*⁶⁸⁰ providing that '[A]s a general rule, if the floating charge covers future assets, assets within the description of the charged future assets which accrue to the company after crystallization will fall within the crystallized charge'.⁶⁸¹ The court held that this statement was similar to the situation created by sub-freight security. It means that when the charterparties 'were made, the sub-freights to which they referred were necessarily future assets, and the clause (the security on sub-freights) was intended to cover them.'⁶⁸²

Based on this, the English authorities have confirmed that the nature of sub-freight security is the equitable assignment by way of a floating charge. Following English law, the Singapore court in the case of *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*⁶⁸³ comprehensively explored the different theories in relation to the nature of this clause and its review was eventually in line with the decisions of *The Bulk Chile*⁶⁸⁴ and of *The Western Moscow*,⁶⁸⁵ submitting that 'liens on sub-freights should be characterized as floating charges that are registrable under s 131 (3) (g) of the (Singapore) Companies Act'.⁶⁸⁶

However, it should be noted that in *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*,⁶⁸⁷ the Singapore court held that the floating charge theory rather than equitable assignment by way of floating charge theory is the most reasonable legal nature. The slight change is *prima facie* not significant, but in the author's opinion, the

⁶⁸⁰ Hugh Beale and others, *The Law of Personal Property Security* (2nd edn, Oxford University Press 2012) 6.79

⁶⁸¹ [2012] EWHC 2017 (Comm) [64]; *Ibid* at 6.79

⁶⁸² *The Bulk Chile* [2012] EWHC 2017 (Comm) 609; the court of appeal did not identify the nature of this clause, but the judgment was in favour of the Commercial Court; [2013] EWCA Civ 184

⁶⁸³ [2018] SGCA 26

⁶⁸⁴ [2012] EWHC 2017 (Comm)

⁶⁸⁵ [2012] EWHC 1224 (Comm)

⁶⁸⁶ [2018] SGCA 26, [69]; The difference between this case and other English cases discussed above is that the lien on sub-freights in this case is based on the bareboat charterparty. But the content of the security under the bareboat charterparty is the similar to that of time charterparties we discussed.

⁶⁸⁷ *Ibid*

underlying implication is important. The detailed discussion will be disclosed in Section 3.4.

Although both the right of interception and the right of a floating charge are primarily derived from the contractual clause, the fundamental difference between them is that, while the former is simply subject to contract law, the latter provides the possibility to arise *droit de suite* against the subsequent sub-charterers and *droit de preference* against the charterer's liquidator and/or the subsequent charterers' liquidators, as long as the corresponding procedure, such as registration, is satisfied.⁶⁸⁸

3.3.5 Agreement to Create a Charge

This fifth legal nature is presented by Professor Tjio who was an *amicus curiae* in *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*.⁶⁸⁹ It was submitted that the lien (security) on sub-freights 'should be characterized as agreements to create a charge on a future contingent event (i.e., the giving of notice to the sub-charterer upon charterer's default)'.⁶⁹⁰ Although the Singapore court did not adopt this theory, it is an attractive test because it may avoid the practical difficulty of having to register this security within the short statutory time limit.⁶⁹¹

Nevertheless, in the opinion of the court, this theory was not consistent with the literal meaning of this clause. In other words, a shipowner's sub-freight security under a standard form did not express that this was an agreement to create a charge.

⁶⁸⁸ It should be noted that in certain jurisdictions, such as under Singapore law, it is not necessary to perform the procedure. As long as the contractual sub-freight security clause is created, this right naturally becomes the statutory right. The detail will be discussed below.

⁶⁸⁹ [2018] SGCA 26

⁶⁹⁰ Ibid at [59]; This proposal is on basis of *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR (R) 976. In this case, an agreement to grant security on a contingency –such agreement not being specifically enforceable immediately –was found to grant no present security (whether by way of an equitable charge or otherwise).

⁶⁹¹ Ibid at [60]; Ian Teo, 'Registrability of Liens on Sub-freights: The Last Word or Not' (2018) LMCLQ 490, 494

In addition, the court asserted that this theory undermined the system of registration. Under this theory,

‘if the Lien was an agreement to create a charge, it would only be registrable when the lien is exercised in response to a default by the charterer... Allowing the shipowner to impose a charge over the charterer’s sub-freights would be tantamount to allowing the shipowner to steal a march on the other creditors, who would be adversely affected if they had dealt with the charterer on an unsecured basis prior to the contingency, and without knowledge of the shipowner’s lien...’⁶⁹²

All in all, it was observed by the court that this new theory is not only inconsistent with the literal meaning of sub-freight security, but also is not fair to other creditors. This theory is therefore regarded simply as an academic opinion.

3.3.6 Observations

In accordance with the above-mentioned five legal natures, the theory of equitable assignment by way of a floating charge prevails. As discussed in Sections 3.3.1 and 3.3.2, the theories of the privity of contract and of subrogation are untenable. Only the contractual right of interception constitutes the challenge against the equitable assignment by way of a floating charge.

In this author’s opinion, the development of the legal nature of sub-freight security has a close connection with the development of modern secured transactions law. The author is in favour of the proposal rendered by Lord Millett that the sub-freight security ‘originates in the maritime law, having been developed from the ship owner’s lien on the cargo.’ However, whether ‘it is a contractual non-possessory right of a kind which is *sui generis*’⁶⁹³ is an issue. Tracing back to the history of this clause, as discussed in Chapter 2, the shipowner’s security is derived from *lex mercatoria*. At that time, neither

⁶⁹² Ibid at [65]

⁶⁹³ *Agnew and Another v Commissioner of Inland Revenue* [2001] UKPC; 28 [2001]2 AC 710, 727

the system of security interests nor the chartering industry had yet been developed. Both the shipowner's cargo security and sub-freight security merely constituted remedial approaches. Furthermore, because it was under a single charterparty, the associated parties were not complex. Even if this remedy was regarded as a pure contractual right, the contractual right theory did not in substance affect the performance of the security. As the system of security interests subsequently improved and the chartering industry developed, the theory of a pure contractual right needs to be reconsidered in the modern context. In particular, Chapter 4 discussed how the growth of the limited liability company and the demand for capital stimulated the occurrence of a new form of security interests, such as a charge. It also expanded the scope of secured property so that the equipment of a company, trading stock and receivables now had the potential to become secured property.⁶⁹⁴ These circumstances could not have been anticipated by earlier practitioners in the shipping industry when they several centuries ago designed sub-freight security.

In light of the theories discussed above, it can be seen that the sub-freight security is derived from trade practices and is not based on any theoretical foundation when it is incorporated in the 'lien' clause in charterparties.

Given these historical changes in the law, there is no doubt that this 'ancient' clause should be examined from a current perspective. This author argues that sub-freight security indeed originated in maritime law and forms a subordinate clause to account for gaps in the shipowner's cargo security. As discussed in Chapter 2, unlike a maritime lien, the sub-freight security needs to be explored from a perspective of general commercial law. Although authorities on the law provide a clear answer that the nature of this clause is an equitable charge by way of a floating charge, we need to explore whether this is indeed the best position.

⁶⁹⁴ Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random House 2016)751

3.3.6.1 A Contractual Right and a Charge

Disputes often in practice arise about whether a charge or a pure contractual right has been created. For a multitude of reasons, this is a common legal issue in commercial law.

First, a charge may be created by contracting parties.⁶⁹⁵ However, the parties do not expressly provide the term ‘charge’ or describe the creation of the charge. One party may contend in this situation that the contract has created a charge, while the other argues that only a contractual right has been created. This situation is similar to the controversy pertaining to the nature of sub-freight security. As discussed in Section 3.2.3.1 of Chapter 4, the primary creation of a floating charge was to satisfy the demands of finance in the nineteenth century. In other words, this new form of security is the consequence of the reform of secured transactions law. Accompanied by the recognition and application of this new form of security in a broad sense, certain forms of security can be construed in light of the theory of floating charge. However, the traditional standard form of this term is contentious.

In addition, in comparison with a fixed charge, a creditor in a floating charge cannot affirm that the property/assets are specifically attached to him. As Buckley stressed it in *Evans v Rival Granite Quarries Ltd*⁶⁹⁶

‘A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically

⁶⁹⁵ Apart from a contractual charge, a statutory charge is created by legislation. For example, Law of Property Act 1925, Section 117 provides that ‘Forms of statutory legal charges’(1) ‘As a special form of charge by way of legal mortgage, a mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in one of the forms (Nos. 1 or 4) set out in the Fourth Schedule to this Act, with such variations and additions, if any, as circumstances may require, and if so made the provisions of this section shall apply thereto.’

⁶⁹⁶ [1910] 2 KB 979

affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.’⁶⁹⁷

That is to say, before the crystallization of a floating charge, the debtor is at liberty to deal with the secured property and the creditor is not entitled to intervene in the debtor’s disposal of the property. Thus, with regard to sub-freight security, some argue that the shipowner, prior to crystallization, is incapable of following the sub-freights once they are in the hands of the charterer, as this security provides the shipowner with no proprietary right in the sub-freights.⁶⁹⁸ After all, *droit de suite* (the right of pursuit) is an essential feature of a proprietary right. However, in *Re Spectrum Plus Ltd*,⁶⁹⁹ Lord Walker held that ‘under a floating charge ... the chargee has a proprietary interest, but its interest is in a fund of circulating capital, and unless and until the chargee intervenes (on crystallization of the charge) it is for the trader, and not the bank, to decide how to run its business ...’⁷⁰⁰ His fellow, judge, Lord Scott, further opined that the ‘essential characteristic of a floating charge ... is that the asset subject to the charge is not finally appropriated as security... until the occurrence of some future event’.⁷⁰¹ Therefore, with regard to sub-freight security, the inability of a shipowner to follow sub-freights, prior to crystallization, does not demonstrate that the sub-freight security is simply a contractual right.

Thus, in English law, whether a contractual clause constitutes a floating charge must depend on the intention of the contracting parties. If the contractual clause describes

⁶⁹⁷ Ibid at 999; it should be noted that in this case ‘a floating security or a floating mortgage’ amounts to ‘a floating charge’.

⁶⁹⁸ *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another* [2018] SGCA 26, [40]; Ian Teo, ‘Registrability of Liens on Sub-freights: The Last Word or Not’ [2018] LMCLQ 490, 492

⁶⁹⁹ [2005] UKHL 41

⁷⁰⁰ Ibid at [139] (Lord Walker) ; Eilis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (2nd edn, Oxford University Press 2014) 321; it should be noted that, prior to *Re Spectrum Plus Ltd*, in terms of nature of chargee’s interest before crystallization, there are several theories including an overreachable charge theory, put forward by Mr Nolan, Defeasible charge theory by professor Worthington and no proprietary interest theory in Australian law; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)199-202

⁷⁰¹ Ibid at [111] (Lord Scott)

that ‘a debt owed by one contractual party to the other should be paid out of a particular asset or fund’,⁷⁰² the court will consider that the debtor has agreed to use his property as a security, even if the property is not specified prior to the exercise of this security. Because the clause has shown that the debtor agrees to using the particular property to pay his debt, even if the amount of property is not exact, the creditor, namely the chargee has ‘a specifically enforceable right to look to the asset for the discharge of the debt’.⁷⁰³ In comparison with specific enforceability, if the contractual clause is simply enforceable by damages or an injunction, this clause will be regarded as a contractual right.⁷⁰⁴ For example, in *Palmer v Carey*,⁷⁰⁵ the lender and the borrower agreed that the borrower might use the lender’s money to buy and to sell the goods. The earnings were deposited into the lender’s bank account. The court held that this situation did not give rise to a charge over the goods or the proceeds, but was merely a personal right to prevent misapplication of the proceeds.⁷⁰⁶

This thesis argues that, in accordance with the aforementioned criteria for distinguishing between the contractual right and the floating charge, the shipowner has a right of floating charge. This is consistent with the purpose of the sub-freight security clause.

Since the advent of a shipowner’s sub-freight security, it has been presumed that a shipowner is expected to attach to sub-freights payable under sub-charterparties payments in respect of the head charterparty or any sub-charterparties. This

⁷⁰² Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)169-170; see also *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584, (CA) 595–596 (Buckley LJ) affirmed by HL; *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602, 619; *Re TXU Europe Group plc* [2003] EWHC 3105; [2004] 1 BCLC 519 [35]

⁷⁰³ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)169-170; see also *Re TXU Europe Group plc* [2003] EWHC 3105, [2004] 1 BCLC 519 [35]

⁷⁰⁴ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)170

⁷⁰⁵ [1926] AC 703 (PC)

⁷⁰⁶ *Ibid* at 706–7

presumption can be verified by the content of the security clause. Take the NYPE 2015 form as an example.

Article 23 stipulates that:

‘[T]he 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’.⁷⁰⁷

It is clear that this clause consists of a shipowner’s sub-freight security, a shipowner’s cargo security and a charterer’s vessel security. Although there is no doubt that these three types of securities reflect different rights, it is reasonable to say that they should all be governed by the law of security, because all securities are described uniformly as a ‘lien’. Regardless of the type of a ‘lien’—a possessory or non-possessory ‘lien’, this term is used to illustrate that the purpose of these three types of securities is the same: to improve the creditor’s chances to obtaining performance of obligation by way of security. Thus, where this term is used and the law of securities applies, the contractual right should not be the intention of the parties.

It may be argued that, when this clause was created, there was no existing system of security. Opponents of the submitted view may therefore argue that the sub-freight security along with the cargo security cannot be subject to the law of security. From the historical timeline, this argument is chronologically accurate. However, Chapter 4 has discussed the history of cargo security, and that illustrated that the real purpose of this

⁷⁰⁷ NYPE 2015, Art 23; other standard forms provide the similar clause. The difference between a time charterparty and a voyage charterparty is that a voyage charterparty under the voyage charterparty is not entitled to enjoy a lien on the vessel. For example, Article 8 of GENCON (1994) issued by BIMCO is provided that ‘[T]he Owners shall have a lien on the cargo and on all sub-freights payable in respect of cargo for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party Including costs of recovering same’.

clause is to enable the shipowner to detain the cargo for freights due. This purpose is consistent with that of security. Despite the later comprehensive development of the law of security, the purpose of the clause has therefore not changed. The shipowner has consistently claimed sub-charter payments for freights due. The purpose is in line with that of security. Although the amount of sub-freights is not specified when the sub-freight security is created, once the default occurs, the shipowner is able to obtain payment by requesting these sub-freights. Thus, there is an obvious security function.

In addition, Section 2 has discussed that ‘sub-freights’ amount to an interest in the use of the vessel. Apart from the purpose that the preceding shipowner may obtain the earnings from his direct counterpart, the charterer, under multiple charterparties this shipowner also expects to obtain the earnings from the subsequent charterers who use the vessel in response to the charterer’s default. The shipowner therefore attempts in essence to invoke property law rather than contract law, because only property law grants the shipowner *droit de suite* and *droit de preference*.

3.3.6.2 Floating Charge by Way of Equitable Assignment

In comparison with the theory of equitable assignment by way of a floating charge submitted by English law, this author suggests that the theory of a floating charge adopted by the Singapore court is more reasonable. If the theory of an equitable assignment must be involved, it simply constitutes an approach to achieving the security. That is to say, creating a right of floating charge is the real purpose and using an equitable assignment is the device for this purpose.

As far as an equitable assignment is concerned, its foundation and implication are merely subject to contract law, which cannot satisfy the purpose of sub-freight security. There are currently two main standpoints on the legal implication of equitable assignment. These two different legal implications of equitable assignment can lead to different consequences. The mainstream standpoint is to consider ‘conceiving of

equitable assignment as a transfer’ while the second implication is to treat it as ‘the creation of a trust’.⁷⁰⁸ The different consequences of two implications are that ‘transfer’ theory requests the assignor to ‘drop out’ from the contractual relationship between himself and his obligor so that the assignee is entitled to enforce the assignor’s claim with the assignee’s own title; while in ‘trust’ theory the assignee lacks an independent title to sue the assignor’s obligor.⁷⁰⁹ It is supposed that a shipowner should be willing to achieve two purposes depending on the security on sub-freights. First, he seeks to invoke an independent right against the sub-charterer; secondly, the charterer is not released from his debt due. In other words, the shipowner’s paramount purpose is to enforce his right against the two or more parties, the original debtor and the subsequent debtors. This should be the fundamental function of a security remedy. The function of equitable assignment might not fully satisfy or match the parties’ intentions.

By contrast, ‘the floating charge’ theory is governed by property law. A floating charge is a proprietary right. Once contracting parties enter into an agreement to create a ‘charge’, it is in theory feasible to enjoy *droit de suite* and *droit de preference*. However, the object of a charge is an invisible right – the sub-freights claim. After the creation of a charge, it is not reasonable for a third party to know the existence of the charge. If the third party has no knowledge of this charge, it is certain that *droit de suite* and *droit de preference* cannot be exercised. For this reason, in common law, the criterion of perfection should be satisfied. ‘Perfection is a useful way to describe any steps that a secured creditor has to take in order to be able to make the security effective against other secured creditors, trustees in bankruptcy and company liquidators or administrators’.⁷¹⁰ Depending on the different types of security interests, the perfection

⁷⁰⁸ James Edelman and Steven Elliott, ‘Two Conceptions of Equitable Assignment’, (the Current Legal issues Seminar Series, Banco Court, Supreme Court of Queensland, June 2013)1

⁷⁰⁹ Ibid at 11-15

⁷¹⁰ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018)424; Apart from ‘perfection’ as a more particular term, a term ‘attachment’ is also used. Both terms are used by the Article 9 of the Uniform Commercial Code (USA), and the Canadian, Australian and New Zealand Personal Property Security Acts (‘PPSAs’), and ‘are a useful way of thinking about

requirements are different. For example, with regard to the legal cargo security, possession or control may be viewed as a method of perfection. By contrast, ‘a charge granted by a company must be registered’.⁷¹¹ In the forthcoming section, registration will be discussed.

It should be noted that, apart from the perfection requirement, crystallization in relation to a floating charge is still inextricable. ‘Crystallization is the process whereby a floating charge ceases to “float” and becomes a fixed charge’.⁷¹² In other words, accompanied by the occurrence of the relevant events, crystallization finishes the process. In relation to sub-freight security, the event normally means the shipowner’s intervention, namely giving notice to the charterer and sub-charterer. After crystallization, if the sub-charterer still pays sub-freights to the charterer, the shipowner enjoys *droit de suite* against the sub-charterer. *Droit de preference* must depend on registration.

3.4 Registration Requirement in Secured Transactions Law

In order to enforce a contractual clause against a third party, including other secured creditors of a charterer, unsecured creditors and liquidators, after the creation of a floating charge, the perfection requirement of registration must be satisfied. The registration requirement is consistent with the character of modern secured transactions. However, for various reasons, common law jurisdictions may choose a divergent method of achieving the purpose of registration.

3.4.1 English Law Registration Model

the various requirements that must be fulfilled before a security interest is fully enforceable against the debtor and all third parties. These concepts, however, map better onto the more logical PPSA system than onto the English law system, which has developed through a mixture of case law and legislation’; Louise Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2017) Chapter 2, fn.1

⁷¹¹ Beale and others (n 710) 424

⁷¹² Beale and others (n 710) 203

With regard to the registration model of sub-freight security, English law went through a long time to determine that only registration can give rise to legal effect against a third party.

It was said that in *The Nanfri*⁷¹³ sub-freight security had been construed as an equitable charge. However, until *The Uglund Trailer*⁷¹⁴ the legal effect of registration was only to draw the attention of practitioners and academics. Before *The Uglund Trailer*⁷¹⁵ was heard in the companies court, most of these cases were decided in the Commercial Court.⁷¹⁶ In *The Uglund Trailer*,⁷¹⁷ after the receiver of the charterers and the shipowner claimed the respective sub-freights, the court had to decide whether this security must be registered under the Companies Act 1948, s 95 (later replaced by the Companies Act 2006). In the end, the court treated this security as others in secured transactions law and held that it was void as a result of its non-registration.⁷¹⁸

Subsequently, both the legal nature of sub-freight security and its registration have sparked strong debates. The Companies Act 1985 s. 395 had excluded security on sub-freights from the requirement of registration as a floating charge.⁷¹⁹ Afterwards, accompanied by the influence of Diamond Report 1989,⁷²⁰ the Companies Act 1989, s 93 persisted in excluding security on sub-freights from the requirement of registration as a floating charge.⁷²¹ Although the Companies Act 1989 never entered into force, the Law Commission for England and Wales in consultation paper in 2002 proposed that

⁷¹³ [1978] 2 Lloyd's Rep 132; [1979] 1 Lloyd's Rep 201

⁷¹⁴ [1985] 2 Lloyd's Rep 372; [1986] Ch 471

⁷¹⁵ Ibid

⁷¹⁶ Ibid; Graeme Bowtle, 'Liens on Sub-hire and Freight: The Western Moscow' [2013] Lloyd's Maritime and Commercial Law Quarterly 142, 142

⁷¹⁷ [1985] 2 Lloyd's Rep 372 ; [1986] Ch 471

⁷¹⁸ *The Uglund Trailer* [1986] Ch 471; [1985] 2 Lloyd's Rep 372

⁷¹⁹ Graeme Bowtle, 'Liens on Sub-hire and Freight: The Western Moscow' [2013] Lloyd's Maritime and Commercial Law Quarterly 142, 145

⁷²⁰ Aubrey Diamond, *A Review of Security Interests in Property* (HMSO 1989)

⁷²¹ Graeme Bowtle, 'Liens on Sub-hire and Freight: The Western Moscow' [2013] Lloyd's Maritime and Commercial Law Quarterly 142, 145

‘contractual liens over sub-freights are not charges and therefore not registrable’ based on the right of interception theory.⁷²²

After the theory of equitable assignment by way of a floating charge prevailed, the Law Commission placed sub-freight security into legal norms of secured transactions law so that registration in modern secured transactions law constitutes the necessary procedure in accordance with the Section 859 A of the Companies Act. After the Companies Act was revised on 6 April 2013, the registration requirement was not changed again. Nevertheless, registration is not mandatory, and this means that contracting parties are entitled to choose whether to register or not. As a result of non-registration, the legal effect of sub-freight security cannot extend to the third party, but a contractual relationship arising from the security clause between contracting parties is thereby created.

3.4.2 Singapore Law Registration Model

As mentioned above, the Court of Appeal in Singapore in *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*⁷²³ is in line with English authorities into confirming the nature of the shipowner’s security on sub-freights as a floating charge. Similarly, these authorities cannot overlook the registration issue in secured transactions law. In accordance with s 131 (3) (g) of the (Singapore) Companies Act, registration is a mandatory procedure in order to create the floating charge. This provision is similar to the old rule in the UK prior to 6, April 2013. This means that the security will be void against the liquidator and creditors of the company if the shipowner does not register under Section 131. In addition, as the duty to register charges is not consistent with

⁷²² ‘Registration of Security Interests: Company Charges and Property other than Land’ (The Law Commission Consultation Paper, No. 164, 2002) 140
<[http://www.lawcom.gov.uk/app/uploads/2015/03/cp164_Company_Security_Interests_Consultation.p](http://www.lawcom.gov.uk/app/uploads/2015/03/cp164_Company_Security_Interests_Consultation.pdf)
df>accessed 28 December 2018

⁷²³ [2018] SGCA 26

procedural law, the companies and their officers are exposed to fines and penalties under s 132 of the Companies Act.⁷²⁴

However, the Singapore court in this case was concerned with the necessity of registration owing to ‘the commercial inconvenience of requiring registration’.⁷²⁵ The Court of Appeal insisted that this negative point arising from the registration of sub-freight security could not change the nature of this security clause. In theory, therefore, registration is necessary. Nevertheless, a legal opinion was submitted by the court. It was proposed that ‘in order to maintain Singapore’s competitive edge as a leading maritime hub, it may be appropriate to examine suitable legislative reform to carve liens on sub-freights that are outside the reach of s 131 of the Companies Act...’⁷²⁶

As Singapore is a maritime country, the judgment of *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*⁷²⁷ gave immediate concern to the industry, to the extent that - the Government needed quickly to seek the advice of the shipping industry. Just several months after this case, the Companies (Amendment) Bill 2018 was passed on 6 August 2018 by the Singapore Parliament. This Bill and its explanatory statement affirm and clarify that the Singapore Court’s characterization in the *Diablo* case of liens on sub-freights as floating charges is maintained, but the shipowner’s lien on sub-freights is exempted from registration requirements under section 131 of the Companies Act.⁷²⁸ In other words, it is not necessary and mandatory for the shipowner to perform the procedure of registering the charge.

However, the non-registration system does not impact on the preferential right of the shipowner that arises from the sub-freight security. As long as contracting parties enter

⁷²⁴ Ibid at [71]

⁷²⁵ Ibid

⁷²⁶ Ibid

⁷²⁷ Ibid

⁷²⁸ Kohe Hasan and Ang Liseah, ‘Companies Amendment Bill 2018: Shipowner’s Lien No Longer Requires Registration’ (Mondaq, Connecting Knowledge & People, 16 September 2018) <<http://www.mondaq.com/x/736660/Marine+Shipping/Companies+Amendment+Bill+2018+Shipowners+Lien+No+Longer+Requires+Registration>> accessed 18 November 2018

into a contractual agreement regarding sub-freight security, this security will be regarded as the charge that ‘takes priority over unsecured creditors and other secured creditors whose security was created after the relevant shipowner's lien was created.’⁷²⁹ This new law amounts to a declaration that the sub-freight security in the chartering industry constitutes a special charge.

3.4.3 Hong Kong Law Registration Model

In Section 3.3.3, it was mentioned that Hong Kong law endorsed the right of interception theory. Although the registration requirement of sub-freight security is excluded from legislation, the reason differs from Singapore law, which treats the security as a special charge. Before the Singapore Parliament amended the new Companies Act, in the case of *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*,⁷³⁰ the Court of Appeal in Singapore had taken Hong Kong Company law as an example in considering how registration should be improved.

In accordance with Section 334(4) of the Companies Ordinance (Cap 622) (HK), the shipowner’s security on sub-freights has been expressly excluded from the registration regime.⁷³¹ It is provided that:

‘For the purposes of subsection (1)(d) and (j), if a company charters a ship from a shipowner, the shipowner’s lien on the subfreights for amounts due under the charter is not to be regarded as a charge on book debts of the company or as a floating charge on the company’s undertaking or property’.

A consultation paper by the Hong Kong Financial Services and the Treasury Bureau titled ‘Second Public Consultation on Companies Ordinance Rewrite’, dated 2 April 2008, explains the reason for the exclusion of sub-freight security as follows:

⁷²⁹ Ibid

⁷³⁰ [2018] SGCA 26

⁷³¹ Ibid at [73]

‘Essentially a lien on subfreights is a provision in the charterparty (lease) of a vessel stating that the shipowners shall have a claim upon all amounts due under sub-charterparties for payments in respect of the headcharter. The provision gives the shipowner the personal right to intercept sub-charter payments before they reach the charterer but the provision nevertheless seems to lack the proprietary characteristics of a charge’.⁷³²

It is clear that, according to the consultation paper, the sub-freight security in Hong Kong law is simply a personal contractual right rather than a proprietary right. Thus, the consequence of non-registration is that the shipowner’s right ranks *pari passu* with other unsecured claims.

3.4.4 Legal Effect of Three Models

Deriving from the above discussion, three types of registration model factually mirror the types of theory about the nature of the shipowner’s security on sub-freights. First, the Hong Kong model favours the right of interception theory. Its approach is to exclude the sub-freight security clause from secured transactions law because this clause, as a pure contractual remedy, cannot be characteristic of a security interest against a *bona fide* third party and a secured creditor. Thus, in comparison with the shipowner’s security on cargo, although two types of security have been incorporated into one clause, their nature is substantially different. The former is a proprietary right, even if other property rights, such as the cargo owner’s right or the bill of lading holder’s right, may

⁷³² Justice Belinda Ang, ‘Waking up from Shipowner’s Nightmare!’ (Maritime Conference, KLRCA ala Lumpur, October 2017)6 <<https://www.supremecourt.gov.sg/Data/Editor/Documents/Speech%20at%20Maritime%20Law%20Conference%202017%20.pdf>> accessed 19 December 2018; Financial Services and the Treasury Bureau, ‘Second Public Consultation on Companies Ordinance Rewrite’ (FSTB, April 2008) 5.17 <https://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2'ndPCCOR_e.pdf> accessed 19 December 2018

compete with the right of the shipowner's retention of the cargo. However, the latter is a pure contractual right rather than a security interest. As for a shipowner, the Hong Kong model is not beneficial to him. According to this model, it is impossible in the secured transactions law for the shipowner to enjoy *droit de suite* and *droit de preference*.

Secondly, the Singapore model directly grants this security as a 'statutory' right. Thus, registration is not a condition for the validity of the shipowner's security. Only if the sub-freight security clause is inserted into the charterparty will this security give rise to an enforceable claim against a third party. When a charterer, such as a Singapore company, is indebted to the shipowner, this model can be deemed to be the best approach to protecting shipowners because the latter enjoy a 'statutory' privileged right without registration. In summary, in Singapore law, the sub-freight security has been developed to become a 'statutory' right. However, this kind of a 'statutory' right is in theory different from the legal cargo security right. Cargo security is created by operation of law, whereas sub-freight security is created by contract. Regardless of whether cargo security is inserted into the contract, the shipowner is entitled to resort to cargo security. By contrast, in order to obtain a 'statutory' right, the contracting parties must first insert the sub-freight security into the charterparty. However, in practice, all standard forms cover the shipowner's sub-freight security. There is thus no doubt that the shipowner will enjoy a 'statutory' right over sub-freights.

Thirdly, after the revision of the Companies Act, the English model now complies with the registration requirement of secured transactions law, although, prior to the revision, as discussed in Section 3.4.1, the Law Commission consultation paper was inclined to adopt the Hong Kong model. Currently, the English model leaves an optional right to the contracting parties. After the sub-freight security has been inserted into the charterparty, the consequence of the registration, if the contracting parties choose to register, is the creation of a floating charge so that this security will be subject to secured

transactions law. Conversely, if they do not complete registration, this sub-freight security is simply a pure contractual right, namely, the right of interception. On the occurrence of the charterer's default, after the shipowner gives notice of assignment to the charterer's debtors, namely to the sub-charterer and subsequent sub-charterers,⁷³³ this right will bind the sub-charterer. However, it is here submitted that, because of the absence of registration, this right is not a privileged right against other creditors of the charterer.

It has been said by one author that '[T]he consequences of laws are determined not by what people should value but by what they do value, since that is what determines their actions.'⁷³⁴ When, after signing the charterparty the creditors choose to register the charge under the English Companies Act, this means that the value of registration is compatible with their underlying requirements and with commercial reality. Alternatively, giving up registration means that their requirements are already satisfied. In a developed jurisdiction, this approach might reflect a democratic ethos.

It is apparent that the impact of secured transactions law in the three models is different. In Hong Kong law, secured transactions law plays no role in the legal effect of the sub-freight security; in Singapore law, secured transactions law determines the privileged effect of this security; and in English law, secured transactions law imposes a legal requirement on parties in order to gain a beneficial effect.

⁷³³ In terms of the content of the notice, it is not necessary to provide the specific and exact amount. If the notice just states that an amount due exists, that is sufficient based on case law; *Dry Bulk Handy Holding Inc v Fayette Internal Holdings Ltd* [2012] EWHC 2017 (Comm) [59], where Lord Andrew Smith held that 'I do not consider that the First Notice mis-states the amount under the KLC: see para 44 above. Even if it did, this would not be material. In my judgment, what was required was that Metinvest be informed that there was an amount due, not how much was due, and (whatever the position with regard to statutory assignments) I do not accept that an error in unnecessary information vitiates a notice invoking the line over sub-freights'.

⁷³⁴ David D Friedman, *Law's Order: What Economics Has to Do with Law and Why It Matters* (Princeton University Press 2000) 24

3.5 Conflicts between Registration in Secured Transactions Law and Commercial Reality in the Chartering Industry

This section will examine which proposed impacts of secured transactions law are more reasonable. Three questions will be discussed, including the consideration of commercial reality in the chartering industry, the necessity of registration, and an underlying solution.

3.5.1 Commercial Reality in the Chartering Industry

Commercial reality has given rise to strenuous debates before the above three jurisdictions established their respective registration models.

In terms of English law, although the existing legislation complies with the registration requirement of secured transactions law for there to be legal effect of the shipowner's sub-freight security against the third party, in the Law Commission's 2002 Consultation Paper the steering group proposed that sub-freight security should be excluded from the registration of the charge. In the Consultation Paper, the commercial reality is described as:

First, a shipowner's sub-freight security is a standard clause in most of charterparties so that associated parties in the chartering industry should have sufficient knowledge the presence of this security. 'Hence little useful purpose would be served by added'.⁷³⁵ Secondly, it was contended that charges on sub-freights were different from the situation that 'persons extending credit to a charterer rely on that income'.⁷³⁶

⁷³⁵ 'Registration of Security Interests: Company Charges and Property other than Land' (The Law Commission Consultation Paper, No. 164, 2002) 140 <http://www.lawcom.gov.uk/app/uploads/2015/03/cp164_Company_Security_Interests_Consultation.pdf>accessed 28 December 2018; Aubrey Diamond, *A Review of Security Interests in Property* (HMSO 1989)Para. 23.4.15

⁷³⁶ Ibid

Further to this Consultation Paper, in *Summary of Responses on Consultation on Registration of Charges Created by Companies and Limited Liability Partnerships 2010* presented by the Department for Business, Innovation & Skills, the commercial reality was also considered and the proposal to exclude contractual liens on sub-freights was maintained.⁷³⁷

In terms of Singapore law, two main issues arising from commercial reality were presented to the Parliament by Ms Indranee Rajah, Second Minister for Finance and Education. She stated that:

‘a) First, leaving aside the long standing industry custom and practice where shipowners do not habitually register Shipowners’ Liens, the registration of Shipowners’ Liens is particularly difficult from a practical perspective. This is because each ship is typically subject to a continual series of charterparties, each entered into as quickly as possible, to ensure that the ship is continually gainfully employed. Often, charters are for periods as short as a few days. This means that many charterparties may have been completed before a charge can even be registered.

b) Second, given the volume of charterparties, there would likely be significant administrative and cost implications for shipping companies. the underlying rationale of section 131 of the Companies Act, which is to protect third parties who deal with companies, by disclosing charges against a company’s property, is less applicable in the shipping context. As observed by the Court of Appeal in its grounds of decision in the *Diablo* case, “[n]otice...may not be necessary in the

⁷³⁷ ‘Summary of Responses on Consultation on Registration of Charges Created by Companies and Limited Liability Partnerships 2010’ (Department for Business, Innovation & Skills 2010) 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31494/10-1230-summary-responses-consultation-registration-of-charges.pdf> accessed 1 May 2019

[shipping] context since all parties who deal with charterers are aware that such liens are standard in charterparties””.⁷³⁸

In comparison with the consideration of the commercial reality in the UK consultation paper, in Singapore, the reality of the chartering industry and impact of registration on shipping companies were the main grounds to exclude the registration requirement.

In Hong Kong, commercial reality was described as ‘Registration is also inconvenient from a commercial perspective since charterparties are usually negotiated by shipbrokers and not by lawyers and are normally of a relatively short duration’.⁷³⁹

3.5.2 Necessity of Registration in the Chartering Industry

Section 3.5.1 investigated how the registration requirement was not consistent with commercial reality from the practical point of view. However, from a perspective based on legal principles, that argument is not sufficient.

It is submitted that, in order to address the question of necessity of registration, it is important to understand the purpose of the registration requirement and its necessity for the chartering industry.

It has been stressed previously that a floating charge, as a proprietary right, takes priority over a pure contractual right against an unsecured creditor or a later registered creditor. However, the creation of a floating charge does not inevitably give rise to

⁷³⁸ Indranee Rajah, ‘Second Reading Speech on the Companies (Amendment) Bill 2018’ Parliament Speech 2018, < [https://www.mof.gov.sg/Newsroom/Speeches/second-reading-speech-by-ms-indranee-rajah-second-minister-for-finance-on-the-companies-\(amendment\)-bill-2018-6-aug-2018](https://www.mof.gov.sg/Newsroom/Speeches/second-reading-speech-by-ms-indranee-rajah-second-minister-for-finance-on-the-companies-(amendment)-bill-2018-6-aug-2018) > accessed 19 December 2018

⁷³⁹ Justice Belinda Ang, ‘Waking Up from Shipowner’s Nightmare!’ (Maritime Conference, KLRCA ala Lumpur, October 2017)6 <<https://www.supremecourt.gov.sg/Data/Editor/Documents/Speech%20at%20Maritime%20Law%20Conference%202017%20.pdf>> accessed 19 December 2018; Financial Services and the Treasury Bureau, ‘Second Public Consultation on Companies Ordinance Rewrite’ (FSTB, April 2008) 5.17 < https://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2'ndPCCOR_e.pdf > accessed 19 December 2018

priority. Unlike the cargo security discussed in Chapter 4, because the secured property of the floating charge is intangible, after this security is created, it cannot be taken for granted that its existence is known by a third party. Perfection of a security interest therefore becomes the necessary and mandatory step to enable the right to be enforceable against the debtor and all third parties.⁷⁴⁰ Possession, registration, notice, or attornment may generate the fulfillment of perfection.⁷⁴¹ In the context of the floating charge, registration and notification should be performed. Notification is beyond this section. Only registration will be discussed here.

Historically, registration was not a requirement. The recorded history of security rights on movable property can be traced back to Justinian's *Corpus Iuris Civilis* in the early Middle Ages.⁷⁴² At that time, a non-possessory security on movable property (cargo) was recognised and accepted without publicity or registration.⁷⁴³ *Prior tempore, potior*

⁷⁴⁰ Louise Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2017) 2-02; as far as 'the creation of the security interest' is concerned, Professor Goode described it as 'attachment'. He contends that 'attachment denotes the creation of the security interest as between debtor and creditor. The effect of attachment is that the security interest fastens on the asset so as to give the creditor rights in rem against the debtor himself, though not necessarily against third parties.'

⁷⁴¹ Ibid at 2-02

⁷⁴² Willem J Zwolve, 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods' in Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Oxford Press University 2004)38. It is noted that the history of Roman law can be classified into two stages: 'the first stage spans more than a thousand years, from the formation of the city-state of Rome to codification of Justinian in the sixth century AD' and the second stage spans five hundred years from the codification of Justinian in the sixth century to its rediscovery in western Europe in the eleventh century. At the first stage, merchants invented and concluded their own usages of trade and codes of conduct that are the *lex mercatoria*. The legal history of *Lex maritima* is identical to that of *lex mercatoria*. Terms and conditions, rules and principles of maritime trade in the *lex maritima* are established by merchanting custom. In this context, it is claimed that the oral history of the security on cargo would be earlier than the written history. However, this thesis's purpose is not to delve into maritime history; it is therefore not necessary to explore the security on cargo from the viewpoint of trading usages; George Mousourakis, *Fundamental of Roman Private Law* (Springer-Verlag Berlin Heidelberg 2012)1; Leon E Trakman, 'The Evolution of the Law Merchant: Our Commercial Heritage, Part I – Ancient and Medieval Law Merchants' (1980) 12 (1) *Journal of Maritime Law and Commerce* 1; Leon E Trakman, 'The Evolution of the Law Merchant: Our Commercial Heritage, Part I – Ancient and Medieval Law Merchants' (1981) 12 (2) *Journal of Maritime Law and Commerce* 153; Xiaobo Wang, *A Study of The Rhodian Sea-Law* (China University of Political Science and Law Press 2011)

⁷⁴³ In Roman period, the security was flexible and efficient in order to provide full support to the creditor. Along with the collapse of Roman Empire in the fifth century, the barbaric custom '*les meubles n'ont pas de suite par hypothèque*' strongly influenced the philosophy of French law to protect both the third party and the secured creditor, so that the possessory pledge constituted a unique security right; Jean-Francois Riffard, 'The Still Uncompleted Evolution of French Law on Secured Transaction Towards Modernity' in Louise Gullifer and Orkun Akseli (eds) *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016)370

iure constituted the principle that justified the lack of publicity.⁷⁴⁴ Issues arose because the principle of *prior tempore, potior iure* temporarily addressed conflicts of different rights in an enclosed society; however, without a comprehensive registration system, and after the development of transnational trade, it was difficult to use *prior tempore, potior iure* to determine which security was firstly created.

Against this historical background, it is sufficient to say that the registration requirement is based not only on the character of intangible property, but also because of the development of open markets.

Returning to our discussion of registration of the floating charge, the purpose of the creation of a floating charge firstly needs to be stressed. As discussed in Section 3.2.3.1 of Chapter 4, this comparatively new form of security interests was created because of companies' financial demands in the nineteenth century.⁷⁴⁵ In a modern economy, future receivables are regarded as the most inexpensive basis for financing.⁷⁴⁶ Regardless of whether we are referring to a small business in a domestic market or to an across the board company, future receivables constitute the predominant valuable capital used to obtain finance from a bank. However, from the bank's point of view, financing contracts normally involves large sums with a high risk. Thus, in order to reduce the risk, an investigation into credit history is absolutely necessary. Correspondingly, a comprehensive registration system becomes an effective method to facilitate the investigation of credit. Certainly, the investigation of credit is beneficial not only to the bank, but also to all parties in an open market.

⁷⁴⁴ Willem J Zwolve, 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods' in Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Oxford Press University 2004)42

⁷⁴⁵ Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin Random house 2016)751; Robert R. Pennington, 'The Genesis of the Floating Charge'(1960)23 (6) *The Modern Law Review* 630, 630

⁷⁴⁶ Spiros v Bazinas, 'Lowering the Cost of Credit: the promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade'(2001)9 *Tulane Journal of International & Comparative Law* 259, 261

As presented by the Diamond Report, Professor McCormack concluded that the registration of company charges was to provide information. This is:

‘for persons who wished to assess the creditworthiness of the company, such as credit reference agencies and the like. Financial analysts and prospective investors might also find the information of assistance. A prospective chargee could find out whether the assets of the company were encumbered. Moreover, the absence of reference to charges on the register enabled a company to provide some sort of assurance that its assets were unencumbered. Finally, the registration requirement was a litmus test for a receiver or liquidator in considering whether to recognise the validity of a charge.’⁷⁴⁷

Generally speaking, beneficial or interest owners of registration consist of bankers, financial analysts, investors and liquidators.

The floating charge in terms of sub-freight security serves a different purpose and has different features from the floating charge used for financing. To start with, the purpose of sub-freight security is to improve the performance of a charterer’s contractual obligation rather than to obtain financing. Furthermore, in the traditional shipping industry, credit constitutes the lifeblood of shipping practitioners. It is also not necessary to register it. As described by Philippe Louis-Dreyfus, in the old days, the shipping business was based on credit. A telephone call might result in a contract worth millions of dollars.⁷⁴⁸ Although times have changed, the underlying purpose of this security has not. Its function cannot be in line with the original purpose of a floating charge used in financing. As the Diamond Report stated that charges on sub-freights were different from the situation wherein ‘persons extending credit to a charterer rely

⁷⁴⁷ Gerard McCormack, ‘Registration of Company Charges: The New Law’, (1990) 4 Lloyd’s Maritime and Commercial Law Quarterly 520, 521; Aubrey Diamond, *A Review of Security Interests in Property* (HMSO 1989) 98

⁷⁴⁸ Lori Ann LaRocco, *Dynasties of The Sea: The Shipowners and Financiers Who Expanded the Era of Free Trade* (Marine Money Inc 2012) Ch2

on that income',⁷⁴⁹ it is not then necessary for the charterer to publicize his sub-freights to show its credit.

Given these differing purposes, it is understandable that sub-freights, as the secured property are deserved income, but financing in most situations equates to extra income. It is fair and reasonable that the registration requirement for the extra income is the condition precedent against other creditors, but it is unfair to say that the registration requirement for the deserved income is necessary.

In addition, a chartering industry is a small and enclosed society. According to the data gathered by UNCTAD, at the end of 2018 there were 95,402 vessels in the world fleet, of which 58,973 were cargo-carrying vessels. Out of 58,937 cargo-carrying vessels, bulk carriers' fleets comprised 43 per cent, namely 25,342 vessels.⁷⁵⁰ Generally speaking, apart from the 25,342 vessels within the bulk carrier fleet, sub-freight security cannot affect vessels not in such fleets. The reasons being: first, that voyage and time charterparties are normally used only in bulk carrier and tanker fleets; secondly, because of the nature of tankers, it is rare that parties exercise a security clause. By contrast, according to Business Statistics UK 'in 2018, there were 5.7 million private sector businesses in the UK'.⁷⁵¹ It can be imagined that the number of companies might be roughly a billion around the world. Any company may use its property to obtain finance. Without registration, it is hard to determine financial risk. However, the sub-freight security covers only 25,342 vessels and the associated participants are limited. Most importantly, in the shipping industry participants, including bankers, financial analysts and prospective investors, have sufficient knowledge of the existence of sub-freight security.⁷⁵² Through the business scope of a company, it is reasonable for these

⁷⁴⁹ Registration of Security Interests: Company Charges and Property other than Land (The Law Commission Consultation Paper, No. 164, 2002) 139,5.14 <http://www.lawcom.gov.uk/app/uploads/2015/03/cp164_Company_Security_Interests_Consultation.pdf> accessed 28 December 2018; Aubrey Diamond, *A Review of Security Interests in Property* (HMSO 1989) Para 23.4.15

⁷⁵⁰ Clarksons Research, 'Shipping Intelligence Weekly' *Clarksons Research* (London, February 2019)

⁷⁵¹ Chris Rhodes, *Briefing Paper: Business Statistics* (House of Commons Library 2018) 3

⁷⁵² *Re Welsh Irish Ferries Ltd. (The Uglad Trailer)* [1986] Ch 471, 480; Gerard McCormack, 273

participants to determine whether it operates in the chartering business. If so, sub-freight security must exist. According to the freight rate posted by Baltic Dry Index, even if freight rates are varied, the risk assessment is consistently appropriate, depending on the type of vessel and the routes of voyage,

Thus, if reasons of commercial reality are insufficient to support a convincing argument against the registration requirement of secured transactions law, it is proposed that the purpose of a floating charge makes it unnecessary for sub-freight security to comply with the registration requirement.

3.5.3 Registration⁷⁵³ and Solution

In the event that registration really is required, certain questions as to the contract registration, the time and the cost have to be addressed in advance.

As presented by Ms Indranee Rajah, many short-term charterparties cannot complete registration before voyages have finished.⁷⁵⁴ Courts and practitioners have also raised this concern.⁷⁵⁵ Even in respect of long-term charterparties, there is still concern about the time and cost expended on registration. From the viewpoint of the registration scheme and of advanced technology, these issues are not relevant to the law.

'Registration of Company Charges: The New Law', (1990) 4 Lloyd's Maritime and Commercial Law Quarterly 520, 524

⁷⁵³ It should be noted that in some jurisdictions, such as under German law, there is no publicity requirement about security rights over movables; Moritz Brinkmann, 'The Peculiar Approach of German Law in the Field of Secured Transactions and Why it has Worked (So Far)' in Louise Gullifer and Orkun Akseli (eds) *'Secured Transactions Law Reform: Principles, Policies and Practice'* (Hart Publishing 2016) 343; Louise Gullifer, 'Conclusion and Recommendation' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 510

⁷⁵⁴ Indranee Rajah, 'Second Reading Speech on the Companies (Amendment) Bill 2018' Parliament Speech 2018, < [https://www.mof.gov.sg/Newsroom/Speeches/second-reading-speech-by-ms-indranee-rajah-second-minister-for-finance-on-the-companies-\(amendment\)-bill-2018-6-aug-2018](https://www.mof.gov.sg/Newsroom/Speeches/second-reading-speech-by-ms-indranee-rajah-second-minister-for-finance-on-the-companies-(amendment)-bill-2018-6-aug-2018) > accessed 19 December 2018

⁷⁵⁵ *Re Welsh Irish Ferries Ltd. (The Ugland Trailer)* [1986] Ch 471, 480 (Nourse J); *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another* [2018] SGCA 26; Ian Teo, 'Registrability of Liens on Sub-freights: The Last Word or Not' [2018] LMCLQ 490

With regard to registration schemes, the traditional model of registration simply referred to recording filing.⁷⁵⁶ However, when recording filing could not address the registration of account receivables, inventory and other intangibles, it was necessary to invent a new form of registration. The United States thereupon adopted a filing system in The Uniform Trust Receipts Act⁷⁵⁷ and the Factor's of Lien Act.⁷⁵⁸ A notice-filing system was subsequently adopted in Article 9 of the United Commercial Code.⁷⁵⁹

‘A notice filing system dispenses with the filing of transaction documents and even the need for transaction details and permits the filing of a simple financing statement specifying the asset or a description of the asset that the registrant has acquired or in which he may acquire a security interest.’⁷⁶⁰

This form of registration has been codified into many Personal Property Security Acts.⁷⁶¹

In recent years, the development of technology has stimulated electronic registration on the notice-filing system. Online registration system has been widely applied in many jurisdictions.⁷⁶² For example, after the revision of the Companies Act in 2013,

⁷⁵⁶ Zaiquan Xie, ‘Development and Change of the System of Security Interests’ (2019) 1 The Jurist 36, 44

⁷⁵⁷ Warren A Heindl, ‘Trust Receipt Financing under The Uniform Trust Receipts Act’(1948) 26 (3) Chicago-Kent Law Review 197; Grant Gilmore, *Security Interests in Personal Property Vol. I* (Boston Little Brown and Company 1965)129-145

⁷⁵⁸ Joseph S Fechteler, ‘The Factor’s Lien Statutes’ (1956) 11 (3) The Business Lawyer 60, 65; Grant Gilmore, *Security Interests in Personal Property Vol. I* (Boston Little Brown and Company 1965) 129-145

⁷⁵⁹ Peter Winship, ‘An Historical Overview of UCC Article 9’in ‘*Secured Transactions Law Reform: Principles, Policies and Practice*’ Louise Gullifer and Orkun Akseli (editors), Oxford: Hart Publishing, 2016, at pp. 21

⁷⁶⁰ Louise Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2017) 2-34

⁷⁶¹ For example, Canada, Australia, New Zealand and Jersey, some African countries (e.g. Sierra Leone, Zambia, Liberia, Ghana, Malawi and Nigeria), some European countries (e.g. Belgium, Romania, Hungary); see in general, Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016)

⁷⁶² P Graham, ‘Registration of Company Charges’ [2014] Journal of Business Law 175; Louise Gullifer and Magda Raczynska, ‘Secured Transactions’ in Sarah Paterson and Rafal Zakrzewski (eds), *McKnight, Paterson, & Zakrzewski on the Law of International Finance* (2nd edn, Oxford University Press 2017)

Companies House in the UK built the online system of WebFiling.⁷⁶³ Furthermore, the notice-filing system and electronic registration are incorporated into a number of Model Laws and guiding principles.⁷⁶⁴

As one commentator has stated, ‘much secured transaction reform relates to setting up or improving a registration system, and the ever-increasing advances in information technology both make possible highly sophisticated systems and enable effective systems to be set up cheaply and easily’.⁷⁶⁵

When the notice-filing system and the online registration system in theoretical and practical fields provides a cheap and quick device for completing the registration requirement, the question will be how to use this system to serve for the registration of sub-freight security. Using the Companies Act 2006 (UK)⁷⁶⁶ as an example, it needs to be examined whether the requirement is consistent with the character of sub-freight security.

In accordance with the Companies Act, as far as the registration of a floating charge is concerned, the particulars that must be delivered to the registrar are as follows:

- ‘(1) the registered name and number of the company;
- (2) the date the charge was created;
- (3) the names of the chargees or relevant security agents or trustees;

⁷⁶³ ‘Sign in to Companies House WebFiling’ <<https://ewf.companieshouse.gov.uk//seclogin?tc=1> > accessed 18 April 2019

⁷⁶⁴ ‘the UNCITRAL Model law, book XI of the Draft Common Frame of Reference (DCFR) produced in 2009 by the drafting team of the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), the Inter-American Model Law and Principles, as well as the EBRD principles and the World Bank Insolvency and Creditor Rights Standards’; Louise Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2017) 2-34; Zaiquan Xie, ‘Development and Change of the System of Security Interests’ (2019) 1 *The Jurist* 36,47

⁷⁶⁵ Louise Gullifer, ‘Conclusion and Recommendation’ in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 510

⁷⁶⁶ Companies Act 2006 refers to the revision on 6 April 2013.

- (4) the existence of a floating charge and, if so, whether it is expressed to cover all the property and undertaking of the company;
- (5) whether any of the terms of the floating charge prohibit or restrict the company from creating further security that will rank equally with or ahead of the charge;
- (6) whether the charge includes a fixed charge over any land, ship, aircraft, or intellectual property that is registered or required to be registered in the United Kingdom (and if so, a short description of the property charged); and
- (7) whether it includes a fixed charge over any other tangible or intangible property.⁷⁶⁷

In addition to these particulars, the Act further provides that where the charge is created or evidenced by an instrument, namely a charterparty, a certified copy of the charge instrument shall be delivered along with the aforementioned particulars.⁷⁶⁸

‘The statement of particulars and a certified copy of any instrument by which the charge was created or is evidenced must be delivered to or received by the registrar within twenty-one days of the charge’s creation. The registrar must allocate a unique reference code to the charge, which is noted on the register; and the particulars and a certified copy of the charge instrument received are placed on the company’s public record and are available for public inspection.’⁷⁶⁹

In accordance with the Registrar’s Rules 2009, there are three ways to deliver: namely, paper documents; CD or DVD-ROM; and authentication by the registrar of electronic certificate.⁷⁷⁰ In these three ways, electronic registration is regarded as the most convenient way. However, when signed in to the Companies House WebFiling system,

⁷⁶⁷ Companies Act 2006, s 859D

⁷⁶⁸ Ibid s 859A(3)

⁷⁶⁹ Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018) 440; Companies Act (UK) 2006, s 859A (2)–(4), s859I(2)

⁷⁷⁰ ‘Registrars (requirements for paper documents) Rules 2009, Registrars (requirements for CD or DVD-Rom) Rules 2009 and Registrars (requirements for paper documents) Rules 2009’ <<https://www.gov.uk/guidance/registrars-rules>> accessed 28 April 2019

the company has to file its confirmation statement or annual return, its annual accounts, information pertaining to changes in the company's director or secretaries, and other information.⁷⁷¹ Since June 2016, the annual return has been replaced by the confirmation statement.

‘On the confirmation statement you must confirm that your basic company information is correct and complete. If any information needs to be updated these changes must be submitted using the relevant form before submitting the confirmation statement. The confirmation statement is separate from the company’s annual accounts’.⁷⁷²

Concerning costs, according to ‘WebFiling transactions (forms/fees)’ published online, most of items are free of charge. Relevant fees are: for ‘Confirmation Statement’, £13; for ‘Notice of change of name by resolution and Special Resolution’, £8 (standard service) or £30 (same day service); for ‘Register a charge’ for, £15 and for ‘Register an acquisition’, £15.⁷⁷³ As far as a shipping company is concerned, the cost of registration has no financial impact. From the content of the registration form, there is no legal or auditing requirement to complete during the registration. There is therefore no additional fee involved.

Given what might be the possibly time-consuming nature of the registration process, the above provisions do require many particulars, but these will already belong to the basic information held by a company about itself. Thus, it is not difficult for the company to prepare these documents. If the WebFiling system operates well, the form-filling will not take long. After finishing WebFiling registration, Companies House will

⁷⁷¹ Ibid

⁷⁷² ‘Filing a Confirmation Statement’ <<https://ewf.companieshouse.gov.uk/help/cy/stdwf/faqHelp.html>> accessed 28 April 2019

⁷⁷³ ‘WebFiling transactions (forms/fees)’, <<https://ewf.companieshouse.gov.uk/help/cy/stdwf/faqHelp.html>> accessed 28 April 2019; it should be noted that Limited Liability Partnerships (LLP) in this form needs to pay the same fee.

within three hours send an email confirming receipt of the registered data.⁷⁷⁴ Companies House will send a second email, normally within two working days, to inform the company whether the registration has been accepted or rejected.⁷⁷⁵ It is sufficient to assume that full registration should be completed within a couple days.

In following the above provisions, there is no convincing argument based on additional costs to place against the registration requirement of a sub-freight security. If the period of a charterparty is beyond several days, then arguments based on time are also unconvincing. It is debatable whether legislation should require shipping companies to comply with a registration scheme.

To start with, as mentioned above, the most convenient registration method is the online system, which ordinarily takes two or three days if the information and documents provided online are accepted. In fact, the Companies Act requires that registration be completed within twenty-one days of the charge's creation. It can be assumed that this most convenient registration method aims more to serve the needs of long-term contracts rather than those of a short-term charterparty.

Secondly, the Companies Act allows any person 'interested in the charge' to register at Companies House.⁷⁷⁶ In view of the particulars of registration and the items for WebFiling, including annual accounts and confirmation statement, such information and documents should come from the chargor, namely the charterer in the charterparty. It is difficult to imagine that, in order to secure the performance of the freight, the charterer has to submit annual accounts to the public. By contrast, when a chargor to a financing contract is willing to provide annual accounts and other company information

⁷⁷⁴ 'About WebFiling' < <https://ewf.companieshouse.gov.uk/help/cy/stdwf/faqHelp.html> > accessed 28 April 2019

⁷⁷⁵ Ibid

⁷⁷⁶ Companies Act 2006, s 859A(2)

to the public, the reason is usually that they expect to obtain the interests through the charged property.

Based on the above rationale, it is safe to say that the registration scheme in the UK is convenient for the underlying chargee and for the chargor who enters into a loan contract or the similar functional contract. However, it does not serve the service the sub-freight security. In the event that a system requires the person to comply with the relevant provisions, it should provide a reasonable process to guide the person. Accordingly, if the process is unreasonable, it should not be applied.

Under the registration system in the UK, apart from the short-term contract, the developed system may satisfy the registration requirement of the long-term contract. It may be argued that advanced technology provides a cheap and quick approach to registration. However, it is also examined that the registration system serves for the needs of long-term contracts, in particular finance contracts. If the charterparties, in accordance with the Companies Act, should be registered, the UK government needs to provide a system to facilitate the registration of charterparties.

To sum up, it may be argued that advanced technology provides a cheap and quick approach to registration, but whether the registration scheme can satisfy the sub-freight security is dependent on aspects of the different jurisdictions. If an existing registration scheme is not consistent with the current character of the chartering industry, the Singapore model is a good example. In other words, the sub-freight security, as a ‘statutory’ floating charge should be removed from the registration list.

3.5.4 Policy Considerations

Regardless of whether registration is necessary in the context of commercial reality or the law, the legislation is to a great extent influenced by policy considerations. In Sections 3.4, different jurisdictions were shown to hold different opinions even if the

commercial reality of the shipping industry was similar in each case. For example, the United Nations Conference on Trade and Development (hereinafter referred to as ‘UNCTD’) ranked shipping nations according to their number of deadweight tons, and by the end of 2018, Singapore and Hong Kong took fifth place and sixth places (respectively with 103,583 dead-weight thousands of tons and 97,806 dead-weight thousands of tons).⁷⁷⁷ There is no fundamental difference in rank and dead-weight between these two jurisdictions. Furthermore, they have similar geographies and economic environments. For example, they both belong to a free trade zone and, an international trade hub and are in a coastal region. In theory, their legislations should be similar. However, it is evident that Singapore law is inclined to protect the shipowner, whereas Hong Kong law is not beneficial to the shipowner. It is generally acknowledged that this outcome is based on policy considerations.⁷⁷⁸

In this author’s opinion, although commercial reality to some extent impacts on the legislation, the decisive influence is attributed to policy considerations. In the face of the similar commercial reality, authorities in different jurisdictions are firstly concerned with politics rather than law. Even if the character of civil law is judge-made law, the legislation is regulated by parliament rather than the judge.

4 Legal Nature and Effect under Maritime Codes and Secured Transactions Law in Civil Law

It is generally accepted that the doctrine of *ubi remedium ibi ius* (where there is a remedy, there is a right) is the traditional theory under common law by which is provided a remedy that may develop new entitlements and expand legal rights.⁷⁷⁹ Thus, when a court grants a contractual remedy, it agrees to recognise and to create a right for

⁷⁷⁷ UNCTAD, ‘Review of Maritime Transport 2018’ (United Nations Conference on Trade and Development, 2018) 29, 31 <https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf> accessed 18 April 2019

⁷⁷⁸ Lianjun Li and Yang Liu, ‘Discussion on Legislation and Policies of Major Asian Shipping Nations and Regions for Promoting Shipping Business’ (2010) 21 (3) *Annual of China Maritime Law* 77, 77

⁷⁷⁹ Daniel Friedmann, ‘Rights and Remedies’ in Ewan Mckendrick and Nili Cohen (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2004) 4

the party invoking the remedy. The approach of construing sub-freight security therefore removes any barriers to invoking the remedy. From the privity of contract theory to the current floating charge theory, the purpose of all theories is to seek a proper legal foundation for the exercise of this clause.

By contrast, the theory of ‘where there is a right, there must be a remedy’ and the principle of *numerus clausus* in civil law determine that the exercise of this security remedy must depend on a right provided by legislation. Pursuant to this traditional rationale, legal rights are independent and ‘it is possible to conceive of legal rights unsupported by legal remedies’.⁷⁸⁰ Legal remedies must, however, be derivative and follow from legal rights. In the context of this thesis, legal rights refer to a type of security interest. As a non-possessory lien never exists in civil law and the lien on sub-freights can be regarded as an imported concept, this section seeks to identify a type of security interest through the existing legislation in civil law that matches the concept of ‘lien’ on sub-freights.

First, some civil law jurisdictions borrow the term ‘lien’ in their maritime codes as a security on sub-freights. In this case, the concept of security on sub-freights established by legislation is either express or implied. In terms of the express concept, such as in German law and Chinese law, the concept of lien on sub-freights has been codified into their maritime legislations in the German Commercial Code and the Chinese Maritime Code respectively. Nevertheless, this lien on sub-freights is restricted to time charterparties and does not include a voyage or bareboat charterparty.

In terms of the implied concept, it means that the security on sub-freights is not directly stipulated by maritime legislations. For example, the Dutch Civil Code,⁷⁸¹ the French

⁷⁸⁰ Ibid 8

⁷⁸¹ Dutch Civil Code, Art 8:954 ‘Right to Refuse the Delivery of the Goods/Right of Retention’

Transport Code⁷⁸² and the Japanese Maritime Law⁷⁸³ provide merely for the shipowner's right on the cargo. It is safe to say that in these jurisdictions the security on sub-freights does not constitute a special right for the shipowner. In that case, whether a contractual security on sub-freights can be regarded as a type of security interest is subject to secured transactions law.

4.1 Legal Nature and Effect under Maritime Codes

4.1.1 Time Shipowner's Statutory Lien on Sub-freights

As mentioned above, some civil law jurisdictions incorporate the time shipowner's security on sub-freights into their legislation. In light of the principle of *numerus clausus*, after a type of security has been provided by law, it constitutes a statutory security. Although the implication of this statutory security on sub-freights is inconsistent with the traditional understanding of the law of security, the legislation grants a shipowner a legal right. The most conspicuous example can be found in the German Commercial Code.

Article 566 (2) (Time Charters) of the German Commercial Code provides that:

‘[F]or his (Disponent Owner) claims under the time charter contract, the Disponent Owner shall also have a lien over the claims of the time charterer under contracts of carriage or sub-charter contracts which the time charterer has concluded and which are performed by using the ship.’⁷⁸⁴

Before the reform of the German Commercial Code, the nature of security on sub-freights was not clear. Since this new Article has been incorporated into the new code, it is generally recognised amongst German legal scholars that the statute grants the time

⁷⁸² Article L 5423-3 of the French Transport Code stipulates that ‘the shipowner has a preferential claim over the cargo for the freight due’

⁷⁸³ Japanese Maritime Law, Art 757

⁷⁸⁴ German Commercial Code, s 566 (2)

shipowner security for his claims arising from the time charterparty and, a statutory right of lien on claims of the time charterer.⁷⁸⁵ Although there has been no published case that interprets this Article in the German courts, the nature of a statutory lien is certain.⁷⁸⁶

However, it is stressed that the statutory lien refers merely to the time shipowner's security on sub-freights; it does not include the shipowner's sub-freights in other types of charterparty. There is no official basis for this standpoint, but following the structure of the German Commercial Code, the underlying reason can be attributed to the different natures of charterparties, as discussed in Chapter 4. A time charterparty in German law is deemed to be a lease contract, whereas the voyage charterparty is a special carriage of goods contract. Given this, the time shipowner's right may be by reference to a lessor's right in a lease contract under the German Civil Code while the voyage shipowner's right is by reference to the carrier's right. However, the underlying basis for this standpoint has no grounding in the existing legal authority.

Since the time shipowner's security on sub-freights as a statutory lien has been provided by legislation, its priority in the ranking of security is not at issue. The legal effect of this statutory lien is as follows:

First, unlike English law, it is not necessary for a time shipowner to register his security on sub-freights. In response to unpaid hire, the time shipowner's security is claimable against the sub-charterer and any third parties under subsequent time charterparties or a carriage contract (voyage charterparty), 'as soon as the debtor of the claim becomes

⁷⁸⁵ Hartmuth Sager in Münchener Kommentar zum Handelsgesetzbuch, Karsten Schmidt (chef editor), Prof Dr Rolf Herber (ed of Vol.7), Vol. 7, 3rd, § 566 HGB, Note 1, München: C. H. Beck / Verlag Franz Vahlen, 2014 <<https://beckassets.blob.core.windows.net/product/toc/822249/407-619-transportrecht-9783406610271.pdf>> accessed 22 Aug 2018 (Translated by Dr Tobias Eckardt)

⁷⁸⁶ Email from Dr Tobias Eckardt To Ms Shengnan Jia (22 Aug 2018). Dr Tobias Eckardt is a professional German lawyer working in the shipping industry. He has assisted the present author in searching for relevant cases in the German court system, but no reported case has been found. Also, he has provided the comment on statutory lien.

aware of the Disponent Owner's lien, the debtor may make payment only to the Disponent Owner.'⁷⁸⁷

In response to the insolvency of charterers, this statutory security grants the time shipowner a right of separation under the German Insolvency Statute. The right of separation, in accordance with Section 47, makes clear that '[A]nyone entitled to claim the separation of an object from the insolvency estate under a right *in rem* or *in personam* shall not form part of the insolvency creditors. Entitlement to separation of such object shall be governed by the legal provisions applying outside the insolvency proceedings.'⁷⁸⁸ This provision expressly stipulates that, as far as the secured property is concerned, this property is part of other insolvency property owned by the debtor. Only secured creditors are entitled to dispose of this property.

Furthermore, Section 50 'Separate satisfaction of pledgees' in the Insolvency Statute provides that '...a pledge acquired by attachment or a legal lien in an object forming part of the insolvency estate shall be entitled to separate satisfaction in respect of the main claim, interest and costs from the pledged object...'.⁷⁸⁹ Although the title of Section 50 mentions simply 'pledgees', its main content clarifies that a 'pledge' and a 'lien' have the same status. It was discussed in In Chapter 2 that the term 'lien' is not a traditional concept in German law. It is obvious, therefore, that 'lienees' should be subject to Section 50. In accordance with Sections 47 and 50, 'the claims of the time charterer under contracts of carriage or sub-charter contracts', means that the charterer may earn freights or hires from its sub-charterer or the subsequent sub-charterers, which should then be distributed to the time shipowner.

In addition, Article 566 in the Commercial Civil Code makes use of the plural when describing 'the claims of the time charterer under contracts of carriage or sub-charter

⁷⁸⁷ German Commercial Code, s 566 (2)

⁷⁸⁸ German Insolvency Statute (amended 2011), s 47

⁷⁸⁹ Ibid at s 50

contracts’, and ‘contracts of carriage or sub-charter contracts’. This means that the number of voyage or time charterparties is not restricted. Thus, it is reasonable to say that ‘claims’ may refer to earnings in any sub-charterparties. The time shipowner, due to this statutory lien, therefore enjoys *droit de suite* and *droit de preference*, and it is not necessary to perform a publicity procedure such as registration. The only obligation on the shipowner is to give notice to the sub-charterer or subsequent sub-charterers in response to any charterer’s default.

It should be noted that before 2013, the nature of this security was not discussed at all among German academics and practitioners. In any event there is no express provision under the German Commercial Code that the parties should negotiate a contractual security on sub-freights. Currently, a time shipowner’s security on sub-freights can be regarded as a direct statutory lien. However, the legislation is silent about a voyage shipowner’s security on sub-freights, and its nature will therefore be explored in Section 4.2.

4.1.2 Time Shipowner’s Quasi-Statutory Lien on Sub-freights

Like German law, Article 141 of the Chinese Maritime Code has provided the time shipowner’s lien on sub-freights.⁷⁹⁰ In Chinese academic and practitioner circles that this security cannot automatically be treated as a statutory lien.⁷⁹¹ The reason is that Article 127 of the Maritime Code gives parties the choice of not applying this provision by providing that ‘[T]he provisions concerning the rights and obligations of the shipowner and the charterer in this Chapter shall apply only when there are no stipulations or no different stipulations in this regard in the charter party’.⁷⁹² This means that, apart from applying directly to Article 141, the contracting parties have two options; either parties may directly apply a lien clause as a security clause under a

⁷⁹⁰ Article 141 of The Chinese Maritime Code provides that ‘[I]n case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer’s goods, other property on board and earnings from the sub-charter’.

⁷⁹¹ No any literature drafted by Chinese scholars or practitioners treats a time shipowner’s sub-freight security as a statutory lien.

⁷⁹² Ibid Art 127

standard form, or else they may reach an agreement to waive the application of Article 141.

It is well-known that each charterparty contains the lien on sub-freights. It is therefore sufficient to say that Article 141 is a long-term standby clause that will rarely be employed. No commentator among Chinese practitioners and academics contends that Article 141 can be regarded as a statutory lien on sub-freights. Most importantly, there are no official documents about the interpretation of this Code that shed light on the nature of this security. In this situation, if the sub-freight security is regarded as a statutory lien, it means that a new form of security interests, namely, a non-possessory lien, is created. In the Chinese legal environment, the voice of maritime legal scholars is weak compared with that of scholars in other commercial areas of law. A proposal about a new form of security interests is therefore unlikely to gain support.

Even so, in this author's opinion, this Article provides a feasible solution in creating a statutory lien on sub-freights; the domestic rationale of the Code would otherwise, be imperfect. It is conspicuous that Article 141 accepts and recognises the existence and application of the lien on sub-freights which is a type of security. This is not a point of contention. Correspondingly, unless there is an opposing provision that denies the legality of this lien, the principle of *numerus clausus* determines that this lien on sub-freights must constitute a statutory lien. To be clear, even if Article 141 is a standby clause, the legislation expressly provides a new form of security which means that the legislation recognises its legality. Following this rationale, if the parties choose to draft a similar security clause in their charterparties, the legal effect amounts to amending the content of the statutory lien in light of the legislation.

Although no authoritative commentary affirms this opinion of a potential statutory lien, from the structure and rationale of the Code, the lien on sub-freights under a time charterparty holds the possibility of becoming a statutory lien. Whether this statutory

lien might be utilised is dependent on the parties choosing to do so. If the parties choose not to insert this security clause into their charterparties, the statutory lien does not exist. However, because of the conservative attitude towards *numerus clausus*, the statutory lien on sub-freights should ideally be used.

In addition, even if the statutory lien is recognised by legislation, the application of this Article in relation to multiple charterparties is limited. As mentioned before, Article 141 simply provides ‘earnings from sub-charter’. This means that; first, earnings from a voyage charterparty might not be covered by this Article, as a narrow interpretation provides that a voyage charterparty in Chinese law amounts to a carriage of goods by sea rather than ‘charter’; and secondly, due to the use of singular ‘sub-charter’, it may be presumed that earnings under subsequent sub-charterparties cannot be governed by this Article. The value of Article 141 is therefore somewhat diminished. A reasonable conclusion is that the lien on sub-freights under a time charterparty in Chinese law is a quasi-statutory lien.

4.2 Legal Nature and Effect under Secured Transactions Law

It is important to note that although the above discussion asserts the nature of the security on sub-freights as being one of statutory lien or quasi-statutory lien, the scope of the discussion is restricted merely to an analysis of charterparties in terms of the German Commercial Code and the Chinese Maritime Code.

Chapter 4 showed that the nature of the time charterparty in these civil law jurisdictions is to be distinguished from their original nature arising from common law. It is unnecessary to research the same clause in reference to other types of charterparty. Both voyage and time charterparties concern the use of a vessel. Accordingly, there is no ground for arguing the natures of a voyage and a time shipowner’s security on sub-freights are different.

4.2.1 Assignment of Future Claims in Contract Law

As mentioned above, most civil law countries do not incorporate into legislation a shipowner's right on sub-freights. Thus, the description that 'the shipowners shall have a lien on all sub-freights payable' is merely a contractual clause which means that, in response to the charterer's default, the shipowner may invoke the remedy by way of exercising a right on sub-freights. In a literal sense, this clause in charterparties grants a shipowner a claim on outstanding hires or freights from the charterer's debtors, namely the sub-charterers in any sub-charterparties. However, because the charterer is indebted to the shipowner, the charterer in turn promises to grant the shipowner a claim to his own debts owed by any sub-charterers. This description is consistent with the theory of the assignment in respect of debt-claims that is prevalent in civil law jurisdictions,⁷⁹³ such as in the Chinese Contract Law,⁷⁹⁴ the Dutch Civil Code⁷⁹⁵ and the German Civil Code.⁷⁹⁶ In view of all these legislations, the assignment of debt-claims can be defined as a mechanism whereby 'the obligee may assign its rights under a contract in whole or in part to a third person, except where such assignment is prohibited'.⁷⁹⁷

⁷⁹³ The term 'assignment' is derived from assignare (assignatio), cession from cedere (cessio). During the period of classical Roman law, a claim could not be separated from the original creditor. However, the demand for the circulation of credit implied the feasibility of assignment of a debt-claim. Standley J Bailey, 'Assignment of Debts in England from the Twelfth to the Twentieth Century I' (1931) 47 LQR 516, 535; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of The Civilian Tradition* (Oxford University Press 1996) 58-59

⁷⁹⁴ The Chinese Contract Law, Art 79 'Assignment of Rights' provides that 'The obligee may assign its rights under a contract in whole or in part to a third person, except where such assignment is prohibited...'.

⁷⁹⁵ The Dutch Civil Code, Art 3:83 'Transferable property rights' provides that '2. The transferability of a debt-claim may be excluded by an agreement between the creditor and debtor' and Article 6:159 'Transfer of a contractual position' provides that '1. A party to an agreement may, with the cooperation of his counterparty, transfer his legal relationship with that counterparty to a third party by means of a private or notarial deed, drawn up for this purpose between him and that third party'.

⁷⁹⁶ Section 398 'Assignment' of Division 5 'Transfer of a Claim' under the German Civil Code provides that '[A] claim may be transferred by the obligee to another person by contract with that person (assignment). When the contract is entered into, the new obligee steps into the shoes of the previous obligee'.

⁷⁹⁷ Chinese Contract Law 1992, Art 79

Coincidentally, a common law scholar, Professor Tjio in *Diablo Fortune Inc v. Duncan, Cameron Lindsay and Another*,⁷⁹⁸ proposed a similar theory about the nature of this security, which is the ‘agreement to create a charge’ theory.⁷⁹⁹ This provides that ‘liens on sub-freights should be characterized as agreements to create a charge on a future contingent event (*i.e.*, the giving of notice to the sub-charterer upon charterer’s default)’.⁸⁰⁰ The Singapore court did not uphold this opinion. From the civil law point of view, this theory can be described as ‘agreement to assign the debt-claim’.

Nevertheless, a systematic approach to law is an essential feature of civil law. When the sub-freights clause and the shipowner’s ‘possessory’ cargo security are incorporated into the same clause in charterparties, apart from the cargo security, the shipowner is obviously expecting to create another form of security. A pure contractual assignment is therefore clearly not in line with the fundamental intention of the shipowner.

When contracting parties simply enter into an agreement to assign the claim, this legal issue will be governed by the law of contract. The assignment is effective upon the assignor, the assignee and the assignor’s debtor so that the assignee enjoys a personal contractual right. By contrast, the assignment of future claims for security purposes means that when the contracting parties enter into an agreement to create a security on future claims, this clause will be governed by the law of security, namely property law. In this connection, the assignment is merely the means and the purpose is the security.

4.2.2 Pledge on Future Claims (Account Receivables)

If the assignment of future claims is a contractual solution by which the shipowner may claim for the charterer’s default, then in order for the contractual right to become a property right against the sub-charterer and subsequent sub-charterers under multiple

⁷⁹⁸ [2018] SGCA 26

⁷⁹⁹ Ibid at [59]

⁸⁰⁰ Ibid

charterparties, the contractual clause must resemble a security interest and the corresponding legal procedure must be satisfied. This section will explore the nature of sub-freight security in civil law and what legal procedure should be satisfied.

By reviewing the character of the contractual sub-freight security laid down by common law, this clause is to be seen as a floating charge on future claims, book debts or receivables. Although no corresponding concept of the 'lien' in civil law is consistent with that of the lien on sub-freights in common law, the concept of a pledge in civil law is consistent with the concept of the floating charge in common law is. That is to say, this security on 'future claims' might be called a 'pledge on book debts' or a 'pledge on account receivables'. The different terms have the same implication. To aid further analysis, it is necessary to review the development of pledges on book debts in order to assess how modern secured transactions law affects the nature of sub-freight security in civil law.

4.2.2.1 Review on the Development of Non-possessory Pledge

Under most civil law jurisdictions, a traditional pledge requires that possession of the pledged property must be transferred to the secured creditor or to a third party custodian.⁸⁰¹ No theory is in favour of a non-possessory pledge in the civil law system. Future claims, book debts or account receivables as intangible property cannot therefore

⁸⁰¹ General reading on this is: Giuliano G Castellano and Marek Dubovec, 'Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad Between Access to Credit and Financial Stability' (2018) 41 (3) Fordham International Law Journal 531; Curtis International Law Firm, 'A New Italian Security: The Non-possessory Pledge' (Curtis October 2016) <<https://www.curtis.com/siteFiles/Publications/A%20new%20Italian%20security.pdf>> accessed 29 April 2019; it should be noted that 'a traditional pledge' does not denote '*pignus*' arising from Justinian's *Corpus Iuris Civilis*. The meaning of *pignus* approximates that of 'pledge' in the modern law. However, the original concept of the security did not provide any rules to restrict non-possessory security to real (immovable) property and possessory security to personal (movable) property. Because of limited space, it is not necessary to trace this back to ancient Roman law; Nan Zhou, *Roman Law*, 1994, Shanghai: The Commercial Press Limited, at pp. 391-393; Shuangyuan Li and Shiyang Wen, *Jurisprudence Comparative of Civil Law*, 1998, Wuhan: Wuhan University Press, at pp.378-379; Huixing Liang and Huabin Chen, *Real law* (2nd edn, Law Press China 2003)309-310; Benhan Chen, *Comparative Research on the Law of Security Interests* (Wuhan University Press, 2003)295; Willem J Zwolve, 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods' in Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Oxford Press University 2004)39; George Mousourakis, *Fundamental of Roman Private Law* (Springer-Verlag Berlin Heidelberg 2012)176-177

become the object of a possessory pledge. However, this situation gradually changed with the industrial revolution, leading to increased economic growth. At the start of the new millennium innovations were made for secured transactions. Two important and typical civil law countries, France and Germany, realized that the traditional philosophy of the security approach was in dire need of modernization. To make secured transactions easier and more efficient, the Grimaldi Committee's Official Report (31 March 2005) of the French Parliament favoured fundamental innovation. The French Civil Code restated that two crucial features of the pledge are to be flexibility and efficiency. These new features drove French law to recognise a non-possessory pledge.⁸⁰² In Germany, the theory of constructive delivery has been clearly codified in the Civil Code. Delivery of possession is not required in the security agreement.⁸⁰³

Chronologically, the evolution of French and German security law in terms of the non-possessory pledge resulted in a complete modernization of the legal framework regarding security rights on movable things. Certain European jurisdictions, such as Belgium and Italy, experienced a passive reform of the security system as a result of the credit crunch. Belgian security law followed the old French law (the Napoleon Code of 1804). Even though French law recognised the non-possessory pledge from 2006, and for many years Belgian scholars debated the modernization of the security law, change in Belgian law lagged behind until the effects of the global financial crisis.⁸⁰⁴

⁸⁰² Jean-Francois Riffard, 'The Still Uncompleted Evolution of French Law on Secured Transaction Towards Modernity' in Louise Gullifer and Orkun Akseli (eds) *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016)370-378; Erik Dirix, 'The Belgian Reform on Security Interests in Movable Property' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016)395; Liming Wang, On Chattel Mortgage (2007) 1 Law Science 22; the new regime of the pledge can be found in the new Articles 2333-2350 of the French Civil Code.

⁸⁰³ 'constructive delivery' of German Civil Code, s 930 (last amended by statute on 4 December 2008) provides that 'If the owner is in possession of the thing, the delivery may be replaced by a legal relationship being agreed between the owner and the acquirer by which the acquirer obtains indirect possession'; s 1205 (2) 'creation (of pledge of movable things)' provides that '[T]he delivery of possession of a thing in the indirect possession of the owner may be replaced by the owner transferring indirect possession to the pledgee and notifying the possessor of the pledging'; Moritz Brinkmann, 'The Peculiar Approach of German Law in the Field of Secured Transactions and Why it has Worked (So Far)' in Louise Gullifer and Orkun Akseli (eds) *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 339-343

⁸⁰⁴ Erik Dirix, 'The Belgian Reform on Security Interests in Movable Property' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart

In 2013, Belgian law officially recognised the pledge over movable goods ‘without dispossession of the pledgor’, like the French law in 2006.⁸⁰⁵ An Italian legislative proposal was finalized in February 2014, and that includes a series of reforms of the security system. The recognition of a non-possessory pledge was also included among the reforms.⁸⁰⁶ On 29th June 2016 the Italian Parliament agreed to a government decree whereby the non-possessory pledge was formally recognised in the legal regime on security.⁸⁰⁷ ‘Through a non-possessory pledge any business registered in the Company Registry Book may establish a security right over present, future, tangible, and intangible assets that are instrumental to their business operations’.⁸⁰⁸

Furthermore, since the United Nations Convention on the Assignment of Receivables in International Trade was enacted in 2004, the majority of jurisdictions of both civil and common law systems have sufficient knowledge of the security on future receivables.⁸⁰⁹ There is no denying that certain legal systems restrict the application of the secured future receivables.⁸¹⁰ It is expected that the influence of this Convention will be that secured future receivables will be widely accepted. Dutch law and Chinese law will be used as examples to explore how these laws may determine the legal nature

Publishing 2016)391-392

⁸⁰⁵ Ibid 395; Jean-Francois Riffard, ‘The Still Uncompleted Evolution of French Law on Secured Transaction Towards Modernity’ in Louise Gullifer and Orkun Akseli (eds) *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016)372-373

⁸⁰⁶ Anna Veneziano, ‘Italian Secured Transactions Law: the Need for Reform’ in Louise Gullifer and Orkun Akseli (eds), ‘Secured Transactions Law Reform: Principles, Policies and Practice’ (Hart Publishing 2016)362

⁸⁰⁷ Giuliano G Castellano and Marek Dubovec, ‘Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad Between Access to Credit and Financial Stability’ (2018) 41 (3) Fordham International Law Journal 531, 543

⁸⁰⁸ Giuliano G Castellano, ‘The New Italian Law for Non-possessor Pledge: Villain or Hero?’ (Oxford Blog, 11 July 2016) <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/new-italian-law-non-possessory-pledge-villain-or-hero>> accessed 1 June 2018

⁸⁰⁹ Orkun Akseli, ‘The United Nations Convention on the Assignment of Receivables in International Trade and Small Business’ in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016) 470; in addition, future receivables amount to future claims. ‘Receivables’ is used to match the United Nations Convention on the Assignment of Receivables in International Trade in this paragraph.

⁸¹⁰ Spiros v Bazinas, ‘Lowering the Cost of Credit: the promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade’(2001)9 Tulane Journal of International & Comparative Law 259, 265

and effect of sub-freight security, as seen in the respective development of secured transactions law in civil law.

4.2.2.2 Dutch Law

A creditor, who is seeking to obtain real security for his claim has two options under Dutch law —creating either a mortgage on registered property (immovable property and registered vessels and aircraft) or a pledge on movable property.⁸¹¹ In accordance with Article 3:231 '[S]ecurity for existing and future debt-claims', a creditor is entitled to create a security for future debt-claims.⁸¹² In terms of the object of the security, the secured object may comprise a movable thing, a debt-claim to the bearer or the usufruct of such a thing or debt-claim.

With regard to the creation of a pledge, there are two forms, namely 'disclosed pledge'⁸¹³ and 'undisclosed pledge'.⁸¹⁴ There are two differences between the two

⁸¹¹ The Dutch Civil Code, Art 3:227 provides that 'A "pledge" and a "mortgage" are real security rights' it is provided that '1. A pledge and a mortgage are both real security rights on an asset of someone else, granting their proprietor ("pledgee" and "mortgagee") the title to recover his financial debt-claim from the sale proceeds of the encumbered asset prior to all other creditors of the person to whom the encumbered asset belongs. When such a real security right is established on immovable property or on a registered ship or airplane, it is called a mortgage; when it is established on any other property, it is called a pledge. 2- A pledge or mortgage on a thing is vested on all that is covered by the right of ownership of that thing'.

⁸¹² Ibid at Art 3:231, it is provided that 'Security for existing and future debt-claims', 'A pledge or a mortgage may be established as security for existing and for future debt-claims. The debt-claim for which security is given, may be to name, to order or to bearer. It may be a debt-claim against the pledgor or mortgagor himself or a debt-claim against someone else.'

⁸¹³ Ibid at Art 3:237 'Establishment of a "non-possessionary pledge"'; it is provided that '1. A pledge on a movable thing, on a debt-claim to bearer or on the usufruct of such a thing or debt-claim may be established also by means of a notarial deed or of registered private deed, in both cases without the need to bring the thing or negotiable document under control of the pledgee or of a third party ('non-possessionary pledge')'.

⁸¹⁴ Ibid at Art 3:239 'undisclosed pledge on a debt-claim to name'; it is provided that 'A pledge on a property right which is to be exercised only against one or more specific persons, not being a debt-claim to order or to bearer, or a pledge on the usufruct of such a property right, can be established as well by means of a notarial deed or a registered private deed, drawn up for this purpose between the pledgor and pledgee, in both cases without notifying the person or persons against whom the property right is to be exercised, provided that this property right already exists at the moment on which the pledge is

forms. The first difference concerns the requirement of creation, while the second difference is relevant for the legal effect against the debtor.

Concerning the ‘disclosed pledge’, its creation may be established by means of a notarial deed or by a registered private deed, but there is no mandatory requirement for contracting parties to complete the process of the notarization or registration. Nevertheless, it is a mandatory requirement to give notice to the debtor, namely the sub-charterers. This pledge cannot otherwise bind the sub-charterers. By contrast, after the notice is given to the debtor, the pledgee in his own name is entitled to claim against the debtor.⁸¹⁵ In addition, Dutch law does not expressly stipulate which party should take responsibility to give notice to sub-charterers. Either the shipowner or the charterer may in theory give notice to sub-charterers. concerning a ‘disclosed’ pledge, on the occurrence of this type of pledge, the debtor is known. It will be apparent that this feature is not consistent with the sub-freight security because it is impossible to have sub-charterers prior to the existence of a head charterparty.

For an ‘undisclosed pledge’, it is stipulated as follows:

‘A pledge on a property right which is to be exercised only against one or more specific persons, not being a debt-claim to order or to bearer, or a pledge on the usufruct of such a property right, can be established as well by means of a notarial deed or a registered private deed, drawn up for this purpose between the pledgor and pledgee, in both cases without notifying the person or persons against whom the property right is to be exercised, provided that this property right already exists

established or that it will be obtained directly on the basis of an at that moment already existing legal relationship’.

⁸¹⁵ Ibid at Article 3:246 (1) ‘Right to collect debt-claims that are encumbered with a pledge’; it is provided that ‘When a pledge is vested on a debt-claim, then the pledgee is entitled to demand satisfaction in and out of court and to collect the performance that is chargeable by the debtor of the pledged debt-claim’.

at the moment on which the pledge is established or that it will be obtained directly on the basis of an at that moment already existing legal relationship'.⁸¹⁶

In order to comply with this Article, the creation of the 'undisclosed pledge' should be dependent on the satisfaction of registration.⁸¹⁷ One commentator contends that there is no distinction between the creation of a proprietary right and its legal effect against third parties.⁸¹⁸ For this reason, as far as an 'undisclosed pledge' is concerned, its registration is an integral part of creation of this security interest.⁸¹⁹ In other words, the creation of a contractual sub-freights clause does not generate a security interest.

It may, however, be argued that, in the context of contract law, a contractual sub-freights clause between the shipowner and the charterer can be created. As stated by Dutch lawyers, registration is to identify which party registers first and so has priority over other rights of the charterer's creditor.⁸²⁰ Thus, the legal consequence of non-registration should lead to the loss of the shipowner's privileged right, but it should not affect the creation of a contractual clause.

In addition, Article 3:246 of the Dutch Civil Code provides that '1. When a pledge is vested on a debt-claim, then the pledgee is entitled to demand satisfaction in and out of court and to collect the performance that is chargeable by the debtor of the pledged debt-claim. This right, however, stays with the pledgor as long as the debtor of the

⁸¹⁶ Ibid Art 3:239

⁸¹⁷ The issue should be noted whether registration in English under the Dutch Civil Code is a mandatory requirement. Perhaps after translation, the implied requirement is uncovered. According to the following article by a Dutch scholar and a conversation between the present author and Dr William Guo, a Dutch lawyer, such a registration is necessary; Email from Dr William Guo to Ms Shengnan Jia (18/28 September 2018)

⁸¹⁸ D J Y Hamwijk, *Publicity in Secured Transactions Law: Towards a European Public Notice Filing System for Non-possessory Security Rights in Movable Assets?* (University of Amsterdam 2014)81

⁸¹⁹ H Partick, 'Symposium-Reform of Security over Movable Property; A View From Practice'(2010) 16 *Edinburgh Law Review* 272, 275

⁸²⁰ Yvo Rampersad and Jeroen van der Weide, 'Has the Dutch Supreme Court Accepted the Concept of English Floating Charge in Dutch Law?' (Leiden Law Blog, 31 March 2014)<<https://leidenlawblog.nl/articles/has-the-dutch-supreme-court-accepted-the-english-concept-of-the-floating-ch>> accessed 13 January 2019

pledged debt-claim is not notified of the existence of the pledge'.⁸²¹ This means that prior to notification, the charterer is entitled to claim sub-freights against sub-charterers and the shipowner has no right to claim sub-freights against the charterer who has received sub-freights.

Looking at the two forms of pledge, it appears that the concept of an 'undisclosed pledge' is in line with that of sub-freight security. However, Article 3: 239 illustrates that when this pledge is created, a legal relationship between the pledgee and the debtor is thereby made.

In this situation, there is seemingly no proper concept to match the pledge on sub-freights. However, in accordance with the applicable legislation and commercial practice, the Dutch Supreme Court in one case (ECLI: NL: HR 2012: LJN BT6947) held that a 'comprehensive security arrangement', namely *verzamel pandakte-constructie*, is 'a transaction by which the bank obtains an undisclosed right of pledge on all present and future receivables by daily registration of an unspecified collective deed of pledge'.⁸²² Some Dutch practitioners assert that this case gives rise to the direct consequence of accepting a 'floating charge' in Dutch law.⁸²³ However, not all practitioners agree with this proposition because they assert that the registration of an English floating charge and of a Dutch pledge occurs in different systems.⁸²⁴

⁸²¹ Dutch Civil Code, Art 3:246

⁸²² ECLI: NL: HR 2012: LJN BT6947; Yvo Rampersad and Jeroen van der Weide, 'Has the Dutch Supreme Court Accepted the Concept of English Floating Charge in Dutch Law?' (Leiden Law Blog, 31 March 2014) < <https://leidenlawblog.nl/articles/has-the-dutch-supreme-court-accepted-the-english-concept-of-the-floating-ch> > accessed 13 January 2019

⁸²³ 'Dutch Supreme Court accepts floating charge' (Legal Alert) < <https://www.debrauw.com/wp-content/uploads/NEWS%20-%20LEGAL%20ALERTS/Corporate%20Recovery%20Restructuring%20+%20Insolvency/2012/Restructuring-Legal-Alert-6-February-2012-Dutch-Supreme-Court-accepts-floating-charge.pdf> > accessed 13 January 2019

⁸²⁴ Yvo Rampersad and Jeroen van der Weide, 'Has the Dutch Supreme Court Accepted the Concept of English Floating Charge in Dutch Law?' (Leiden Law Blog, 31 March 2014) < <https://leidenlawblog.nl/articles/has-the-dutch-supreme-court-accepted-the-english-concept-of-the-floating-ch> > accessed 13 January 2019

To this author's knowledge, the divergence of registration should not impact on the nature of the security. As discussed in the sections on English law and Singapore law, these two jurisdictions recognise the floating charge, but have different attitudes towards registration. It is therefore safe to say that the concept of pledge on future claims in the Dutch Law is consistent with that of the English floating charge on sub-freights.

4.2.2.3 Chinese Law

Existing Chinese law, like the Dutch Civil Code, treats the security on sub-freights as a pledge on account receivables. Under Article 223 of Property Law of PRC 2007, the object of a pledge can include account receivables, negotiable documents, IP and others.⁸²⁵ Although the scope of account receivables is not mentioned under Property Law, the People's Bank of China has enacted 'Measures for the Registration of Pledge of Account Receivables (revised in 2017)' to clarify the meaning of account receivables. It provides that:

'The account receivables as mentioned in these measures refer to the obligee's right of claim to require the obligor to pay for certain goods, services or facilities provided by the obligee, as well as other claims for payment in accordance with the law, including existing and future monetary claims.'⁸²⁶

It is necessary to specify the power of the People's Bank of China in order to understand the legal effect of the meaning of 'account receivables'. The People's Bank of China is

⁸²⁵ The Chinese Property Law 2007, Art 223 provides that 'The following rights which an obligor or third party has the right to dispose of may be pledged:(1) Money orders, checks, and cashier's checks;(2) Securities and deposit receipts;(3) Warehouse receipts and bills of lading;(4) Transferable fund units and stock rights;(5) Exclusive trademark rights, patent rights, copyrights or other property rights in intellectual property that can be transferred;(6) Account receivables'.

⁸²⁶ Measures for the Registration of Pledge of Account Receivables (2017 Amendment), Art 2. This regulation was enacted in 2007. In the old version, the scope of account receivables was not clear and broad.

entitled to provide the Departmental Rules on the instruction of the State Council.⁸²⁷ Although these Departmental Rules do not amount to ‘hard’ law, in accordance with Provisions of the Supreme People’s Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments enacted by the SPC, the provision of Departmental Rules can be regarded as the applicable ‘law’ when the relevant law and judicial interpretation are silent on the matter.⁸²⁸ It is generally accepted in practice that the future claim, as a type of account receivables constitutes the object of the pledge so that sub-freights arising from a sub-charterparty can be regarded as account receivables.

It is disputable whether the meaning and scope of ‘account receivables’ enacted by the People’s Bank of China is valid under Chinese law. The question arises from the *numerus clausus* principle. In Chapter 3, it was argued that in Chinese law ‘the types and contents of real rights shall be stipulated by law’.⁸²⁹ However, under the current circumstance, the definition and scope of ‘account receivables’ are simply provided by the Departmental Rules/Regulations. Thus, in one strict sense, it may be assumed that a Chinese court may overrule the validity of the definition and scope of ‘account receivables’ provided by the People’s Bank of China. The SPC provided a positive legal answer in 2018.

⁸²⁷ Articles 2 and 4 of the Law of the People's Republic of China on the People's Bank of China (2003 Amendment) provide that ‘[T]he PBC is the central bank of the People's Republic of China. As the central bank, the PBC shall formulate and implement monetary policies, prevent and dissolve financial risks, and maintain the stability of banking industry in the country under the leadership of the State Council.’ And ‘[T]he PBC shall perform the following functions: Promulgating and implementing orders and regulations in relation to its functions.’ In Article 4, ‘regulations’, in accordance with Article 80 of the Chinese Legislation Law (2015 Amendment) refer to ‘departmental rules’. Article 80 of the Chinese Legislation Law stipulates that ... the People's Bank of China ...may draft rules within the scope of that department's authority on the basis of laws, state council administrative regulations, decisions, or orders.’

⁸²⁸ Article 4 of Provisions of the Supreme People's Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments (effective 4 November 2009) stipulates that ‘... administrative regulations, local decrees, autonomous decrees and special decrees may be cited directly in a judicial judgment.’ Administrative regulations contain the departmental rules.

⁸²⁹ Article 5 of the Chinese Property Law 2007 and Article 116 of the General Rules of the Civil Law of PRC 2017 are completely the same.

In *Liaoning Wufeng Agricultural Technology Co.Ltd v Shengyang Branch of Industrial Bank Co.Ltd*,⁸³⁰ the SPC not only affirmed that the future money provided by the People's Bank of China could be covered by the term, 'account receivables', but it also further clarified that the pledged account receivables contains the present fixed receivables and unspecific future receivables. On the occurrence of certain circumstances, if the account receivables can become specific, these specific receivables will be regarded as the pledged property.⁸³¹ It may now be concluded that in Chinese law the concept of a pledge on account receivables is in line with that of the floating charge in common law.

In terms of the creation of a pledge on future claims, Article 228 of the Chinese Property Law stipulates that '[A]s regards the pledge of receivables, the parties concerned shall enter into a written contract, and the pledge right shall be established after the related credit rating institution has handled the registration of the pledge'.⁸³² This Article has shown the closest relationship between the creation and the registration of a sub-freight security. Registration is the mandatory requirement in order to create an effective sub-freight security. To be clear, a contractual clause, generally speaking, is created by contracting parties. Even if this contractual clause cannot be directly enforced against a third party, it has been created by contracting parties and should be binding on the two parties. However, in accordance with Article 228, the meeting of minds in the writing may not create a sub-freight security. Only after the completion of registration may, this security clause can be deemed to be created in law.⁸³³ Although this Article has incurred some negative commentary,⁸³⁴ the existing legislation still determines that

⁸³⁰ [2017] No.5014 Retrial

⁸³¹ Ibid

⁸³² The Chinese Property Law 2007, Art 228 stipulates that: '[A]s regards the pledge of receivables, the parties concerned shall enter into a written contract, and the pledge right shall be established after the related credit rating institution has handled the registration of the pledge.'

⁸³³ Shengping Gao, 'Theory of Registration of Account Receivables--Focus on Revision of Measures for the Registration of Pledge of Account Receivables' 2015 (6) Contemporary Law Review 86, 87

⁸³⁴ Benhan Chen, 'Review on Registration of Pledge in Property Law'(2014) 8 Law Science 123, 125-127

registration is a mandatory procedure. Thus, party autonomy in Chinese property law is rarely applied.

In this author's opinion, creation and validity should be independent of each other. The condition precedent of creation is dependent on the contracting parties' mutual agreement while validity requires a certain legal procedure, such as registration. In civil law countries including in Chinese law, although *numerus clausus* determines the specific content of security interests, apart from the lien, other forms of security interest rely on the contracting parties' will. There is no reasonable ground in this context to deny the creation of a security based on the contracting parties' will. If completion of registration determines the creation of this security, the consequence is that creation and validity become in essence the same.

It should be noted that in modern secured transactions law the concept of factoring is similar to that of a pledge on receivables. In Dutch and Chinese law, factoring is regarded as a quasi-security. A typical form of factoring refers to 'a finance company (factor) assumes responsibility for collecting and administrating unpaid invoices, book debts or other receivables of its customer (usually a company). The receivables of the customer of the factor will either be assigned or pledged by the customer to the factor'.⁸³⁵ The difference between factoring and the pledge on future property lies in their dissimilar fundamental purposes. Factoring is created for receivables financing, but the pledge is to safeguard the performance of a contractual obligation. In common law countries and other civil law countries, factoring has become a common approach to obtain finance. However, its character is far from that of a sub-freight security.

⁸³⁵ John Steenberghe and Huan Tan, 'Lending and Taking Security in the Netherlands: Overview' (Practical Law 1 November 2018) <<https://uk.practicallaw.thomsonreuters.com/0-384-7454>> accessed 28 April 2019

4.2.3 *Status Quo* and Different Viewpoints

It is apparent that there are two theories about the legal nature of sub-freight security--the assignment of future claims based on the law of contract and the pledge on future claims based on the law of security. In the practical and academic domains of civil law, it is rare to find a judicial decision or any authoritative literature that discusses the legal nature of sub-freight security.

With regard to the theory of assignment of future claims, a Chinese scholar submitted a proposal in his article to endorse this theory. He contended that a ‘lien’ on sub-freights was not in line with the concept of possessory lien so that it was in practice difficult to exercise this right. However, in accordance with the theory of equitable assignment presented in English case of *The Cebu (No.2)*,⁸³⁶ it was reasonable to adopt the theory of assignment of right into the Chinese Contract Law.⁸³⁷ The difference between Chinese law and English law is that the Chinese Contract Law does not provide a comprehensive assignment theory.⁸³⁸

To the present author’s observations, many Chinese scholars are accustomed to learning from common law, especially English case law. One supposes that this scholar’s article was completed after *The Western Moscow* case,⁸³⁹ and the argument could be changed. He perhaps considers that the theory of the floating charge on future claims under English law is consistent with the pledge on future claims in Chinese law.

A French lawyer has asserted, in accordance with Article 2286 of the French Civil Code, that *prima facie* sub-freight security can be construed as *cession de dette*, namely the assignment of claims. However, there is no legal relationship between a shipowner and

⁸³⁶ [1990] 2 Lloyd’s Rep 316

⁸³⁷ Hengsi Wang, ‘The Owner’s Lien on “earnings From the Sub-charter” in China: its Puzzle and Solution: Interpretation from the View of CMC Article 141’ (2011) 22 (4) Annual of China Maritime Law 70,71-71

⁸³⁸ Ibid

⁸³⁹ *The Western Moscow* [2012] EWHC 1224 (Comm); *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another* [2018] SGCA 26

sub-charterers which is incompatible with the requirement of the creation of a *cession de dette*. It is therefore suggested that sub-freight security is a similar assignment of claims.⁸⁴⁰

In comparison with the assignment of future claims which is subject to contract law, along with the development of secured transactions law, a shipowner's security on sub-freights can be construed as the pledge on intangible rights that is governed by contract law and by property law. The contracting parties' mutual intention drives the creation of the security on sub-freights. However, its validity against the sub-charterer is dependent on the notification to the sub-charterer and on *droit de preference* against the other creditors and charterer's liquidator must rely on the completion of registration.

It is debatable whether sub-freight security can be treated in civil law as a pledge on account receivables. If the answer is negative, sub-freight security will be construed as a new form of security. In this situation, *numerus clausus* arising from secured transactions law may greatly limit the creation and legal effect of this security.

A traditional pledge in civil law is not relevant to future claims, account receivables or book debts. The concept of the pledge on future property is transplanted from common law. As with the function of the floating charge, the main function of the pledge on account receivables is to satisfy the demand for finance. As discussed about Dutch and Chinese law, judicial decisions in financial dispute cases recognise the legal effect of the pledge on future claims. Thus, as long as sub-freights can be treated as future claims, there is no reason for the court to reject the pledge theory.

At a recent maritime law conference in 2018, a Chinese speaker compared English and Singapore case law with Chinese law and then argued that the 'the pledge over accounts receivable can be established by shipowners' lien'.⁸⁴¹ Meanwhile, he also

⁸⁴⁰ Email from Jun Shen To Ms Shengnan Jia (9 July 2018)

⁸⁴¹ Xuan'ang Liu, 'Registration of the Shipowners' Lien on Sub-freight or Sub-hire and the Realization

acknowledged that the meaning of ‘account receivables’ was vague and the legal effect of the pledge ‘will greatly restrict the charterers’ ability to dispose of their properties freely before the crystallization’, in accordance with Chinese law.⁸⁴² However, under the existing system of security, the pledge on account receivables should be the most reasonable construction of the legal nature of sub-freight security.

Regardless of which of the above theories is workable in civil law, cases about the shipowner’s sub-freight security are rare. In other words, without cases it is difficult to test which theory is workable. Many maritime lawyers working in China were asked to discuss any such cases, but were unable to say that they had ever encountered any during their career. This situation is not unique to Chinese practitioners. In continental European countries, when facing disputes arising from charterparties, local lawyers normally refer these to London Arbitration and to English law rather than seeking answers from their own maritime or commercial codes. It is not therefore surprising that it is difficult to find a comprehensive discussion of the nature of sub-freight security. Whilst shipping practitioners applying the common law complain about the registration issue on sub-freight security, few civil law practitioners are concerned about this legal issue. Thus, from a practical point of view given, that English law dominates the dispute resolution of charterparties, it becomes necessary to explore the meaning of sub-freight security.

However, as argued in the introductory chapter, civil law jurisdictions are challenging the dominance of common law approaches by establishing new international commercial courts or arbitration bodies. It is to be expected that disputes arising from charterparties will be heard by these civil law courts or arbitration bodies and be governed by their substantive law. In the context of secured transactions law, as discussed for Dutch and Chinese law, existing legislation has provided a solution for

of Bankruptcy Claims—Also on Its Nature and Effect under Chinese Law’ (The Ninth International Conference on Maritime Law, Shanghai, October 2018)

⁸⁴²Ibid

the legal nature and effect of sub-freights interests. Resort to these approaches has been a result of the absence of chartering disputes. Neither lawmakers nor policymakers have received messages from shipping practitioners about how secured transactions law should affect the chartering industry, and it is uncharted whether the registration requirement ought to apply to sub-freight security. Nevertheless, it is sufficient to say that considerations of policy and commercial reality should be in line with the common law discussed above. Thus, there is no further discussion necessary.

4.3 Protection of the Shipowner by Civil Procedural Law

From the practical point of view, whether sub-freight security is a pledge on future claims is a less meaningful point. Even if English law is the governing law, prior to proceedings, shipowners will have started to seek claims from civil procedures.

Procedural law normally provides the system for the protection of claims, namely property preservation. In this system, the creditor is entitled to apply for retention of the debtor's property prior to or after the proceedings when the creditor is concerned that the debtor may transfer the property or may perform other adverse stratagems. Apart from the actual debtor, who is the charterer, an associated third party might also be involved, such as the sub-charterer. In a typical example, A is entitled to claim against B who opens an account with Bank C. In this case, A is entitled to apply to freeze B's account in Bank C. Nevertheless, whether Bank C pays money to A depends on whether it, Bank C, is entitled to exercise set-off. If B and Bank C have entered into a loan contract before the legal relationship between A and B, Bank C may exercise set-off against B. It can be seen in this example that a shipowner may file the sub-charterer's account as an effective way to force the sub-charterer to pay him for sub-freights.

In certain civil law countries, the Special Maritime Procedure Code is more powerful than the general procedural code. For example, in the Chinese Special Maritime

Procedure Code, the shipowner is entitled to file a maritime injunction. Article 51 of the Chinese Special Maritime Procedure Law provides that '[A] maritime injunction means any of compulsory measures by which a maritime court, on application by a maritime claimant, orders an act or omission by the party who opposes the claim, in order to protect the lawful rights and interests of the maritime claimant against any infringement.'⁸⁴³ Based on the maritime injunction, the maritime court may order the respondent to perform the obligation.⁸⁴⁴

In certain civil law jurisdictions, such as Dutch law,⁸⁴⁵ although the Special Maritime Procedure Code is absent, the Civil Procedure Code provides the similar provision like that in the Chinese law.

Procedural law was examined in Chapter 4 and it is therefore unnecessary to repeat this here. All in all, procedural law is simply an interim remedy. Under multiple charterparties, it is difficult for the shipowner to claim the sub-freights against all subsequent sub-charterers. Absence of registration in secured transactions law means that *droit de suite* and *droit de preference* are waived. This results in secured transactions law losing its legal effect.

5 Conclusion

This chapter has examined the extent to which the legal nature and effect of sub-freight security is influenced by secured transactions law. However, the answer has been shown not to be simple, because sub-freight security is not only a 'dead' clause in law; it is also a 'living' clause in the chartering industry. It means that this clause has a close

⁸⁴³ The Chinese Maritime Code 1992, Art 51 provides that 'A maritime injunction means any of compulsory measures by which a maritime court, on application by a maritime claimant, orders an act or omission by the party who opposes the claim, in order to protect the lawful rights and interests of the maritime claimant against any infringement'.

⁸⁴⁴ In Chinese maritime practice, the maritime injunction is not normally for sub-freights.

⁸⁴⁵ Dutch Code of Civil Procedure, Articles 475 to 479, and Articles 718 to 723

connection with the chartering industry. For this reason, the research question should be addressed from both law and industry perspectives.

In a legal context, although the legal tradition in common and civil law systems is different, two main viewpoints about the nature of this clause are in mutual agreement: contractual theory and proprietary right theory. At common law, contractual theory refers to the right of interception theory, while proprietary right theory denotes a floating charge. In civil law, they are an assignment of the contractual right (future claims) and a pledge on future claims or account receivables. As mentioned several times above, from the point of view of the structure of security on cargos and sub-freights, it is apparent that a contractual right cannot satisfy the shipowner's fundamental intention. The desired remedy is harder to obtain where the contractual right is confined merely to contracting parties rather than to other creditors. The floating charge or the pledge on account receivables therefore corresponds more accurately to the shipowner's will. This clause should be subject to the secured transactions law.

The difference between the two legal systems is that the legal nature and effect of this clause in civil law are uncertain because of the absence of authoritative judicial decisions and legislation. Procedural law can provide only an opportunity to exercise this clause. However, the specific character of a proprietary right such as *droit de preference*, disappears if this clause relies simply on procedural law.

Nevertheless, even if sub-freight security is a proprietary right, it simply affords a contractual solution to the shipowner. In accordance with the registration requirement of secured transactions law, the legal effect of this clause is therefore dependent on the completion of registration. However, the requirement of registration may cause difficulties for the shipowner if it is time-consuming, costly and commercially unrealistic. From a legal point of view, it cannot be ignored that the intangible right, like the debt-claim, is different from physical property that can be easily observed in

public. An intangible right as the object of the security is hidden, unless the parties intentionally disclose its existence. Thus, publicity might be the most effective approach. This also relates to the public interest.

However, when a requirement of secured transactions law is evaluated, the shipping industry must be allowed to influence policy and legislation. As discussed about Singapore law, following from the provision of the Companies Act, registration is not a mandatory requirement. In the context of the Singapore shipping industry, this legislation satisfies the public interest. Looking specifically at Singapore, due to the open ship registry policy of 1966,⁸⁴⁶ over three thousand vessels were registered there before 2010. Existing legislation removes the obligation on the shipowner to register and provides him with a ‘statutory’ floating charge. This legislation obviously reflects national policy, which in Singapore is disclosed to protect the shipowner registered there. This legislation also creates a preferential policy for other shipowners who have not registered.⁸⁴⁷ Thus, Singapore’s registration policy on the sub-freight security is compatible with its long-term governmental strategy, and there is an interlinked relationship between the shipping industry and the law is interlinked.

The nature of the chartering industry also determines that a sub-freight security is not a typical floating charge. It is unreasonable to have to comply with all requirements of a floating charge. When in the chartering industry a registration requirement in secured transactions law is not practical in the chartering industry and then the existing registration scheme, such as the Companies Act (UK), is inconsistent with the industry’s needs, it is not necessary to follow it.

In conclusion, the modern secured transactions law has impacted on the legal nature and effect of sub-freight security. Correspondingly, the nature of the chartering industry

⁸⁴⁶ Stig Tenold, ‘A Most Convenient Flag: The Development of the Singapore Ship Registry, 1969-1982’ (SNF Report 69/00, 2000)

⁸⁴⁷ Lianjun Li and Yang Liu, ‘Discussion on Legislation and Policies of Major Asian Shipping Nations and Regions for Promoting Shipping Business’ (2010) 21 (3) Annual of China Maritime Law 77, 77

should to some extent impact on the legal effect of sub-freight security. It is not therefore necessary to comply fully with the requirements of secured transactions law.

Chapter Six: CONCLUSION

1 Introduction

This thesis examined the concept, legal nature and effect of a traditional shipowner's lien in a standard charterparty form, as well as the development of the chartering industry and of modern secured transactions law. These examinations have provided the context and legal rationales for addressing the overarching research question presented by this work:

To what extent should the legal nature and effect of shipowner's contractual security in traditional chartering industry be influenced by modern secured transactions law?

This chapter aims to provide a persuasive and clear answer based on the previous chapters' arguments and demonstrations. In addition to identifying and addressing the legal issues arising from the existing legal context, this chapter proposes several solutions. Finally, it will point out future directions for further research.

2 Modern Secured Transactions Law and Shipowner's Security in the Traditional Chartering Industry

It is no simple task to determine the extent to which shipowner's security should or should not be influenced by secured transactions law, because both secured transactions law and the chartering industry are evolving. It is safe to say that the parallel evolution of these two fields together impacts on the shipowner's security. Furthermore, their impacts are constantly evolving. In situations where one's impact is more pronounced, the other's impact could be diminished. This thesis simply provides a general norm.

First, it was pointed out in Chapters 2 and 3, in the context of comparative law approach, that a preliminary discussion is required of the concept of shipowner's 'lien' as a security in two legal systems and of the salient features of this security in secured transactions law. Regardless of this initial discussion's contribution to the final outcome, the basic legal issues arising from the shipowner's security cannot be overlooked and they require analysis.

Based on this, Chapter 2 argued that the shipowner's lien, unlike a special maritime lien, should be subject to general commercial law. That Chapter then examined the concept of the shipowner's lien in common and civil law, and concluded that in common law the concept of the lien is complex and varied due to its pragmatic approach to law. Depending on the different categories, different liens including but not limited to common law lien, contractual lien, equitable lien, possessory lien and non-possessory lien can be found in a specific context. By contrast, in the civil law context, the English 'lien' can be translated as 'right of retention', which can be regarded as a possessory lien under English law.⁸⁴⁸ However, not every civil law country provides in its legal system for the right of the lien. In French and Dutch law, for instance, one can identify a concept similar to the English 'possessory lien'. Certain civil law jurisdictions do stipulate the right of the lien in the system of security interest, but this is not conceptually in line with that in English law. The most important thing is that the scope of civil law lien is very narrow. Its concept cannot match that of the lien in common law. It is thus apparent that the word 'lien' is an inappropriate and imprecise legal terminology if the purpose of this thesis is to examine the legal nature and effect of the shipowner's lien. ~~—in so far as its use in the lien clause is concerned; this has led to ambiguity.~~ In the face of such divergence, a review of the purpose of the shipowner's lien leaves little doubt that it is intended to provide an effective security mechanism in response to the charterer's default. This consensus in the two legal systems, it is

⁸⁴⁸ In English law, the right of retention does not amount to the right of lien. In this context, it simply points out that some civil jurisdictions consider that the right of retention can be regarded as the possessory lien. Please see the Chapter 2 for the details.

submitted, supports the use of the term ‘security’, as proposed by the present author in this thesis.

However, even if the proposed unitary approach is adopted, the principle of security interests in the two legal systems is not about to change. Chapter 3 examined the principles of party autonomy and of *numerus clausus* in the two legal systems. This Chapter pointed out that with regard to the shipowner’s security, two major legal phenomena, namely, property and contract, are involved. While the principle of party autonomy reigns supreme in the law of contract, its limitations and *numerus clausus* under property law, affect the shipowner’s protection and legal effect. From the secured transactions law perspective, combining a contractual solution based on party autonomy with a legal solution based on the limitation of party autonomy and *numerus clausus* is an approach to protect the shipowner and to achieve the legal effect of shipowner’s security.

Second, because the two types of shipowner’s securities were by their nature different, this thesis distinguished between cargo security and sub-freight security. The aim was to examine the impact of secured transactions law on the legal nature and the corresponding legal effect of the different securities. In particular, the function of party autonomy and *numerus clausus* in the law of security could be revealed.

In terms of cargo security, it was demonstrated that the development of the chartering industry gave rise to a review of the legal nature and effect of this security, which was additionally influenced by the theory of modern secured transactions. To demonstrate this argument, Chapters 4 employed an historical method to examine the origin and evolution of the cargo security. The outcome was that the legal possessory cargo security in a single charterparty is derived from usage of trade, and the possession requirement is traditionally unquestionable. However, after the growth of multiple charterparties, the legal nature and effect of the disponent shipowner’s cargo security

should be reconsidered in modern secured transactions law, because the disponent shipowner cannot possess the cargo physically. In accordance with the authorities,⁸⁴⁹ the English and Singapore courts held that the disponent shipowner's cargo security was not a conventional security interest, but its legal effect was similar to that of a security interest. Although the two authorities are in favour of the legal effect of the disponent shipowner's cargo security, it is arguable that the current authorities are not convinced as to the legal nature of the disponent shipowner's sub-freight security. If the legal nature is questionable, its legal effect is untenable. On the basis of this, the thesis re-examined the secured property in the disponent shipowner's cargo security. It was subsequently proposed that the secured property was an interest in the cargo and this interest amounts to a right of possession that does not derive from physical possession. In light of this rationale, this thesis found that an interest in cargo, as the secured property, could in modern secured transactions law be covered by a floating charge. The thesis furthermore argued that, in a closed circle including multiple charterparties' parties and bill of lading contracts', all parties should have sufficient knowledge of the disponent shipowner's charge on the cargo. The registration requirement in secured transactions law is therefore not necessary.

In the context of civil law, the above rationale proposed in common law is untenable, because civil law countries depend mainly on legislation to provide legal nature and effect. One should therefore examine that whether the theory of secured transactions law has been incorporated into legislation. However, the deficiency of the civil law approach is that, once the legislation is not comprehensive, the legal nature and effect of this clause will be uncertain. Section 5 therefore examines these differences in developed and in emerging jurisdictions.

Before doing that examination, the thesis investigated the nature of voyage and time charterparties. The reason for this is that some civil law jurisdictions, in comparison

⁸⁴⁹ *The Clipper Monarch* [2016] 1 Lloyd's Rep 1; *Five Ocean Corporation v Cingler Ship Pte Ltd* [2015] SGHC 311

with common law ones, hold different opinions regarding the nature of voyage and time charterparties, and this impacts on the legal nature of cargo security. A typical example is that the voyage charterparty in some civil law jurisdictions, including German law, Dutch law and Chinese law, counts as the carriage of goods contract, so that all shipowners in voyage charterparties count as carriers. When the voyage disponent shipowners wish to exercise their cargo security, regardless of whether they possess the cargo physically, legal cargo security is in theory feasible. However, their rights are derived from the carriers' cargo security. Conversely, the time charterparty is regarded as reflecting the nature of a 'lease' contract; a deep-rooted idea is that the time charterparty cannot have any connection with the carriage of goods by sea. If the time disponent shipowners wish to exercise their cargo security, they therefore have to claim constructive possession.

Within this context, both developed and emerging jurisdictions treat the voyage shipowner's cargo security as a legal security, regardless of the voyage shipowner or the voyage disponent shipowner.

In terms of the commercial code and secured transactions law of developed jurisdictions, such as under German law (in the German Commercial and Civil Codes), the theory of indirect possession in the law of secured transactions law has been incorporated into legislation so that either the shipowner or the disponent shipowner may resort to the relevant provision to exercise statutory cargo security. Given the judge-made law philosophy developed in the German jurisdiction, it is sufficient to assume that the law of secured transactions does not limit the creation of contractual cargo security.

Under an emerging legal framework, however, such as Chinese law (including the Maritime Code, Property Law and Contract Law), legislation is insufficient for protecting both a single charterparty and multiple charterparties. Whether the disponent shipowner's cargo security can be regarded as the statutory right is questionable in light

of the existing maritime code and secured transactions law. In addition, due to the impact of *numerus clausus* in secured transactions law, parties have no right to revise the cargo security.

In practice when the substantive law cannot provide a clear solution, the shipowner and the disponent shipowner have to depend on procedural law, namely Chinese Special Maritime Procedure Law, in order to exercise their rights. This special provision grants the parties a right to apply for property preservation, which is similar to the concept of an interim measure in common law.⁸⁵⁰ However, procedural law cannot provide a privileged right before the disponent shipowner's cargo security is recognised. With regard to the impact of modern secured transactions, it is safe to say that the theory of secured transactions law, such as the theory of indirect possession, favours the exercise of the disponent shipowner's cargo security, but there is still room for improvement in the legislation.

The above investigation of common and civil law demonstrates that the development of the chartering industry has raised a new legal issue regarding the legal nature and effect of the disponent shipowner's cargo security. This new legal issue can and should be addressed by secured transactions law. However, whether there exists an adequate solution depends on the comprehensive character of the legal framework.

In terms of sub-freight security, Section 2 of Chapter 5 demonstrated that the growth of multiple charterparties improved the expansion of the scope of secured sub-freights. This author suggests that sub-freights could be construed as a collective term including all sub-freights and/or sub-hires in any sub-charterparties. Section 3 investigated how the development of secured transactions law in common law had guided academic literature and the courts in probing into the legal nature of sub-freight security.

⁸⁵⁰ There is no specific definition of interim measure under Chinese law. However, the property preservation, the evidence preservation and the behaviour preservation provided by Chinese law exert a similar function, like the interim measure in common law.

Although the debate surrounding the right of interception and the right of a floating charge in relation to the nature of sub-freight security was still predominantly within only academic discussion, in common law jurisdictions such as the English and Singapore ones, courts had provided authorities that the sub-freight security should be regarded as a floating charge.⁸⁵¹ From the perspective of the function of a sub-freight security, a pure contractual right theory was untenable. Although there was not much debate on its legal nature, no consensus has been reached on whether its legal effect must comply with the registration requirement in secured transactions law. The Companies Act (UK) was in favour of the registration requirement, while Singapore law did not impose on the parties the obligation of registration. The different legislations were attributed to commercial realities and to policy considerations.

Within civil law, there is no case law or comprehensive research on the legal nature of sub-freight security. Taking German law, Dutch law and Chinese law as examples, it was proposed that the existing legislation in civil law jurisdictions had provided the pledge on future claims that was compatible with a floating charge on sub-freights. From the scope of the pledged property, modern secured transactions stimulated the expansion of the pledged property from current property to future property including future claims and account receivables. This situation should be attributed to the development of *numerus clausus*. In legal practice, however, because there was no relevant case that ruled on the legal nature of sub-freight security, this legal issue did not attract the attention of practitioners and academics. By reference to the judicial decisions in the Dutch and Chinese financial cases, the pledge on future claims was valid.⁸⁵² Whether the legal nature of sub-freight security can be construed as the pledge on future claims needs further evaluation by a competent authority. There is no doubt at the moment that contracting parties are entitled to apply procedural law to exercise

⁸⁵¹ *The Western Moscow* [2012] EWHC 1224 (Comm); *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another* [2018] SGCA 26

⁸⁵² ECLI: NL: HR 2012: LJN BT6947; *Liaoning Wufeng Agricultural Technology Co Ltd v Shengyang Branch of Industrial Bank Co Ltd* [2017] No.5014 Retrial

their sub-freight security rights. However, procedural law does not address the legal issue of *droit de suite* and *droit de preference*.

As far as sub-freight security is concerned, the impact of modern secured transactions law in common law supports the view that sub-freight security is a floating charge and in civil law provides the status that sees this security as a pledge on future claims. However, in order to give rise to the legal effect of a floating charge or a pledge, modern secured transactions law provides a legal requirement, namely the registration of the floating charge or pledge. Owing to commercial reality, lawmakers, scholars and practitioners in common law questioned the necessity of registration.⁸⁵³ This thesis argued that, apart from the consideration of commercial reality, the origin and function of a floating charge and of a pledge on future claims differ from those of sub-freight security. The former is used in company finance, having developed with industrial evolution and the demands of capital, whereas the latter is simply for improving the performance of a charterer's obligation. As far as company finance is concerned, the registration requirement is an effective approach for monitoring and reducing financial risk. However, sub-freight security emerges in a closed chartering circle. That is to say, 'the *raison d'être* of the system of registration was to warn unsuspecting creditors, whereas anyone dealing with a corporate charterer must know that it has created liens on sub-freight'.⁸⁵⁴ It is therefore not reasonable for sub-freight security to comply with the registration requirement. In concluding the discussion, this chapter has argued that the new form of secured transactions clarified the legal nature of sub-freight security as a floating charge or a pledge on future claims, but, because of the unique feature of the chartering industry, it was not necessary for the sub-freight security to comply with the

⁸⁵³ *Re Welsh Irish Ferries Ltd. (The Uglund Trailer)* [1986] Ch 471, 480; Aubrey Diamond, *A Review of Security Interests in Property* (HMSO 1989)111; Gerard McCormack, 'Registration of Company Charges: The New Law', (1990) 4 Lloyd's Maritime and Commercial Law Quarterly 520, 524; Indranee Rajah, 'Second Reading Speech on the Companies (Amendment) Bill 2018' Parliament Speech 2018, < [https://www.mof.gov.sg/Newsroom/Speeches/second-reading-speech-by-ms-indranee-rajah-second-minister-for-finance-on-the-companies-\(amendment\)-bill-2018-6-aug-2018](https://www.mof.gov.sg/Newsroom/Speeches/second-reading-speech-by-ms-indranee-rajah-second-minister-for-finance-on-the-companies-(amendment)-bill-2018-6-aug-2018) > accessed 19 December 2018

⁸⁵⁴ *Re Welsh Irish Ferries Ltd. (The Uglund Trailer)* [1986] Ch 471, 480; Diamond (n 853), 111; McCormack (n 85)524

legal registration requirement of the floating charge or pledge. Although advanced technology creates a cheap and convenient online registration system, such as WebFiling in the UK, it remains debatable whether the system can satisfy the requirement of the chartering industry. It was reasonable for the Singapore law model to remove the registration requirement for the sub-freight security, meanwhile recognising this security as the floating charge.

To sum up, regardless of common law or civil law, modern secured transactions law has affected the legal nature and effect of sub-freight security. However, it was demonstrated that the character of the chartering industry should to some extent affect the legal effect of this type of security. On this basis, this thesis suggests that the legal nature of the sub-freight security should be construed by the law of security, but its legal effect should be influenced by both the law of security and the nature of the chartering industry. To what extent the two fields should impact on this security is dependent to a great extent on policy considerations.

The shipowner's security, including the cargo and sub-freight security, is derived from the usage of trading in a traditional chartering industry. Along with the establishment of a comprehensive legal framework, this traditional security is incorporated into the security system. Its legal nature in modern secured transactions law should therefore be governed by the law of security. However, the impact of the chartering industry cannot be overlooked in considering the legal effect of this security. This thesis suggests that, if the legal effect of this security does not impact on public interests or intervene in the secured transactions market, its effect is not on the premise that it satisfies the legal requirement of secured transactions law.

From the viewpoint of comparative law, modern secured transactions law affects both common law and civil law. However, it is in common law where the relevant case law has reacted to the impact of security law, where there is no sufficient case law to witness

the impact in civil law. Thus, in accordance with the legislation and theory of security in civil law, there is no impediment to exercising this security, but how the court will construe the legislation in light of the principle of *numerus clausus* remains an issue.

3 Proposals

In Chapter 2, it was provided the sufficient ground on why this thesis employed the term ‘security’ to replace the term ‘lien’ by demonstrating that the word ‘lien’ in charterparties was a rather inappropriate and imprecise legal terminology in two legal systems. Furthermore, after reviewing the different legal natures of the shipowner’s security on cargo and sub-freights in Chapters 4 and 5, it was provided that it was important and necessary to avoid the use of ‘lien’. Whilst the shipowner’s security is widely accepted and employed in the chartering industry, in particular, along with the development of modern secured transactions, UNCITRAL has applied ‘a unitary, functional and comprehensive approach’ to diminish and eliminate divergence in the different concepts of securities.⁸⁵⁵ The unitary and functional approach means that research on secured transactions employs ‘a single, unitary concept of “security right”’.⁸⁵⁶ It is therefore proposed that the term ‘security’, which can sufficiently illustrate the purpose of the shipowner’s ‘lien’, should replace the term ‘lien’ in the chartering industry.

Further to the above proposal, this thesis proposes that this security be divided into two sub-clauses, each of which describes the purpose of parties and the different legal natures of security on cargo and sub-freights. First, it has been shown that the legal natures of security on cargo and sub-freights are substantially distinctive. Secondly, the legal nature of security on sub-freights is currently the subject of controversy. In common law, the right of inception theory in relation to its nature always exists,

⁸⁵⁵ Spyridon v Bazinas, ‘The UNCITRAL Legislative Guide on Secured Transactions and The Draft UNCITRAL Model Law on Secured Transactions Compared’ in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing 2016) 484-485

⁸⁵⁶ Ibid 485

whereas, in civil law, assignment theory in the law of contract might be applied. The structure of the German Commercial Code can serve as a useful tool for eliminating the unnecessary divergence, and provisions can be borrowed from this. Section 566 of the Fifth Book Maritime Trade provides for ‘disponent shipowner’s lien’ in time charterparties provides that:

‘(1) For his claims under the time charter contract, the Disponent Owner shall have a lien over the property on board the ship, including the fuel, insofar as such property is owned by the time charterer...

(2) For his claims under the time charter contract, the Disponent Owner shall also have a lien over the claims of the time charterer under contracts of carriage or sub-charter contracts which the time charterer has concluded and which are performed by using the ship...’⁸⁵⁷

Certainly, in the above provision, the term ‘lien’ should be replaced by the term ‘security’. Alternatively, to simply clarify the nature of sub-freight security, the clause can be drafted to stipulate that a shipowner has a security right on sub-freights that may be claimed or defended against the sub-charterer and/or other creditors after the shipowner has satisfied the legal requirement. It would be useful for parties to accept such a provision and to exercise it.

4 Further Research

4.1 The Civil Law Perspective

As illustrated in the introductory chapter, comparative research on common and civil law is based on the change of power of common law in maritime dispute resolution in recent and likely future years. The subject matter of this thesis, namely the shipowner’s security in charterparties, was selected for the principal reason that it was foreseen that

⁸⁵⁷ German Commercial Code, s 566

common and civil law in the domain of secured transactions law might generate similar impacts on the legal nature and effect of shipowner's security. In light of this rationale, Chapter 3 firstly demonstrated that shipowner's security was subject to contract law and to secured transactions law. Secondly, it showed that principles of party autonomy and *numerus clausus* operated together in secured transactions law. However, in Chapter 4 and Chapter 5, it was shown that common law and civil law always kept faith with their own approaches, respectively a pragmatic approach and a systematic approach. When the legal nature and effect of shipowner's security were influenced by the demands of the chartering industry, the response to this change was different in the two legal systems. In common law, the authorities could reconsider the legal nature and effect of this security on a case-by-case basis. By contrast, in civil law, where there was no relevant legislation, the legal nature and effect of shipowner's security presented uncertainty because there was no authoritative answer. In addition, the absence of judicial decisions in response to disputes about shipowner's security has meant that the uncertain consequences were more pronounced. The legal nature and effect of this security in civil law therefore needs future evaluation. This examination should depend on the occurrence of judicial decisions, if any, and reform of *numerus clausus*.

Another important aspect that should be evaluated in the future is the nature of the voyage and time charterparties. Compared with the common law regime, many civil law countries hold different opinions about the nature of voyage and time charterparties. The difference in these opinions influences to a degree the legal situation of, and legal effect on, the shipowner and disponent shipowner, as mentioned in Section 2. The typical example is that the voyage charterparty counts as the carriage of goods contract so that all shipowners in voyage charterparties count as carriers. When the voyage disponent shipowners wish to exercise their cargo security, regardless of whether they possess the cargo physically, the legal cargo security is in theory feasible. However, as far as a time disponent shipowner is concerned, the same approach for protection cannot be used. Although there was some space in this thesis for discussing this issue, the

comprehensive argument is largely inconclusive. Future work will therefore need to concentrate on this legal issue.

4.2 *Droit de Suite* and *Droit de Preference* against a Third Party

In Chapter 3 the security clause was construed from the points of view of contract law and property law. This thesis has also argued that *droit de suite* and *droit de preference* in secured transactions law can contribute to the legal effect of shipowner's security under multiple charterparties. However, it should be noted that the question as to whether a security interest is a kind of proprietary right is controversial. Some scholars contend that the nature of security interests is a proprietary right, even though, in comparison with a real property right, the security right is limited.⁸⁵⁸ Other scholars assert that the security interest cannot be directly regarded as a property or proprietary right. It is simply a contractual right. It can alternatively be regarded as a quasi-property right.⁸⁵⁹ This thesis did not leave space to discuss this issue. The present author simply argued that a security right is a kind of a proprietary right. However, whether the *droit de preference* and *droit de suite* arising from the proprietary right are enforceable is dependent on the status of this right compared with other property rights.

In this context, there is no further in-depth discussion of *droit de suite* and *droit de preference* and of their impact on a third party, including cargo owners and liquidators of charterers. For example, in some jurisdictions, such as China, the interest of cargo owners commonly has priority over the shipowner's security right. This thesis does not explore why the shipowner's right cannot be regarded as superior in rank. The issue is

⁸⁵⁸ Roy Goode, 'Security: A Pragmatic Conceptualist's Response' (1989) 15 Monash University Law Review 361; わがつま さかえ, *The Priority Position of the Creditor in the Modern Law* (Japanese; 近代法における債権の優越的地位) (Shujiang Wang tr, Encyclopedia of China Publishing House 1999) 50-51 and 98-101; Dekuan Liu, 'The Security: the Property Right or the Creditor Right' in Zheng Yubo (ed), *Thesis on Real Right in Civil Law II* (Wu-Nan Book Inc. 1985) 517-518. Steven L Harris and Charles W Mooney Jr, 'A Property-Based Theory of Security Interests: Taking Debtor's Choices Seriously' (1994) 80 Penn Law: Legal Scholarship Repository 2021, 2051

⁸⁵⁹ Tian Yin, *French Property Law* (Law Press China 1998) 49-50; David E Allan, 'Security: Some Mysteries, Myths, & Monstrosities' (1989) 15 Monash University Law Review 337

not addressed, mainly because this conflict in essence mirrors the internal conflict of property law between the security right and the real property right, which is not a direct concern of the chartering industry and secured transactions law. In the future it would therefore be useful to broaden the horizon of this research to examine to what extent property law should impact on the shipping industry.

4.3 The Impact of New Technology

As described in *Review of Maritime Transport 2018*, ‘technological advances in the shipping industry, such as autonomous ships, drones and various blockchain applications, hold considerable promise for the supply side of shipping’.⁸⁶⁰ Thanks to the impact of new technology on the shipping industry, a preliminary consensus has been reached between the shipping industry and legislators that ‘as the future of technological advances in shipping is being defined, and the maritime industry is leveraging technology to improve its services, the existing legal, policy and regulatory frameworks are being adapted and new frameworks written, as necessary, at both the national and international levels’.⁸⁶¹ Thus, it is important and necessary to explore the impact of new technology on the chartering industry and shipowner’s security.

Judging from current technological trends, it is expected that new blockchain technology will greatly affect the chartering industry and the shipowner’s security clause.

⁸⁶⁰ UNCTAD, ‘Review of Maritime Transport 2018’ (United Nations Conference on Trade and Development, 2018) <https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf> accessed 18 April 2019

⁸⁶¹ UNCTAD, ‘Review of Maritime Transport 2018’ (United Nations Conference on Trade and Development, 2018) <https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf> accessed 18 April 2019, 83; see also Francesco Munari, ‘Blockchain and Smart Contracts in Shipping and Transport: A Legal Revolution is About to Arrive?’ (14th Annual International Colloquium New Technologies and Shipping/Trade Law, Swansea, September 2018); Grant Hunter, ‘Smart Contracts: The BIMCO Experience’, (14th Annual International Colloquium New Technologies and Shipping/Trade Law, Swansea, September 2018)

‘The blockchain technology as a whole is about trust in transactions and contracts in a shared ledger framework where digital identity can be confirmed and will be used where there is a clearing or settling function to be undertaken, as is the case in any trade and transport transaction.’⁸⁶² Based on this rationale, ‘blockchain is a distributed ledger technology that enables peer-to-peer transactions that are securely recorded, as in a ledger, in multiple locations at once and across multiple organisations and individuals, without the need for a central administration or intermediaries’.⁸⁶³

In light of the above illustration, the chartering industry and security might be affected in several ways, as set out below.

First, when charterparty transactions can be recorded in the same system, the associated parties, including the shipowner, disponent shipowners, charterers, even shippers and consignees, are recorded and the various parties give notice each other. In this case, ‘blockchain has the potential to be used, among others, to track cargo and provide end-to end supply chain visibility; record information about vessels, including on global risks and exposure’.⁸⁶⁴ The controversy about a registration requirement in secured transactions law is then no longer present. If this tentative consideration is demonstrated by blockchain technology, it is sufficient to assume that the principle of secured transactions law might be developed as well.

Secondly, in view of the potential outcome that a central administration or intermediaries are then no longer necessary, multiple charterparties might be untenable in chartering industry because charterparty transactions become visible. However, this point is dependent not only on technology, but also on the commercial reality.

⁸⁶² UNCTAD, ‘50 Years of Review of Maritime Transport, 1968-2018: Reflecting On the Past Exploring the Future’ (United Nations Conference on Trade and Development 2018) <https://unctad.org/en/PublicationsLibrary/dtl2018d1_en.pdf> accessed 18 April 2019, 62

⁸⁶³ UNCTAD, ‘Review of Maritime Transport 2018’ (United Nations Conference on Trade and Development, 2018) <https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf> accessed 18 April 2019, 87

⁸⁶⁴ Ibid

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