

Are liens over sub-freights registrable charges under Singapore's Companies Act?

The Singapore Court of Appeal recently confirmed that liens over sub-freights are to be regarded as registrable charges under Singapore's Companies Act. This means that failure to register a lien means it will be void against the liquidator and any creditor of the company which granted the lien.

Background

Many charterparties permit the owner to exercise a lien over subhire or sub-freights in the event of non-payment of hire or other sums under the charter. This effectively gives the owner the ability to intercept any freight or hire payable to its charterer as security for unpaid hire. However, as a result of this recent judgment if an owner fails to register its right to a lien at the outset of a charter, it may be ineffective against creditors in the event of the charterer's insolvency. Members contracting with Singaporean charterers should therefore bear in mind this recent judgment and take appropriate steps in order to preserve this invaluable remedy.

There is uneven treatment of liens over sub-freight amongst common law jurisdictions. English courts have consistently held that such liens operate as a charge on the company and are void

against the liquidator in the absence of registration. In contrast, the Hong Kong legislature has expressly excluded the need for registration of liens over sub-freights.

The position in Singapore had not been determined until the recent decision of *Duncan, Cameron Lindsay and another v Diablo Fortune Inc* [2017] SGHC 172.

The Diablo Fortune case

Diablo Fortune Inc bareboat chartered the "V8 Stealth II" to Siva Ships International Pte Ltd. Clause 18 of the bareboat charterparty conferred on the owner a lien "upon all cargoes, sub-hires and sub-freights belonging or due to the charterers or any sub-charterers..." Siva sub-chartered the ship to V8 Pool Inc. After Siva failed to pay hire and filed a winding up application in





Singapore, the owner sent a lien notice to the sub-charterer. Siva was subsequently wound up.

The Court's judgment

The Singapore High Court was required to determine whether the owner's lien over sub-freight was a registrable charge under the Companies Act so that it might be enforced by the owner against the liquidator and creditors of Siva. The court held it was a registrable charge and, as it had not been lodged within the statutory period of thirty days after the formation of the charter, the lien was void. The owner appealed against the High Court's decision.

The Court of Appeal considered the owner's argument that the lien was a right to intercept the sub-freight before it was paid to the insolvent charterer and was therefore exempt from registration. It also considered whether the charge had to be registered upon giving notice of a lien, rather than upon the formation of the charter.

However, the court confirmed that liens on sub-freights fall within the definition of a floating charge under section 131(3)(g) ("a floating charge on the undertaking or property of a company") of the Singapore Companies Act and are required to be registered within the statutory period. The lien was therefore void for want of registration.

The court recognised that the requirement to register such charges was "hugely inconvenient and impracticable". However, absent any legislative reform, this commercial burden did not justify treating such liens as exempt from registration. Accordingly, the owner's arguments failed.

Conclusion

Following this judgment, Singapore's Ministry of Law has held a public consultation on proposed amendments to the Companies Act to exempt liens over sub-freight and sub-hire from registration requirements.

Meanwhile, in the absence of any legislative reform, the position in Singapore is now clear that should a Singaporean company grant a lien over sub freight, it is registrable under Singapore's Companies Act within thirty days of the formation of the charter. Failure to do so will mean that the owner will not have priority over other creditors but will only rank pari passu with all other unsecured creditors. The lien clause will therefore be effectively worthless. Similarly, as mentioned, where an English charterer is involved, any lien must also be registered in accordance with the Companies Act 2006, under English law.

From a broader perspective, the decision serves as a timely reminder for Members to carry out prudent pre-fixture enquiries into the market reputation and financial standing of their counterparties. Particularly in the current economic environment, where counterparty insolvency is relatively commonplace, Members would be well advised to ensure they comply with any formal requirement for enforcement of their rights. Although this may not be practical in every charter, it is suggested that Members should at least take these precautionary steps where the value of the contract is relatively large, where long-term charters are involved or where there is concern as to the counterparty's financial standing.

If Members have any queries relating to this judgment please contact the Managers.

The UK Defence Club