



BILLS OF LADING

Freight prepaid bills of lading

Executive summary

- A freight prepaid bill of lading issued in circumstances where freight has not been prepaid can have a detrimental impact on Owner's right to claim bill of lading freight from the consignee.
- The intended commercial function of a freight prepaid bill of lading is to assure the consignee that, as between the consignee and the carrier, no liability for freight can be asserted.
- The consignee may be able to defeat an otherwise valid claim for freight by an Owner (or possessory lien over cargo in respect of such freight) by claiming an estoppel as a result of the freight prepaid wording in the bill of lading.

- Freight prepaid wording in a bill of lading will not affect the liability of the shipper for freight where freight has not actually been paid.
- Freight prepaid wording will not affect an Owner's right to a lien on sub-hire, subcharter freight or sub-charter sub-freight arising under a charterparty lien clause where the sub-hire, freight or sub-freight has not, in fact, been paid and where the relevant Charterer has a right to claim the freight.
- Freight prepaid wording can affect an Owner's right under a charterparty lien clause to lien bill of lading freight under a Charterer's bill. A charterer may not have a right to claim unpaid bill of lading freight from a consignee under a charterer's bill of lading marked as freight pre-paid because of estoppel arguments. If the Charterer has no right to bill of lading freight, then there are no sums due to the Charterer for an Owner to lien pursuant to the charterparty lien clause.

A. Who is this guide intended for?

This article is written with the member, in-house claims teams or legal counsel in mind, or whoever else comes across 'freight prepaid' bills of lading.

For a practical explanation, we refer to our publication *'Practical Guide: Freight prepaid bills of lading'*.

B. What is a freight prepaid bill of lading?

The annotation 'freight prepaid' on a bill of lading is intended to show that the bill of lading freight has been paid prior to the cargo being shipped and the bill of lading issued.

A freight prepaid bill is in this respect different from other bills of lading such as those marked 'freight collect' or 'freight payable as per charterparty', where the freight is only payable at some point after the bill has been issued.

C. Use of freight prepaid bills of lading in sale and purchase arrangements

In the context of sale and purchase of goods, the requirement for a freight prepaid bill of lading can be a critical issue for both buyer and seller.

Where goods are sold on terms that the seller is to pay for carriage costs (such as cost, insurance and freight (CIF) terms), the buyer (or its financing bank) will want to know that bill of lading freight for the carriage has been paid by the seller. This is important for the buyer (or its financing bank) to know since the payment of the freight means that the carrier has been remunerated for the transportation and therefore will not seek to recover such costs from the buyer or exercise a lien over cargo to secure such payment.

As a consequence, sale contract and/or letter of credit terms can make the issuance of a freight prepaid bill of lading a condition of payment of the purchase price.

D. Why use a freight prepaid bill - protection for buyer/consignee

The advantages of a freight pre-paid bill of lading for a buyer/consignee are that this notation on the bill of lading may enable the buyer/consignee to avoid the carrier being able to exercise a possessory lien over the cargo (and refuse to give up possession of cargo) where freight for the cargo has not been paid.

The inclusion of the freight prepaid wording on a bill of lading may create an estoppel where the buyer/consignee has relied on the statement that freight has been paid. Such reliance may exist, for example, where the buyer makes or procures payment of the price for goods after receipt of a freight prepaid bill but would not have done so if it had known the freight was in fact unpaid.

Where an estoppel arises, the carrier is prevented from exercising rights (such as a possessory lien over cargo pending payment of freight) arising from the fact that freight has not been paid.

E. Bill of lading marked 'freight prepaid' but freight has not in fact been paid

The question arises as to how a bill of lading marked 'freight prepaid' is to be treated in cases where, in reality, the freight has not actually been paid.

(i) Knowledge of buyer/consignee

In a situation where the buyer/consignee knows that freight has not been paid, the estoppel will not be available since the buyer/consignee cannot be said to have relied on the freight prepaid notation in the bill of lading.

(ii) Shipper who has not paid freight but the bill of lading is marked 'freight prepaid'

A shipper of cargo under a freight prepaid bill of lading who has not paid freight is also unable to rely on the freight prepaid wording in a bill of lading to defeat a claim for freight by the carrier. This is because the shipper, as the paying party, is well aware that freight has not been paid and is not able to say that it relied on the freight prepaid wording.

F. Implications for the carrier

As can be seen from the above, issuing freight prepaid bills of lading can have a detrimental impact on the rights of an Owner where it might otherwise seek to rely on a possessory lien over the cargo or rights to claim bill of lading freight. This can affect rights that might otherwise arise under the bill of lading or charterparty.

By way of recap, there are a number of potential rights of lien that an Owner may seek to exercise where freight or charter hire has not been paid. The main point to bear in mind is that the Owner will usually, under English law, have distinct rights under the charterparty in relation to a possessory lien over a) the cargo on the one hand and b) a right to lien sub-hire, sub-freights or bill of lading freight on the other.

G. Freight - owner's bills vs charterer's bill

The starting point is that bill of lading freight is payable to the 'carrier'. Where the Owner issues the bills of lading (so-called 'owner's bills'), the freight is payable to the Owner, since the Owner is the carrier. Equally, if the charterer issues the bills of lading (so-called 'charterer's bills'), the freight is payable to the Charterer (and not to the Owner). The reason is that the Charterer is the carrier under a charterer's bill.

An Owner's rights to claim unpaid freight are not the same under owner's bills and charterer's bills so the distinction needs to be kept in mind when considering the impact of the freight prepaid wording.

H. Charterparty lien on sub-hire, sub-freight or bill of lading freight

It is common to find an express contractual provision in charterparties which gives the Owner the right - where hire or freight has not been paid under the Owner's charterparty with its Charterer - to serve a notice of lien on the a) Charterer's sub-Charterer or b) the shipper under a charterer's bill of lading. The lien notice will require that the sub-Charterer or shipper pay any unpaid freight or hire (up to the amount of hire or freight due but unpaid by the Charterer to the Owner) direct to the Owner. The Owner's exact rights to claim sub-hire, freight, sub-freight and/or bill of lading freight will depend on the exact wording of the relevant charterparty clause.

There are two general requirements for the Owner to have a right to exercise a lien under a charterparty lien clause. (1) There must be a present sum due and unpaid under Owner's charterparty with the Charterer. (2) There must be sub-hire, freight, sub-freight or bill of lading freight remaining to be paid under the relevant sub-charter or bill of lading.

(i) Freight paid prior to the date of the lien notice

Where sub-hire, freight, sub-freight or bill of lading freight has been paid before the date of Owner's lien notice, the Owner has no right to claim further payment by way of lien, irrespective of whether bills of lading have been marked freight prepaid or not.

(ii) Freight yet to be paid at the date of the lien notice

Where, however, sub-hire, freight, sub freight or bill of lading freight remains to be paid at the date of Owner's notice of lien, the Owner's ability to lien such sums depends - not on whether the bill of lading has been marked freight prepaid - but on whether the Charterer has a right to claim the sum from its sub-Charterer or shipper (see the *Nanfri* [1979]1 LR 201).

(iii) Sub-Charterers and shippers cannot rely on a 'freight prepaid' marking on the bill to defend Owner's lien over hire, freight, sub freight or bill of lading freight

It is only if the freight prepaid bill of lading could be used to defeat a claim for freight by the Charterer that the Owner's claim to lien (the sums due to the Charterer) will be compromised. The basis of any defence to Charterer's claim for freight (and therefore Owner's right to lien) arising from the issuance of a freight prepaid bill of lading is founded in estoppel (and therefore requires reliance on the freight prepaid wording). This means that the lien over freight payable to the Charterer by a) a sub-Charterer or b) the shipper under a charterer's bill of lading will not

be defeated by a freight prepaid annotation. The reason is that none of those parties can be said to have relied on the freight prepaid nature of the bill (as they know that the sum has not been paid by them).

(iv) Consignee under a charterer's bill (but not under an owner's bill)

It is only a consignee under a charterer's bill of lading (who does not know that the freight is unpaid and who relies on the freight prepaid wording) who may be able to avoid the lien (on the basis that it could avoid a claim for payment of bill of lading freight by the Charterer, as carrier, under the freight prepaid bill of lading by arguing estoppel).

It should be noted that the above discussion relates to Owner's rights of lien in respect of bill of lading freight under charterer's bills only. Where Owner's bills have been issued, the Owner has a different direct right to claim bill of lading freight and does not need to rely on the contractual lien in its charterparty with Charterers - see below.

I. Owner's bills - Owner's right to intercept bill of lading freight

Where a bill of lading has been issued on behalf of the Owner, as carrier (a so-called 'owner's bill'), the shipper's obligation to pay bill of lading freight is owed to the Owner. Where the Owner's vessel is on charter, the effect of wording such as 'freight payable as per charterparty' may operate such that the Owner directs that the payment of freight is to be made to the Charterer as Owner's delegate for receiving the freight. The authority of the Charterer to collect freight on Owner's behalf can be revoked at any time by the Owner before the freight has been paid and the Owner is then entitled to claim freight directly from the shipper under the bill of lading (see *MV Smart* [2021] EWHC 1157 moving away from the previously understood position under English law that an Owner would only be able to claim freight under an owner's bill if the Charterer was in default of its payment obligations under the charterparty).

If the shipper has already paid the bill of lading freight to the Charterer before the Owner revokes Charterer's authority and makes its claim, the Owner's right to claim freight from the shipper is lost. If the freight remains unpaid, an incorrect annotation in the bill that freight has been pre-paid will not defeat the Owner's claim against the shipper (the *Indian Reliance* [1997]1 LR 52 and the *Nanfri* (see above)).

J. Possessory lien over cargo

(i) Time charterparty

The fact that a time charterparty may include a right of possessory lien over the cargo for non-payment of hire will primarily affect rights as between the Owner and time Charterer. It is only if the lien clause from the time charterparty has been incorporated into the bill of lading that it will have any contractual impact on the holder of the bill and only then to the extent of the exact right contained in the clause.

As a starting point, where there is a chain of charterparties, it is more common for the terms of a sub-voyage charter to be incorporated into the bill of lading rather than the terms of the time charter.

If, however, the time charter lien wording has been incorporated into the bill of lading, the extent of that lien must be considered to determine whether it extends to a lien over cargo owned by parties other than the time Charterer¹. Absent clear wording, the court will be reluctant to find 'a right to seize one person's goods for another person's debt' (Turner v Haji Goolam [1904] AC 826).

Where the bill of lading does clearly incorporate a right to a possessory lien over cargo for non-payment of hire, then the existence or otherwise of freight prepaid wording will be irrelevant since the right to lien will be triggered by the non-payment of hire under the time charter. The status of freight payments are irrelevant.

(ii) Voyage charterparty

Where the bill of lading holder is not a party to the voyage charterparty

Generally, when exercising a possessory lien over cargo, the Owner is doing so by exercising a right of lien incorporated from the voyage charterparty into the bill of lading since the bill of lading holder is not a party to the terms of the voyage charterparty. Where common lien terms, such as that in the GENCON form² are involved, the freight in respect of which the lien is being exercised is the bill of lading freight (whether more or less than the charterparty freight).

As such, where the Owner has a right to exercise a possessory lien over the cargo as a result of unpaid freight, the relevant freight is that due under the bill of lading. That possessory lien can be defeated and the consignee can demand delivery of the cargo if there is no bill of lading freight outstanding. Equally, based on an estoppel

argument, a consignee can claim an estoppel defence to the lien where the relevant bill of lading has been marked freight prepaid but the bill of lading freight has not in fact been paid (where the consignee has relied on the freight prepaid reference).

The incorrect addition of a freight prepaid annotation accordingly has a significant impact on an Owner's rights of possessory lien where the shipper is not also a party to the voyage charterparty.

Where the bill of lading holder is a party to the voyage charterparty

If the Charterer is also the bill of lading holder, the governing contract of carriage is the voyage charterparty, rather than the bill of lading (which merely acts as a receipt). The applicable lien clause will therefore be the lien clause in the charterparty – and not the lien clause in the bill of lading. As the Owner will exercise its lien under the voyage charterparty in respect of voyage charterparty freight (and not under the bill for bill of lading freight), a freight prepaid annotation on the bill will not defeat the Owner's right to lien the cargo.

(iii) Common law lien

Finally, an Owner also has a common law lien in respect of freight payable under a bill of lading even in the absence of a contractual provision. That common law lien would be affected by the same difficulties seen in the voyage charter context if freight has in fact been paid or where (even though freight has not in fact been paid) the bill is marked freight prepaid and the consignee can rely on an estoppel argument to avoid the lien.

K. Can an Owner/Master refuse to issue a freight prepaid bill of lading

Given the potential implications for an Owner of signing a freight prepaid bill where there is a risk that freight has not been prepaid, the question of some importance is whether the Master can refuse to sign such a bill until the Owner is satisfied that freight has in fact been prepaid.

(i) Owned vessel

Where the Owner is trading the vessel for its own account, then the terms of the bill of lading will be within the Owner's control and a freight prepaid bill should only be issued where bill of lading freight has in fact been paid.

(ii) Chartered vessel

Where the vessel is under charter then the position is more difficult

¹ Clause 17 of the Baltime form of charter restricts the lien 'cargoes...belonging to the Time Charterers...'. Compare clause 18 of the NYPE 1946 form 'the Owners shall have a lien upon all cargoes... for any amounts due under this Charter...'

² Owners shall have a lien on the cargo for freight, deadfreight, demurrage and damages for detention.'

and may depend on whether the vessel is under time charter or voyage charter.

(iii) Time chartered vessel

Under a time charterparty, the Master is generally under the orders of the Charterers as regards employment (see clause 8 of NYPE 1946 as an example). In the absence of an express provision stating to the contrary, the Master is not generally able to refuse to sign a bill of lading marked freight prepaid when presented by the charterer for signature. Indeed, any such refusal could be considered to be a repudiation of the relevant time charter (see the *Nanfri*, above).

The exception to this would be in the (admittedly unusual) circumstances where the Master knows that freight has not been paid. It is a well-established principle that the Master is not required to sign a bill of lading which contains information that the Master knows is incorrect. As such the Master is not required to sign a bill marked 'freight prepaid' where the Master has knowledge that the freight remains to be paid. Indeed, were the Master to sign a bill of lading

knowing the content to be incorrect, then that may expose the Owner to liability to third parties who suffer loss as a result of the incorrect statement.

(iv) Voyage chartered vessel

In the context of a voyage charterparty - in the absence of express wording dealing with the issue of freight prepaid bills of lading (in this regard see clause 18 of the SYNACOMEX form requiring telex confirmation from Charterers that freight has been irrevocably transferred before freight prepaid bills are released) - the position is much less clear.

The discussion of this aspect in the principal practitioner text 'Voyage Charters (4th Edition)' at paragraphs 18.213 to 18.215 shows that there are conflicting decisions on the matter under English law and doubt will remain until the question reaches the English Court of Appeal or Supreme Court. Whilst this is clearly unsatisfactory from the perspective of commercial certainty, Owners would be advised to address this risk in their charterparty terms until there is clarity from the English courts.