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International Law Seminar

*Termination of contracts - Whether the economy can
create a force majeure situation*

The Danish and Scandinavian law perspective

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Topics

1. *Termination of contracts and “economic force majeure” under Danish and Scandinavian law*
2. *Owners’ lien in sub-freights*

Economic force majeure

- Can a drastic and unpredictable drop in prices and collapse of markets constitute an “economic force majeure” situation that may release a debtor from its obligations to fulfil a contract ?
- Even very significant increases - or drops - in prices of 400 – 500 % in war time does not, as a general rule, constitute a force majeure situation under general Scandinavian contract law.

Economic force majeure

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Economic force majeure - Shipbuilding contracts (1)

- **Arbitration award of 10 November 1959 – Compania Naviera Panamericana S.A. vs. Uddevallavarvet Aktiebolag**
- Contract for building of a tank vessel to be delivered 15 May – 15 June 1959 between a Swedish shipyard and a Panamanian Shipowner
- An unpredictable collapse in the international freight-market caused by the “Suez crisis” occurred in 1956 which resulted in a fall in freight rates from index 306 in December 1956 to 48 in December 1957
- The market price for a similar new building fell to 50 % of the agreed contract price
- The buyer annulled the contract with the shipyard with reference to “economic force majeure”

Economic force majeure - Shipbuilding contracts (2)

- *"The shipping trade is more than most other industries affected by changes in the general state of the market and the economy and of the consequences of complications in international politics. The drop in the freight-rates are, in terms of both its speed and its proportions, in a class of its own compared to other trades. These facts results in that contracts within the shipping trade has an element of speculation....
At the time when the contract was made the freight rates were extraordinary high for the worlds tank-fleet. Everybody within the business must have been aware that this extraordinary situation in the tankmarket was not likely to continue"*

Economic force majeure - Shipbuilding contracts (3)

- ***Arbitration award of 30 May 1975 - A/S Akers mek. Verksted vs. Hilmar Reksten***
 - *“The Owner has not claimed that the collapse of the freight market and the decrease in the value of ships was a failure of a basic assumption on which the contract was based. In the opinion of the tribunal any such claim would, if it had been submitted, not have been successful, cf. arbitration award [of 10 November 1959]”*

Economic force majeure – T/C-parties (1)

- **Section 391(4) of the Danish Merchant Shipping Act**
- *“The [Owner] shall be entitled to damages unless the time charterer shows that the delay in the payment was due to an interruption of communications or transfers of payment or some other hindrance beyond the control of the time charterer and which the time charterer could not reasonably have been expected to foresee at the time of the conclusion of the contract...”*

Economic force majeure – B/B-charterparties (1)

- **Arbitration award of 29 May 1974: Rolf Wigands Rederi A/S, Norway vs. Molena Trust Incorporated.**
- *The parties agreed in 1968 on a 10 years B/B charter for the vessel "Rolwi".*
- *It was agreed that the charterers should have a the right to buy the vessel after 5 years and that the price for the vessel at that time should ensure Owners a fixed profit of US\$ 600,000.*
- *Charterers exercised its right to buy "Rolwi" in 1973 where the exchange rate between NOK and US\$ had depreciated with 48 % due to an unpredictable devaluation of the US\$ which resulted in that Owners would earn no profit but suffer a loss on the contract.*
- *Owners claimed that Charterers should compensate its loss.*

Economic force majeure – B/B-Charterparties (2)

- *“The thought that a devaluation of US\$ in relation to NOK could occur seems not to have given any attention by either of the parties. The Owners were likely of the opinion, like so many others in Norwegian shipping, that the US\$ had been stable for so many years and that the American economy seemed so strong that a devaluation of US\$ was not possible to occur. It is correspondingly mentioned by Owners that clauses relating to rates of exchange were not, at that time, inserted into contracts in US\$ because making an agreement in US\$ was, a such, considered as an assurance against any currency risk.”*

Lien in sub-freights (1)

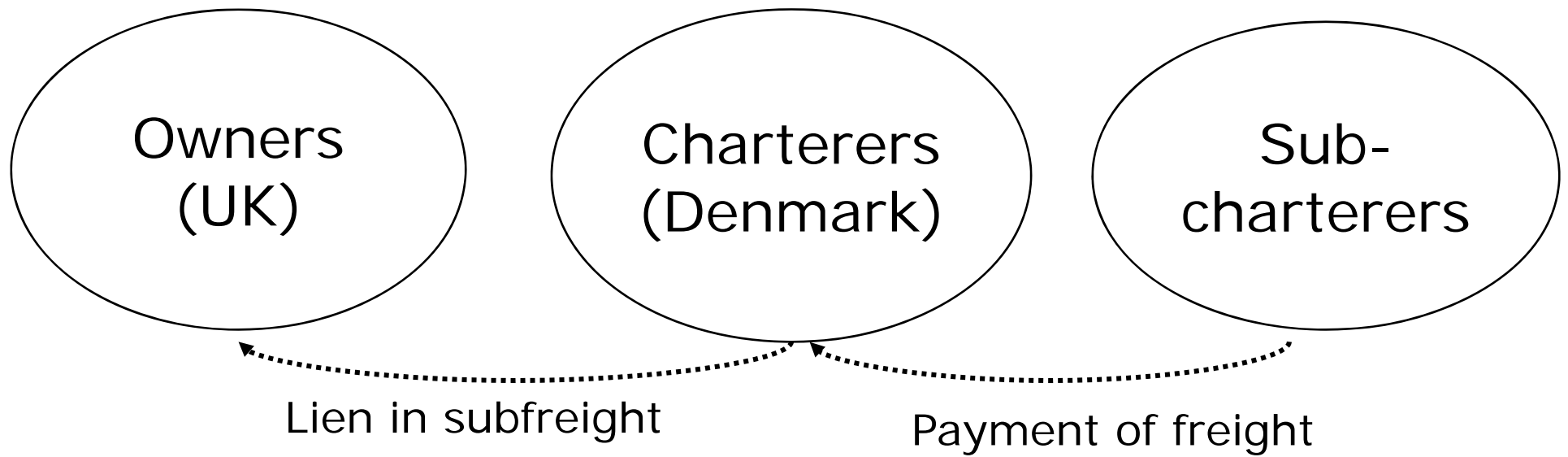
- **“BALTIME 1939” Uniform Time-Charter (as revised 2001)**

“Lien

The Owners shall have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter...”

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Lien in sub-freights (2)

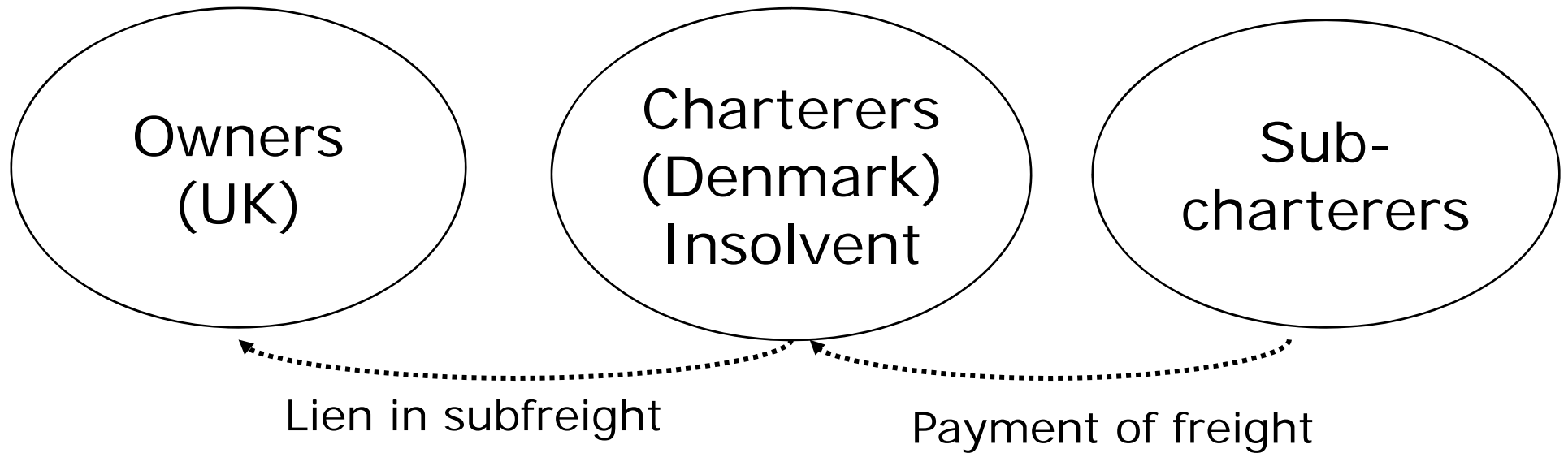


Lien in sub-freights (3)

- Danish Insolvency Court order has, subject to Danish law, a global legal effect and comprises all assets of the debtor worldwide
- Recognition ?
- The insolvency extinguishes (renders void) a right of lien (and other rights of security) if the “act of perfection” applicable to the particular security right has not been carried out prior to the declaration of bankruptcy
- What is the “Act of Perfection” with respect to lien in freights?
- International private law - what law is the proper law of the “Act of Perfection” ?

Lien in sub-freights (4)

Notification to sub-charterers about lien in subfreight



Lien in sub-freights (5)

- Is Owners' lien right in sub-freights voidable under Danish law? - Only If:
 - The "act of perfection" was carried out later than 3 months before the charterers' declaration of bankruptcy; and
 - The "act of perfection" was not carried out without "undue delay after the debt to Owners was established".