COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

DOCUMENTS

1 à/to 15

NEW YORK

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

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MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

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MARITIME LIENS AND MORTGAGES

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Preliminary Report and Questionnaire

International Convention 1926

INTERNATIONAL SUBCOMMITTEE
ON
MARITIME LIENS AND MORTGAGES

PRELIMINARY REPORT AND QUESTIONNAIRE

Introductory Remarks

1. Cases involving maritime liens and mortgages may show a large number of international aspects. In fact, such cases are apt to possess more international aspects and more international connecting factors than almost any other maritime situation. With respect to one and the same ship the mortgage and lien creditors may each have a different nationality, while the mortgages and liens may each have accrued in a different country or, as far as liens are concerned, on the high sea. A ship may subsequently have changed its « nationality » either before or after the several liens against it have accrued; likewise mortgages on such ship may have been registered before or after it changed its « nationality ».

Finally, it often happens that a ship is arrested and sold in the jurisdiction of a country which is foreign to all the elements set out above (country of registration or flag of the ship, country in which liens accrued, nationality of mortgagees and lien creditors).

2. As is shown by its name, the International Convention for the unification of certain rules relating to maritime liens and mortgages and the Protocol of signature both signed at Brussels on April 10th, 1926, represented an attempt to create international uniformity in this field.

Until today this convention has been ratified or adhered to by nineteen States, namely Argentina, Belgium, Brazil, Denmark, Spain, Estonia, Finland, France, Hungary, Italy, Monaco, Norway, Poland, Portugal, Roumania, Sweden, Switzerland, Syria and Turkey, of which States Estonia ceased to exist as an independent sovereign nation.

However, a number of important maritime countries, such as Canada, Germany, India, Ireland, Japan, the Netherlands, Russia, the United Kingdom and the United Sates decided to remain outside.

For this reason, it cannot be maintained that the 1926 Convention fulfilled the hopes with which it was greeted at the time of its adoption.

3. Outside the Convention, that is to say when a ship is arrested and sold in the jurisdiction of a *non-Contracting State,* the problems of conflict of laws that may arise in connection therewith and with the distribution of the proceeds of the sale, are generally decided in accordance with the Private International Law of the « forum » and with the particular municipal law applied by the « forum », irrespective of the flag or nationality of the ship concerned.

The same will occur whenever a ship flying the flag of (« belonging to ») a *non-Contracting State,* is arrested and sold in the jurisdiction of a *Contracting State,* unless under the municipal law of the « forum » the provisions of the Convention or similar provisions of national law should be applicable to such case.

4. This situation might perhaps be acceptable, if the municipal law of the maritime countries on maritime liens and mortgages would be more or less the same or if the rules of conflict of laws obtaining in these countries would on the whole be similar. Unfortunately this does not seem to be the case. Apart from certain ancillary questions which will be shortly referred to hereunder, the two main problems with which maritime creditors are faced are those relating to recognition and enforcement of « foreign » mortgages and more especially of « foreign » liens and to ranking. In the Courts of many countries both problems are solved in different ways leading to varying results. Under these circumstances the protection granted by liens and mortgages will differ depending on the country in the jurisdiction of which the ship concerned is arrested and sold.

5. This divergence in the judicial decisions given by the Courts of the numerous countries involved may in part be explained by the varying legal concepts adhered to under the domestic law and under the Private International Law of the « forum ». On the one hand we find a generous application of foreign law, on the other a restriction of that application by reason of the public policy of the country of the Court seized or as a result of other juridical concepts obtaining in that country. In some countries, such as England, although in principle both foreign mortgages and liens are recognised, yet the enforcement thereof is intimately connected with problems of jurisdiction and is considered in toto as forming part of procedural law, while in other countries both recognition and ranking are classified as being matters of substantive law. Another complication is due to the fact that the categories of claims giving rise to maritime liens differ from country to country. Again the domestic law of certain countries recognizes certain rights in ships, not being maritime liens, as for instance the English possessory lien of shipwrights and port authorities which is a

common law lien and which under certain conditions ranks higher than all maritime liens. Finally, the domestic law of certain other countries seems to discriminate against the rights of foreign creditors, specially creditors of mortgages registered elsewhere, in favour of their own nationals.

6. Since the second World War, there has been an increasing need for the financing of ships and especially of new buildings. Large amounts are lent to shipowners against mortgages both on ships being operated and on ships under construction. In many cases these latter mortgages are intended to survive in some form or other after the delivery of the ship to her owner.

Considering that under the law of many countries most liens override mortgages, as far as priority is concerned, banks and other financial institutions which are prepared to put up the funds required, find themselves in the invidious position that the greater or smaller value of their security may depend on the country in which they will have to enforce this security. More often than not the choice of that country is not theirs, but is determined by some other creditor, either a lien creditor or sometimes even an unsecured creditor, who has arrested the ship in one of the world's ports. The same applies to those Governments who owing to economic circumstances or under their national policy find themselves copelled to grant loans to shipowners or to guarantee such loans granted by third parties. The same may also apply to creditors of socalled contract liens.

The above considerations induced the Bureau Permanent of the Comité Maritime International to take up the study of this subject and to see what could be done to improve the present situation.

Further contents of this Report

7. In so far as the undersigned is aware, the topic of maritime liens and mortgages has been not discussed on an international level since 1926. Anyway, the Comité Maritime International did not study the subject since that year, except in so far as mortgages on ships under construction are concerned which were dealt with in the draft convention on registration of rights in respect of ships under construction which draft convention was adopted at the Stockholm Conference of 1963.

This means that in the first place the parties interested such as banks and other financial institutions, public authorities, shipowners, ships' masters, officers and crews, salvors, passengers, marine underwriters and possibly others such as shipwrights, suppliers etc. etc. should pronounce themselves on the preliminary question as to whether,

under the present conditions, there exists a need for further international legislation in this field. This is the first question to which the national associations will be asked to supply the answer.

Supposing the answer to the preliminary question to be in the affirmative, the national associations will be asked to express an opinion on the principles on which the new international rules should be based.

In order to facilitate the study of these matters, it was thought advisable to start by listing a number of points with respect to which the 1926 Convention does not meet with the requirements of modern conditions.

Next this Report will contain certain tentative suggestions which are intended to show a possible way, in which international agreement on this complicated subject might perhaps be arrived at, without however pretending to represent anything like proposals.

Thirdly, the attention of the national associations is drawn to certain matters which are ancillary to or related with the field of maritime liens and mortgages, matters which may or may not be included in the new convention (1).

Finally, this Report ends with a questionnaire, the replies to which may enable the International Subcommittee to study the possibility of securing sufficient international agreement, so as to warrant the preparing of the draft of a new convention and of a report to be submitted to the next Conference of the Comité Maritime International.

The 1926 Convention

8. The fact that this Convention has been the subject of an ever increasing number of criticisms of a varying and sometimes conflicting nature and that these criticisms are being voiced, not only in countries which did not accede to it, but also in those which became parties thereto, seems to indicate that the Convention does not meet with present time requirements.

It may be useful to set out hereunder, by way of illustration and without commenting thereon, some of the points which according to the opinions expressed in countries of either category, call for improvement.

a) The liens referred to in Article 2, sub-paragraph (5), namely liens securing « claims resulting from contracts entered into or acts

(1) The words « new convention » used here and subsequently denote either a new Protocol to the 1926 Convention or the revised text of that Convention or an entirely new international treaty which would replace the 1926 Convention.

« done by the master, acting within the scope of his authority, away « from the vessel's home port, where such contracts or acts are neces- « sary for the preservation of the vessel or the continuation of the « voyage, whether the master is or is not at the same time owner of « the vessel, and whether the claim is his own or that of ship-chandlers, « repairers, lenders, or other contractual creditors » (1) take precedence over mortgages (2).

Already in 1926 doubts were expressed with regard to this rule. Nowadays, where the shipowner is in daily contact by wireless or telex with the master of the ship and his (the owner's) agents all over the world, as a result of which the shipowner is in a position to have the « contracts » referred to in Article 2, sub-par. (5) concluded in his own name and where moreover the creditor may secure payment by other means such as, for instance, a bank guaranty, there seems to be no justification to have the liens concerned take precedence mortgages (hypothecs).

b) The Convention recognises (creates) too many liens thereby reducing the security of mortgagees.

c) The Convention takes away what under the domestic law of certain maritime nations are called the rights of possessory lien creditors, which rights include, inter alia, a right of retention with respect to the ship.

A possessory lien should be granted to shipwrights.

d) The Convention does not preclude Contracting States from creating or maintaining in their domestic law a right of retention, also in so far as such right does not grant to the creditor a lien proper. As the present circumstances do not justify the maintaining of this right, the Convention should forbid the Contracting States to create or maintain the right in their municipal law.

e) Liens against freight should be abolished, as it reduces the security of the creditor having granted a loan to the shipowner against an assignment of freight (charterhire).

f) The provisions of the Convention relating to liens against freight have been badly drafted and require revision.

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(1) The only authentic text of the Convention is the French text. The above quotation and any further references to the wording of the Convention are taken from a translation published by the Belgian Ministère des Affaires étrangères et du Commerce extérieur.

(2) In this report the word « mortgage » refers to both maritime hypothecs (or hypothecations) as known in the law of many Continental countries and the maritime mortgages of Anglosaxon law, and similarly the word « mortgages » denotes the creditor whose claim is secured by such hypothec (or hypothecation) and the holder of an Anglosaxon maritime mortgage.

g) The system of ranking « per voyage » which is set out in Article 5 and Article 6 of the Convention needs to be reconsidered and improved, as it has led to conflicting interpretations. In particular, the concept of voyage is ambiguous and would need clarification.

h) It is to be regretted that the Convention does not contain provisions dealing with the position of carterers of socalled « longterm charters » (vide : § 14 of this Report).

i) The Protocol of Signature which states that it has the same force and the same value as if its provisions were inserted in the text of the Convention itself, entitles the legislature of each Contracting State to change to a certain extent the order of priorities set out in the Convention and to recognise or confer certain liens other than those recognised by the Convention. The Protocol may therefore disturb the international uniformity which is aimed at by the Convention.

The Protocol should therefore be abolished.

j) Article 9, dealing with the extinction of liens against a ship is incomplete, in that a number of causes of extinction are not mentioned therein and are therefore subject to the municipal law of each of the Contracting States. The following possible causes of extinction of liens are not mentioned in the Convention, namely :

i) change of flag or registration of the ship in the register of another country;

ii) requisition of the ship by the authorities of any country;

iii) deregistration of the ship without a subsequent re-registration in the same or in another country; this may happen when the ship is deregistered in connection with her being broken up;

iv) the constitution by the shipowner of a limitation fund either under the Convention relating to the limitation of the liability of owners of sea-going ships of 1924 or under the Convention of 1957, or under the applicable domestic law of any country whether or not being a party to the 1926 Convention;

v) the sale of the ship by the Order of a Court of a non-Contracting State.

k) Article 9 further provides that the grounds upon which the periods of extinction of liens may be interrupted are determined by the law of the court, where the case is tried, while the last paragraph of this article states that the Contracting States may provide in their domestic law for an extension of said periods under certain circumstances which are set out in that paragraph.

It is felt that this interruption should also be a matter of uniform international law and should not be left to international law.

l) Under the Convention the interruption of the period(s) of extinction of liens should be wholly abolished.

m) Article 4 dealing with « accessories » should be reconsidered and revised.

n) The drafting of a number of provisions of the Convention is defective, such as

i) the description of the liens in Article 2 which in certain respects is not clear;

ii) the use of the word « accessories » in Article 4 to denote certain claims of the shipowner, is incorrect as in the law maritime that word has an entirely different meaning;

iii) the expression « other accident of navigation » used in Article sub-paragraph 4°) is ambiguous,

etc. etc.

Method of arriving at an improvement of the present international situation

9. Having regard to the practically universal dissatisfaction with the 1926 Convention which dissatisfaction is felt also in many of the countries which acceded tot his Convention, it does not seem doubtful that there would be reason for improvement.

The method, whereby such improvement should be attempted and which would be in accordance with the age-old traditions of C.M.I., would be the elaboration of a revised set of rules of *uniform* law.

These rules should encompass and give *uniform solutions* to as many as possible of the problems actually existing and experienced. The most important of these problems are those which relate to the international recognition of liens and mortgages and the respective priorities as between registered mortgages « inter se », as between liens « inter se » and as between mortgages and liens.

Other problems, however, some of which have already been referred to in paragraph 8 of this report, also call for improvement or require new international uniform rules dealing therewith. In this field, where creditors whose claims have different priorities, compete in the distribution of one particular sum of money (the proceeds of the sale of a ship), any gap in the uniform rules to be applied may lead to discrepancies in the treatment of the claims concerned, depending on the country in the jurisdiction of which the ship is sold and the proceeds of the sale are to be distributed, thereby affecting the security of the claims of one or more of such creditors. Thus, the result sought, namely the international uniform protection of the different categories of creditors concerned, would not be arrived at.

When considering the drafting of a new Convention, it should be borne in mind that in 1964 the situation with respect to maritime liens and mortgages is vastly different from the one in which the 1926

Convention was adopted, in as much as since the end of World War II the importance of maritime mortgages and of the sums involved therein have far outgrown the amounts of claims secured by maritime liens, whereas in 1926 it was the international recognition of these liens and therefore the international protection of lien creditors that were considered as being of the same, if not of greather interest than the security afforded by maritime mortgages. Having this in mind, it may be necessary, firstly, to further restrict the categories of maritime liens and, secondly, to forbid as between Contracting States any discrimination against foreign registered mortgages, in order to satisfy the requirements of the largest possible number of maritime countries.

It is only when it should appear absolutely impossible to reach international agreement on one or more points which, although of minor importance, yet should nevertheless be dealt with for the reasons mentioned above, that recourse should be had to formulating rules of conflict of laws, but only as a last resort.

10. There is no need to stress that one of the main objects of the work to be undertaken, will be to obtain support for the new Convention from as many nations as possible.

To what extent such support and international agreement will be gained and what be the substance of that agreement with respect to the numerous questions involved, will depend on a number of factors which can only be ascertained after the national associations will have given detailed answers to the questions contained in the questionnaire. It would therefore be useless to attempt to give already at this stage any concrete suggestions with regard thereto.

Ancillary and related questions

A. Effect of a change of the national registration (the flag) of the ship

11. This situation which presents an important problem, is not provided for in the 1926 Convention.

The situation may occur, not only when a ship in operation is deregistered in one country in order to be registered in another, but also when, upon her construction being terminated, she is delivered to a foreign shipowner.

In reviewing this situation, it is to be supposed that both before and after the change of the country of registration mortgages have been effected and liens have accrued. Moreover, it may happen that under the municipal law of a given country this deregistration and reregistration are effected without the mortgages having been notified thereof and their consent having been obtained and without lien creditors being aware thereof.

The first question which arises in this respect is whether mortgages which were registered and liens which had accrued prior to the de-registration of the ship, should survive this de-registration. Should this system be adopted, the change of flag would not affect either the international recognition of the rights concerned nor their respective priorities, *provided* that both countries concerned were Contracting States.

Should another system be adopted, it would be necessary to set up rules which in the event of a change of flag would give sufficient protection to the creditors whose rights existed prior thereto.

A problem which is not so easy to solve, presents itself when of the two countries of registration one should be a Contracting State and the other a non-Contracting State.

Nevertheless also this contingency should be provided for in the new Convention.

B. Extinction of liens and mortgages

12. Apart from the extinction of liens by lapse of time or through other causes to be stated in the new Convention, it seems desirable to provide that the sale of a ship flying the flag of one of the Contracting States by the order of a Court of a Contracting State and the distribution of the proceeds of that sale among the interested parties, including all mortgages and lien creditors, will at any rate have the effect of all mortgages, liens and other rights on the ship as existing at the date of sale being definitely extinghuished (1).

The question, however, arises whether some sort of provision should not be worked out with respect to the sale of a ship by the order of a Court of a non-Contracting State. Supposing that the ship sold flew the flag of a Contracting State, would such sale have the same effect with respect to liens and mortgages as when she would have been arrested and sold within the jurisdiction of a Contracting State ? The practical importance of this question is illustrated by the recent English case of « The Acrux » (Lloyd's Rep. I 1962, 405).

C. The draft convention on registration of rights in respect of ships under construction

13. This draft convention provides international uniform rules with respect to registered rights (especially registered mortgages) on ships under construction, which topic is not dealt with in the 1926

(1) In this connection reference is made to Article VII of the Geneva Convention of the 19th June, 1948, relating to the international recognition of rights on aircraft.

Convention or in any other international instrument. The main purpose of this draft convention is to arrive at international recognition of such rights and to make it possible for the rights concerned and more especially for mortgages to remain in force after the ship will have been delivered by the yard to the shipowner and as a result thereof will have been registered in a country other than that in which the shipyard is situated. For that purpose article 9 of the draft convention provides that registered title and mortgages shall, on registration of the ship in another Contracting State, be registered in the register of the latter State, retaining the priority resulting from the original registration, while, if these rights should not comply with the statutory requirements for registration of the national law of that other State, the legal effects of the original registration shall remain in force during a period of sixty days as from the deregistration of the ship from the register of the country of the shipyard, thus giving the mortgagee and the shipowner sufficient time to effect the registration of the mortgage in the foreign ship's register.

Doubtless a convention of this kind would strengthen the international position of mortgagees of mortgages on ships under construction in that they would acquire a larger measure of certainly of survival of their security. On the other hand, once the ship will have been put into operation, the mortgagee will be faced with all the problems already described, since the draft convention deals exclusively with registered rights. Consequently, maritime liens including liens accrued prior to the delivery of the ship to the shipowner, such as a lien accruing upon a collision of the ship under construction or during her trials, are outside the scope of the draft convention. The question, how such liens or further liens accruing after said delivery should rank with respect to the mortgages effected on the ship during the construction period, remains therefore unanswered.

For these reasons it would seem highly desirable if not imperative to incorporate the essence of the Stockholm draft in the new convention which should apply to all maritime liens and mortgages irrespective whether they accrued or were effected during the construction period or subsequently.

D. Long term charters

14. Nowadays the financing of ships, and more especially of new buildings, is often secured by an assignment of the charterhire due to the shipowner under long term charters concluded by the shipowner with third parties. In many cases such assignment is considered as constituting a better security than a registered mortgage.

In as much as an international convention on maritime liens and mortgages deals primarily with matters concerning security, it may

be asked whether such convention should not include provisions relating to the international recognition of the rights concerned and moreover relating to the effect of a voluntary sale or of a sale by order of the Courts of one of the Contracting States on these rights. Here also reference is made to the above-mentioned Geneva Convention of 1948.

Considering that this topic is already being dealt with by another international subcommittee of C.M.I., and on a wider scope, it may be sufficient at this stage to draw the attention of the national associations to this topic, without an attempt being made to explore in this Report the problems connected therewith.

E. Necessity of avoiding discrepancies between the new Convention and the 1957 Convention on Limitation of the Liability of Shipowners.

15. While article 3, 2°) of the 1957 Convention provides that in each portion of the limitation fund set up under this Convention the distribution among claimants will be effected in proportion to the amounts of their respective claims, article 4 and article 7 of the 1926 Convention seem to establish, at least by implication, the right of lien creditors to share in such fund, due regard being given to the rank of their claims.

Although it would be difficult to imagine that these seemingly conflicting previsions could in practice ever give rise to difficulties, yet it would be a wise precaution to avoid such conflict when preparing a new convention. This may be done by stating in the new convention that, in the event of the distribution of a fund as aforementioned, the creditors sharing in the fund will do so « pari passu » without being entitled to any priority resulting from the liens securing their claims.

Questionnaire

I. Is it your opinion that new international legislation relating to maritime liens and mortgages would be necessary or desirable ?

II. a) In what respects does the 1926 Convention need to be improved ?

(to be answered by each national Association, the country of which has acceded to the Convention)

b) Same question, but to be answered by all other national Associations.

III. a) What would in your opinion be the requirements of a new convention ?
More specially :

b) Are you in favour of the new Convention providing for rules of uniform law with respect to all the problems mentioned in this report or to as many as possible of these problems ?

c) Are there any other problems in this field which are not dealt with in this report which in your opinion are susceptible of international uniform legislation ? If, so, please state such problems.

IV. Supposing that a new draft convention containing uniform provisions were adopted, then :

a) would you be in favour of an international recognition by all the Contracting States of maritime mortgages duly entered in the public register in which the ship is registered;

i) when the country of registration should be a Contracting Sate, and

ii) when this country should be a non-Contracting State ?

b) Should in your opinion the categories of claims giving rise to maritime liens, as set out in Article 2 of the 1926 Convention

i) be restricted and, if so, how; or

ii) be maintained, or

iii) be extended, and if so, to which other claims ?

c) Do you not agree that at any rate the claims referred to in Article 2, sub-paragraph 5°) should not be secured by any lien ?

d) Which should be the rules of the new convention that govern priorities :

i) as between registered mortgages « inter se »;

ii) as between registered mortgages and liens, and

iii) as between liens « inter se » ?

e) Should international recognition be granted to rights on ships other than maritime liens proper, as for instance the English possessory lien or a right of retention not giving rise to a lien ?

f) If so, what should be the priority, if any, to be granted to such rights ?

g) Or should the new convention forbid the Contracting States to maintain or create such rights in their municipal law ?

h) Should or should not the Contracting States be allowed to grant in their domestic law liens in respect of claims other than those to be listed in the new convention, even if such liens should be postposed to all registered mortgages and to all the liens listed ?

i) Do you agree that under no circumstances the Contracting State should discriminate against the rights resulting from mortgages having been duly registered :

i) in a Contracting State, or

ii) in a non-Contracting State ?

j) Are you of opinion that under the new Convention liens should be enforceable against the freight earned by the ship ?

k) If so, please set out the conditions under which, in your opinion, freights should be liable to a lien, inter alia, the freight earned by *whom* and during *what voyage*.

l) Should maritime liens be enforceable again *other* assets of the shipowners, such as one or more of the sums due to the owner and referred to in Article 4 of the 1926 Convention ?

V. a) What period or periods should be fixed in the new convention with respect to the extinction of liens ?

b) Should these periods run from the date on which the claim secured by the lien accrues or from the date on which the creditor seeks to enforce the lien ?

VI. a) Do you agree that the new Convention should list the causes of interruption of the period or periods of extinction and that under national law interruption by other causes should not be allowed ?

b) If so, what should be the causes to be listed ? (v. paragraph **8**, sub-par j) of this report).

c) Or are you of opinion that under the new Convention no interruption of these periods should be allowed ?

VII. a) Should the new convention deal with problems connected with a change of nationality (flag) of the ship concerned which problems discussed in paragraph 11 of this report ?

b) In the affirmative, which is the solution you propose with regard to these problems ?

VIII. a) Do you agree that the new convention should provide that, in the event of a ship flying the flag of a Contracting State being sold by the order of a Court of one of the Contracting States, all registered mortgages and liens on such ship shall be extinct as a result of such sale and the distribution of the proceeds of the sale ?

b) Do you consider it necessary or desirable for the new convention to contain similar provisions with respect to the sale of a ship by the order of a Court of a non-Contracting State and, if so, subject to what conditions ?

IX. a) Should the new Convention also cover mortgages on ships under construction and any liens accruing against such ship during the period of construction ?

b) In the affirmative, should this be done by incorporating the essence of the draft Convention on the Registration of rights in respect of ships under construction in the new convention ?

X. a) Are you in favour of the new convention dealing with long-term charters, such as bare-boat charters, time charters and charters for consecutive voyages, for the purpose of protecting the position of the charterer in the event :

i) of a sale of the chartered ship by the order of a Court of either a Contracting or of a non-Contracting State;

ii) or of a voluntary sale of the ship ?

b) In the affirmative, should such provisions relate to long term charters without further qualifications or should the application of the provisions be restricted to the case in which the shipowner had assigned his rights under the charter to a third party by way of security ?

c) In either case, what would be your suggestions for dealing with this particular matter ?

XI. Do you agree that otherwise than in the 1926 Convention, the new convention should contain a provision of the kind mentioned in paragraph 15 in fine of this report ?

XII. a) What should be in your opinion the scope of application of the new Convention ?

b) Should it be as wide as possible, so as to apply also, inter alia, to ships flying the flag of a non-Contracting State ?

XIII. Please give a sumary description of your domestic law relating to maritime liens and mortgages, dealing more specially with the following questions :

a) what are the maritime liens recognised in your domestic law;

b) does your domestic law recognise other rights on or with respect to ships, such as :

i) possessory liens;

ii) statutory liens;

iii) a right of retention not giving rise to a maritime lien ?

c) What are under your domestic law the respective priorities :

i) as between registered mortgages « inter se »;

ii) as between registered mortgages and maritime liens;

iii) as between maritime liens « inter se » and

iv) as between registered mortgages and maritime liens, on the one hand, and the « other rights on a ship » referred to in sub-paragraph b) above on the other hand ?

d) Under your domestic law is it possible to have a ship deleted from the national register on being sold abroad, without the mortgagees having been notified and their consent having been obtained ?

e) Under your domestic law can a ship be entered in your national register without production of evidence that her previous registration in another country was deleted ?

f) Are there any other provisions of your domestic law that would be pertinent to the subject under study ?

XIV. Which are the rules of conflict of laws applied by your Courts in cases to which the 1926 Convention does not apply ?

XV. Assuming your answer to question I to be in the affirmative, would you favour :

a) by amending the 1926 Convention, or

b) by drafting a protocol to the 1926 Convention, or

c) by preparing an entirely new convention which would replace the 1926 Convention ?

Amsterdam, January 1964.

J. T. Asser

President of the International Subcommittee

CONVENTION INTERNATIONALE POUR L'UNIFICATION DE CERTAINES REGLES RELATIVES

AUX PRIVILEGES ET HYPOTHEQUES MARITIMES

ET PROTOCOLE DE SIGNATURE

signés à Bruxelles le 10 avril 1926.

Article 1.

Les hypothèques, mortgages, gages sur navires, régulièrement établis d'après les lois de l'Etat contractant auquel le navire est ressortissant et inscrits dans un registre public, soit du ressort du port d'enregistrement, soit d'un office central, seront considérés comme valables et respectés dans tous les autres pays contractants.

Article 2.

Sont privilégiés sur le navire, sur le fret du voyage pendant lequel est née la créance privilégiée et sur les accessoires du navire et du fret acquis depuis le début du voyage :

1°) Les frais de justice dus à l'Etat et dépenses encourues dans l'intérêt commun des créanciers, pour la conservation du navire ou pour parvenir à la vente et à la distribution de son prix ; les droits de tonnage, de phare ou de port et les autres taxes et impôts publics de mêmes espèces ; les frais de pilotage, les frais de garde et de conservation depuis l'entrée du navire dans les dernier port ;

2°) Les créances résultant du contrat d'engagement du capitaine, de l'équipage et des autres personnes engagées à bord ;

3°) Les rémunérations dues pour sauvetage et assistance et la contribution du navire aux avaries communes ;

4°) Les indemnités pour abordage ou autres accidents de navigation, ainsi que pour dommages causés aux ouvrages d'art des ports, docks et voies navigables ; les indemnités pour lésions corporelles aux passagers et aux équipages ; les indemnités pour perte ou avaries de cargaison ou de bagages ;

5°) Les créances provenant des contrats passés ou d'opérations effectuées par le capitaine hors du port d'attache, en vertu de ses pouvoirs légaux, pour les besoins réels de la conservation du navire ou de la continuation du voyage, sans distinguer si le capitaine est

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO

MARITIME LIENS AND MORTGAGES

signed at Brussels, April 10, 1926.

(Translation)

Article 1.

Mortgages, hypothecations and other similar charges upon vessels, duly effected in accordance with the law of the contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or a central office, shall be regarded as valid and respected in all the other contracting countries.

Article 2.

The following give rise to maritime liens on a vessel, on the freight for the voyage during which the claim giving use to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage :

1. Law costs due to the State, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale ; tonnage dues, tonnage dues light or harbor dues, and other public taxes and charges of the same character ; pilotage dues ; the cost of watching and preservation from the time of the entry of the vessel into the last port ;

2. Claims arising out of the contract of engagement of the master, crew, and other persons hired on board ;

3. Remuneration for assistance and salvage, and the contribution of the vessel in general average ;

4. Indemnities for collision or other accident of navigation, as also for damage caused to works forming part of harbors, docks, and navigable ways ; indemnities for bodily injury to passengers or crew ; indemnities for loss of or damage to cargo or baggage ;

5. Claims arising on contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the same time owner of the vessel, and

ou non en même temps propriétaire du navire et si la créance est la sienne ou celle des fournisseurs, réparateurs, prêteurs ou autres contractants.

Article 3.

Les hypothèques, mortgages, gages sur navires prévus à l'article 1er, prennent rang immédiatement après les créances privilégiées mentionnées à l'article précédent.

Les lois nationales peuvent accorder un privilège à d'autres créances que celles prévues audit article mais sans modifier le rang réservé aux créances garanties par hypothèques, mortgages et gages et aux privilèges les primant.

Article 4.

Les accessoires du navire et du fret visés à l'article 2 s'entendent :

1°) Des indemnités dues au propriétaire à raison de dommages matériels subis par le navire et non réparés, ou pour pertes de fret.

2°) Des indemnités dues au propriétaire pour avaries communes, en tant que celles-ci constituent soit des dommages matériels subis par le navire et non réparés, soit des pertes de fret ;

3°) Des rémunérations dues au propriétaire pour assistance prêtée ou sauvetage effectué jusqu'à la fin du voyage, déduction faite des sommes allouées au capitaine et autres personnes au service du navire.

Le prix du passage, et, éventuellement, les sommes dues en vertu de l'article 4 de la Convention pour la limitation de la responsabilité des propriétaires de navires sont assimilés au fret.

Ne sont pas considérés comme accessoires du navire ou du fret les indemnités dues au propriétaire en vertu de contrats d'assurance, non plus que les primes, subventions ou autres subsides nationaux.

Par dérogation à l'article 2, alinéa 1er, le privilège prévu au profit des personnes au service du navire porte sur l'ensemble des frets dus pour tous les voyages effectués pendant le cours du même contrat d'engagement.

Article 5.

Les créances se rapportant à un même voyage sont privilégiées dans l'ordre où elles sont rangées à l'article 2. Les créances comprises dans chacun des numéros viennent en concurrence et au marc le franc en cas d'insuffisance du prix.

Les créances visées aux n° 3 et 5, dans chacune de ces catégories, sont remboursées par préférence dans l'ordre inverse des dates où elles sont nées.

whether the claim is his own or that of shipchandlers, repairers, lenders, or other contractual creditors.

Article 3.

The mortgages, hypothecations, and other charges on vessels referred to in article 1 rank immediately after the secured claims referred to in the last preceding article.

National laws may grant a lien in respect of claim other than those referred to in the said last-mentioned article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.

Article 4.

The accessories of the vessel and the freight mentioned in article 2, mean :

1. Compensation due to the owner for material damage sustained by the vessel and not repaired, or for loss of freight ;
2. General average contributions due to the owner, in respect of material damage sustained by the vessel and not repaired, or in respect of loss of freight ;
3. Remuneration due to the owner for assistance and salvage services rendered at any time before the end of the voyage, any sums allotted to the master or other persons in the service of the vessel being deducted.

The provision as to freight apply also to passage money, and, in the last resort, to the sums due under article 4 of the convention on the limitation of shipowners' liability.

Payments made or due to the owner on policies of insurance, as well as bounties, subventions, and other national subsidies are not deemed to be accessories of the vessel or of the freight.

Notwithstanding anything in the opening words of article 2, the lien in favor of persons in the service of the vessel extends, to the total amount of freight due for all voyages made during the subsistence of the same contract of engagement.

Article 5.

Claims secured by a lien and relating to the same voyage rank in the order in which they are set out article 2. Claims included under any one heading share concurrently and ratably in the event of the fund available being insufficient to pay the claims in full.

The claims mentioned under Nos. 3 and 5 in that article rank, in each of the two categories, in the inverse order of the dates on which they came into existence.

Les créances se rattachant à un même événement sont réputées nées en même temps.

Article 6.

Les créances privilégiées du dernier voyage sont préférées à celles des voyages précédents.

Toutefois, les créances résultant d'un contrat unique d'engagement portant sur plusieurs voyages viennent toutes au même rang avec les créances du dernier voyage.

Article 7.

En vue de la distribution du prix de la vente des objets affectés par le privilège, les créanciers privilégiés ont la faculté de produire pour le montant intégral de leurs créances, sans déduction du chef des règles sur la limitation, mais sans que les dividendes leur revenant puissent dépasser la somme due en vertu desdites règles.

Article 8.

Les créances privilégiées suivent le navire en quelque main qu'il passe.

Article 9.

Les privilèges s'éteignent, en dehors des autres cas prévus par les lois nationales, à l'expiration du délai d'un an, sans que, pour les créances de fournitures, visées au n° 5 de l'article 2, le délai puisse dépasser six mois.

Le délai court pour les privilèges garantissant les rémunérations d'assistance et de sauvetage, à partir du jour où les opérations sont terminées ; pour le privilège garantissant les indemnités d'abordage et autres accidents et pour lésions corporelles, du jour où le dommage a été causé ; pour le privilège, pour les pertes ou avaries de cargaison ou des bagages, du jour de la délivrance de la cargaison ou des bagages ou de la date à laquelle ils eussent dû être délivrés ; pour les réparations et fournitures et autres cas visés au 5° de l'art. 2, à partir du jour de la naissance de la créance. Dans tous les autres cas le délai court à partir de l'exigibilité de la créance.

La faculté de demander des avances ou des acomptes n'a pas pour conséquence de rendre exigibles les créances des personnes engagées à bord, visées au n° 2 de l'art. 2.

Parmi les cas d'extinction prévus par les lois nationales, la vente n'éteint les privilèges que si elle est accompagnée des formalités de

Claims arising from one and the same occurrence are deemed to have come into existence at the same time.

Article 6.

Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyages.

Provided that claims, arising on one and the same contract of engagement extending over several voyages, all rank with claims attaching to the last voyage.

Article 7.

As regards the distribution of the sum resulting from the sale of the property subject to a lien, the creditors whose claims are secured by a lien have the right to put forward their claims in full, without any deduction on account of the rules relating to limitation of liability, provided, however, that the sum apportioned to them may not exceed the sum due having regard to the said rules.

Article 8.

Claims secured by a lien follow the vessel into whatever hands it may pass.

Article 9.

The liens cease to exist, apart from other cases provided for by national laws, at the expiration of one year, and, in the case of liens for supplies mentioned in n° 5 of article 2, shall continue in force for not more than six months.

The periods for which the lien remains in force in the case of liens securing claims in respect of assistance and salvage runs from the day when the services terminated, in the case of liens securing claims in respect of collision and other accidents and in respect of bodily injuries from the day when the damage was caused ; in the case of liens for the loss of or damage to cargo or baggage from the day of the delivery of the cargo or baggage or from the day when they should have been delivered ; for repairs and supplies and other cases mentioned in N° 5 of article 2 from the day when the claim originated.

In all the other cases the period runs from the enforcibility of the claim.

The fact that any of the persons employed on board, mentioned in N° 2 article 2 has a right to any payment in advance or on account does not render his claim enforcible.

As respects the cases provided for in the national laws in which a lien is extinguished, a sale shall extinguish a lien only if accompanied

publicité déterminées par les lois nationales. Ces formalités comporteront un préavis donné dans la forme et les délais prévus par ces lois à l'administration chargée de la tenue des registres prévus à l'article 1er de la présente Convention.

Les causes d'interruption des délais susdits sont déterminées par la loi du tribunal saisi.

Les Hautes Parties Contractantes se réservent le droit d'admettre dans leur législation, comme prorogeant le délai ci-dessus fixé le fait que le navire grevé n'a pu être saisi dans les eaux territoriales de l'Etat dans lequel le demandeur a son domicile ou son principal établissement, sans que ce délai puisse dépasser trois ans depuis la naissance de la créance.

Article 10.

Le privilège sur le fret peut être exercé tant que le fret est encore dû ou que le montant du fret se trouve encore entre les mains du capitaine ou de l'agent du propriétaire. Il en est de même du privilège sur les accessoires.

Article 11.

Sauf ce qui est prévu à la présente Convention, les privilèges établis par les dispositions qui précèdent ne sont soumis à aucune formalité, ni à aucune condition spéciale de preuve.

Cette disposition ne porte pas atteinte au droit de chaque Etat de maintenir dans sa législation les dispositions exigeant du capitaine l'accomplissement de formalités spéciales, soit pour certains emprunts sur le navire, soit pour la vente de la cargaison.

Article 12.

Les lois nationales doivent déterminer la nature et la forme des documents se trouvant à bord du navire sur lesquels mention doit être faite des hypothèques, mortgages et gages prévus à l'article premier, sans que toutefois le créancier qui a requis cette mention dans les formes prévues puisse être responsable des omissions, erreurs ou retards de l'inscription sur ces documents.

Article 13.

Les dispositions qui précèdent sont applicables aux navires exploités par un armateur non propriétaire ou par un affreteur principal, sauf lorsque le propriétaire s'est trouvé dessaisi par un acte illicite et quand, en outre, le créancier n'est pas de bonne foi.

by formalities of publicity which shall be laid down by the national laws. These formalities shall include a notice given in such form and within such time as the national laws may prescribe to the authority charge with keeping the registers referred to in article 1 of this convention.

The grounds, upon which the above periods may be interrupted are determined by the law of the court where the case is tried.

The High Contracting Parties reserve to themselves the right to provide, by legislation, in their respective countries, that the said periods shall be extended in cases where it has not been possible to arrest the vessel to which a lien attaches in the territorial waters of the State in which the claimant has his domicile or his principal place of business, provided that the extended period shall not exceed three years from the time when the claim originated.

Article 10.

A lien on freight may be enforced so long as the freight is still due or the amount of the freight is still in the hands of the master or the agent of the owner. The same principle applies to a lien on accessories.

Article 11.

Subject to the provisions of this convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.

This provisions does not affect the right of any State to maintain in the legislation provisions requiring the master of a vessel to fulfil special formalities in the case of certain loans raised on the security of the vessel, or in the case of the sale of its cargo.

Article 12.

National laws must prescribe the nature and the form of documents to be carried on board the vessel which entry must be made of the mortgages, hypothecations, and other charges referred to in article 1 ; so, however, that the mortgages requiring such entry in the said form be not held responsible for any omission, mistake, or delay in inscribing the same on the said documents.

Article 13.

The foregoing provisions of this convention apply to vessels under the management of a person who operates them without owning them or to the principal charterer, except in cases where the owner has been dispossessed by an illegal act, or where the claimant is not a bona fide claimant.

Article 14.

Les dispositions de la présente convention seront appliquées dans chaque Etat contractant lorsque le navire grevé est ressortissant d'un Etat contractant, ainsi que dans les autres cas prévus par les lois nationales.

Toutefois, le principe formulé dans l'alinéa précédent ne porte pas atteinte au droit des Etats contractants de ne pas appliquer les dispositions de la présente convention en faveur des ressortissants d'un Etat non contractant.

Article 15.

La présente convention est sans application aux navires de guerre et aux navires d'Etat exclusivement affectés à un service public.

Article 16.

Rien, dans les dispositions qui précèdent, ne porte atteinte à la compétence des tribunaux, à la procédure et aux voies d'exécution organisées par les lois nationales.

Article 17.

A l'expiration du délai de deux ans au plus tard à compter du jour de la signature de la convention, le Gouvernement belge entrera en rapport avec les Gouvernements des Hautes Parties Contractantes qui se seront déclarées prêtes à la ratifier, à l'effet de faire décider s'il y a lieu de la mettre en vigueur. Les ratifications seront déposées à Bruxelles à la date qui sera fixée de commun accord entre lesdits Gouvernements. Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Etats qui y prendront part et par le Ministre des Affaires Etrangères de Belgique.

Les dépôts ultérieurs se feront au moyen d'une notification écrite, adressée au Gouvernement belge et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification qui les accompagnent sera immédiatement, par les soins du Gouvernement belge et par la voie diplomatique, remise aux Etats qui ont signé la présente convention ou qui y auront adhéré. Dans les cas visés à l'alinéa précédent, ledit Gouvernement fera connaître, en même temps, la date à laquelle il a reçu la notification.

Article 14.

The provisions of this convention shall be applied in each contracting State in cases in which the vessel to which the claim relates belongs to a contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this convention in favor of the nationals of a non-contracting State.

Article 15.

This convention does not apply to vessels of war nor to government vessels appropriated exclusively to the public service.

Article 16.

Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunals, modes of procedure or methods of execution authorized by the national law.

Article 17.

After an interval of not more than two years from the day on which the convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a procès verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government, and accompanied by the instrument of ratification.

A duly certified copy of the procès verbal relating to the first deposit of ratifications, of the notification referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article 18.

Les Etats non signataires pourront adhérer à la présente convention, qu'ils aient été ou non représentés à la Conférence internationale de Bruxelles.

L'Etat qui désire adhérer notifie par écrit son intention au Gouvernement belge, en lui transmettant l'acte d'adhésion, qui sera déposé dans les archives dudit Gouvernement.

Le Gouvernement belge transmettra immédiatement à tous les Etats signataires ou adhérents copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 19.

Les Hautes Parties Contractantes peuvent au moment de la signature du dépôt des ratifications ou lors de leur adhésion, déclarer que l'acceptation qu'elles donnent à la présente Convention ne s'applique pas soit à certains soit à aucun des Dominions autonomes, colonies, possessions, protectorats ou territoires d'outre-mer, se trouvant sous leur souveraineté ou autorité. En conséquence, elles peuvent ultérieurement adhérer séparément au nom de l'un ou l'autre des Dominions autonomes, colonies, possessions, protectorats ou territoires d'outre-mer, ainsi exclus dans leur déclaration originale. Elles peuvent aussi, en se conformant à ces dispositions, dénoncer la présente Convention, séparément pour l'un ou plusieurs des Dominions autonomes, colonies, possessions, protectorats ou territoires d'outre-mer se trouvant sous leur souveraineté ou autorité.

Article 20.

A l'égard des Etats qui auront participé au premier dépôt de ratifications, la présente convention produira effet un an après la date du procès-verbal de ce dépôt. Quant aux Etats qui la ratifieront ultérieurement ou qui y adhéreront, ainsi que dans le cas où la mise en vigueur se fera ultérieurement et selon l'article 19, elle produira effet six mois après que les notifications prévues à l'article 17, alinéa 2 et à l'article 18, alinéa 2, auront été reçues par le Gouvernement belge.

Article 21.

S'il arrivait qu'un des Etats contractants voulut dénoncer la présente convention, la dénonciation sera notifiée par écrit au Gouvernement belge, qui communiquera immédiatement copie certifiée conforme de la notification à tous les autres Etats, en leur faisant savoir la date à laquelle il l'a reçue.

Article 18.

Non-signatory States may accede to the present convention whether or not they have been represented at the international conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 19.

The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all of the self-governing Dominions, or of the colonies, overseas possessions, protectorates, or territories undert heir sovereignty or authority, and they may subsequently accede separately on behalf of any selfgoverning Dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provision in respect of any sel-governing Dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

Article 20.

The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the procès verbal recording such deposit. As respects the States which ratify subsequently or which accede, and also in case in which the convention is subsequently put into effect in accordance with article 19, it shall take effect six months after the notifications specified in article 17, paragraph 2, and article 18, paragraph 2, have been received by the Belgian Government.

Article 21.

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States informing them of the date on which it was received.

La dénonciation produira ses effets à l'égard de l'Etat seul qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement belge.

Article 22.

Chaque Etat contractant aura la faculté de provoquer la réunion d'une nouvelle conférence, dans le but de rechercher les améliorations qui pourraient être apportées à la présente convention.

Celui des Etats qui ferait usage de cette faculté aurait à notifier un an à l'avance son intention aux autres Etats, par l'intermédiaire du Gouvernement belge, qui se chargerait de convoquer la conférence.

PROTOCOLE DE SIGNATURE

En procédant à la signature de la Convention internationale pour l'unification de certaines règles relatives aux privilèges et hypothèques maritimes, les Plénipotentiaires soussignés ont adopté le présent Protocole, qui aura la même force et la même valeur que si ces dispositions étaient insérées dans le texte même de la Convention à laquelle il se rapporte.

I. « Il est entendu que la législation de chaque Etat reste libre ;

1°) d'établir parmi les créances visées au 1° de l'article 2 un ordre déterminé inspiré par le souci des intérêts du Trésor ;

2°) d'accorder aux administrations des ports, docks, phares et voies navigables qui ont fait enlever une épave ou d'autres objets gênant la navigation ou qui sont créanciers pour droits de port, ou pour des dommages causés par la faute d'un navire, le droit, en cas de non-paiement, de retenir le navire, les épaves ou autres objets, de les vendre et de s'indemniser sur le prix par préférence à d'autres créanciers, et

3°) de régler le rang des créanciers pour dommages causés aux ouvrages d'art autrement qu'il n'est dit à l'article 5 et à l'article 6.

II. « Il n'est pas porté atteinte aux dispositions des lois nationales des Etats contractants qui accorderaient un privilège aux établissements publics d'assurance pour les créances résultant de l'assurance au personnel des navires ».

Fait à Bruxelles, en un seul exemplaire, le 10 avril 1926.

The denunciation shall only operate in respect of the State which made the notification, and on the expiration of one year after the notification has reached the Belgian Government.

Article 22.

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should give one year advance notice of its intention to the other States through the Belgian Government, which would make arrangements for convening the Conference.

PROTOCOL OF SIGNATURE

In proceeding to the signature of the international convention for the unification of certain rules relating to maritime liens and mortgages, the undersigned plenipotentiaries have adopted the present protocol, which will have the same force and the same value as if the provisions were inserted in the text of the convention to which it relates :

I. It is understood that the legislation of each State remains free :

1) To establish among the claims mentioned in N° 1 of article 2, a definite order of priority with a view to safeguarding the interests of the Treasury ;

2) To confer on the authorities administering harbors, docks, lighthouses, and navigable ways, who have caused a wreck or other obstruction to navigation to be removed, or who are creditors in respect of harbor dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the vessel, wreck, or other property, to sell the same, and to indemnify themselves out of the proceeds in priority to other claimants, and

3) To determine the rank of the claimants for damages done to works otherwise than as stated in article 5 and in article 6.

II. There is no impairment of the provisions in the national laws of the contracting States conferring a lien upon public insurance associations in respect of claims arising out of the insurance of the personnel of vessels.

Done at Brussels, in a single copy, April 10, 1926.

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

2

(2 - 64)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

2

(2 - 64)

Rapport preliminaire

et

Questionnaire

COMMISSION INTERNATIONALE
SUR LES
PRIVILEGES ET HYPOTHEQUES MARITIMES

RAPPORT PRELIMINAIRE ET QUESTIONNAIRE

Introduction

1. Les litiges relatifs aux hypothèques et privilèges maritimes présentent le plus souvent un aspect international. Ils sont même susceptibles d'offrir un aspect international plus marqué et d'être plus intimement liés à des facteurs internationaux que pratiquement toute autre situation dans le cadre du droit maritime. En effet, si l'on considère un seul et même navire, celui-ci peut avoir des créanciers hypothécaires et privilégiés de différentes nationalités et être grevé en même temps d'hypothèques et de privilèges nés dans divers pays, et même en ce qui concerne les privilèges, nés en pleine mer. Un navire peut dans l'intervalle avoir changé de nationalité soit avant, soit après la naissance des privilèges; de même les hypothèques sur le dit navire ont pu être enregistrées avant ou après son changement de nationalité.

Enfin, il arrive souvent qu'un navire soit saisi et vendu dans un pays qui est complètement étranger aux éléments mentionnés ci-dessus. (Pays de l'enregistrement, ou pays du pavillon du navire, pays où les privilèges sont nés, ou pays de la nationalité des créanciers hypothécaires ou des créanciers privilégiés).

2. Comme son nom l'indique, la Convention Internationale pour l'unification de certaines règles relatives aux Privilèges et Hypothèques Maritimes et le Protocole signature, signés tous deux à Bruxelles le 10 avril 1926, constituent un effort pour créer une uniformité internationale dans ce domaine.

Jusqu'à présent, cette Convention a été ratifiée ou a reçu l'adhésion de 19 pays, à savoir l'Argentine, la Belgique, le Brésil, le Danemark, l'Espagne, l'Estonie, la Finlande, la France, la Hongrie, l'Italie, Monaco, la Norvège, la Pologne, le Portugal, la Roumanie, la Suède, la Suisse, la Syrie et la Turquie.

L'Estonie a cessé d'exister en tant que nation indépendante.

Cependant un certain nombre de pays maritimes importants tels que le Canada, l'Allemagne, l'Inde, l'Irlande, le Japon, les Pays-Bas, la Russie, le Royaume-Uni, et les Etats-Unis d'Amérique ne se sont pas ralliés à la Convention.

Pour cette raison on est obligé d'admettre que la Convention de 1926 n'a pas donné le résultat espéré au moment de son adoption.

3. En dehors du domaine de la Convention, c'est-à-dire quand un navire est saisi dans la juridiction d'un état non contractant, le problème de conflit de lois, qui peut être soulevé, et celui de la distribution du produit de la vente du navire, sont généralement tranchés suivant le droit international privé du « forum » et la loi interne du « forum »; ceux-ci étant appliqués sans tenir compte du pavillon ni de la nationalité du navire en question.

La même chose se produit quand un navire battant pavillon ou appartenant à un Etat non contractant est saisi et vendu dans la juridiction d'un Etat contractant à moins que la loi interne du « forum » n'admette dans un tel cas, l'application des dispositions de la Convention ou l'application de dispositions similaires de la loi nationale.

4. Cette situation serait acceptable si la loi interne des pays maritimes, relative aux privilèges et hypothèques maritimes, était plus ou moins la même ou si les règles de conflit de lois en cette matière étaient semblables. Malheureusement tel n'est pas le cas. A part quelques questions subsidiaires qui seront examinées plus loin, les deux problèmes majeurs auxquels les créanciers maritimes doivent faire face sont celui de la reconnaissance et de la force exécutoire des hypothèques nées à l'étranger et plus spécialement celui des privilèges nés à l'étranger et de leur rang. Ces deux problèmes sont traités de manière différente par les tribunaux des divers pays ce qui entraîne des décisions contradictoires. En conséquence, la protection accordée par les privilèges et hypothèques varie suivant le pays dans la juridiction duquel le navire est saisi et vendu.

5. Cette divergence entre les décisions des tribunaux des divers pays peut partiellement s'expliquer par la diversité des conceptions légales qui inspirent le droit interne et le Droit International Privé du « forum ». D'un côté nous voyons une généreuse application du droit étranger, de l'autre, cette application est restreinte en raison de l'ordre public du pays du tribunal saisi ou sur base d'une conception juridique différente ayant cours dans ce pays. Dans certains pays, en Grande-Bretagne par exemple, quoiqu'en principe les hypothèques et les privilèges étrangers soient reconnus, leur force exécutoire est cependant étroitement liée aux problèmes de juridiction et comme faisant intégralement partie du droit de procédure, tandis que dans d'autres pays, la reconnaissance et le rang sont considérés comme relevant des règles du droit.

Une autre complication surgit du fait que les catégories de créances assorties d'un privilège maritime varient d'un pays à l'autre. Le droit interne de certains pays reconnaît l'existence de certains droits qui ne sont pas des privilèges maritimes, tel par exemple le droit de rétention sur le navire reconnu notamment aux chantiers et aux autorités portuaires et, qui est un privilège de droit commun, qui dans certaines circonstances a priorité sur tous les autres privilèges maritimes. Enfin, le droit interne de certains autres pays semble établir une discrimination au détriment des créanciers étrangers dont l'hypothèque a été enregistrée à l'étranger, et en faveur des créanciers nationaux.

6. Depuis la deuxième guerre mondiale un besoin de plus en plus croissant de financement de navires et plus spécialement de leur construction s'est fait jour. Des montants très élevés sont prêtés aux propriétaires de navires en échange d'hypothèques sur des navires en exploitation et sur des navires en construction. Dans la plupart des cas, ces hypothèques sont destinées à conserver leur valeur sous l'une ou l'autre forme après la livraison du navire à l'armement.

Si l'on considère que dans beaucoup de pays la loi donne priorité aux privilèges sur les hypothèques, les banques et autres organismes financiers, qui seraient disposés à fournir les fonds nécessaires, se trouvent confrontés avec l'angoissante incertitude résultant de ce que la plus ou moins grande valeur de leur sûreté peut dépendre du pays dans lequel cette sûreté donnera lieu à exécution du gage. La plupart du temps le choix du pays ne dépend pas d'eux mais est déterminé par quelqu'autre créancier, soit un créancier privilégié, soit même un créancier chirographaire et qui a fait saisir le navire dans un port mondial quelconque. La même situation se présente pour les Gouvernements qui suivant les circonstances économiques ou leur politique nationale décident d'accorder des prêts aux propriétaires de navires ou de garantir des prêts accordés par des tiers. De même encore pour les créanciers auxquels a été consenti un privilège dit contractuel.

Les considérations que nous venons de développer ont amené le Bureau Permanent du C.M.I. a étudier ce sujet et à examiner ce qui pourrait être fait pour améliorer la situation actuelle.

Considérations complémentaires

7. Pour autant que nous le sachions le problème des privilèges et hypothèques maritimes n'a pas été discuté à un niveau international depuis 1926. De toute façon le C.M.I. n'a pas étudié ce sujet jusqu'aujourd'hui, sauf en ce qui concerne les Hypothèques sur les Navires en Construction, qui ont fait l'objet d'un projet de convention sur l'enregistrement des droits sur les navires en construction, adopté à la Conférence de Stockholm en 1963.

Cela signifie que les parties intéressées tels que les banques et autres organismes de financement, les autorités publiques, les propriétaires de navires, les capitaines, les officiers et équipages, les sauveteurs, les passagers, les assureurs maritimes et d'autres tels que les chantiers maritimes, les fournisseurs d'approvisionnement, etc., etc... devront décider, au préalable, si, dans les circonstances actuelles, il apparaît nécessaire de promulguer une législation internationale additionnelle dans ce domaine. C'est la première question qui doit être résolue par les Associations Nationales.

Supposons que la réponse à cette question soit affirmative; les Associations Nationales devront en ce cas exprimer leur opinion sur les principes qui doivent former la base des nouvelles règles internationales.

En vue de faciliter l'étude de cette question, il a été jugé utile d'énumérer les différents points de la Convention de 1926 qui ne cadrent pas avec les exigences des conditions contemporaines.

Le présent rapport fera ensuite part de diverses suggestions concernant les possibilités d'arriver à un accord international sur ce sujet compliqué, sans avoir toutefois la prétention de considérer ces suggestions comme des propositions.

Troisièmement l'attention des Associations Nationales est attirée sur certaines matières connexes subsidiaires ou rattachées au domaine des privilèges et hypothèques, matières qui peuvent être ou non inclues dans la nouvelle convention (1).

Finalement, le rapport se termine par un questionnaire dont les réponses permettront à la Commission Internationale d'étudier la possibilité d'obtenir une approbation internationale suffisante pour justifier la préparation d'un projet de nouvelle convention et d'un rapport, qui seront soumis à la prochaine Conférence du C.M.I.

La Convention de 1926

8. Le fait que cette Convention ait fait l'objet d'un nombre croissant de critiques de nature variée et parfois en sens opposé et que ces critiques soient formulées non seulement par les Etats qui n'ont pas adhéré à la Convention mais également par les Etats qui l'ont acceptée, semble indiquer que la Convention ne donne pas satisfaction aux exigences actuelles.

(1) Les mots « nouvelle Convention » employés ici et subséquemment, se rapportent soit à un nouveau protocole de la Convention de 1926, soit à un texte revu de cette convention, soit à un traité international entièrement nouveau qui remplacerait la Convention de 1926.

Il semble utile d'indiquer ci-dessous, à titre exemplatif et sans commentaires, certains points qui sont susceptibles, suivant les opinions exprimées dans les pays des deux catégories mentionnées, d'être améliorés.

a) Les privilèges mentionnés dans l'Article 2, sous-paragraphe 5, à savoir les privilèges garantissant : « Les créances provenant des con-« trats passés ou d'opérations effectuées par le capitaine hors du port « d'attache, en vertu de ses pouvoirs légaux, pour les besoins réels de « la conservation du navire ou de la continuation du voyage, sans « distinguer si le capitaine est ou non en même temps propriétaire du « navire et si la créance est la sienne ou celle des fournisseurs, répara-« teurs, prêteurs ou autres contractants » ont priorité sur les hypothèques (2).

Déjà en 1926 des doutes avaient été exprimés au sujet de cette disposition. Actuellement l'armateur est en relation journalière avec le capitaine et ses agents dans le monde entier grâce à la radio et au telex, ce qui permet au propriétaire de conclure en son nom les contrats mentionnés à l'Article 2 sous-paragraphe 5; de même le créancier peut obtenir des sûretés par d'autres moyens, tels que la garantie bancaire. La situation actuelle ne paraît plus justifier que les privilèges en question aient priorité sur les hypothèques.

b) La Convention reconnaît (ou crée) un très grand nombre de privilèges, réduisant de ce fait la garantie des créanciers hypothécaires.

c) La Convention supprime ce qui dans le droit interne de certaines nations maritimes est appelé le droit possessoire, droit qui comporte notamment le droit de rétention sur le navire.

Un privilège possessoire devrait être accordé aux chantiers maritimes.

d) La Convention n'interdit pas aux Etats contractants de créer ou de maintenir dans leur loi interne un droit de rétention à condition que ce droit ne crée par un privilège particulier en faveur du créancier. Dans les circonstances actuelles l'existence de ce droit ne se justifiant pas, la Convention devrait interdire aux Etats contractants de créer ou de maintenir ce droit dans leur loi interne.

e) Le privilège sur le fret devrait être supprimé, car il diminue la garantie du créancier qui a accordé un prêt au propriétaire du navire, prêt garanti par la cession du fret.

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(2) Dans ce rapport le mot « hypothèque » se réfère à la fois à l'hypothèque maritime connue dans le droit de nombreux pays continentaux et aux hypothèques maritimes de droit Anglo-saxon, de même que le mot « créancier hypothécaire » se rapporte au créancier dont la créance est garantie par cette hypothèque et au titulaire d'une hypothèque maritime suivant le droit Anglo-saxon.

f) Les dispositions de la Convention concernant les privilèges ont été mal rédigées et nécessitent une révision.

g) Le système de priorité « par voyage » qui est établi dans l'Article 5 et 6 de la Convention doit être revu et amélioré car il a donné lieu à des interprétations contradictoires. La conception du terme « voyage » en particulier est ambiguë et devrait être clarifiée.

h) Il est regrettable que la Convention ne contienne pas de dispositions ayant trait à la situation des affréteurs dans l'affrètement à long terme. (voir paragraphe 14 de ce rapport).

i) Le protocole de signature, dont la valeur et l'importance sont les mêmes que si ses dispositions avaient été insérées dans le texte de la Convention, permet au législateur de chaque Etat contractant de changer dans une certaine mesure l'ordre des priorités établi dans la Convention et de reconnaître ou conférer certains privilèges autres que ceux reconnus par la Convention. Le protocole peut donc altérer l'uniformité internationale qui est le but de la Convention. Il devrait donc être aboli.

j) L'article 9 qui traite de l'extinction des privilèges contre le navire est incomplet. Certaines causes d'extinction n'y sont pas mentionnées et par conséquent sont sujettes au droit interne de chacun des Etats contractants. Les causes d'extinction possibles de privilèges qui ne sont pas mentionnées dans la Convention sont les suivantes :

i) le changement de pavillon ou l'enregistrement du navire dans le registre d'un autre pays;

ii) la réquisition du navire par les autorités d'un pays quelconque;

iii) la radiation de l'enregistrement du navire sans qu'il y ait enregistrement subséquent dans le même pays ou dans un autre pays; ce qui peut arriver quand l'enregistrement du navire est radié parce que le navire doit être détruit;

iv) la constitution par un propriétaire de navires d'un fonds de limitation soit en application de la Convention relative à la limitation de la responsabilité des propriétaires de navires de mer de 1924 et/ou 1957, soit en application de la loi interne des pays ayant adhéré ou non à la Convention de 1926;

v) la vente du navire sur injonction d'un Tribunal d'un Etat non contractant.

k) L'Article 9 prévoit également que les causes, pour lesquelles la période d'extinction des privilèges peut être interrompue, sont déterminées par la loi du Tribunal où l'affaire est jugée, tandis que le dernier paragraphe de cet Article déclare que les Etats contractants peuvent prévoir dans leur droit interne une extension de la dite période dans certaines circonstances établies dans ce paragraphe.

Il apparaît que cette interruption devrait également faire l'objet d'une disposition internationale uniforme et ne pas être liée à l'appréciation du droit national.

l) La Convention devrait abolir toute interruption des périodes d'extinction des privilèges.

m) L'Article 4 qui traite des « accessoires » devrait être revu et corrigé.

n) La rédaction d'un certain nombre de dispositions de la Convention est erronée tels que :

i) la description des privilèges dans l'Article 2 n'est pas claire à certains égards;

ii) l'emploi du mot « accessoire » dans l'article 4 pour déterminer certaines revendications du propriétaire du navire est incorrect, ayant en droit maritime un sens complètement différent.

iii) l'expression « autre accident de navigation » utilisée dans l'Article 2 sous-paragraphe 4 est ambiguë etc. etc.

Méthode permettant d'arriver à une amélioration de la situation internationale actuelle

9. Compte tenu du mécontentement presque général au sujet de la Convention de 1926, mécontentement ressenti également par les pays qui l'ont ratifiée, il semble n'y avoir aucun doute quant à la nécessité de l'améliorer.

La méthode à adopter et qui est en harmonie avec les anciennes traditions du C.M.I. est l'élaboration d'un nouvel ensemble de règles de droit *uniformes*.

Ces règles devraient comprendre et donner une *solution uniforme* pour le plus grand nombre possible de problèmes actuellement existants et ayant fait l'objet d'une expérience. Le plus important de ces problèmes est celui qui se rapporte à la reconnaissance internationale des hypothèques et privilèges et à la priorité respective des hypothèques « inter se », des privilèges « inter se » et des hypothèques et privilèges les uns à l'égard des autres.

D'autres problèmes cependant, que nous avons en partie mentionnés au paragraphe 8 de ce rapport, nécessitent également une amélioration ou demandent d'être traités par une nouvelle loi internationale uniforme. Dans ce domaine où les créanciers, dont les créances ont des priorités diverses, sont en concurrence pour la répartition d'une somme d'argent déterminée (le produit de la vente d'un navire), toute lacune dans les règles uniformes à appliquer peut conduire à des contradictions dans le traitement des créances en question, suivant le pays

dans la juridiction duquel le navire est vendu et le produit de la vente distribué, et par conséquent la garantie des créances de l'un ou l'autre de ces créanciers peut en être affectée.

Dès lors, le résultat recherché, à savoir la protection internationale uniforme des différentes catégories de créances, ne serait pas atteint.

En songeant à la rédaction d'une nouvelle Convention, il ne faut pas perdre de vue que la situation des privilèges et des hypothèques en 1964 est extrêmement différente de celle qui existait en 1926, quand la Convention fut adoptée. En effet, depuis la fin de la deuxième guerre mondiale l'importance des hypothèques maritimes et des sommes qu'elles représentent, a largement dépassé la valeur des créances garanties par les privilèges maritimes, alors qu'en 1926 il était reconnu internationalement que ces privilèges, et par conséquent la protection internationale des créanciers privilégiés, devaient être considérés sur le même plan et même comme étant plus importants que la garantie accordée aux hypothèques maritimes. En partant de cette idée il est peut-être nécessaire, premièrement de limiter d'avantage les catégories de privilèges maritimes et deuxièmement de défendre entre Etats contractants toute discrimination en défaveur des hypothèques enregistrées à l'étranger afin de rejoindre les exigences du plus grand nombre possible de pays maritimes.

Ce n'est que s'il apparaissait impossible d'atteindre un accord international sur l'un et l'autre point qui, fut-il de moindre importance, doit cependant être envisagé pour les raisons mentionnées ci-dessus, que l'on devrait se résoudre à formuler des règles de conflits de loi, mais ce uniquement en dernière analyse.

10. Il n'est pas nécessaire d'insister sur le fait que le principal objectif de ce travail sera d'obtenir l'appui du plus grand nombre possible de nations pour élaborer cette nouvelle Convention.

Jusqu'à quel point cet appui sera-t-il acquis et une Convention Internationale acceptée, et quelle sera la substance de cette Convention en ce qui concerne les nombreuses questions impliquées, dépendra d'un nombre de facteurs qui peuvent uniquement être déterminés après que les Associations nous auront donné des réponses détaillées aux questions reprises au questionnaire. Il est donc inutile en ce moment de faire déjà des suggestions concrètes à cet égard.

Questions subsidiaires et connexes

A. Effet du changement de l'enregistrement national (du pavillon) du navire

11. Cette situation qui pose un important problème n'a pas été traitée par la Convention de 1926.

Cette situation peut se présenter non seulement quand un navire en exploitation est radié dans un pays afin d'être enregistré dans un autre, mais également quand la construction étant terminée il est livré à un propriétaire de navires étranger.

En prenant en considération cette situation, on peut imaginer que des privilèges et hypothèques ont été accordés avant et après le changement du pays d'enregistrement. De même il peut arriver que la loi interne d'un pays déterminé permette que la radiation et le réenregistrement s'effectuent sans que les créanciers hypothécaires aient été avisés, sans leur consentement et sans que les créanciers privilégiés soient au courant.

La première question qui se pose à ce sujet est la suivante : les hypothèques enregistrées et les privilèges qui existent avant la radiation du navire doivent-ils subsister après cette radiation ? Si l'on adopte ce système, le changement de pavillon n'affecterait, ni la reconnaissance internationale des dits droits, ni les priorités respectives, à *condition* que les deux pays intéressés soient des Etats contractants.

Si l'on adopte un autre système, il sera nécessaire de prévoir des Règles qui, dans l'éventualité d'un changement de pavillon, donneraient une protection suffisante aux créanciers dont les droits existaient antérieurement au dit changement.

Un problème, dont la solution n'est pas facile, se pose quand, des deux pays de l'enregistrement, l'un est un Etat contractant et l'autre ne l'est pas.

Néanmoins cette éventualité devrait également être prévue dans la nouvelle Convention.

B. Extinction des privilèges et hypothèques

12. A part l'extinction des privilèges par l'expiration d'un délai ou pour d'autres causes énumérées dans la nouvelle convention, il paraît désirable de prévoir que la vente d'un navire battant le pavillon de l'un des Etats contractants, sur injonction d'un Tribunal d'un Etat contractant, et la distribution du produit de la vente entre les parties intéressées, comprenant tous les créanciers hypothécaires et privilégiés, aura pour effet en tous cas, que les hypothèques, privilèges et autres droits sur le navire, seront éteints définitivement à la date de la vente (1).

La question surgit cependant de savoir si une disposition quelconque ne devrait pas être prévue dans le cas de la vente d'un navire sur injonction d'un Tribunal d'un Etat non-contractant. Supposons que le

(1) Nous nous référons à la Convention de Genève du 19 juin 1948, Article VII, se rapportant à la reconnaissance internationale des droits sur les aéronefs.

navire vendu batte le pavillon d'un Etat contractant; cette vente aurait-elle le même effet, eu égard aux privilèges et hypothèques, que s'il s'agissait d'un navire saisi et vendu dans la juridiction d'un Etat contractant ? L'importance pratique de cette question est illustrée par le cas anglais récent de « The Acrux » (Lloyd's Rep. I 1962, 405).

C. Le projet de Convention sur l'enregistrement des droits sur les navires en construction

13. Ce projet de Convention prévoit des règles internationales uniformes concernant les droits enregistrés (spécialement les hypothèques enregistrées) sur les navires en voie de construction, sujet qui n'est pas traité par la Convention de 1926 ni par aucun autre document international. Le but principal de ce projet de Convention est d'obtenir la reconnaissance internationale de ces droits et de permettre que les dits droits et plus spécialement les hypothèques conservent leur valeur après la livraison du navire par le chantier à l'armement, ce qui entraîne l'enregistrement du navire dans un pays différent de celui où est situé le chantier. Dans ce but l'Article 9 du projet de Convention prévoit que les titres et les hypothèques enregistrés seront, au moment de l'enregistrement du navire dans un autre Etat contractant, enregistrés dans ce dernier Etat, conservant ainsi la priorité résultant de l'enregistrement primitif. Si ces droits n'étaient pas conformes aux exigences légales d'enregistrement du droit national de ce dernier Etat, les effets légaux de l'enregistrement primitif conserveront leur valeur durant une période de 60 jours, à partir de la radiation du navire du régistre du pays du chantier, donnant ainsi au créancier hypothécaire et à l'armement le temps nécessaire pour procéder à l'enregistrement de l'hypothèque, dans le registre du navire étranger.

Sans aucun doute cette Convention renforcerait la position internationale des créanciers hypothécaires sur les navires en construction, qui seraient ainsi assurés dans une plus large mesure de la protection de leurs créances. D'autre part à partir du moment où le navire serait exploité, le créancier hypothécaire devrait faire face à tous les problèmes qui ont été décrits, puisque le Projet de Convention ne s'applique qu'aux droits enregistrés. Par conséquent les privilèges maritimes comprenant les privilèges qui sont nés avant la livraison du navire à l'armateur tel que le privilège en cas de collision d'un navire en construction ou pendant les essais, restent en dehors du domaine de la Convention. La question, de savoir comment ces privilèges ou d'autres privilèges qui naîtraient après la livraison du navire devraient être classés en regard des hypothèques prises sur le navire pendant la période de construction, demeure sans réponse.

Pour ces raisons il semble extrêmement souhaitable sinon impératif, d'incorporer l'essentiel du projet de Stockholm dans la nouvelle

Convention qui devrait s'appliquer à tous les privilèges et hypothèques maritimes qu'ils soient nés pendant la période de construction ou ultérieurement.

D. Affrètements à long terme

14. De nos jours le financement des navires et plus spécialement de la construction de nouveaux navires est fréquemment garantie par la délégation au prêteur du loyer du navire, dû à l'armateur, en vertu d'un contrat d'affrètement à long terme conclu avec des tiers. Souvent une telle délégation est considérée comme offrant une meilleure garantie qu'une hypothèque enregistrée.

Comme une Convention Internationale sur les privilèges et hypothèques maritimes s'occupe particulièrement des problèmes de garantie, on peut se demander si cette Convention ne devrait pas comprendre des dispositions relatives à la reconnaissance internationale des droits en question et même des dispositions relatives à l'effet sur ces droits, de la vente volontaire ou de la vente forcée sur injonction du Tribunal d'un des Etats contractants. Nous nous référons ici également à la Convention de Genève de 1948, mentionnée plus haut.

Considérant que cette question est déjà traitée par une autre Commission Internationale du C.M.I. sur un plan plus vaste, il peut être suffisant à ce stage d'attirer l'attention des Associations Nationales sur ce sujet, sans qu'il faille examiner dans ce rapport les problèmes s'y rapportant.

E. Nécessité d'éviter des contradictions entre la nouvelle Convention et la Convention de 1957 sur la Limitation de la responsabilité des propriétaires de navires.

15. Tandis que l'Article 3, 2°) de la Convention de 1957 prévoit que pour chaque portion du fonds de limitation constitué sur base de cette Convention, la distribution parmi les créanciers sera effectuée dans la proportion du montant de leurs créances respectives, l'Article 4 et l'Article 7 de la Convention de 1926 semblent consacrer, au moins implicitement, le droit pour les créanciers privilégiés de partager ce fonds sans que soit tenu compte du rang de leurs créances respectives.

Quoiqu'il soit difficile d'imaginer que ces dispositions, apparemment contradictoires, puissent en pratique donner lieu à des difficultés, ce serait une sage précaution d'éviter ce conflit lors de la préparation de la nouvelle Convention. Ceci peut se faire en déclarant, dans la nouvelle Convention, que dans le cas de distribution du fonds mentionné ci-dessus, les créanciers partageant ce fonds, le feront « pari passu » sans avoir droit à aucune priorité résultant des privilèges garantissant leurs créances respectives.

Questionnaire

I. Etes-vous d'avis qu'une nouvelle législation internationale traitant des privilèges et hypothèques maritimes est nécessaire et souhaitable ?

II. a) Sous quel rapport la Convention de 1926 doit-elle être améliorée ?
(réponse à donner par chaque Association Nationale dont le pays a accepté la Convention)

b) La même question, mais la réponse doit être donnée par toutes les autres Associations Nationales.

III. a) Quelles seraient, selon vous, les exigences d'une nouvelle Convention ?
Plus spécialement :

b) Désirez-vous que la nouvelle Convention prévoit des règles de droit uniforme sur tous les problèmes mentionnés dans ce rapport ou seulement sur le plus grand nombre de problèmes possible ?

c) Existe-t-il d'autres problèmes dans ce domaine qui ne sont pas traités dans ce rapport et qui, selon votre avis, peuvent être soumis à une législation internationale uniforme ? Dans l'affirmative, mentionnez ces problèmes.

IV. Supposons qu'un nouveau projet de Convention contenant des dispositions uniformes soit adopté, en ce cas :

a) seriez-vous favorable à la reconnaissance internationale, par tous les Etats contractants, des hypothèques maritimes, dûment mentionnées dans le régistre public dans lequel le navire est enregistré ?

i) quand le pays de l'enregistrement est un Etat contractant, et

ii) quand le pays de l'enregistrement est un Etat non-contracttant ?

b) Estimez-vous que les catégories de créances, qui donnent lieu à des privilèges maritimes telles qu'elles sont prévues dans l'Article 2 de la Convention de 1926,

i) doivent être limitées et dans l'affirmative, comment; ou

ii) maintenues, ou

iii) étendues, et dans l'affirmative à quelles autres créances ?

c) N'êtes-vous pas d'accord qu'en aucun cas les créances mentionnées à l'Article 2, sous paragraphe 5, ne devraient être garanties par privilège ?

d) Quelles devraient être les dispositions de la nouvelle Convention régissant le rang :

i) entre les hypothèques enregistrées « inter se »;

ii) entre les hypothèques et les privilèges, et

iii) entre les privilèges « inter se » ?

e) Doit-on accorder une reconnaissence internationale à certains droits sur les navires, autres que les privilèges maritimes proprement dits, tel par exemple le privilège possessoire britannique, ou le droit de rétention qui n'est pas privilégié ?

f) Dans l'affirmative, quel rang doit-être reconnu à ces droits, si un privilège est accordé ?

g) Ou bien la Convention doit-elle interdire aux Etats contractants de maintenir ou de créer de tels droits dans leur loi interne ?

h) Les Etats contractants pourront-ils ou non accorder dans leur Droit interne des privilèges aux créanciers autres que ceux mentionnés dans la nouvelle Convention, même si de tels privilèges prenaient rang après toutes les hypothèques enregistrées et tous les autres privilèges admis ?

i) Etes-vous d'accord qu'en aucun cas un Etat contractant ne pourra faire de distinction entre les droits résultant d'une hypothèque dûment enregistrée :

i) dans un Etat contractant, ou

ii) dans un Etat non-contractant ?

j) Etes-vous d'avis que dans la nouvelle Convention on doit pouvoir faire valoir un privilège sur le fret promérité par le navire ?

k) Dans l'affirmative, déterminez les conditions suivant lesquelles le fret serait tenu de garantir un privilège, notamment le fret perçu par qui, et pendant quel voyage ?

l) Les privilèges maritimes doivent-ils également produire leurs effets sur d'autres actifs appartenant à des propriétaires de navires p.ex. sur les sommes dues au propriétaire et mentionnées à l'Article 4 de la Convention de 1926 ?

V. a) Quels sont le ou les délais qui doivent être fixés par la Convention, pour l'extinction des privilèges ?

b) Ces délais doivent-ils prendre cours à la date ou le privilège prend naissance ou à la date à laquelle le créancier essaye d'obtenir le bénéfice du privilège ?

VI. a) Estimez-vous que la nouvelle Convention doit énumérer les causes d'interruption du ou des délais d'extinction et qu'elle ne doit pas permettre au droit national d'introduire d'autres causes d'interruption ?

b) Dans l'affirmative quelles sont les causes qui doivent être énumérées (voir paragraphe 8, sous-paragraphe j) de ce rapport) ?

c) Considérez-vous que dans la nouvelle Convention il ne faut pas permettre d'interrompre ces délais ?

VII. a) La nouvelle Convention doit-elle s'occuper des problèmes relatifs au changement de nationalité du navire (pavillon) qui fait l'objet des problèmes posés au paragraphe 11 de ce rapport ?

b) Dans l'affirmative quelle est la solution proposée à l'égard de ces problèmes ?

VIII. a) Etes-vous d'avis que la nouvelle Convention doit stipuler que dans le cas d'un navire, battant le pavillon d'un Etat contractant, et vendu sur l'ordre du Tribunal d'un Etat contractant, toutes les hypothèques enregistrées et tous les privilèges attachés à ce navire seront éteints à raison de cette vente et de la distribution du produit de la vente ?

b) Considérez-vous comme nécessaire ou désirable que la nouvelle Convention contienne des dispositions similaires concernant la vente d'un navire à la suite d'une décision d'un Tribunal d'un Etat non-contractant et dans ce cas quelles seraient les conditions requises ?

IX. a) La nouvelle Convention devrait-elle aussi couvrir les hypothèques sur les navires en construction et tous les autres privilèges qui naissent pendant la période de construction ?

b) Dans l'affirmative, faut-il incorporer l'essentiel du projet de Convention sur l'enregistrement des droits des navires en construction, dans la nouvelle Convention ?

X. a) Pensez-vous que la nouvelle Convention devrait s'occuper des affrètements à long terme, tels que les affrètements coque-nue, affrètements à temps et affrètements pour voyages consécutifs, dans le but de protéger la position de l'affréteur en cas :

i) de vente du navire affrété, sur décision du Tribunal d'un Etat contractant ou non-contractant;

ii) ou de la vente volontaire du navire ?

b) Dans l'affirmative, ces dispositions devraient-elles s'occuper inconditionnellement de tous affrètements à long terme ou l'application

de ces dispositions devrait-elle être limitée au cas, où le propriétaire de navire a cédé ses droits résultant de l'affrètement, à un tiers ?

c) En ce cas, quelles sont vos suggestions sur la manière de traiter ce sujet ?

XI. Etes-vous d'accord que contrairement à la Convention de 1926, cette nouvelle Convention devrait contenir une disposition du genre mentionné au paragraphe 15, in fine, de ce rapport ?

XII. a) Quel doit-être, à votre avis, le champ d'application de la nouvelle Convention ?

b) Devrait-il être aussi étendu que possible de façon à s'appliquer aussi, notamment, aux navires battant le pavillon d'Etats non-contractants ?

XIII. Veuillez, s.v.p., donner une description résumée de votre loi nationale concernant les privilèges maritimes et les hypothèques se rapportant plus spécialement aux questions suivantes :

a) Quels sont les privilèges maritimes reconnus par votre loi interne ?

b) Votre loi reconnaît-elle d'autres droits se rapportant aux navires, tels que :

i) les privilèges possessoires;

ii) privilèges légaux;

iii) un droit de rétention qui ne donne pas naissance à un privilège maritime ?

c) Quelles sont, dans votre loi interne, les rangs respectifs :

i) des hypothèques enregistrées entre elles,

ii) des hypothèques enregistrées et des privilèges maritimes,

iii) des privilèges maritimes entre eux et

iv) des hypothèques enregistrées et des privilèges maritimes, d'une part, et des autres droits sur le navire, mentionnés dans le sous-paragraphe b) ci-dessus, d'autre part ?

d) Votre loi nationale permet-elle qu'un navire soit rayé du régistre national par sa vente à l'étranger, sans que les créanciers hypothécaires aient été avisés et sans que leur consentement ait été obtenu ?

d) Suivant votre loi nationale, un navire peut-il être enregistré dans votre régistre national sans avoir à produire la preuve que l'enregistrement précédent dans un autre pays a été radié ?

f) Existe-t-il d'autres dispositions dans votre loi nationale qui se rapporteraient à l'objet de cette étude ?

XIV. Quelles sont les règles de conflits de loi appliquées par vos Tribunaux dans les cas où la Convention de 1926 ne s'applique pas ?

XV. Si votre réponse à la question N° 1 est affirmative, seriez-vous partisan

a) d'amender la Convention de 1926, ou

b) de rédiger un protocole à joindre à la Convention de 1926, ou

c) de préparer une Convention entièrement nouvelle qui remplacerait la Convention de 1926 ?

Amsterdam, janvier 1964.

J. T. ASSER,

Président de la Commission Internationale

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

3

(3 - 64)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

INTERNATIONAL MARITIME COMMITTEE

MARITIME LIENS AND MORTGAGES

3

(3 - 64)

Replies to Questionnaire

SWEDEN	(HYPO - 3)
FINLAND	(HYPO - 4)
ITALY	(HYPO - 5)
UNITED STATES	(HYPO - 6)

SWEDISH ASSOCIATION OF INTERNATIONAL MARITIME LAW

REPLY

INTRODUCTORY COMMENTS

The Swedish Association had the pleasure to receive the Preliminary Report and Questionnaire during the first part of January 1964 together with a request that the Association should give its answer and its report middle of March 1964. We should like at this stage to pay our tribute to the chairman of the International Subcommittee for the very lucid and full analysis of the problems involved. The subject is indeed very complicated reaching over a wide field.

The Swedish Association has endeavoured in the time available to give its answers to the various questions in as full way as possible. A group consisting of Mr. P. Dreijer, E. Hagbergh, L. Hagberg, Cl. Palme, K. Pineus, L. Rahmn have studied the subject and has also cooperated with the study group formed in Norway consisting of Mr. Sj. Braekhus, P. Michelet, A. Rein and Fr. Rindal. Still the complicated nature of the subject, the various and sometimes conflicting interests involved and the limited time available for thorough studies of various complicated aspects make it imperative to request that our answers should be regarded as of a preliminary nature and should not necessarily on all points be held as the final and definite views of the Swedish Association.

We should like to add that many of the questions in the Questionnaire may be held as different approaches to the same problems and our answers will accordingly in many cases be overlapping.

In order not to upset the timetable of the International Subcommittee the Swedish Association after this important and general reservation should like to submit the following report.

GENERAL OBSERVATIONS

We have considered what would be the best methodical approach to the problems involved.

Jeremy Bentham's words : « The greatest happiness of the greatest number is the foundation of morals and legislation » are we submit applicable to the work in hand. One of our targets, perhaps the most important one, should be to strenghten the position of long term credits in ships. This can only be obtained if what emerges as the ultimate results of our efforts in this field is framed in such a way as to attract as many ratifications as possible and thus constitute a practical example of « the greatest hapiness of the greatest number » of States. In this respect the 1926 Convention leaves much to be desired.

To that end our Association has considered the problem which we develop in our answers to the Questionnaire, whether it would not be realistic to resort to a system of « separate units » (Vide i.a. our answer to Questions I and II).

Question

I. Is it your opinion that new international legislation relating to maritime liens and mortgages would be necessary or desirable ?

Answer

Yes, we think new international legislation relating to maritime liens and mortgages desirable.

We are aware that maritime circles attach great importance to a system by which the Contracting States recognize mortgages duly created in another Contracting State.

We submit that a separate Convention be made in which it is said that the Contracting States understake to recognize and accept a mortgage duly created in another Contracting State. Such a convention should also deal with the effect of a forced sale of a vessel in a Contracting State and should we hope be adopted by most Maritime Countries.

The draft Convention adopted in Stockholm in 1963 on registration of ships under construction has, we understand, much appeal to some countries and less to others. It would probably be technically possible to have the separate convention on mortgages referred to above worked into the Stockholm draft. The coolness shown towards it in some countries must not be allowed to wreck the general acceptance of other Conventions which otherwise might prove acceptable to most countries. For that reason it might prove advisable to retain the draft Convention on registration of ships under construction as a separate Convention.

The attitude towards maritime liens is not identical everywhere. For that reason we submit that a separate Convention be made dealing with liens, priorities, prescriptions, etc.

Naturally the three Conventions, if one has to resort to that number should be prepared in such a way as to eliminate all difficulties in

respect of coordinations for those Contracting States that are prepared to adopt all three of them.

Should the further exploration of the attitude of the various National Associations prove that there is unanimity of views of what we in this connection might call « the three units », or on two of them, then of course one might try to follow a less complicated course and have only one or two Conventions. The methodical approach we suggest has thus as its one and only aim to get as many adherents as possible.

Question

II. (a) In what respect does the 1926 Convention need to be improved ? (to be answered by each national Association, the country of which has acceded to the Convention)

(b) Same question, but to be answered by all other national Associations.

Answer

As we have already said under our reply to Question number I we believe it might well prove necessary to have three Conventions :

(i) One dealing with the mutual acceptance of mortgages and registration of mortgages, and also with the effect of a forced sale.

(ii) One dealing withe registration of rights in ships under construction.

(iii) One dealing with liens, priorities and prescription. As for the Convention on liens we should like to underline the following points.

The group of liens now appearing as number 1 in Article 2 need a careful study as to the actual meaning. We have however no fundamental changes in mind. It might well be that this group had better be split up in two groups, one compromising the costs of a forced sale of a vessel and the costs for preserving the vessel after a petition has been filed for a forced sale, the other compromising charges debited for public services to the ships. It should particularly be mentioned that other public charges or taxes do not give right to a lien.

As for the content of the Protocol of Signature we believe that in some respects it should be put into the Convention itself, whereas some of it had better be cut out altogether.

The rights appearing in the Protocol under I nr 1 should we think be cut out. Article 2 nr 1 of the Convention is sufficient in that respect.

The costs of removing a wreck which now appear under 1 nr 2 should be put into the first group of liens in the new Convention.

The rest of nr I should should we submit be abolished.

As for the text now appearing in the Protocol of Signature under nr II it had probably better be retained in a Protocol. Should most national Associations like to have the text of nr II appear in the Convention itself we would not oppose such a course though.

The liens in Article 2 appearing under 2 and 3 should be retained.

The idea behind the group of liens now appearing under nr 4 should be retained. We should like the wording to be improved. We think that is should be said in a general way.

(i) that a third party is entitled to a lien for damages which occur in consequence of the navigation and management of the vessel

(ii) that the indemnity for bodily injury and for cargo damage now appearing in nr 4 should be retained.

If it is felt that an enumeration should be added we think that as examples be mentioned damages due to collision, explosion and oilpollution, damages caused to harbours and costs incurred for removing a wreck which has become an obstruction to navigation.

We have carefully weighed the advantages and disadvantages of retaining the liens for claims now appearing under nr 5. We have reached the conclusion that they should be struck out. (Vide also our reply to Question IV (c) below.)

We submit that in the new convention the right of retention should be dealt with.

We are not prepared at this stage to say whether such a right should be given a rank before or after a mortgage in a ship.

In favour of the idea of having the right of retention rank immediately *before* the mortgage can be said :

(a) that it would make it more easy for a shipowner to order repairs as the shipyards would get a better security for the repair bill than they have at present in our country and

(b) that the right of retention would be given the same rank as it has already in Denmark, Norway and the United Kingdom. (We lack information however of the rank the right of retention has in other countries.)

In favour of the idea of having the right of retention rank immediately *after* the mortgage can be said :

(a) that this would permit the mortgagees to have a say on the question whether the classification work, or the work for owners account should be put in hand or not; the reasons for not doing it could well be that it would be more economic to have the ship sold without investing additional money in it. (Average repairs covered by Hull Underwriters do not enter the picture in this connection.)

(b) that for the shipyard industry as a whole to move up the rank of the right of retention would be a mixed blessing indeed; shipyards are to a very large extent long term creditors in ships. They have certainly more money at stake in that respect than the amounts of most repair bills.

(c) that shipyards have every opportunity to obtain information and check the mortgages of a ship and can decide, before starting out on a large repair works, to obtain a bankguarantee or the assent of mortgagees, should they feel this a wise precaution.

Until we know more of the rank granted to the right of retention in other countries our Association should like to reserve its view as to the rank that should be accorded to such right in the new convention.

We submit that a new Convention on liens should deal with the following problem as well :

The right to become subrogated to a lien; that is to say the Convention should say that the lien should follow the claim.

The separate Convention on recognition on mortgages should in our view settle the following problems :

(i) that a forced sale of a ship in a Contracting State according to lex fori finally disposes of all maritime liens and mortgages on that ship

(ii) that a buyer of such a ship has the right to register his ship on the basis of a document issued by the public authority that has sold the ship.

We mean of course in respect of (i) that nevertheless the buyer and the mortgagee should be at liberty to decide that the mortgage in the ship should be maintained.

Question

III (a) What would in your opinion be the requirements of a new convention ?

More specially :

(b) Are you in favour of the new Convention providing for rules of uniform law with respect to all the problems mentioned in this report or to as many as possible of these problems ?

(c) Are there any other problems in this field which are not dealt with in this report which in your opinion are susceptible of international uniform legislation ? If, so, please state such problems.

Answer

Our attitude towards Question III is we believe made sufficiently claer by the answer we have given to Question I and II. Still further investigation of the whole subject might well prove that there might be other problems in this field which are susceptible of international uniform legislation. For instance the subject dealt with in the report regarding « coordination of the Conventions relating to Liens and Mortgages and Limitations ». It has also been pointed out that for those States that have ratified the arrest conventions of 1952 a possible conflict between the two conventions should be looked into.

Question

IV Supposing that a new draft convention containing uniform provisions were adopted, then :

(a) would you be in favour of an international recognition by all the Contracting States of maritime mortgages duly entered in the public register in which the ship is registered;

(i) when the country of registration should be a Contracting State, and

(ii) when this country should be a non-Contracting State ?

Answer

We should like to answer the question IV (a) (i) in the affirmative.

We do not think that a new Convention should say expressly that it *does* recognize maritime mortgages duly entered in the public register whatever the flag of the ship, nor that the Convention should say that it *does not* in case the ship flies the flag of a non-Contracting State.

Were the Convention to say that it does recognize the maritime mortgages of a Contracting State it would follow that if the ship flies the flag of a non-Contracting State it is up to the national law to decide this issue. Sweden might well be prepared to recognize the maritime mortgages made out in the non-Contracting State of A but in exceptional cases be reluctant to accept one made out in the non-Contracting State of B. The question should be left open in the Convention.

Question

IV (b) Should in your opinion the categories of claims giving rise to maritime liens, as set out in Article 2 of the 1926 Convention

(i) be restricted and, if so, how; or

(ii) be maintained, or

(iii) be extended, and if so, to which other claims ?

Answer

Our attitude towards the number of maritime liens will follow from our answer to Question II.

With regard to the type of liens now appearing under nr 5 we have as we have already said come to the conclusion they should be struck out. We have discussed at some length before reaching this result.

Those in favour of the retention of the type of lien appearing under nr. 5 have said, that this lien makes it much easier for the master to obtain supplies, that owing to the lien for these claims the creditor will dare to make a contract without asking for cash payment or bank-guarantee, that therefore the ship will not be retained in port unnecessarily in order to await such security, that the opposition to the retention of this type of liens is based on experience from the highly efficient liner trade, that it does not take into account the problems of the small ships navigating on a thin economical margin.

Those in favour of abolishing altogether the type of liens appearing under nr. 5 submit, that communication being what they are today this type of contract is largely something of the past and has little practical importance, that experience goes to show that abuses are none

too rare, i.e. ships go on sailing, obtaining fuel and stores in various ports on the strenght of maritime liens long after they are bankrupt, to the detriment of long term creditors.

Thus we advocate that liens under nr. 5 should be struck out.

Question

IV (c) Do you not agree that at any rate the claims referred to in Article 2, sub-paragraph (5°) should not be secured by any lien ?

Answer

Our answer to this question is « yes ». Claims referred to in Article 2 sub-paragraph 5° should not be secured by a lien.

Question

IV (d) Which should be the rules of the new convention that govern priorities :

(i) as between registered mortgages « inter se »;

(ii) as between registered mortgages and liens, and

(iii) as between liens « inter se » ?

Answer

The answer to question IV (d) (i) should in our view be this.

The separate Convention on recognition of mortgages which we favour should contain rules as to the priorities between registered mortgages inter se. The priority should count from the time of entry in the register. If the entry is made the same date the priority should be identical, unless in the applications it is explicitly said the order of priority as between them. The priority between mortgages on the one hand and liens and right of retention on the other should be dealt with in the separate Convention on lien.

The answer to question IV (d) (ii) we have already discussed above.

In answer to question IV (d) (iii) we should like to say that Mr. Asser's description of the law of the Netherlands has much that appeals to us. Mr. Asser says (page 9 in his paper on Maritime Liens and Mortgages in the conflict of Laws) « These liens rank in the order in which they are listed in the article irrespective of the date on which they arise except that in the case of several liens for salvage the later has precedence over the earlier ». Such a system appears to us to have the additional advantage of doing away with many of the present difficulties in respect of the concept of « voyage ».

It might be worth considering if the concept of « distinct occasion » (Cf i.a. Article 2 of the 1957 Convention on Limitation) could be made to work in this connection.

Question

IV (e) should international recognition be granted to rights on ships other than maritime liens proper, as for instance the English possessory lien or a right of retention not giving rise to a lien ?

Answer

To continental lawyers the right of retentions is something with which they are familiar whereas the finer shades of the common law right of possessory lien is rather hard to grasp. In the paper Maritime Liens and Mortgages in the Conflicts of Law, Gothenburg 1963, Mr. Asser says (page 24) :

« Next we have the socalled possessory lien, which is a common law and not a maritime lien. In a recent case, namely « The St. Muriel » it has been described as the right of the shipwright or ship-repairer to retain the ship in his possession until his claims for payment are satisfied. In principle the shipwright's lien in respect of repairs ranks only after the maritime liens and is only enforceable so long as the ship remains in the possession of the shipwright, but the right of retaining the ship does not prevent her from being arrested and sold by order of the Court. In such event the English courts specifically protect the repairer's interest by ranking his claim high in the order or priorities, namely by preferring it to all registered mortgages and statutory liens, while it is being postposed to all maritime liens which accrued before the possessory lien came into being (« The St. Merril » sup.). As regards questions of rank, all maritime liens override alle registered mortgages whether accrued prior or after the mortgage and all statutory liens, the theory being that the mortgagee is an assignee to the owner's right of property.

Similarly, all posessory liens rank after existing maritime liens. Mortgages take precedence over later statutory liens which only accrue at the time of arrest of the ship. »

We are in favour of having a Convention on Maritime liens contain a provision about right of retention as we have already said. We are not prepared at this stage to indicate definitely the rank that should be given to the right of retention.

Whatever the outcome of the discussions that will follow on the particular issue of rank it will probably prove necessary to have the new convention to say also :

(i) that only claims for building and repairing of a ship give right of retention;

(ii) that only claims accruing whilst the vessel is in the possession of the builder or the repair yard should give right of retention. As soon as the vessel is out of the possession of the claimant the right of retention is extinguished;

(iii) that the claim for which a right of retention is exercised is payable out of the proceeds for a forced sale;

(iv) that the ship should be released as soon as the Owner has given full security for the claim for which right of retention is exercised.

In this respect the provisions of the 1957 Convention on limitation of liability might well serve as a model.

Question

IV (f) If so, what should be the priority, if any, to be granted to such rights ?

Answer

We have already when answering question IV (e) indicated that we believe that were an international Convention to contain a provision about right of retention, as we think it should (vide our reply to question II a), such right should rank immediately before the maritime mortgage.

Question

IV (g) Or should the new convention forbid the Contracting States to maintain or create such rights in their municipal law ?

Answer

We should of course very much like a Convention on liens to forbid the Contracting States to maintain or create other rights in their municipal law even if they obtain a lower rank than the rank granted to liens, right of retention and mortgages in the new Convention.

Still this might prove to be asking too much.

If one has to resign oneself to allow the Contracting State to create special rights in their municipal law then we submit that the Convention should decide that such rights should

(i) take rank after the rights enumerated in the Convention

(ii) be applicable only for the ships flying the flag of that particular State, or of another State that has introduced the same right in its national legislation.

Question

IV (h) Should or should not the Contracting States be allowed to grant in their domestic law liens in respect of claims other than those to be listed in the new convention, even if such liens should be postposed to all registered mortgages and to all the liens listed ?

Answer

In our answer to Question II (a) and IV (g) we said, that while we should very much like the Convention on liens to forbid the Contracting States from creating in their domestic law liens in respect of

claims other than those listed in the new Convention, we did not believe this was practical policy. We submit however again that if such rights are made permissible they should be dealt with as we explain above under our answer to Question IV (g).

Question

IV (i) Do you agree that under no circumstances the Contracting State should discriminate against the rights resulting from mortgages having been duly registered :

(i) in a Contracting State, or

(ii) in a non-Contracting State ?

Answer

The Swedish Association agrees that under no circumstances the Contracting State should discriminate against the rights resulting from mortgages having been duly registered in a Contracting State. As for mortgages registered in a non-Contracting State the Contracting State should in our view have liberty of action and accordingly the Convention should say nothing on the subject. (Vide also our answer to Question IV a).

Question

IV (j) Are you of opinion that under the new Convention liens should be enforceable against the freight earned by the ship ?

Answer

We have discussed and weighed very carefully the advantages and disadvantages of the present situation with regard to liens in respect of freight and other accessories appearing in Article 4 of the 1926 Convention. We have reached the conclusion that lien in accessories should be struck out entirely, with the possible exception of those appearing in Article IV nr 2. (Vide also our answer to Question IV e).

Question

IV (k) If so, please set out the conditions under which, in your opinion, freight should be liable to a lien, inter alia, the freight earned by *whom* and during *what voyage*.

Answer

In view of our negative answer to question IV (j) there is no need for us to answer this question.

Question

IV (l) Should maritime liens be enforceable against *other* assets of the shipowners, such as one or more of the sums due to the owner and referred to in Article 4 of the 1926 Convention ?

Answer

As we have already said in our reply to Question IV (j) we think that no lien should be enforceable against other assets of the shipowner than the ship, thus preferably not in any of the sums referred to in Article 4. It could be contemplated though that the sum referred to in Article 4 nr 2 for unrepaired damages should be retained.

Question

V (a) What period or periods should be fixed in the new Convention with respect to the extinction of liens ?

Answer

We think that the periods of extinction of the 1926 Convention should be maintained except of course that the particular period of six months for liens under Article 2 nr. 5 would disappear if these types of liens are struck out which we think they should.

(i) We submit that the Convention had better also say that the Court should apply the lex fori in respect of liens and their prescription

(ii) that a lien should become time barred within the period now appearing in Article 9 first para unless before the expiry of such period proceedings have commenced before a competent Court or an Arbitrator or an Arbitration Tribunal in a Contracting State or the claim has been filed in the bankruptcy estate of the debtor in a Contracting State.

(iii) that a right of execution is time barred unless application for a forced sale in a Contracting State is made within a year counted from a final decision of an action described in nr. (ii) above.

The Convention on mortgages should set out that mortgages are governed by the law of the State where the ship is registered.

Question

V (b) Should these periods run from the date on which the claim secured by the lien accrues or from the date on which the creditor seeks to enforce the lien ?

Answer

The period for extinction of liens should run we think from the date on which the claim secured by a lien accrues. Thus no change is advocated.

As for the extinction of the right of retention we refer to our reply under Question IV e under (ii).

Question

VI (a) Do you agree that the new Convention should list the causes of interruption of the period or periods of extinction and that under national law interruption by other causes should not be allowed.

(b) If so, what should be the causes to be listed (v. paragraph 8, sub-par. (j) of this report).

(c) Or are you of opinion that under the new Convention no interruption of these periods should be allowed ?

Answer

Our Association holds the view that the period of extinction should not be allowed to be interrupted. Our answer is therefore in respect of

(a) no; unless it is felt that it is necessary especially to mention that an action in court or before an Arbitrator or Arbitration Tribunal or filing in bankruptcy breaks the period of extinction. To us this would appear superfluous.

(b) In view of our attitude as explained to question VI (a) we do not have to give the list.

Subject to the qualification given in our answer to question VI (a) we answer (c) in the affirmative.

Question

VII (a) Should the new convention deal with problems connected with a change of nationality (flag) of the ship concerned which problems are discussed in paragraph 11 of this report ?

(b) In the affirmative, which is the solution you propose with regard to these problems ?

Answer

(a) The new Convention should in our view deal with problems connected with a change of flag.

(b) The draft convention on Registration of ships under construction, adopted by the C.M.I. in 1963, contains in article 11 provisions in this respect. Our Association believes that the solution adopted in the said article might well prove a formula that might be used in the new Convention.

To these provisions should, we think, be added the rule about forced sale which we propose under our answer to Question II.

Question

VII (a) Do you agree that the new Convention should provide that, in the event of a ship flying the flag of a Contracting State being sold by the order of a Court of one of the Contracting States, all registered mortgages and liens on such ship shall be extinct as a result of such sale and the distribution of the proceeds of the sale ?

(b) Do you consider it necessary or desirable for the new convention to contain similar provisions with respect to the sale of a ship by the order of a Court of a non-Contracting State and, if so, subject to what conditions ?

Answer

With respect to Question VIII (a) we think that the Convention should say that on sale of the ship in a Contracting State all liens and mortgages should become extinct. (Vide also our answer to Question II (d).)

As for Question VIII (b) would not the result if nothing is said in the Convention as to the effect of a sale in a Non-Contracting State, be that the Court is free to judge each case on its merits ? Is that not what most of us should like ?

We are not sure that it is derisable to deal in the Convention with the problem mentioned in Question VIII (b).

Question

IX (a) Should the new Convention also cover mortgages on ships under construction and any liens accruing against such ship during the period of construction ?

(b) In the affirmative, should this be done by incorporating the essence of the draft Convention on the Registration of rights in respect of ships under construction in the new Convention ?

Answer

For the reasons explained under our answer to Question I above we think that a new Convention should cover mortgages on ships under construction along the lines of the draft Convention on the subject adopted in Stockholm 1963. It might perhaps prove necessary to have that issue dealt with in a separate Convention prepared in such a way as to not come into conflict with a Convention of mutual recognition of mortgages and forced sale and a Convention on liens.

As already pointed out in our answer to Question I should the general reaction of the National Associations prove to be such as to make it possible to have everybody agree to have a Convention on mutual recognition of mortgages and on ships under construction made into one Convention only we should welcome it. Still at present we believe it is a sound policy to strive to have a separate Convention for ships under construction.

Question

X (a) Are you in favour of the new Convention dealing with long-term charters, such as bare-boat charters, time charters and charters for consecutive voyages, for the purpose of protecting the position of the charterer in the event :

(i) of a sale of the ship chartered by the order of a Court of either a Contracting or of a non-Contracting State;

(ii) or of a voluntary sale of the ship ?

(b) In the affirmative, should such provisions relate to long term charters without further qualifications or should the application of the provisions be restricted to the case in which the shipowner had assigned his rights under the charter to a third party by way of security ?

(c) In either case, what would be your suggestions for dealing with this particular matter ?

Answer

An International Subcommittee under the chairmanship of Mr. Giorgio Berlingieri (The Berlingieri Committee, for short) has undertaken a study of the problem of charterparties. A working group within Berlingieri Committee has produced a report and a draft convention.

The work of the Berlingieri Committee has for the time being been suspended owing to the view that it might well prove desirable to see if and to what extent the registration of charterparties and the problems connected with it should form part of the revision of the 1926 Convention.

We are aware that c/p are in many cases used as collateral for a long term credit granted to a ship. In fact creditors in many cases regard the c/p as of greater importance as security than the ship itself. Our discussions have however shown that the question of registration of c/p and the position of the c/p in case of a forced sale of the vessel is very hard to find. We believe that in some countries, but not in Sweden, there is opposition to the whole idea of having c/p dealt with by an international Convention whether separate or not.

Our endeavours at this stage should be to get the widest possible acceptance of the Conventions which are to be prepared and controversial issues, if not essential to the Conventions in preparation, had better be avoided.

For these reasons, we have, reluctantly indeed, reached the conclusion that the answer to Question X (a) had better at this stage be « no ». Needless to say that if other National Associaitons should react positively to the query under X (a) then we shall join in the efforts to find an acceptable solution.

Our answer to question (c) is thus to a certain extent dependent on the reactions of other National Associations. If these reactions prove that most Associations prefer to have the matter of c/p kept outside a new Convention on mortgages then we believe the study of c/p should be proceeded with as separate issue, as it has become too important to be kept in cold storage very much longer.

Question

XI. Do you agree that otherwise than in the 1926 Convention, the new convention should contain a provision of the kind mentioned in paragraph 15 in fine of this report ?

Answer

It might well prove a wise precaution to avoid a possible, although farfetched, conflict with the 1957 Convention on limitation by stating in the new Convention that the creditors sharing in a limitation fund under the 1957 Convention do so pari passu. They should not be entitled to any priority resulting from the liens securing their claims. (Vide also our answer to Question III.)

Question

XII (a) What should be in your opinion the scope of application of the new Convention ?

(b) Should it be as wide as possible, so as to apply also, inter alia, to ships flying the flag of a non-Contracting State ?

Answer

We should like the convention to have a wide application.

Thus it should lay down i.a. that a maritime mortgage issued in a Contracting State should be held valid in other Contracting States.

We have already said that should it prove practical policy to allow the Contracting States to introduce in the national law liens or other rights not mentioned in the Convention the Court in the Contracting State shall not be permitted to apply such additional liens and rights to other vessels than those belonging to the same State as the Court or of another State that has introduced the same right in its national legislation. (Vide our answer to Question IV (g).)

As for the maritime liens that will appear in the new Convention the Convention should say that lex fori should apply.

Question

XIII Please give a summary description of your domestic law relating to maritime liens and mortgages, dealing more specially with the following questions :

(a) what are the maritime liens recognised in your domestic law;

(b) does your domestic law recognize other rights on or with respect to ships, such as :

(i) possessory liens;

(ii) statutory liens;

(iii) a right of retention not giving rise to a maritime lien ?

Answer

(a) Sweden has ratified the 1926 Convention and introduced its contents in the maritime code.

(b) Our law does not recognize

(i) possessory liens but we do recognise a right of retention.

(ii) Yes, we have, on the strength of article 3 second par. added a statutory lien, ranking after maritime mortgages, for claims for damage due to a B/L containing false or incomplete statements. This we think should be struck out from our law.

(iii) Yes, we have a right of retention which ranks after maritime liens and mortgages. As we have already said we should like a new Convention to introduce a right of retention.

Question

XIII (c) What are under your domestic law the respective priorities :

(i) as between registered mortgages « inter se »;

(ii) as between registered mortgages and maritime liens;

(iii) as between maritime liens « inter se » and

(iv) as between registered mortgages and maritime liens, on the one hand and the « other rights on a ship » referred to in sub-paragraph (b) above on the other hand ?

Answer

We describe, in our answer to Question IV (d) (i), the way we think a new Convention should govern priorities between mortgages « inter se ». The reply given to the said question is at the same time a brief outline of our own system of priorities between registered mortgages and our answer to Question XIII (c) (i) had therefor better be a reference to what has been said already in respect of Question IV (d) (i).

As Sweden has ratified the 1926 Convention the priorities between registered mortgages and maritime liens are those of the Convention. (Question XIII (c) (ii) and (iii).

The « other rights on a ship » to which references made under (iv) would under our law be the right of retention, which in Sweden ranks after liens and mortgages.

We have already, when we give our answer to Question IV (e), submitted our views in respect of the right of retention, that is to say we advocate that such right be inscribed in the new Convention.

Question

XIII (d) Under your domestic law is it possible to have a ship deleted from the national register on being sold abroad, without the mortgagees having been notified and their consent having been obtained ?

Answer

Unfortunately practical experience shows that it is possible in our country to have the ship deleted from the national register on being sold abroad without the mortgagees having been notified and their consent having been obtained.

This is highly unsatisfactory.

Question

XIII (e) Under your domestic law can a ship be entered in your national register without production of evidence that her previous registration in another country was deleted ?

Answer

The answer is in the affirmative.

Question

XIII (f) Are there any other provisions of your domestic law that would be pertinent to the subject under study ?

Answer

No we don't think there are.

Question

XIV Which are the rules of conflict of laws applied by your Courts in cases to which the 1926 Convention does not apply ?

Answer

Very little definite can be said about the working of the conflict of law rules in respect of maritime liens and mortgages.

Some Scandinavian Courts have accepted maritime liens in ships flying the flag of the Courts althoughs the liens were created abroad and unknown to lex fori. This then would mean an adoption of « lex loci contractus » for liens.

As for maritime liens in respect of claims for wages this would we believe be dealt with according to the law of the flag.

If there are liens duly created under lex fori, maritime mortgages created abroad or vice versa or maritime liens created both abroad and at home the position in respect of rank and prescription becomes most complicated if and when the Court recognises such rights.

We do not know for certain what the decision would be but we should not be surprised that in a « mixed bag » such as described above our Courts would find that to apply lex fori to question of rank and prescription might perhaps be made to work, although it would not solve the position for a lien created abroad with no equivalent in lex fori.

The complicated problems that may occur, and have done so, should stimulate the various States towards a solution of all the problems involved.

Question

XV Assuming your answer to question I to be in the affirmative, would you favour :

(a) by amending the 1926 Convention, or

(b) by drafting a protocol to the 1926 Convention, or

(c) by preparing an entirely new convention which would replace the 1926 Convention ?

Answer

We think that it would be preferable to draft entirely new conventions to replace the 1926 Convention. Probably much of the contents of the 1926 Convention might be used in the new ones.

Stockholm 10 March 1964.

for the Swedish Association of International Maritime Law

Kaj Pineus, President *Claes Palme, Hon. Secretary.*

FINNISH MARITIME LAW ASSOCIATION

REPLY

I. Having regard to the fact that at the time when the Convention on Maritime Liens and Mortgages was brought into being in 1926 the shipowner's liability was limited either to the value of the ship or to a certain amount of money, but that the Brussels Convention 1957 on the Limitation of Shipowners' Liability fixes this liability at a certain amount of money only, without regard to the value of the ship, there are stipulations in the 1926 Convention, which are in conflict with the stipulations in the 1957 Convention. Thus under the 1926 Convention the holder of a claim, to which a maritime lien is attached, has the rights to be paid in full, irrespective of amounts due to other claimants, whereas according to the 1957 Convention the total proceeds are to be divided pari passu between all claimants.

There thus seem to be reasons for having these matters clarified.

II. a) In addition to clarification being necessary on conflicts between these two Conventions, it seems to be a widespread opinion that the maritime liens of the 1926 Convention are too far reaching and thus damaging to more important claims. As such more important claims registered mortgages have been considered.

III. b) The stipulations regarding maritime liens and mortgages could, as is the case with the 1926 Convention, be brought together in one and the same Convention. It has, however, been said that if there are two separate Conventions, one regarding ships under construction and another relating to ships trading, then, perhaps, it would be easier te secure ratification. If that is so, we would have no objections to two different Conventions, but we think it would be important to have liens for vessels under construction (and such liens can arise) regulated in a Convention relating to mortgages in ships under construction. Likewise liens regarding ships trading should be included in a Convention on mortgages in such ships.

IV. a) (i) It would be natural that a State which has ratified the Convention, as suggested under III, and which has thus become a con-

tracting State, should recognize mortgages registered in another contracting State.

In this connection it might be advisable to investigate whether in a new Convention this should enumerate the conditions the existence of which is necessary for the registering of a mortgage.

(ii) Whether a contracting State should recognize a mortgage registered in a non-contracting State would depend on so many different factors that it is difficult to give a definite answer regarding all cases. But if the requirements for the registration of a mortgage in a non-contracting State are appreciably the same as in a contracting State, then the contracting State should have no reason for not recognizing a mortgage registered in such non-contracting State.

b) Claims under 1, 2 and 3 in Article 2 of the 1926 Convention must probably also in the future be protected by maritime liens. This would also apply to claims under N° 4, although we have an open mind on the question as to how far passengers' luggage should be protected by a lien.

We understand that « public taxes » mentioned in Article 2 1) means only costs in connection with the administering of the sale of a ship and does not refer to the shipowners taxation. In Finland claims for ordinary taxes rank after mortgages.

c) Claims under Article 2 5) could, we think, be protected without resorting to maritime liens and such liens should therefore not apply to claims under N° 5.

d) (i) Mortgages take preference according to date of registration or, if preferred, from the date of application for registration.

(ii) Liens take preference before mortgages.

(iii) The stipulations in the 1926 Convention on the order in which liens are to rank, seem to be fair, equitable and practicable.

It is probably necessary to grant a ship-builder or a ship-repairer the right to have security in the ship he is building or repairing for claims arising out of the building or repairing contract (right of retention).

f) This right of retention would probably have to rank after liens but before mortgages.

g) Right of retention must probably exist as without such right ship-builders and repairers in many cases would not undertake to carry out works. The consequence in such cases would be that holders of liens and mortgages would suffer. On the other hand, it might in cases, where big repairing contracts are concerned, be necessary to have the approval of mortgage holders before repairing a vessel. This is at present a very common stipulation in contracts of credit, where the creditor has a security in the ship.

h) Although there should be no need to have additional liens there would seem te be no objection to contracting states establishing additional liens according to their domestic laws. Such liens should, however, rank after Convention liens and mortgages.

i) A contracting State should not discriminate against the rights resulting from mortgages having been duly registered

(i) in another contracting State,

(ii) but might not be able to recognize a mortgage registered in a non-contracting State, unless the conditions for registering a mortgage in such non-contracting State are such that a contracting State could approve of them.

j, k, l) There are reasons pro and con for liens being enforcible against accessories. We would, however, be prepared to have liens extended to embrace compensation and remuneration as enumerated in Article 4) 1, 2 and 3, but have an open mind on the question whether outstanding freight should be included.

V. a) and b) On the whole it seems that the stipulations in the 1926 Convention are fair, sensible and practical, both as regards the date on which a lien shall be considered to have arisen and as regards the time at the expiration of which the lien would extinguish. Consequently national laws should not be allowed to deviate from the strict rules of the Convention.

VI. a) In Article 9 of the 1926 Convention the running of the time during which a lien is in force, can be interrupted if the vessel to which the lien attaches has not been in territorial waters, where she could have been arrested. This means that, for instance, if a vessel after a collision is not in the claimant's territorial waters for say four months, then a lien for claims out of that collision would be extended by these four months, wherefore the lien would be in force sixteen months.

We are of the opinion that it is not necessary to have stipulations making it possible to have the lifetime of a lien thus extended. In the first place, we now have the Arrest Convention of 1952 and any claim having a lien attached will be a maritime claim, as defined in the Arrest Convention, and can be basis for the arrest of the ship. But even in countries, where the Arrest Convention is not in force, vessels can be arrested. Means of communications nowadays are so well arranged that arrest can be made anywhere within one year after the claim has arisen, and there should therefore be no need to have the running of the lifetime of a lien extended.

b) Reference under this heading is made to paragraph 8 (sub-paragraph j). When reading this sub-paragraph j), we come to the conclusion that same refers to a cause which extinguishes the lien and has nothing to do with the interruption of the period during which the lien would be in force.

c) We have thought it convenient to place our reply to this question under VI. a) above.

VII. a) It is advisable and necessary that the Convention should state what effect a change of flag has ont he validity of liens and registered mortgages.

b) A lien or registered mortgage should follow a vessel, irrespective of a voluntary change of her flag. As to other factors which might influence the status of a lien or registered mortgage, we would refer to page 23 of this report, sub-paragraph j). In this respect we are of the opinion that a requisition of a ship by authorities should not affect these rights. If a vessel is being broken up and if for this reason she is expunged from the register, then, as the ship no longer exists, the security which claimants have had in her also de facto ceases to exist.

In such cases our Law states that claimants have security in the proceeds of the sale and that in addition the shipowner might become personnaly liable. Sale by order of a Court should extinguish liens and (unless otherwise agreed between the parties) registered mortgages.

The constitution of a limitation fund, where all claims are divided pari passu, would, of course, extinguish claims.

We think it important that the Conventions should clarify these points and, if so, there would be no difficulties as regards contracting States. Whether non-contracting States would follow the same principles would have to be looked into in each separate case.

VIII. a) and b) We have found it convenient to state our standpoint under VII.

IX. a) and b) We are of the opinion that all mortgages and liens both regarding ships under construction and ships trading, could be combined in one Convention, but we would be quite willing to accept one Convention for ships under construction and another for existing ships.

X. a) (i) Chartering of vessels has developped in such a way that in a not too distant future possibilities will have to be established to have long time charters regitered in vessels. Validity of such registrations could be stipulated in the Convention to be made as regards contracting States, but none of us is able to say what standpoint non-contracting States would take.

(ii) If there is a voluntary sale of a ship, then naturaly the seller and the charterer, on one side, could negotiate with the buyer, on the other side. If a vessel is let on a long charter, then the shipowner has certain rights and he can assign his rights to a third party, for instance to a credit-giving bank. But the charterer also has certain rights, and he might be interested in the uninterrupted continuation of a charter,

irrespective of the ownership of the vessel. If possibilities are established fo register a long-time charter, then there is no reason why the rights of the charter party should not apply to both sides.

b) We refer to what we have said under a).

XI. It is, of course, very important that there should be no conflicts between the 1957 Convention on the Limitation of Liability and the Convention to be made on Liens and Mortgages.

XII. a) The ultimate aim would, of course, be to have a worldwide application of the new Convention.

b) Irrespective of what is said in the new Convention, its stipulations cannot be administered in non-contracting States, unless they agree. Whether contracting States should apply the Convention to vessels flying the flag of a non-contracting State would have to be decided in casu, or on lines as in Article 7 of the 1957 Convention on Limitation of Liability.

XIII. a) The liens under our Law are practically the same as in Article 2 of the Convention, but claims under N° 5 of the Convention are, in our Law, split up into two. Further, Bill of Lading claims are taken out of N° 4 in the Convention and brought in under N° 6 in the domestic law.

b) As to other rights in our domestic law,

i) there are no possessory liens;

ii) there are no other statutory liens;

iii) there are, in our Law, no explicit stipulations regarding a right of retention by a shipwright. We do not therefore want to express an opinion as to what standpoint the Courts would take, if brought to them for decision.

c) Our domestic law provides :

i) that mortgages rank from the date they are registered;

ii) registered mortgages rank after maritime liens;

iii) and iv) liens rank inter se and, in respect of registered mortgages, as prescribed in the Convention.

d) If it is impossible to contact holders of registered mortgages, it might, in exceptional cases, be necessary to have a ship deleted from the register without the mortgagees being notified or their consent being obtained.

e) There is no explicit stipulation to the effect that a vessel must be expunged from a foreign register before being entered in the Finnish register. However, all stipulations regarding registration of vessels in Finland are so complete and give the authorities such wide rights to scrutinize all information, which they also avail themselves of meticulously,

that it would be impossible to get a foreign vessel registered in Finland without the vessel having been expunged from a foreign register.

f) On the whole, our registration gives ample safeguards to protect the rights of holders of registered mortgages.

XIV. If a certain rights has arisen in a foreign country and according to the laws of that country, then our Courts will recognize the validity of such right. As to the administering of such right in Finland Lex Fori would apply.

XV. a), b) and c) We do not think that it would be advisable to make amendment to the 1926 Convention. The right course would probably be to repeal the said Convention and to draft a new one.

Helsinki / Helsingfors, 12th March, 1964.

Rudolf Beckman. *Bertel Appelqvist.*

ITALIAN MARITIME LAW ASSOCIATION

REPLIES

Question

I. The revision of the 1926 Convention is certainly necessary for three main reasons, namely : (1) because on various aspects, which are going to be dealt with when answering to the subsequent questions, the present rules are not satisfactory; (2) because the number of countries which have ratified or adhered to it is not large enough and it is not likely it will increase, so that it would appear necessary to draft new rules which might obtain a wider approval; (3) because in order to achieve actual uniformity the field of application of the international rules must become much wider.

Question

II. As stated above, wider uniformity must be achieved and most satisfactory rules must be drafted. It is felt that the field of application of the convention, as presently stated in Art. 14, is not wide enough. In addition, some important problems, such as the effect of the forced sale, are not governed, and some other matters are left to national legislation, thus endangering the actual uniformity. Suffice it to indicate, as an example, the possibility for national legislations to establish the causes of interruption of the periods of extinction provided in Art. 9.

III. (b) It is felt that only uniform rules of substantive law, as opposed to uniform conflict of law rules, must be sought, in as much as uniform conflict of law rules would be of very small benefit. It is a fact that uniform conflict of law rules are taken into consideration only when it is apparent that no satisfactory agreement can be arrived at on uniform rules of substantive law and that in our case the latter rules appear not only possible, but almost certainly easier to agree than conflict of law rules.

Anyhow conflict of law rules ought to be included in the new draft as regards :

(i) the hypothecs and mortgages (reference is made here to Art. 1 of the 1926 Convention);

(ii) those matters which are not governed internationally, such as the liens which can be created by national legislations under the present Article 3.

(c) The Questionnaire has been so carefully prepared that it is indeed very difficult to find some aspects which are worthy of international regulation and which have not yet been considered. There might perhaps be two problems, on which the attention of the International Subcommittee can be drawn, namely :

(i) According to Art. 1 (2) of the Protocol of Signature the Contracting States are authorised to grant a special right of retention to Port Authorities as security of their claims with respect to removal of wrecks. Since the main concern of all such Authorities is the possibility of obtaining the reimbursement of the costs of raising the wrecks out of the proceed of sale, it might perhaps be possible to govern this matter internationally by including the provision of the Protocol in the Convention itself. We realize that there is one problem, that is the nature of the right granted to the Harbour Authorities, since in some countries they have a possessory lien, whilst in other countries they have a right of retention only.

(ii) The Convention for the unification of certain rules relating to the arrest of seagoing ships of 10th May 1952 provides in its Art. 2 that no vessel can be arrested for claims other than the maritime claims. Now there are some claims which are secured by maritime liens, such as law costs, and tonnage and harbour dues, which are not maritime claims and therefore a conflict might arise between the 1926 and the 1952 convention because whilst the claimant must, in order to enforce his lien, arrest the vessel, this would not appear possible under the 1952 convention. Perhaps a better coordination is possible.

Question

IV. (a) International recognition of hypothecs and mortgages by all Contracting States according to the rule presently set forth in Art. 1 must always be provided, but also in respect to vessels registered in non-contracting States. We realize that by limiting this rule to vessels registered in contracting States a sort of pressure could be put on non-contracting States with the result that they would have an interest to adhere to the convention. But whilst the present rule set forth in Art. 1 is in line with art. 14, according to which the rules of the convention are applicable when the vessel to which the claim relates is registered in a contracting State, the situation would change if, as we recommend, Art. 14 be revised to the effect of making the convention applicable in each contracting State to all vessels, irrespective of nationality. In this case it would appear illogical to restrict the application of Art. 1 only to ships registered in contracting States.

(b) The categories of claims giving rise to maritime liens should certainly be restricted in order to assure a better protection to the mortgagees. To this effect the claims referred to in article 2, sub-paragraph 5) should not be secured by a maritime lien anymore. One of the

reasons why a maritime lien is granted in respect of claims ex contractu is to encourage, in certain circumstances, the entering into contracts with the shipowner or the master, by assuring the contracting party that his claim will be satisfied; in addition, the cause for which the claim arises is considered, in certain circumstances, worthy of special protection. None of those principles can certainly be invoked as a justification of the maritime lien in question : if contractors or suppliers do not trust the shipowner, they can obtain payment of their claim before the ship sails or request a contractual security such as a mortgage or a hypothec. If the shipowner can do neither of those things, that means that his financial conditions are very bad and it would therefore be much worse to allow him to continue to operate the vessel, by creating other debts which would be preferred to the mortgages, than to stop the vessel. It is true that the preservation of the vessel and the continuation of the voyage are matters of common interests to all parties concerned in the adventure, and that therefore, in this respect, the reason why the expense isincurred might be worthy of special protection. But in the present times, when a shipowner is in sound financial condition he can remit the money necessary to pay the suppliers or contractors anywhere in the world in a very short period of time. If the preservation of the vessel or the continuation of the voyage cannot be assured, that is only due to the bad financial conditions of the shipowner and not to the impossibility of providing the master in time with the money necessary to such effect. There is therefore no justification for the maritime lien granted under Art. 2 sub-paragraph 5) and this conclusion, it must be noted, had already been arrived at by some members of the C.M.I. as early as in 1912 when the draft convention on maritime liens and mortgages was being examined.

It has been discussed in the last years whether the claims of social insurance associations or pension funds with respect to crew insurance are secured by a maritime lien and sometimes in order to try to grant such a lien it has been decided that the claim was one of the crew. It is felt that, as a consequence of the present social insurance systems, which are almost everywhere of a governmental nature, it would be reasonable to grant to the above claims a maritime lien having the same rank of that securing the claim for crew wages.

This is the only extension of the present system which might be taken into consideration.

(c) This question has already been answered in the affirmative.

(d) i) *Priority of registered mortgages inter se.*

Under Italian law the priority is based on the date of registration of the hypothec. The registrar must effect registration in the same order of application and, to this effect, he must enter all applications, imme-

diately upon presentation, in a special register, called « repertory ». But should he fail to register the hypothecs in the same order as they have been presented this would give rise only to his liability, whilst priorities would be governed according to the date of registration of the hypothecs in the register. It is felt that this is the only system which can assure satisfactory protection to all third parties.

But if an agreement cannot be arrived at as regards the rules governing priority of mortgages (or hypothecs) inter se, the matter could be left to the national legislations, according to Art. 1 of the 1926 Convention.

ii) *Priority between mortgages and liens.*

We are of the opinion that the present system is satisfactory, and must be kept unaltered.

iii) *Priority between liens inter se.*

The present system is the effect of a compromise which has been reached after great difficulties, and therefore it should, to the maximum extent possible, be kept unaltered. The two main principles on which the priority of maritime liens inter se must be established are the cause of the claim (e.g. salvage, salary of the crew) and the beneficial effect of the service done to the ship (e.g. salvage, repairs, etc.). According to the first principle, some claims are preferred to others, because they deserve a particular protection; according to the second one, the later claim must be preferred to the former ones, because it « salvam fecit totius pignoris causam » (D. 20.4.6).

The compromise which was agreed in 1926 is based on the following main lines : the priority is based on the cause of the claims which are to this effect divided in five categories, but only with respect to claims arising out in the same voyage. The claims arising out in different voyages belong to different groups and those arising out in a later voyage are preferred to those arising out in a former voyage.

The claims belonging to the same category rank *pari passu* if they have arisen in the same voyage, with the exception of those mentioned in sub-paragraphs 3 and 5, which rank in the inverse order of their accrual.

Although this system is not perfect, we think it has worked out satisfactorily, with one exception, that is the exact interpretation of the term « voyage ».

It is not clear in fact which is the voyage which must be taken into consideration with respects to liners and tramps; and the use of the same term with respect to the freight in Article 2 has caused additional problems, because it has been discussed whether a voyage in ballast is a separate voyage or not; the negative has prevailed, and this has again raised other problems, because it is not always clear to which voyage with cargo that in ballast is actually linked.

There are then other problems with respect to fishing vessels, tugs, etc.

We believe that a definition of voyage is necessary and that, to this effect, it is necessary to abandon any connection between the voyage as a basis of the system of priorities and the voyage during which the freight is earned, even if it will be thought convenient that liens should still be enforceable on freight.

The same definition cannot apply to liners and to tramps. As regards liners, reference should be made to the two ends of the line; it could be stated, for instance, that the voyage begins when the vessel sails from one end and terminates when the vessel sails from the other end. As regards tramps, reference should be made to the commencement of the loading and to the termination of the discharge, and it could be stated, for instance, that the voyage begins when the vessel arrives in the harbour where the loading will commence and terminates at the time of departure from the port where the last cargo has been discharged. A voyage in ballast should be considered as a separate voyage beginning at the time of departure of the vessel from the port where the last cargo has been discharged, and terminating at the time of arrival in the port where a new cargo is going to be loaded.

As regards fishing vessels, the fishing season could be considered a voyage.

As regards tugs or other small crafts who normally operate inside the harbours, the concept of voyage cannot apply.

The same conclusion holds good with respect to the period during which the vessel is laid up and the period running from the time of launching to the time of the maiden voyage.

There are undoubtedly difficulties for the clear and correct ranking of liens per voyage, but we think that efforts should be made in order to overcome such difficulties. We also realize that it might look improper to apply the same concept of voyage to a liner plying between England and Australia and to a ferry boat plying between Oslo and Kiel. But, if the ranking per voyage is abolished there will be even more problems, the solution of which will prove even more difficult.

As regards the ranking of the maritime liens which have accrued during the same voyage, we believe that some modifications should be effected to the present system, namely :

Art. 2. sub-paragraph 1 : A distinction ought firstly to be made between those costs which are secured by a maritime lien only if they are incurred in the last port, and those which are subject to the one year period of extinction. Law costs due to the State, expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale, costs of watching and preservation from the time of the entry of the vessel into

the last port belong to the first group; in fact all such costs deserve a priority only if they actually lead to the sale; if the vessel, on the contrary, sails from the port where law costs etc. have been incurred, the *ratio* which has determined the granting of the priority ceases to exist.

On the contrary, tonnage dues, light and harbour dues and other public taxes and charges of the same character and pilotage dues should only be subject to the one year period of extinction.

It follows that this sub-paragraph should be divided into two distinct groups, the first one of which should have, we believe, a higher priority.

The wording should also be improved, because it is not clear what the expenses incurred in the common interest of the creditors in order to preserve the vessel exactly are : we think that they cover both what could be defined as the juridical preservation of the security (e.g. costs of the arrest, etc.) and the physical preservation, but only to the extent that the relative expenses are incurred when the vessel is in the custody of the court. Should repairs carried out by one or more creditors be included, on the ground that they preserved the vessel, the category would be widened too much.

Art. 2. sub-paragraph 2 : Reference should be made here, as indicated above, to social insurance premiums.

Art. 2. sub-paragraph 3 : Salvage in the legal phraseology includes, we understand, also services rendered to a ship after her loss, such as her raising from the bottom of the sea. The words « assistance et sauvetage » have a more strict meaning and they refer only, at least according to Italian law, to services rendered to a ship in order to prevent her loss. We believe that a maritime lien should be granted also with respect to the raising of a ship and to the finding of a derelict at sea and, if this opinion is shared by the majority of the members of the International Subcommittee, this sub-paragraph should be amended accordingly in its French text.

Art. 2. sub-paragraph 4 : In our opinion it is not equitable to grant an equal priority to indemnities for personal injury and to indemnities for loss of or damage to cargo and baggage. In addition, reference ought to be made also to the death of pasengers. We therefore suggest to split this sub-paragraph in two and to refer firstly to indemnities for death of or personal injury to passengers or crew and to persons not carried by the burdened vessel as a consequence of collision or other accident of navigation; and to refer then to indemnities for loss of or damage to cargo and baggage and for damages caused by collision or other accident of navigation.

(e) We think it is better to leave other liens to national legislations, according to Art. 3.

(f) In any case, such liens should rank after the mortgage. It must anyhow be pointed out that, to a certain extent, the claim of contractors for repairs is secured by a maritime lien under Art. 2 sub-paragraph 1 as regards the costs of preservation of the vessel.

(g) We think that the present system is satisfactory and that Art. 3 should be kept alive.

(h) This question has already been answered in the affirmative.

(i) We agree that under no circumstances the Contracting States should discriminate against the rights resulting from mortgages having been duly registered either in a Contracting State or in a non-Contracting State.

(j) We think that the freight is not a valid and useful security and that therefore liens should be enforceable only on ships. To our knowledge very seldom it has occurred that a claimant has enforced his lien on the freight. It must also be taken into consideration that the definition of freight would be extremely difficult, and therefore it appears, also for this reason, much wiser to leave it out entirely.

(k) Reference is made to the preceding answer.

(l) Yes. But the present terminology is highly improper since the various rights mentioned under Art. 4 are not accessories of the ship. We think that it would be advisable to state, in Art. 4, that the maritime liens are *extended* to the rights listed therein, using the concept of accessories in Art. 2 only with respect to the accessories in proper sense, namely life boats, wireless set, etc.

If the maritime liens will not be enforceable on the freight anymore, the reference to the remuneration due to the owner for salvage services should be deleted. There is in fact a clear difference between the sums listed under sub-paragraphs 1) and 2) of Art. 4 and those listed under sub-paragraph 3) of this Article : in fact whilst the former two sub-paragraphs provide the extension of the maritime liens to sums which are payable to the owner of the vessel on account of her loss or of damages caused to her, and which therefore compensate the depreciation of the vessel, the latter sub-paragraph provides the extension of the security to sums which are earned by the shipowner in the course of the operation of the vessel, and have therefore the same nature of the freight.

This is the reason why, if the maritime liens will not be enforceable on the freight, they cannot be enforceable also on the remuneration due to the owner for salvages services.

As regards the sums listed under sub-paragraphs 1) and 2), we think that it would perhaps be advisable to make clear how the maritime liens can be enforced on them and which are the causes of their extinction. We believe that the payment of the sums to the shipowner causes the extinction of the maritime lien but that in order to prevent such payment an intimation to the debtor should be sufficient.

Question

V. (a) One year seems to be a reasonable period with respect to all maritime liens.

(b) The rules laid down in Art. 9 second and third paragraph should be kept unaltered. It would be very dangerous to state that the period runs from the date on which the creditor seeks to enforce the lien, because such date is not known, and therefore it would be uncertain how long the liens will be alive.

A specific rule should be provided anyhow with respect to the contribution of the vessel in general average; in fact otherwise according to the general rule laid down in the third paragraph of Art. 9 the period would run from the date when the adjustment is completed and this may occur years after the date of the general average act. We think therefore it would be convenient to insert in the second paragraph a provision according to which in this case the period runs as from the termination of the adventure.

Question

VI. We think that the period of extinction should not be subject to any interruption or extension whatsoever in order to give to third parties the certainty that only maritime liens which have accrued during the last year are still in existance. This is particularly important for mortgages. There might be some very special circumstances only in which a suspension (and not an interruption) of the running of the period of extinction is justified, namely when, after the maritime lien has accrued, the vessel is requisitioned : in fact the claimant could not, during the requisition, enforce his lien and should wait until after the derequisition; similarly, if salvage service are rendered to a ship under requisition and her owners derive some benefit from those services, a maritime lien would attach although it would be unenforceable whilst the ship remains under requisition (The Meandros, 16 Asp. M.L.C., 476).

It would be advisable to provide expressly that maritime liens are extinguished after the period has elapsed unless prior to it lapse the vessel is arrested. Only the arrest in fact brings to the knowledge of third parties the existance of the lien, be it a safety measure (saisie conservatoire) or a measure which leads to the sale of the vessel (saisie éxécution). Of course if after the arrest the vessel is released its effect terminates and the period of extinction runs again as if the arrest would not have been effected.

Should it be thought convenient to provide for causes of interruption, this matter should anyhow be governed by the convention itself and not left to national legislation, in order to avoid lack of uniformity.

Question

VII. (a) We think this matter should be dealt with in the convention in order to avoid uncertainties both as regards the effect of the change of nationality on the existance of maritime liens and to the moment at which the nationality must be taken into consideration.

The problem is much more serious with respect to mortgages, because their survival to the deregistration of a vessel from a national register would imply the registration of the mortgage in the new register with a system similar to that adopted by the Stockholm Conference with respect to ships under construction. We fear anyhow such system will not operate easily on account of the considerable difference which exists between national law as regards the requirements of mortgages and hypothecs. In order to avoid the danger of preventing a wide ratification of the new convention, this matter should be left aside, unless it will be possible to insert a provision in this respect in the Protocol.

(b) (i) a change of nationality does not cause the extinction of maritime liens or other liens.

(ii) with respect to liens created by national laws, if it will be decided that such liens are governed by the law of the flag the relevant law will be that of the time when the lien is enforced. Of course the application of the *lex fori* would eliminate all problems in this respect.

Question

VIII. (a) It is undoubtedly very desirable that this matter be governed internationally by providing that all mortgages and liens (even those created by national laws) are extinguished as a consequence of the forced sale of the vessel (the sale in the course of bankruptcy proceedings included).

In order to protect all claimants a rule similar to that set forth in Art. 7 of the Convention relating to the international recognition of rights on aircrafts, signed at Geneva on 19th June 1948 should be adopted. The provision in this article is worded as follows :

1. Les procédures de vente forcée d'un aéronef sont celles prévues par la loi de l'Etat contractant où la vente est effectuée.

2. Les dispositions suivantes doivent, toutefois, être respectées :

a) la date et le lieu de la vente sont fixés six semaines au moins à l'avance;

b) le créancier saisissant doit remettre au tribunal ou à toute autre autorité compétente un extrait certifié conforme des inscriptions concernant l'aéronef. Il doit, un mois au moins avant le jour fixé pour la vente, en faire l'annonce au lieu où l'aéronef est immatriculé conformément aux dispositions de la loi et prévenir, par lettre recommandée

envoyée, si possible par poste aérienne, aux adresses portées sur le registre, le propriétaire ainsi que les titulaires de droits ou de créances privilégiées mentionnées au registre conformément au paragraphe 3 de l'article 4.

3. Les conséquences de l'inobservation des dispositions du paragraphe 3 sont celles prévues par la loi de l'Etat contractant où la vente est effectuée. Néanmoins, toute vente effectuée en contravention des règles définies dans ce paragraphe peut être annulée sur demande introduite dans les six mois à compter de la vente, par toute personne ayant subi un préjudice du fait de cette inobservation.

4. Aucune vente forcée ne peut être effectuée si les droits dont il est justifié devant l'autorité compétente et qui sont préférables, aux termes de la présente Convention, à ceux du créancier saisissant ne peuvent être atteints grâce au prix de la vente ou ne sont pris à charge l'acquéreur.

(b) We believe that this provision should apply also in case the forced sale is effected in a non-contracting State, although in the negative the ratification or adherence would be encouraged.

Question

IX. (a) Reference should be made to ships under construction in Art. 1 in order to extend the application of the same conflict of law rule also to ships under construction.

We do not think that other problems ought to be dealt with in this convention is as much as the rules included in the draft convention approved at the Stockholm Conference have actually, with the exception of those set forth in articles 8 and 9, no international bearing. In addition, it would seem at least abnormal to provide such rules for ships under construction and not for ships in service.

(b) The convention on registration of rights in respect of ships under construction should be left separate.

Question

X. We think the new convention should not deal with long term charters, since this is an entirely different matter and it would be utterly wrong and greatly dangerous to mix up so different problems. We are here dealing with securities only and must avoid to extend the convention to problems which are outside this field.

Any such extension would only create difficulties and endanger the actual uniformity by reducing the number of ratifications or acceptances.

Question

XI. The coordination between the 1957 Convention on limitation and the convention on maritime liens and mortgages is undoubtedly necessary and we think it is correct to state in the latter that all liens are extinguished after the limitation fund has been set up.

Question

XII. The scope of the Convention should be as wide as possible. In our opinion each Contacting State should apply the Convention in its territory in all circumstances, irrespective of the nationality of the ship concerned. This would assure real uniformity and eliminate considerable problems of conflict of law.

Question

XIII. (a) The rules of the 1926 Convention have been incorporated in the Italian Navigation Code with very few and minor alterations. As regards the claims which are secured by maritime liens, Art. 552 of the Navigation Code is divided in six sub-paragraphs, of which those numbered 1) and 2) correspond to sub-paragraphs 1) and 2) of Art. 2 of the Convention, those numbered 4), 5) and 6) correspond to sub-paragraphs 3), 4) and 5) of Art. 2.

Sub-paragraph 3) of Art. 552 adds some few claims, namely those of the Government with respect to sums advanced for the maintenance and the repatriation of the crew and those of the Social Insurance Organizations with respect to insurance premiums.

(b) The Italian Civil Code has a set of rules dealing with liens on movable and immovable property. The liens on movable property can also be applied with respect to ships, but they rank after the hypothecs which, according to Art. 575 of the Navigation Code, rank after maritime liens but are preferred to all other liens.

The Civil Code liens are of two different kinds; there are general liens, which are granted on all assets of the debtor and special liens, which are granted on a certain asset only. General liens are not a charge, but give a right of priority to the creditor at the time of the distribution of the proceeds of sale of the debtor's assets. The claimant has therefore no droit de suite on the debtor's assets which have been sold prior to the time of the enforcement of the claim.

Special liens instead have a droit de suite, which in most cases is anyhow conditional to the subject matter of the lien remaining in the possession of the claimant : they can, therefore, be considered as possessory liens. Since the loss of possession causes in those cases the extinction of the lien, the claimant is granted a right of retention in order to protect his security.

As general rule therefore the possessory liens can be enforced also if the property burdened by them has been transferred to a third party after the lien has accrued, provided the claimant has still the possession, but they cannot be enforced on a property which did not belong to the debtor at the time when the lien has accrued. There are anyhow exceptions to this rule, since certain possessory liens can be enforced on assets which are not owned by the debtor, at the time when the lien has

accrued, provided the claimant was in good faith. This rule, which increases the protection of the claimant, applies to the possessory lien which can more likely arise on ships, namely that securing the claims for costs of preservation and improvements (such are repairs carried out to a ship) : it follows that even when the repairs are ordered by a person who is not the owner of the vessel, the repairer, if he is in good faith, has a possessory lien on the vessel as security for his claim.

(c) (i) According to Art. 574 of the Navigation Code the priority of the hypothecs inter se is based on the date of their registration on the ships' register.

(ii) Maritime liens are preferred to hypothecs.

(iii) The rules which govern the priority of maritime liens inter se are alike those set forth in Art. 5 and 6 of the 1926 Convention : those two articles have in fact been incorporated in Art. 555 and 556 of the Navigation Code, with one exception only, namely that claims for loss of life and personal injury are preferred to claims for loss of or damage to cargo and baggage.

(iv) As previously stated, all civil code liens come after the hypothecs.

(d) The shipowner who wishes to sell his ship abroad must previously obtain the authorization of the Ministry of Merchant Marine and to this effect file an application to the Port Authority where the vessel is registered. The Port Authority informs all third parties by means of publication of the application on newspapers and the authorization is granted and the vessel de-registered only after sixty days have elapsed, provided nobody has opposed to the de-registration, or, if there have been objections, until they have been finally decided by the Court or a satisfactory security has been provided by the shipowner. As regards hypothecs, de-registration cannot be effected until either the hypothecs have been deleted or security has been provided.

(e) No. Registration of a foreign vessel can be effected only if a certificate of de-registration from her previous register is supplied.

(f) Subrogation is specifically governed by our law. There are various kinds of subrogation, namely :

(i) Subrogation which is the effect of a payment : this subrogation may occur either by operation of law in certain cases or by agreement between the third party which pays and the claimant or by agreement between the third party which provides to the debtor the sums necessary in order to effect the payment and the debtor. In all cases the person who pays becomes subrogated in the rights of the party who is satisfied including the relative securities, such as hypothecs and liens of any kind.

(ii) Subrogations of the mortgages or of the claimant whose claim is secured by a lien (maritime or not) when they cannot satisfy their

claims out of the proceeds of sale of the burdened property because there are other preferred creditors : in such a case they become subrogated in the other securities of the claimant who has been paid on other assets of the same debtor.

(iii) Subrogation of the purchaser of a mortgaged property who either pays the mortgagee or is deprived of his property as a consequence of the mortgagee enforcing his security : he becomes subrogated in the mortgages of the mortgagee on other assets of the debtor.

The causes of extinction are, with respect to hypothecs, specifically set forth. Many of them are applicable also to liens.

Question

XIV. Art. 6 of the Navigation Code states that rights of security (i.e. hypothecs, maritime liens and possessory liens) are governed by the law of the flag of the vessel. It is anyhow uncertain in which moment the law of the flag is relevant, in case of a change of nationality.

XV. We think that it would be preferable to draft an entirely new convention which should replace the 1926 Convention.

Italian Maritime Law Association, by

Roberto Sandiford, *Francesco Berlingieri.*

MARITIME LAW ASSOCIATION OF THE UNITED STATES

ANSWERS

I. Yes. It is very desirable.

II. (a) The United States has not ratified or adhered to the 1926 Convention.

(b) A more precise statement of the maritime liens which are superior to the lien of the mortgage is desirable.

III. (a) The new Convention should provide precisely for the ranking of maritime liens inter se, particularly those which are superior to the liens of the mortgage and for their extinction. The Convention should be limited to those matters on which it can be reaonably expected to get an agreement of the maritime countries.

(b) No. The Convention should be limited to rules of substantive law including the ranking of liens and mortgages.

(c) The Stockholm Convention of 1963 dealing with rights against ships under construction should be incorporated in the proposed Convention.

IV. (a) (i) Yes.

(ii) Yes.

(b) (i) Yes. The distinction between supplies ordered by the master and those ordered by others should be eliminated and the distinction between home and foreign ports should also be eliminated.

The question of liens on freight should be registered and liens on accessories other than freight eliminated.

(iii) Liens should not be extended. The ranking of the liens inter se should be clearly defined. New liens might be permitted provided they are subordinate to the lien of the mortgage.

(c) There should be no distinction between contracts made by the master and those made by any other duly authorized agent of the owner. Our law provides that any person furnishing repairs, supplies, towage, use of drydock or marine railway or other necessaries to any vesel, whether foreign or domestic, on the order of the owner of such vessel or of persons authorized by the owner, shall have a maritime lien on the vessel which may be enforced by a suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

We think this is the correct rule.

(d) (i) A mortgage first filed should have priority over a subsequent mortgage.

(ii) Under the law of the United States the following maritime liens have priority over a preferred mortgage :

1. Salvage.
2. Wages of the crew.
3. Damages arising out of tort.
5. Wages of stevedores.

(iii) As between liens of the same rank, the last in point of time should be firt and there should be a time after which the liens are extinguished.

(e) Yes. It is unlikely that a possessory lien can be asserted in a country other than that grating the lien.

(f) It should be subordinate to the maritime liens recognized by the Convention, including the mortgage.

(g) No.

(h) Yes.

(i) - (i) and (ii). An international Convention such as this should not permit any discrimination.

There is some discrimination in our Ship Mortgage Act.

(k) Consideration should be given to permitting liens for supplies which enabled the vessel to earn the freights on which the lien is claimed. This is tied in with the question of the assignment of freights, charter hire, etc., as part of the security given by the mortgage.

(1) No.

V. (a) Two years.

(b) The period should run from the date the claim accrued.

VI. (a) No.

(b) ——————

(c) No interruption should be allowed.

VII. (a) Yes.

(b) If there is a change of flag it should be on condition that all existing liens are recognized as though they would have been had there been no change of flag.

VIII. (a) Yes. Provided proper and timely notice was given to the mortgagees and holders of all recorded liens of the proposed sale.

(b) Yes. The effect of a sale by the court in an action in rem should be the same in a contracting and a non-contracting State.

IX. (a) Yes.

(b) This should be so incorporated in the Convention that a State could adhere to this part and not to the rest of the Convention, or vice versa.

X. (a) No. However, where mortgages contain an assignment or pledge of charter hire or freights as part of the security for the indebtedness secured by the mortgage, a provision should be made for the recording of such charter parties.

(i) When a ship is sold by order of the court, a decree of the court will direct the payment of charter hire and protect the charterer.

(ii) In the case of voluntary sale of a ship, the charterer needs to know to whom payment should be made.

(b) This should be limited to cases in which the shipowner has asigned or pledged his rights under the charter party to a third party by way of security.

(c) This should be limited to long term charters and they should be recorded in the same place with the mortgage and notice of the assignment given to the charterer.

XI. Yes.

XII. (a) The Convention should have as wide a scope as possible.

(b) Yes.

XIII. (a) Maritime liens arise both out of contract and tort under American law. They can be enforced by an action in rem in a court of admiralty. Priorities are determined between liens of the same rank by the time the lien arose but in the inverse order — the last in time comes first. It does not depend upon possession of notice through filing. Liens may be lost by laches. In general, the liens recognized under the laws of the United States are :

1. Salvage.
2. Seamens' claims for wages.
3. Tort — (a) personal injury;
   (b) property damage.
4. General average.
5. Preferred ship mortgage.
6. Supplies and repairs.
7. Towage, wharfage, pilotage, stevedoring, cargo damage, breach of charter parties.

(b) (i) Yes.

(ii) Yes.

(iii) Yes.

(c) (i) As between preferred mortgages they rank in the order in which they have been recorded, the first recorded coming first.

(ii) The following liens take precedence over the preferred mortgage.

1. Salvage, including contract salvage.
2. Wages of the crew of the vessel.
3. Damages arising out of tort.

4. General Average.

5. Wages of stevedores.

Liens arising prior to the recording of the preferred mortgage take precedence over the mortgage.

There is a provision in our Act to the effect that the American court in forceclosing a mortgage on a foreign ship, that the mortgage shall be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway furnished in an American port.

(iii) Maritime liens take priority in accordance with the listing under XIII (a). Liens of the same class take priority in the reverse order, i.a., the last in point of time comes first.

(iv) Mortgages and maritime liens take procedance over all other rights on the ship.

(d) No.

(c) No.

(f) There are other liens such as the ship's lien on cargo or freight for general average contribution. There are also liens given by charter party on freights and sub-freights, and there is a question of the assignment of charter hire as security for a mortgage. All of these must be considered in determining what action to take on any lien on freights.

XIV. CONFLICTS OF LAWS :

The Courts of the United States will generally apply the law of the place where the tort ocurred to that tort. If the tort takes place on he high seas between an American vessel and a foreign vessel, they will porbably apply the American law. If it occurs between two foreign ships and the law of the flags of both ships is the same, that will be applied. If the law of the two flags is different, they will apply the American law.

The American courts will apply to liens based upon contracts the law of the place where the repairs are made or the supplies are furnished.

By preparing an entirely new Convention.

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

4

(4 - 64)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

INTERNATIONAL MARITIME COMMITTEE

MARITIME LIENS AND MORTGAGES

4

(4 - 64)

Replies to Questionnaire

BELGIUM	(HYPO - 7)
NORWAY	(HYPO - 8)
NETHERLANDS	(HYPO - 9)

BELGIAN MARITIME LAW ASSOCIATION

REPLY

I. Yes, most necessary.

II. a) So as to become acceptable to a greater number of interested States — and, if possible, by way of consequence, inevitable for the others.

— So as to provide for adequate publicity of all rights on ships.

b) Non-applicable.

III. a) See II. a) above.

b) As many as possible of these problems.

c) Not at present.

IV. a) (i) Yes.

(ii) No. The new Convention should provide for such legitimate means of pressure upon non-contracting States, which can otherwise (by being less demanding as regards registration, de-registration, publicity, etc.) become havens of refuge for shady transactions of every kind.

b) They should, as far as possible, be restricted. Considering the claims as they are listed in Article 2 of the 1926 Convention :

1) These are to a large extent justified and, in any case, inevitable, if ratification is to be obtained. However, only those expenses incurred to preserve the vessel (including remunerations listed under 3) hereunder) should rank first. Removal of wrecks could be added.

2) These should be limited to the current contract of engagement, with an overall limit of six months.

3) Should rank first, as stated hereabove.

4) If liens are justified in respect of such claims, they should be restricted to indemnities for collision and for bodily injury to passengers.

5) Should be deleted.

c) Agreed.

d) Mortgages should rank as from their date of registration in a Contracting State (see Article 6 of the Stockholm Draft Convention

of 1963). As regards other priorities, the 1926 system might be retained, but we should prefer to provide for registration of claims secured by liens wherever possible.

e) Not being familiar with the legal mechanism of possessory.

f) liens or rights of retention other than that recognised.

g) in Belgian law in favour of an unpaid vendor, we prefer to reserve our reply to these questions until explanations and justifications are given by those (if any) interested in the preservation of such rights.

h) No. Some regard has to be given to ordinary creditors.

i) (i) Yes.
(ii) No. (see our reply to IV. a) (ii) above.

j) No.

k) No.

l) Considering the various sums as they are listed in Article 4 of the 1926 Convention :

1) Compensation due for damage YES, for loss of freight NO.

2) General average contribution due in respect of damage YES, loss of freight NO.

3) NO.

V. One year from the date on which the claim accrues.

VI. One must be careful, when dealing with these problems, to avoid confusion between :

— an event which *interrupts* a period and causes a new period (of same or different duration) to commence,

— and an event which *suspends* a period and thus simply causes that period to stop running for a certain time.

We are of the opinion that the one-year period should in no case whatsoever (except requisition, as stated below) be *suspended*. As regards *interruption* (which a creditor must cause to occur within one year, in order to preserve his lien), it might be possible for an international Convention to define very broadly the type of judicial proceedings which count as interruption, but it seems difficult to invade further the procedural field of domestic law. But we should like the new Convention to include registration of the claim as constituting interruption.

As regards the events listed in para. 8, j) of the Preliminary Report :

(i) and (iii) : no de-registration of the ship should be allowed in a contracting State (whether for breaking up or registration elsewhere)

without a prior procedure of notifications and publicity making it possible for creditors to have their claim either settled or re-registered (see Article 9 of the Stockholm Draft Convention of 1963).

(ii) requisition might be considered as a cause of suspension.

(iv) the constitution of a limitation fund should be of no concern to any mortgagee, but should purge only those claims which accrue from the event on account of which the limitation fund has been constituted.

(v) forced sale in a non-contracting State should be entirely disregarded (see our reply to IV. a) (ii) above).

VII. Yes. We suggest following the lines of the Stockholm Draft Convention of 1963 (but the penultimate paragraph of Article 9 could be improved).

VIII. a) Yes, with a provision for a prior procedure of notifications and publicity.

b) No, as stated above.

IX. Yes; we should like to see a comprehensive system set up.

X. This problem is of course most important, but its legal basis and implications are so different that it might be best to treat it separately; but, if a system of protection were devised, it would probably have to take effect by a process of registration in the Register with which we are concerned here.

XI. Yes. (see our reply to VI. (iv) above).

XII. The rules of the new Convention should apply to all cases tried or settled in one of the Contracting States and to all cases tried or settled elsewhere, where the law of one of the Contracting States is the proper law according to the rules of conflict of the lex fori.

XIII. a) Our domestic law embodies, since 1928, the rules of the 1926 Convention.

b) No.

c) (i) Date of registration.

(ii) and (iii) As in the 1926 Convention.

(iv) Non-applicable.

d) The problem is obscure as far as we are concerned, because our law has not expressly provided from deletion from the register.

e) Apparently yes, since our law does not require such evidence to be furnished.

f) None that we have thought of so far.

XIV. The *rank* of the various claims in rem has to be determined as part of a forced sale procedure, thus according to the lex fori (the rules of which embody the 1926 Convention). The *substance* of the various claims must be determined according to normal Belgian Rules of Conflict.

XV. We are in favour of proposing an entirely new Convention, to replace the 1926 Convention and to embody the principles of the Stockholm Draft Convention of 1963.

This answers has been given by a subcommittee appointed by the Board of the Belgian Maritime Association, consisting of André G. Vaes, chairman, Léon Gyselinck, Max Hollenfeltz de Treux, René Bosmans and Etienne Gutt, members.

Antwerp. March 31st, 1964.

NORWEGIAN MARITIME LAW ASSOCIATION

REPLY

GENERAL OBSERVATIONS

The Norwegian Association welcomes the initiative taken by the C.M.I. Bureau Permanent in proposing a study of the operation of the 1926 Lien Convention and should like to compliment Mr. J. T. Asser, President of the International Subcommittee, on the very full and instructive analysis of the problems as set out in the Preliminary Report.

Norway ratified the 1926 Convention in 1933 and a considerable number of decisions by Norwegian courts interpreting the various provisions have been handed down during the last 30 years. Based on this experience the Norwegian Association feels that the 1926 Convention is no longer satisfactory. It should be replaced by a new convention rather than being modified by amendments. In preparing for a new Convention the principal aim should be to formulate a set of rules acceptable to a larger number of nations than has been the fact with the 1926 Convention. To the extent compatible with that aim the Norwegian Association would like to advocate the adoption of the following basic considerations :

1. Maritime liens should be confined to attach to the ship itself including all physical accessories and should not be extended to include substitutes for the ship or any part thereof, such as claims for compensation in tort, insurance claims, salvage claims and claims for contribution in General Average. There should be no maritime liens on freight.

2. Maritime liens should not be granted for supply claims nor for claims based on contracts entered into by the Master. Thus the provisions of Article 2 N° 5 of the 1926 Convention should be deleted altogether. On the other hand maritime liens should be granted for tort claims in general in excess of what is accepted under Article 2 N° 4 of the 1926 Convention.

3. There should be a general presumption to the effect that the transfer of the claim giving rise to the lien should also entail the transfer of the lien itself.

4. The right of national laws to recognize liens with priority ahead of convention liens should be retained on clearly defined and restricted terms along the liens set out in the Protocol of Signature to the 1926 Convention.

5. A right of retention (possessory lien) for ship repairers should be recognized on certain conditions.

6. National liens ranking behind liens recognized by the Convention should be discouraged or preferably be prohibited.

7. The new Convention should not include provisions on registration of charterparties nor grant them any protected rights.

8. The lien convention should make lex fori the applicable conflict of law principle in maritime lien matters whereas the law of the flag should apply in all mortgage matters.

9. To the extent the principles and provisions of the 1926 Convention are retained modifications, clarifications and improved drafting are required.

Question I

Is it your opinion that new international legislation relating to maritime liens and mortgages would be necessary or desirable ?

Answer

Yes, we are of the opinion that new international legislation covering all aspects of maritime liens and mortgages is highly necessary and desirable. In order to facilitate the financing of shipping through the utilization of the ship as a credit object such legislation should cover mortgages as well as maritime liens and apply to vessels trading as well as to vessels under construction. We submit as the ideal solution that all of these aspects should be dealt with in one convention, but taking into account the vast dissimilarities in the domestic laws of the various nations and the differences in public shipping policies we consider it realistic to assume that such a wide convention will not for the time being be universally adopted. In consequence, we suggest that three separate conventions be worked out : one for registered rights in ships under construction, one for mortgages on vessels in commission and one for maritime liens. The three conventions should be made to suit each other in such a way that combined they will form a complete system of rules relating to secured rights in ships. However, they should also be drafted in such a way that a country may adopt the one without the others if that should be deemed desirable.

Although we appreciate the drawbacks of a system of three conventions as distinct from one all-inclusive convention we believe that

the three conventions separately and combined will enjoy a wider international acceptance than the single « package » convention. It is conceivable that whereas a number of nations might adopt a mortgage convention some of them may not be prepared to adopt a lien convention. And whereas some ship importing countries and other shipbuilding and ship exporting countries may be most interested in a « ship under construction convention », other countries may be totally indifferent to legislation in that field.

We feel that the draft Convention of Registration of Rights in respect of Ships under Construction adopted at Stockholm in 1963 should be made the one corner stone in the system of three conventions to be proposed. Hence, the efforts should now be concentrated on drafting a lien convention and a mortgage convention.

Question II. a)

In what respects does the 1926 Convention need to be improved ?

Answer

The 1926 Convention is ambiguous and poorly drafted throughout and should be completely redrafted even where the substance of the provisions is acceptable. The Convention should be simplified not only by eliminating some categories of claims now giving rise to maritime liens but also in respect to assets being subjects to liens. Whenever possible generalizations should be preferred to detailed enumeration, for instance should the indemnities giving rise to liens (cp. Art. 2 N° 4 of the 1926 Convention) be generalized rather than be specified, even though it might lead to an increase in the number of lien claims.

The Norwegian Association has comments and suggestions to make to practically all of the provisions of the 1926 Convention. Some suggestions have been made in the General Observations above — others will be made below.

Question III. a)

What would in your opinion be the requirements of a new convention ?

Answer

In answer to this question reference is made to our General Observations above.

Question III. b)

Are you in favour of the new Convention providing for rules of uniform law with respect to all the problems mentioned in this report or to as many as possible of these problems ?

Answer

Subject to the comments already made herein we are in favour of the new Convention(s) providing for rules of uniform law with respect to all the problems mentioned in the Report, except those pertaining to long term charterparties.

Question III. c)

Are there any other problems in this field which are not dealt with in this report which in your opinion are susceptible of international uniform legislation ? If so, please state such problems.

Answer

Some problems only briefly touched upon in the Report would require a closer analysis. We should like to have provisions on the permissibility or non-permissibility of domestic maritime liens outside of the Convention and on the applicable law in conflict situations. Consequently, we should like to bring up for discussion the provisions of the Protocol of Signature to the 1926 Convention.

Question IV

Supposing that a new draft convention containing uniform provisions were adopted, then :

a) Would you be in favour of an international recognition by all the Contracting States of maritime mortgages duly entered in the public register in which the ship is registered,

i) when the country of registration should be a Contracting State, and

ii) when this country should be a non-Contracting State ?

Answer

In order for a maritime mortgage entered in the public register of the vessel's home country to be internationally recognized certain minimum requirements should be met, inter alia that a copy of the mortgage has been filed with the Recorder and is available for scrutiny. The mortgage convention should restrict itself to the recognition of mortgages recorded in the Contracting States and should be silent on the question of recognition of other mortgages.

Question IV

b) Should in your opinion the categories of claims giving rise to maritime liens, as set out in Article 2 of the 1926 Convention

i) be restricted and, if so, how; or

ii) be maintained, or

iii) be extended, and if so, to which other claims ?

Answer

We feel that the lien for claims arising on contracts entered into or acts done by the Master (Art. 2 N° 5) should be deleted.

On the other hand we feel that liens for indemnities (Art. 2 N° 4) should be extended to comprise all indemnities resulting from death and bodily injury and from physical damage caused through the operation of the vessel. The existing list of indemnities seems arbitrary and the wording of the provision is not clear. The term « accident of navigation » is, strictly interpreted, too narrow excluding, for instance, such accidents as explosion and fire which may occur at sea as well as in berth. Furthermore, it seems strange to restrict the liens to indemnities for damage to harbour works and docks etc. and to exclude damage to other objects outside the vessel which may be hit or otherwise damaged. Lien claims for personal injury are now restricted to injuries to passengers and crews whereas injuries to stevedores, repair workers and other persons on board are excluded. All of these inconsistencies would be remedied through a generally worded provision as suggested. The criteria would be « physical damage » and « bodily injury » thus ensuring that loss resulting from default in the ordinary performance under a contract would be excluded. On the other hand damage to cargo or any other physical damage would be included even though a contract (bill of lading, charterparty) offers the legal basis for presenting a claim. In using the words « resulting from... injury and... damage » all loss of whatever nature recoverable would be included.

Although we have no basic disagreement with the provisions of Art. 2 N° 1 we feel that the wording is unsystematic and untenable. Legal costs and enforcement expenses should certainly be secured by maritime liens but as they are of a different nature than other public charges such as pilotage dues etc. we recommend that they be treated separately and on best priority ahead of any other claims — possibly with the exception of the lien for public removal of wrecks which might head the list on first priority (cp. the 1926 Protocol of Signature). It seems unwarranted to include — without time limitation — all preservation and watching costs which the creditors might wish to incur. Assume, for instance, that the ship has been laid up in port for a year or more before a default giving rise to the public sale has occurred. Only such costs should be secured by liens as have accrued after the forced sale of the ship has been requested through application to the court.

In respect of other public charges and dues to be secured by liens we suggest that they be described in general terms rather than be enumerated. The principal consideration should be that only charges representing a remuneration for services rendered to the ship should be secured by liens whereas no maritime lien should be granted for public charges of a purely fiscal nature.

Question IV

c) Do you not agree that at any rate the claims referred to in Article 2, sub-paragraph 5°) should not be secured by any lien ?

Answer

Yes.

Question IV

d) Which should be the rules of the new convention that govern priorities :

i) as between registered mortgages « inter se »;

ii) as between registered mortgages and liens, and

iii) as between liens « inter se » ?

Answer

Unless a mortgagee has expressly agreed to accept other mortgages ahead on better priorities registered mortgages should be ranked according to the date of their registration, i.e. a mortgage would rank behind those already recorded but ahead of subsequent mortgages recorded at a later time.

A provision corresponding to Article 6 paragraph 2 of the Stockholm draft on « Ships under Construction » should be adopted.

All maritime liens under the Convention should rank ahead of registered mortgages.

We are much in doubt about the ranking of liens « inter se » and should like to reserve our opinion to be expressed after we have completed a careful study of the various views advanced by the other associations. However, we are not in favour of retaining the « voyage » concept as a distinguishing factor at it has proved ambiguous and has given rise to much litigation. As a substitute might be used the concept of « distinct occasion ». We should like to consider with particular interest the Dutch system of ranking.

Question IV

e) Should international recognition be granted to rights on ships other than maritime liens proper, as for instance the English possessory lien or a right of retention not giving rise to a lien ?

Answer

The new Convention should expressly grant a right of retention (possessory lien) for shiprepairers and stipulate the terms therefore. Such a right should be recognized only for the period while the vessel is in the possession of the repairer. Furthermore, the right of retention should be granted only to secure the payment of work undertaken at

the time and not for payment of work previously undertaken. If adequate security is put up by the vessel owner the right of retention should cease to exist.

Question IV

f) If so, what should be the priority, if any, to be granted to such rights ?

Answer

The right of retention should rank ahead of mortgages but the Norwegian Association is undecided on whether it should rank behind or ahead of the maritime liens. We shall be guided by the prevalent opinion among the other Associations.

Question IV

g) Or should the new convention forbid the Contracting States to maintain or create such rights in their municipal law ?

Answer

No.

Question IV

h) Should or should not the Contracting States be allowed to grant in their domestic law liens in respect of claims other than those to be listed in the new convention, even if such liens should be postposed to all registered mortgages and to all the liens listed ?

Answer

The Contracting States should not be allowed to grant other maritime liens in their domestic law than those authorized in the new convention. If, nevertheless, it should be decided to allow the Contracting States to grant additional liens any such lien should rank behind all convention liens and mortgages and should preferably be restricted to vessels flying the flag of the granting country and to vessels from other countries granting similar liens. A further restriction might be to make such liens applicable only in respect of claims originating in the granting country. By such provisions non-convention liens would be accepted as a purely local matter.

Question IV

i) Do you agree that under no circumstances the Contracting State should discriminate against the rights resulting from mortgages having been duly registered :

i) in a Contracting State, or

ii) in a non-Contracting State ?

Answer

Please refer to our answer to question IV a.

Question IV

j) Are you of opinion that under the new Convention liens should be enforceable against the freight by the ship ?

Answer

No.

Question IV

k) If so, please set out the conditions under which, in your opinion, freights should be liable to a lien, inter alia, the freight earned by *whom* and during *what voyage*.

Answer

No comment.

Question IV

l) Should maritime liens be enforceable against *other* assets of the shipowners, such as one or more of the sums due to the owner and referred to in Article 4 of the 1926 Convention ?

Answer

No. Please note sub-paragraph N° 1 of the General Observations above.

Question V. a)

What period or periods should be fixed in the new convention with respect to the extinction of liens ?

b) Should these periods run from the date on which the claims secured by the lien accrues or from the date on which the creditor seeks to enforce the lien ?

Answer

We are in favour of a one-year time bar period running from the date on which the lien claim arose. Another one-year period should be allowed to enforce the maritime lien in any Contracting State, following a res judicata decision.

Question VI. a)

Do you agree that the new Convention should list the causes of interruption of the period or periods of extinction and that under national law interruption by other causes should not be allowed ?

Answer

Yes.

Question VI. b)

If so, what should be the causes to be listed ? (v. paragraph 8, sub-par j) of this report).

Answer

The time bar period should only be interrupted by commencing suit before a competent court or arbitration tribunal in any of the Contracting States or by filing claim in bankruptcy or in simular insolvency proceedings according to national law.

In addition to time bar the following causes of extinction of maritime liens should be listed :

a) a forced sale of the ship by court order;

b) the constitution of a limitation fund in instances where the claim giving rise to the lien shares in the fund « pari passu » with all other claims.

Question VI. c)

Or are you of opinion that under the new Convention no interruption of these periods should be allowed ?

Answer

No.

Question VII. a)

Should the new convention deal with problems connected with a change of nationality (flag) of the ship concerned which problems discussed in paragraph 11 of this report ?

Answer

Yes.

Question VII. b)

In the affirmative, which is the solution you propose with regard to these problems ?

Answer

Change of flag should have no bearing on lien matters but should be of consequence in mortgage matters. A generally worded provision should be worked out along the lines of Art. 9 of the 1963 Stockholm Draft Convention on Ships under Construction. Additional provisions

should be worked out to cover change of flag in connection with a forced sale of a vessel. A forced sale in a foreign country (Contracting or non-Contracting State) should be recognized by the home country if the vessel was in the foreign jurisdiction at the time of the sale and the sale was made in accordance with lex fori. In such case the striking of the vessel from the old register and the re-registration of title in the new home port should be permitted.

Question VIII. a)

Do you agree that the new convention should provide that, in the event of a ship flying the flag of a Contracting State being sold by the order of a Court of one of the Contracting States, all registered mortgages and liens on such ship shall be extinct as a result of such sale and the distribution of the proceeds of the sale ?

Answer

Yes.

Question VIII. b)

Do you consider it necessary or desirable for the new convention to contain similar provisions with respect to the sale of a ship by the order of a Court of a non-Contracting State and, if so, subject to what conditions ?

Answer

Yes, subject to the conditions suggested in answer VII b).

Question IX. a)

Should the new Convention also cover mortgages on ships under construction and any liens accruing against such ship during the period of construction ?

Answer

No — see our answer to question I above. Alternatively, the Stockholm Draft Convention should be incorporated.

Question IX. b)

In the affirmative, should this be done by incorporating the essence of the draft Convention on the Registration of rights in respect of ships under construction in the new convention ?

Answer

See our answer to question IX a).

Question X. a)

Are you in favour of the new convention dealing with long-term charters, such as bare-boat charters, time charters and charters for consecutive voyages, for the purpose of protecting the position of the charterer in the event :

i) of a sale of the chartered ship by the order of a Court of either a Contracting or of a non-Contracting State;

ii) or of a voluntary sale of the ship ?

b) In the affirmative, should such provisions relate to long term charters without further qualifications or should the application of the provisions be restricted to the case in which the shipowner had assigned his rights under the charter to a third party by way of security ?

c) In either case, what would be your suggestions for dealing with this particular matter ?

Answer

No. Although desirable to protect the position of the Charterer in case of a forced or voluntary sale of a vessel we have concluded that the practical problems in that connection are insurmontable.

Question XI

Do you agree that otherwise than in the 1926 Convention, the new convention should contain a provision of the kind mentioned in paragraph 15 in fine of this report ?

Answer

Yes.

Question XII. a)

What should be in your opinion the scope of application of the new Convention ?

b) Should it be as wide as possible, so as to apply also, inter alia, to ships flying the flag of a non-Contracting State ?

Answer

The scope of application of the new lien Convention should be the widest possible and should apply in all instances — also to ships flying the flag of a non-Contracting State.

Question XIII

Please give a sumary description of your domestic law relating to maritime liens and mortgages, dealing more specially with the following questions :

a) what are the maritime liens recognized in your domestic law;

Answer

Only one maritime lien on the vessel and on freight is recognized in addition to those of the 1926 Convention, viz. a lien for claims arising out of incorrect or incomplete information stated in a Bill of Lading. However, certain maritime liens are also granted on cargo.

Question XIII

b) does your domestic law recognize other rights on or with respect to ships, such as :

i) possessory liens;

ii) statutory liens;

iii) a right of retention not giving rise to a maritime lien ?

Answer

Norwegian law recognizes statutory liens for certain social security charges and for wreck removal expenses as well as a right of retention granted to repairers.

Question XIII

c) What are under your domestic law the respective priorities :

i) as between registered mortgages « inter se »;

ii) as between registered mortgages and maritime liens;

iii) as between liens « inter se » and

iv) as between registered mortgages and maritime liens, on the one hand, and the « other rights on a ship » referred to in sub-paragraph b) on the other hand ?

Answer

Registered mortgages take priority, one before another, in the same order as they have been submitted for registration unless otherwise agreed between the mortgagor and the mortgagees concerned.

Maritime liens rank ahead of registered mortgages with the exception of the one particular lien mentioned under a) above which ranks behind registered mortgages.

The priorities of maritime liens « inter se » are determined in accordance with the 1926 Convention.

Statutory liens rank ahead of maritime liens but Norwegian law is unsettled on the question of priorities between maritime liens and the right of retention. The prevailing opinion is that the right of retention ranks ahead of the maritime and statutory liens. In any event it ranks ahead of the registered mortgages.

Question XIII

d) Under your domestic law is it possible to have a ship deleted from the national register on being sold abroad, without the mortgagees having been notified and their consent having been obtained ?

Answer

A ship cannot be deleted from Norwegian registry without the mortgagees having been notified and their consent having been obtained.

Question XIII

e) Under your domestic law can a ship be entered in your national register without production of evidence that her previous registration in another country was deleted ?

Answer

A ship cannot be registered in Norway unless evidence is produced to the effect that her previous registration in another country has been cancelled.

Question XIII

f) Are there any other provisions of your domestic law that would be pertinent to the subject under study ?

Answer

No.

Question XIV

Which are the rules of conflict of laws applied by your Courts in cases to which the 1926 Convention does not apply ?

Answer

In a leading decision handed down in 1961 the Norwegian Supreme Court held that maritime liens should be considered under the law applicable to the claim giving rise to the lien and thus applied American law (lex loci contractus) granting a maritime lien to an American shipyard which upon the order of the shipowner had undertaken repairs onboard a Norwegian vessel (ND 1961 p. 300). The priority of the « American » lien in competition with « Norwegian » liens was not at issue and consequently was not ruled upon.

Question XV

Assuming your answer to question I to be in the affirmative, would you favour :

a) by amending the 1926 Convention, or

b) by drafting a protocol to the 1926 Convention, or

c) by preparing an entirely new convention which would replace the 1926 Convention ?

Answer

As outlined in our General Observations we are in favour of preparing new conventions to replace the 1926 Convention.

Oslo, March 1964.

Alex. Rein, President. *Frode Ringdal, Hon. Secretary.*

THE NETHERLANDS' MARITIME LAW ASSOCIATION

MARITIME LIENS AND MORTGAGES

Answers

The following answers have been given by a Subcommittee appointed by the Board of the Netherlands' Maritime Law Association, consisting of W.E. Boeles, chairman, J. van der Berg, B. Dupuis and J.A.L.M. Loeff, members and L. Hardenberg, secretary. The Subcommittee have based themselves on the English text of the questionnaire.

I. Yes.

II. a) The Netherlands have not adhered to the 1926 Convention.

b) Yes in many respects as set out below.

III. a) See under b) and c).

b) Yes, as many as possible.

c) It has happened that a country which had the privileges of the Brussels Convention incorporated in its domestic law nevertheless by applying principles of international law admitted a privilege for a foreign claim, which was not privileged according to their domestic law. It is felt that the Convention should also deal with such problems and it would therefore seem advisable that the Contracting States accept uniform rules of international private law compelling them to apply the Convention under alle circumstances, no matter whether the claims are put forward by nationals of a Contracting State or of a non Contracting State.

IV. a) Yes.

i) Yes.

ii) Yes (also when the country is a non-Contracting State).

b) i) Be restricted by allowing only liens for the following claims.

aa) Those mentioned under 1e in art. 2 of the Convention;

bb) by restricting those mentioned under 2 exclusively to claims arising out of the engagement of Master and Crew relating to the period during which they have served on board of the ship;

cc) by restricting the claims mentioned under 4 to indemnities for collision and deleting completely the lien mentioned under 5.

It is pointed out that the claims for damage to cargo and baggage and for bodily injury to members of the crew are always insured by the owner, so that they do not need a privilege, whilst passengers may be required to insure themselves as in the majority of cases is done.

c) Yes (see above under b) i) cc).

d) The present system should be maintained.

e) and f) Certain members of the Subcommittee are in favour of the recognition of a right of retention for the ship's repairer. Others being against the recognition of such right would accept to replace it by a privilege (lien) ranking immediately after the other liens and after a mortgage if such mortgage is of prior date and otherwise before such mortgage. The former however, if no right of retention is recognized for the ships repairer, would grant him a lien ranking above mortgage, notwithstanding the mortgage is of prior date.

g) Yes.

h) No objection provided these liens will be ranking after mortgages and all the liens listed and will not follow the vessel into whatever hands it may pass.

i) Yes in both cases.

j) No.

k) —

l) No.

V. a) The liens, which on the submission of the Subcommittee should be recognized in the Convention, should expire in one year.

b) This year should run from the date on which the claim accrues.

VI. a) Yes.

b) The Questionnaire erroneously refers to para 8 j) of the preliminary report, whereas it was clearly the intention to refer to para 8 k).

It was suggested by the Committee to list as causes of interruption :

1. Arrest of the vessel, respectively the taking of the required legal steps to secure a share in the proceeds of the vessel;

2. Requisition of the vessel;

3. Impossibility to arrest the vessel in the domestic territorial waters of the claimant, provided that the lien in any case is to expire in three years.

c) No.

VII. a) Yes.

b) The new Convention should expressly state that change of flag makes no difference whatsoever.

VIII. a) Yes, as a result of such sale, not as the result of the distribution of the proceeds.

b) Yes, but subject to the conditions as referred to in article 318 t of the Netherlands' Commercial Code :

« In the event of a forced sale by order of a Court abroad of a ship entered in the Ships' Register the vessel is not released of the mortgages encumbering it according to the preceding articles, unless the mortgagees have been summoned in person to exercice their rights on the proceeds and they have been actually given the opportunity to do so. »

IX. a) Yes.

b) Yes.

X. a) i) Yes.

ii) Yes.

b) To long-term-charters without further qualifications and not restricted to the case in which the shipowner has assigned his rights.

c) Survival of the charter.

XI. Yes.

XII. The new convention should be as wide as possible.

XIII. a) According to art. 318 c of the Dutch Commercial Code Dutch law recognizes as maritime liens, which follow the ship in whatever hands it may pass :

1) the costs of execution (forced sale);

2) claims of the Master and the Crew arising under their service agreements and relating to the period during which they have served aboard the ship;

3) salvage claims, pilotage dues, canal and harbour dues and other shipping dues;

4) collision claims.

b) i) No.

ii) No.

iii) Although some doubt exists most probably Dutch Law recognizes the right of Shipyards to retain possession of the vessel for unpaid repair-accounts.

c) i) Mortgages rank inter se according to the date of their being registered in the Ships Register, Mortgages of prior registration ranking before those of later registration.

ii) Maritime liens as mentioned above rank before mortgages. There are some other privileged claims viz. those mentioned in art. 318 q of

the Dutch Commercial Code which rank after mortgages and do not travel with the vessel in whosesoever possession it comes. They share all the same rank.

iii) Maritime liens rank inter se according to the number they are enumerated above. Salvage-claims of more recent date rank before older salvage-claims.

iv) ?

d) No (art. 20 Maatregel Schepen).

e) No (art. 10 Maatregel Schepen).

f) Yes, various articles of the Commercial Code among which art. 318 o, r, s, t, v and 322.

XIV. With the exception of art. 318 v of the Commercial Code as cited above under XIII f, the law of the Netherlands does not answer this question. The Courts seem to give a certain preference to the law of the country where the ship is sold and the proceeds are devided.

XV. The Subcommittee would be in favour of amending the 1926-Convention.

Amsterdam, 2 april 1964.

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÉQUES MARITIMES

5

(4 - 64)

Réponses au Questionnaire

YOUGOSLAVIE (HYPO - 10)

FRANCE (HYPO - 11)

ASSOCIATION YOUGOSLAVE DE DROIT MARITIME

REPONSE

OBSERVATION PRELIMINAIRE

La Commission nationale de l'Association Yougoslave de Droit Maritime tient avant tout à exprimer sa vive reconnaissance à M. Asser, Président de la Commission internationale, pour l'étude approfondie sur la matière concernant la révision de la Convention de 1926 qui nous a beaucoup facilité notre tâche en nous présentant les questions qui permettent d'aborder le problème qui nous est soumis.

1. En ce qui concerne les privilèges nous ne croyons pas qu'une révision de la Convention serait nécessaire, mais nous considérons qu'une telle révision serait souhaitable si elle permettrait d'élargir le nombre des Etats contractants.

2. La Yougoslavie n'a pas ratifié la Convention de 1926 mais le Décret-loi du 30 mai 1939 relatif aux droits réels sur navires et aux privilèges maritimes a introduit dans le droit interne yougoslave toutes les dispositions de la Convention, sans aucune modification. Si on procède à une revision de la Convention, il serait utile de prendre en considération le problème du transfert des hypothèques et des mortgages d'un registre national à un autre registre national et de leurs effets juridiques dans l'ordre juridique de l'Etat de la nouvelle nationalité du navire.

3. La Convention de 1926 n'ayant pas réglé les questions relatives au rang des privilèges et de leur survivance dans le cas de changement de nationalité du navire ainsi que dans le cas qu'on raye le navire du registre national, il faudrait y pourvoir par des dispositions adéquates. Une définition de la notion de « voyage » serait aussi très utile.

Dans le Rapport préliminaire une question qui nous semble de toute première importance est touché. Il s'agit de la survivance de l'hypothèque ou du mortgage après changement de nationalité du navire et plus particulièrement des hypothèques sur navires en construction après la livraison du navire à l'acheteur étranger. Les différences

entre le mortgage anglo-américain et l'hypothèque des pays dont le droit est d'origine romaine sont bien connues. On ne peut inscrire dans les registres nationaux que des droits réels reconnus par l'ordre juridique du for. Un mortgage ne peut donc être inscrit dans le registre d'un pays ne connaissant que l'hypothèque sur navire. Des difficultés analogues subsistent probablement dans les pays ne connaissant que le mortgage. Si l'on veut rendre possible le transfert de l'inscription d'une hypothèque sur les navires en construction dans le registre national du navire et lui conserver ses effets juridiques il faut resoudre le problème des rapports entre hypothèque et mortgage sur navires. Un échange de vues sur les possibilités et la méthode à suivre pour aboutir à un résultat pratique serait peut-être utile.

Le seul critère qui devrait présider aux travaux relatifs à une révision éventuelle de la Convention de 1926 devait être celui d'adopter les modifications qui permettraient d'élargir son champ d'application. C'est pourquoi nous croyons que les suggestions des Associations nationales des pays n'ayant ni ratifié ni adopté dans leur droit interne la Convention devraient être décisives en ce qui concerne l'étude des modifications à apporter au texte de la Convention.

4. a) Nous considérons que la solution donnée au problème de la reconnaissance internationale des hypothèques maritimes par les art. 1 et 14 de la Convention de 1926 est satisfaisante. Il ne nous semble pas possible d'obliger les Etats contractants d'appliquer la Convention aux navires immatriculés dans un Etat non-contractant sans réciprocité. Il serait admissible, peut-être, de les obliger à reconnaître les hypothèques dûment mentionnés dans le registre d'un Etat non-contractant à condition de réciprocité.

b) A notre avis les privilèges de la Convention de 1926 pourraient être maintenus.

c) Il semble que dans la pratique courante des affaires le privilège du § 5 de l'art. 5 de la Convention de 1926 remplit encore un rôle important. Il résulte des sentences des tribunaux que ce privilège est préjudiciable aux créanciers hypothécaires mais il reste à établir si son abolition ne porterait pas préjudice aux intérêts de la navigation maritime.

d) A notre avis la règle du § 2 de l'art. 6 du Projet de Convention relative à l'inscription des droits sur navire en construction devrait être appliquée au rang des hypothèques enregistrées, inter se. Les Règles de l'art. 3 de la Convention de 1926 devrait continuer à régir le rang entre les hypothèques et les privilèges et l'art. 5 de la Convention celui des privilèges inter se.

e) Il nous semble qu'on ne devrait pas accorder une reconnaissance internationale aux droits qui ne sont pas de privilèges maritimes

proprement dits et en ce qui concerne le droit de retention ce problème, à notre avis, exige des études comparatives approfondies des solutions législatives dans les différents pays.

f) — — — — —

g) La loi interne devrait en tout cas être conforme à la règlementation internationale.

h) Nous n'avons pas d'objection à la règle du § 2 de l'art. 3 de la Convention de 1926 selon laquelle les lois nationales peuvent accorder un privilège à d'autres créances sans modifier le rang des privilèges unifiés et sans leur donner de priorité sur l'hypothèque.

i) Nous sommes d'accord sur le principe, toutefois en tenant compte de ce qui vient d'être dit en réponse à la question N° 4, a.

j) Nous sommes d'avis qu'on pourrait maintenir le droit du créancier privilégié à faire valoir son privilège sur le fret du navire.

k) L'art 2 de la Convention de 1926 se limite à appliquer le privilège au fret « du voyage pendant lequel est née la créance privilégiée » en omettant de définir la notion de voyage et ne désignant pas les personnes par lesquelles le fret doit être gagné. On pourrait peut-être utiliser les solutions jurisprudentielles du problème ainsi posé pour arriver à une solution en ce qui concerne la notion de voyage. Le fret gagné par l'armateur pour le transport effectué devrait garantir le privilège aux conditions prévues à l'art. 10 de la Convention de 1926.

l) A notre avis les privilèges devraient produire leurs effets sur les sommes mentionnées à l'art. 4 de la Convention de 1926. Ces sommes sont les seuls actifs du propriétaire qui restent aux créanciers privilégiés qui ne sont pas des créanciers personnels du propriétaire du navire en cas de perte du navire.

5. a) Les délais établis pour l'extinction des privilèges dans la Convention de 1926 nous semblent satisfaisant.

b) Ces délais devraient commencer à prendre cours à partir des dates établies dans l'art. 9, § 2 de la Convention de 1926.

6. Il est dans l'intérêt général que la durée des privilèges soit limitée dans le temps aussi clairement que possible. C'est pourquoi nous croyons qu'on ne devrait pas admettre la possibilité de l'introduction de causes d'interruption du délai par les lois nationales / et dans ce sens, on pourrait, le cas échéant, reviser la disposition du § 5 de l'art. 9 de la Convention de 1926 / et par conséquence nous ne voyons pas de nécessité de fixer de telles causes d'interruption dans le texte de la Convention. Bien entendu, s'il faut maintenir certaines causes d'interruption de ce délai, il faut les fixer dans la Convention elle-même.

7. a) Oui.

b) A notre avis le changement de nationalité ne devrait pas affecter ni les privilèges ni les hypothèques.

8. a) Oui.

b) Oui, nous l'estimons désirable, mais la reconnaissance internationale d'une telle vente judiciaire devrait être subordonné au respect des droits réels, les privilèges inclus, de la loi du pavillon.

9. a) Oui.

b) Oui.

10. Nous ne pensons pas que la Convention devrait s'occuper des affrètements à long terme. Ce problème relève plutôt de la matière étudiée par la Commission internationale sur la publicité navale. En tout cas on ne voit pas de rapport direct entre les privilèges et hypothèques et l'affrètement du navire à long terme.

11. Oui.

12. a) Le champ d'application de la Convention de 1926 est à notre avis satisfaisant.

b) A notre avis on pourrait peut-être élargir le champ d'application de la Convention en modifiant le texte du § 2 de l'art. 14 en obligeant les Etats contractant d'appliquer la Convention même s'il s'agit d'un navire ressortissant d'un Etat non-contractant et s'il s'agit de l'appliquer en faveur des ressortissants d'un Etat non-contractant, à condition de réciprocité matérielle.

13. a - c) La loi yougoslave se base entièrement sur la Convention de 1926. Les droits enregistrés, en général, et les hypothèques plus spécialement, prennent rang d'après le moment de la présentation de la demande d'inscription au bureau d'immatriculation de navires et les tribunaux font inscrire les hypothèques dans cet ordre.

d) Le navire grevé d'hypothèques ou de privilèges ne peut pas être vendu à l'étranger ni autrement rayé du registre de navires si les créanciers hypothécaires n'y consentent pas ou si les créanciers privilégiés s'y opposent.

e) Non.

f) Dans notre loi nationale les dispositions de droit matériel sont contenues dans le Décret-loi mentionné du 30 mai 1939 et les dispositions d'ordre formel sont celles de deux décrets du 21 mars 1940 relatifs à l'organisation du registre de navires et à la procédure relative à l'inscription de droits réels sur navires.

14. Il n'y a pas de règles de conflit de lois codifiées dans cette matière. Dans les cas où la Convention de 1926 ne s'applique pas, il y a une tendance dans notre jurisprudence d'appliquer, en principe, la loi du pavillon.

15. Nous croyons qu'en ce qui concerne l'instrument modifiant la Convention de 1926 on pourrait suivre l'exemple de la Conférence de Stockholm en ce qui concerne la révision de la Convention en matière de connaissement de 1924.

A notre avis il faut tenir compte du fait qu'en dehors des Etats ayant ratifiée la Convention de 1926 il y a un nombre des Etats qui ont adoptés les dispositions de la Convention dans leur droit interne, sans ratification, et qu'il y a une utilité certaine du point de vue de l'unification du droit à se limiter aux modifications éventuellement imposés par l'évolution de la pratique maritime dans les derniers 40 ans.

Zagreb, 15 mars 1964

V. Brajkovic
Président de l'Association
Yougoslave de Droit Maritime

E. Pallua
P. Percic
Rapporteurs

ASSOCIATION FRANÇAISE DU DROIT MARITIME

REPONSE

L'Association Française de Droit Maritime a pris connaissance avec la plus grande attention du rapport présenté par M. Asser et du questionnaire qui l'accompagne.

Après une étude approfondie de ces deux documents, l'Association Française ne croit pas nécessaire d'entrer dans le détail des questions posées à raison des considérations générales qui sont exposées ci-dessous :

1. L'Association Française rappelle en premier lieu que la Convention de 1926 est le résultat d'un long effort de conciliation entre trois tendances et conceptions différentes qui furent celles des pays latins, dont la France, de la Grande-Bretagne et des Etats-Unis d'Amérique, de l'Allemagne.

Les uns et les autres de ces pays recherchant — malgré leurs divergences — une plus grande sûreté du crédit hypothécaire, tout en sauvegardant les droits d'un certain nombre de créanciers qui devaient rester privilégiés du fait que leurs créances se rattachent étroitement à l'exploitation du navire.

Dans ce but, la France a renoncé à beaucoup de privilèges qui étaient chez elle traditionnels et qui, non moins traditionnellement primaient les hypothèques.

Soucieuse de participer à l'unification du Droit Maritime et malgré que le texte proposé heurtât sur de nombreux points ses propres conceptions, elle a signé la Convention de 1926 en même temps que les représentants des autres Puissances qui avaient participé à la discussion. Elle fut l'une des premières à la ratifier avec la pensée qu'elle serait suivie par ses partenaires. L'Association Française constate avec un grand regret qu'il n'en a rien été de la part des pays vis-à-vis desquels elle avait fait les concessions nécessaires, et que dans ces conditions l'unification du droit devient absolument irréalisable.

L'Association Française souligne, dans cet ordre d'idée, que la France a toujours ratifié les Conventions internationales à la discussion desquelles elle a participé et au bas desquelles ses représentants avaient

apposé leurs signatures. Il lui paraît déplorable, parce que contraire au but recherché, qu'ici encore cet exemple n'ait été que trop rarement suivi.

2. En second lieu, l'Association Française fait remarquer que faisant un pas de plus vers l'unification, la France, après de longues études, a complètement modifié sa législation interne sur les privilèges et hypothèques maritimes pour l'aligner sur la Convention Internationale puisque une loi du 19 février 1949 a modifié son Code de Commerce afin d'y incorporer toutes les dispositions de la Convention Internationale. Elle ne pouvait faire davantage.

L'Association Française affirme à cet égard que le système établi par la Convention a fonctionné jusqu'ici sans rencontrer de difficultés tant au point de vue économique que juridique; que les organismes prêteurs, dont certains sont spécialisés dans le crédit maritime, n'ont jamais eu à souffrir de l'existence des privilèges qui d'après la Convention (et la loi interne) priment les hypothèques; que pas davantage des difficultés n'ont surgi dans la détermination du rang soit des privilèges entre eux, soit des privilèges et des hypothèques, soit des hypothèques entre elles, tant est clair et hors de discussion le classement opéré par la Convention Internationale ainsi que par la loi interne.

3. En troisième lieu, l'Association Française estime qu'il ne lui paraît pas exact d'affirmer (rapport M. Asser N° 9) qu'il existe un « mécontentement presque général au sujet de la Convention de 1926, mécontentement ressenti également par les pays qui l'ont ratifiée ». Elle n'en veut pour preuve, en outre la propre expérience de la France, que le fait que les législations nouvelles de nombreux Etats, qui n'ont pas tous ratifié la Convention, se sont appropriés ses dispositions pour en faire leur loi nationale (Lybie, Grèce, Turquie, Sénégal), sans parler des projets législatifs qui bientôt seront loi, par exemple celui de la République Argentine.

Il paraît évident que si des dispositions de la Convention étaient en soi aussi défectueuses qu'il est soutenu ou ne correspondaient plus aux exigences économiques actuelles, des législations aussi récentes ne les auraient pas retenues.

Il paraît aussi évident que ces Etats ne seront guère disposés à refondre la législation qu'ils viennent juste d'élaborer.

4. En quatrième lieu, il importe au premier chef d'éviter la coexistence de deux Conventions ayant le même objet et de ne pas recommencer l'expérience fâcheuse d'une Convention de 1957 sur la limitation de Responsabilités susceptible d'exister en même temps que celle de 1924 ayant le même objet. Car c'est alors l'unité du droit international qui se trouve détruite en son propre sein.

Il faut donc, avant toutes choses, avoir la certitude qu'une nouvelle convention aura une audience suffisamment large pour faire disparaître à coup sûr la Convention préexistante. Or ce n'est pas en multipliant les questions et les problèmes que cette audience a des chances d'être atteinte.

5. En conclusion, l'Association Française repousse comme lui paraissant non fondés la plupart des critiques formulées à l'égard de la Convention de 1926.

Dans son désir d'unification du droit, elle ne s'oppose pas cependant à reprendre l'étude, sur le plan international du régime des privilèges et des hypothèques maritimes et autres droits réels susceptibles de grever le navire, ainsi que celle de leur publicité, ne serait-ce que pour porter remède au défaut d'harmonie évident, qu'elle a déjà souligné par ailleurs, de la Convention de 1926 et de celle de 1957.

Mais au préalable, étant donné ce qui vient d'être exposé, l'Association Française estime qu'il est pour elle préférable de connaître mieux, par les réponses que recevra la Commission Internationale, la législation en la matière des principaux Pays maritimes, et les desiderata *précis* et *limités* de ceux-ci.

L'Association redit en terminant sa conviction qu'en cette matière l'effort d'unification doit se limiter présentement à quelques grands problèmes comme serait celui de la reconnaissance internationale des droits régulièrement acquis sur le navire et de son organisation.

Le président : *Marcel Pitois.* Le rapporteur : *Pierre Lureau.*

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

6

(5 - 6 a)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

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MARITIME LIENS AND MORTGAGES

6

(5 - 64)

Second Report (HYPO - 12)

Provisional Draft Convention (HYPO - 13)

INTERNATIONAL SUBCOMMITTEE
ON
MARITIME LIENS AND MORTGAGES

SECOND REPORT

Introductory Remarks

On the 11th and 12th April, 1964, a Group composed of Messrs. Francesco Berlingieri, W. Birch Reynardson, Arthur Boal, Carlo van den Bosch, Michel Dubosc, Colin Harris, Kaj Pineus, Frode Ringdal, André Vaes and the undersigned met at Oxford. Mr. L.C.H. Everard acted as Secretary, while Mrs. S. Morris, representing Mr. Albert Lilar, President of the International Maritime Committee, also assisted at the meeting.

Prior to the meeting Reports containing the Replies to the Questionnaire had been received from the following National Associations, namely, in chronological order, the Swedish, Finnish, Italian, British, American, Belgian, Norwegian, Dutch and French Associations (1).

The contents of these Reports were considered and discussed by the Group which arrived at a number of provisional conclusions, reference to which will be made hereunder.

On the basis of these discussions and conclusions a small group composed of Messrs. Francesco Berlingieri, W. Birch Reynardson, André Vaes and the undersigned met on the 13th April, 1964, and prepared the provisional draft of a new Convention on Maritime Liens and Mortgages for consideration by the Meeting of the International Subcommittee which is to take place in Amsterdam on the 19th and 20th June, 1964. The text of this provisional draft has been printed at the end of this Report.

(1) Further Replies prepared by the Yougoslav and Canadian Associations were received by the Undersigned only after the termination of the meeting.

Discussion of the provisional draft-Convention

I. As appears from the Reports received, the majority favours the adoption of a new Convention which would replace the 1926 Convention. In fact, only the Netherlands Association proposed to revise the 1926 Convention rather than prepare an entirely new instrument (2).

The French Association took a view which differed considerably from those expressed by the other Reports. According to the French Report the criticisms which are directed against the 1926 Convention do not appear to be justified and, in consequence, there seems to be no urgent need for revising the 1926 Convention, let alone the adoption of a new Convention. However, the French Association would not object to the study of the problems relating to maritime liens and mortgages and other similar rights on ships on an international level.

Under these circumstances, the Group decided to act in accordance with the majority view.

II. The Replies to the Questionnaire show in certain respects a wide divergence of opinions with regard to matters of substantive law. Consequently, the Group realized that the drafting of such rules of uniform substantive law as would satisfy the largest possible number of countries, would be an arduous task. Nevertheless, the Group decided that only in this way real international uniformity would be attained, which would not be the case if a solution were sought along the lines of a Convention that would embody or almost exclusively embody provisions of conflict of laws. Except for a few points in connection wherewith the attached draft Convention refers to national law, all other provisions thereof contain rules of uniform substantive law.

III. As regards the *scope of application* of the new Convention, the following conclusions were arrived at :

i) The scope should be as wide as practically possible. It is therefore proposed that in each Contracting State the provisions of the Convention will be applicable to all ships irrespective as to whether they are registered in a Contracting State or in a non-Contracting State (art. 13).

ii) In accordance with the majority of the Replies received, the Group arrived at the provisional conclusion that the provisions of the Convention should extend to *mortgages* granted on and *liens* attaching to *ships under construction*. It was feared that a system whereby mortgages and liens on ships in operation on the one hand and on ships under construction on the other would be dealt with in separate con-

(2) The Yougoslav Association takes a similar view.

ventions, as is suggested in the Replies of the Norwegian and Swedish Associations, might jeopardise the security of lien creditors and especially that of mortgagees of the latter kind of ships, in the event that certain countries should adhere to one, but not the other Convention.

Consequently, article 12 of the draft provides that the provisions of the Convention shall also apply to ships which are to be or are being constructed in a Contracting State. Article 12 of the new draft is therefore more extensive than the Stockholm draft Convention, in that it makes the provisions of the new draft relating to liens also applicable to ships under construction, while the only reference to liens in the Stockholm draft is to be found in article 7 of that draft providing that « priority between rights registered according to this Convention and maritime or possessory liens or similar rights shall be the same as for registered after completion », which provision does not seem to solve a number of problems, especially those arising in the event that a ship after its completion is registered in another State.

On the other hand, the Group decided not to reproduce in the new draft the other provisions of the Stockholm draft Convention such as those dealing with rights in respect of ships other than mortgages and neither those which impose upon the Contracting States an obligation to provide for the possibility of registration of ships under construction and of such other rights and mortgages. The Group felt that by doing so the new draft might be unduly burdened, while moreover the question as to whether the possibility of such registration should be made compulsory, would seem to be essentially the concern of each individual country.

However, in order to prevent the international complications which might result from the situation in which a ship under construction would be registered in more than one country, for instance in the country of construction and in that of the owner for whose account the ship is being built, the second half of article 12 of the new draft further provides that no mortgage on a vessel under construction shall be registrable elsewhere than in the Contracting State in which such vessel is or is to be built, a provision similar to that of Article 3 of the Stockholm draft-Convention. The counterpart of that rule, namely a provision forbidding each Contracting State to register a ship previously registered in another country without proof of de-registration in the latter country, is to be found in the second paragraph of Article 6 of the new draft.

iii) For the same reasons as those set out in the preceding subparagraph, the Group decided provisionally not to adopt the suggestion made in the Replies of the Swedish Association of International Maritime Law, namely to prepare *three* separate conventions, the first on maritime mortgages and the effect of a forced sale, the second on registration of ships under construction and the third dealing with liens, priorities and prescription.

iv) Following the majority view, the Group decided not to include in the new draft any provisions dealing with *long term charters*. The Group, although fully realizing the importance of this topic and the need for international legislation thereon, nevertheless believed that the inclusion of this topic, while not indispensable in a Convention dealing with maritime lens and mortgages, is fraught with so many problems that an attempt to do so not only might cause a considerable delay in the preparing of the final draft Convention by the Comité Maritime International, but might make such a Convention, if adopted, less acceptable to a number of maritime countries. Moreover, the topic is already being studied by an International Subcommittee of C.M.I. under the Chairmanship of Mr. Giorgio Berlingieri.

IV. *Mortgages, liens and ranking.*

Article 1 1) of the new draft provides for the international recognition of all *registered mortgages* irrespective as to whether granted on ships registered in a Contracting State or in a non-Contracting State, provided that certain *minimum requirements* as to *registration* and *publicity* of the mortgage have been complied with. The reference to « hypothecations » (which by the way means something quite different from the French « hypothèques ») and to « other similar charges » appearing in Article 1 of the 1926 Convention has not been reproduced in the new draft.

2) As is shown by the Replies to the Questionnaire, there seems to be a consensus of opinion that the number of *maritime liens* to be recognized under the new Convention should be restricted and that particularly there is no justification to have the claims referred to in Article 11, subparagraph 5°) of the 1926 Convention secured by a maritime lien.

3) No such unanimity appears to exist with regard to the question which are the other liens that should be listed in the new Convention and especially which are the liens that should take precedence over maritime mortgages. This situation proved to be the most difficult problem with which the Group was faced. Should all desiderata expressed in the Replies be met, the result would be that the categories of liens overriding mortages would be even more extensive than those set out in the 1926 Convention, whereby one of the main purposes for drafting a new Convention, namely the securing of a higher priority of and therefore a better protection for registered mortgages, would be frustrated.

In these circumstances it seemed necessary to devise a compromise which it is hoped may be acceptable to the largest number of national associations.

According to this compromise a relatively large number of maritime liens will be internationally recognised and enforceable, but only

part of the liens listed will have priority over registered mortgages, while the remainder will rank after such mortgages.

The *pre-mortgage* liens include those arising in respect of the following claims :

i) costs, arising in connection with the arrest and sale of the vessel and the distribution of the proceeds of the sale;

ii) costs of wreck removal;

iii) port, canal and other similar dues;

iv) wages etc. due to the crew and social insurance premiums payable by the employer of the crew;

v) loss of life and personal injury claims, the definition of which claims is wider than that of Article 2, 4) of the 1926 Convention (vide : below sub-paragraph 7);

vi) remuneration for salvage.

The further liens listed which rank *after* registered mortgages, are those securing :

aa) claims for repairs and maintenance of the ship;

bb) property claims.

4) The *pre-mortgage liens* may be divided into three categories, namely :

a) the socalled « law costs » wich are deemed to have incurred for the benefit of *all* creditors;

b) costs of wreck removal and harbour and canal dues to *public authorities*, all of which enjoy a high priority in a number of national legislations;

c) those securing claims which for *social* reasons should also override mortgages, namely crew's wages etc. and life and personal injury claims;

d) remuneration for salvage, for the reason that all successful salvage operations are made for the preservation of the ship and therefore also for the protection of the security of the mortgagee.

5) It is further to be noted that otherwise than in Article II, subparagraph 2) of the Protocol of Signature to the 1926 Convention, under which each Contracting State may provide in its national legislation for the right to detain and sell a ship (or wreck) for the purpose of recovering costs of wreck removal, harbor dues or other damage caused by the ship, thus rendering illusory the rights recognised under the Convention itself, the new draft proposes to give a lien to claims in respect of wreck removal, while both that lien and those securing and harbor and canal dues rank high in the list of priorities. The object of that proposal is to ensure real international uniformity also with respect to those latter liens.

For the same reason, is was decided not to grant in the new draft to the Contracting States any liberty such as those set out in the said Protocol of Signature, except the right to recognise in their legislation liens securing other claims, provided however that such « national » liens shall rank only *after* those mentioned in Article 2 (vide : Article 4, sub-paragraph 1).

As regards pilotage dues and contribution in general average, there seems to be no real necessity to have these claims secured by a maritime lien.

6) The next problem which was considered by the Group was that relating to the *right of retention* and the *possessory lien*, belonging to shipbuilders and ship repairers. In English law, a possessory lien, although not being a lien proper, has a high priority (3), while the right of retention as recognized in certain other countries, although neither being a lien, gives to the creditor the possibility of having his claim paid in full over and above those of all lien creditors and all mortgagees, as the right of retention entitles the creditor to refuse to give up possession of the ship concerned until such payment has been made.

It was felt that present day circumstances do not justify any more the granting of such high ranking security to this particular class of creditors. Just as any other party entering into a contract with the shipowner (with the exception of members of the ship's crew, salvors, passengers and shippers of cargo), a shipyard is in a position where it may require the shipowner to provide security, as for instance a bank-guaranty, whenever it should entertain doubts about its claim being paid.

However, the majority of the Replies to the Questionnaire indicate a desire to grant in the new Convention some measure of protection to shipyards. In an attempt to solve this difficult problem, the Group suggests a compromise according to which the claims of the shipyard for *maintenance* and *repairs* will be secured by a maritime lien ranking immediately after the registered mortgages, while Article 4, second paragraph of the new draft entitles the Contracting States to introduce into or retain in their national laws a right of retention securing any claims whatsoever, provided that such right of retention does not prejudice the enforcement of any of the claims listed, i.e. pre-mortgage liens, mortgages and post-mortage liens.

In practice this compromise means that such right of retention will be effective only as against the ordinary creditors of the shipowner and, depending on the national legislation of the Contracting State concerned, the creditors of socalled « national » liens referred to in the first paragraph of said Article 4.

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(3) Vide : p. 7 of the Replies presented by the British Maritime Law Association.

7) The last of the *post-mortgage* liens set out in the new draft deals with property claims, i.e. claims for loss of or damage to property carried on board the ship, and property whether on land or sea caused by the ship or by any person on board the ship for whose act neglect or fault the Owner or Carrier is responsible.

These claims therefore include both claims in tort, such as, for instance, collision claims and contracting claims such as cargo and luggage claims.

It is to be noted that the definition of this category of claims as well as that of the life and personal injury claims which according to the new draft is secured by a pre-mortgage lien, is « mutatis mutandis » the same as that of Article 1, 1°), a) and b) of the 1957 Convention on the limitation of liability of shipowners.

The definition of both categories is more extensive than the corresponding definition in Article 2, 4) of the 1926 Convention, but it is thought that this apparent disadvantage is outweighed by the advantage of having the same concepts in different international conventions, while moreover the wider definition of life and personal injury claims seems justified for social reasons. As regards property claims, these only rank after mortgages, so that the more extensive scope of this category would not encroach upon the security granted to mortgagees.

8) Article 3 of the new draft deals with priorities and lays down, as regards the several categories of pre-mortgage liens « inter se », what may be called the traditional order, except that otherwise than in the 1926 Convention and in certain national legislations life and personal injury claims override salvage.

Within each category of liens, claims rank « pari passu », except that claims in respect of remuneration for salvage rank in their inverse chronological order.

Finally, Article 3, 4) of the new draft refers to the national law of the country of registration for the purpose of determining the rank of mortages « inter se ».

9) The majority of the Replies are in favour of entirely abolishing liens on freight, but the opinions are divided as to whether a lien should be granted on what in Article 4 of the 1926 Convention are termed « accessories ».

Considering that in practice a lien on freight is rarely if ever enforced and that the same applies to liens on « accessories », the Group suggests to omit in the new draft all references to these liens. Naturally, this would not prevent Contracting States from recognizing such liens in their national legislation. Whether or not such liens would be recognized and enforced in the forum of any country other than that of the Contracting State concerned, would depend on the rules of private international law of the forum first mentioned.

V. *Extinction of liens. Interruption or suspension of period of extinction.*

Here again a diversity of views is shown by the Replies which caused the Group to suggest a compromise which is laid down in Article 9 of the new draft.

In formulating this compromise the Group pursued two objects, namely :

i) to abolish the concept of « voyage » as appearing in the 1926 Convention the interpretation of which concept has given rise to serious doubts;

ii) to draft rules that would be simple and clear.

According to the main rule all lien will be extinguished after a period of *two years* from the time at which the claims secured thereby arose, subject only to the following three exceptions :

a) if the ship is arrested and subsequently sold by order of the Court, all liens still in existence expire pursuant to such sale; vide in this connection : Articles 7 and 8.

b) The lien securing costs arising in connection with the arrest etc. of the ship are extinguished, if the arrest should not lead to a sale.

c) The lien securing port, canal and other similar dues are extinguished when the ship leaves the place where these claims arose, the underlying reason for this rule being that the port authorities and other authorities are in a position where they may enforce payment by refusing to give clearance to the ship.

The Group further believed that, in the event that the proposed two years period of extinction should be adopted (which is twice the period set out in Article 9 of the 1926 Convention), there would seem to be no reasonable grounds for allowing for any interruption or suspension of that period either under the new Convention or under national law, with only one exception, namely when the ship is requisitioned. In that event time will not count in respect of the period of requisition.

More especially there seems to be no need to provide for the case of impossibility of arrest, it being extremely unlikely that a creditor should not be able to arrest the ship within the two years period of extinction.

VI. *Co-ordination of the new Convention and the 1957 Convention on the limitation of liability of shipowners.*

Following the unanimous view expressed in the Replies and in accordance with Article 3, 2°) of the 1957 Convention, Article 11 of the new draft provides that no maritime or other lien shall be enforceable after the setting up of a limitation fund.

VII. *Lien as « right in rem ». Effects of change of flag. Assignment of lien.*

The Articles 5, 6, sub-paragraph 1), and 10 deal with these matters.

Article 5 sets out the legal nature of the maritime lien as a right « in rem ». The first paragraph of that Article states (perhaps superfluously) that the liens listed in Article 2 accrue, irrespective as to whether the shipowner, the demise charterer or other charterer be the debtor of the claims secured by those liens, while the second paragraph enunciates the so-called « droit de suite », i.e. the right to enforce such liens against the ship notwithstanding a change of ownership or of flag, excepting a change of ownership or of flag resulting from a forced sale effected subject to the conditions of Article 7 and Article 8.

In the opinion of the Group it would however not be feasible to provide that, notwithstanding a change of flag (of registration) of the ship concerned, registered mortgages effected prior to such change shall be kept alive. The new draft does not, and should not, give detailed provisions of uniform law on the extent of the rights conferred by a maritime mortgage and neither on the formal requirements in respect of the granting and registration thereof, except the minimum requirements referred to in Article 1. These rights and these requirements may vary according to the national law of the country of registration. In these circumstances an automatic re-registration (transcription) of existing mortgages in the new register might meet with serious objections under the national law of the country of the new registration, irrespective as to whether the country of first registration would be a Contracting State or a non-Contracting State, while clearly the convention cannot provide for the re-registration in a non-Contracting State.

In order to safeguard in so far as possible the interests of mortgagees in the event of a change of flag, the first paragraph of Article 6 provides that no registration in the register of a Contracting State will be allowed without the consent of the mortgagee of a mortgage previously registered in respect of such ship in another country, whether the latter should be a Contracting State or a non-Contracting State. In the event of re-registration of such ship in one of the Contracting States the morgagee will therefore have sufficient opportunity of protecting his rights.

Finally, a provision stating that the assignment of a claim secured by a lien will entail the automatic transfer of the lien itself, is set out in Article 10. The reason for making this rule is that under the law of certain countries it is doubtful whether a maritime lien is capable of being assigned.

VIII. The effects of a forced sale of a ship is the subject matter of Articles 7 and 8 of the new draft.

The first paragraph of Article 7 dealing with the case in which the ship is sold by the order of a Court of a *Contracting State*, contains the obvious provision that such sale shall have the effect that all liens, mortgages and other encumbrances on the ship cease to attach, subject however to two minimum requirements with which such sale should comply, namely :

a) a minimum period of notice in respect of the sale;

b) the giving of such notice to the Registrar of the register in which the ship is registered.

According to Article 8 the forced sale made in a *non-Contracting State* shall have the same effect in the jurisdiction of the *Contracting States*, subject to the same conditions as those set forth in Article 7 and provided further that the proceeds of such sale shall have been distributed in accordance with the provisions of the new Convention. The last provision aims at protecting in the jurisdiction of the Contracting States a purchaser who should have purchased the ship in such forced sale and any further owner of the ship.

IX. The final Article of the new draft contains a provision similar to that of Article 16 of the 1957 Convention on the limitation of the liability of shipowners.

Final Remarks

The purpose of the Group in preparing the attached draft Convention is to have a text which could serve as a basis for consideration and discussion of the many problems arising in this field by the International Subcommittee when it will meet in Amsterdam on the 19th and 20th June, 1964.

A number of the provisions of the draft represent compromises provisionally arrived at on the basis of the Replies and the discussions within the Group. It is in no way suggested that the solutions so proposed could not be replaced by others or could not be improved.

Amsterdam, May 1964.

J.T. Asser,

President of the International Subcommittee.

INTERNATIONAL SUBCOMMITTEE
ON
MARITIME LIENS AND MORTGAGES

PROVISIONAL DRAFT CONVENTION

Article 1

Mortgages on vessels shall be recognised as valid in all Contracting States provided that :

i) the Mortgage shall have been duly effected and registered in according with the law of the State where the vessel is registered;

ii) the register in which the Mortgage is inscribed is an official register open to public inspection;

iii) such register shall specify the name(s) of the Mortagee(s), the amount of the Mortgage, and the date which, according to the law of the State of registration, determines its rank as respects other registered mortgages.

Article 2

The following claims shall be secured by Maritime Liens on the vessel :

i) Costs arising in connection with the arrest and subsequent sale of the vessel and the distribution of the proceeds thereof.

ii) Costs of removing the wreck.

iii) Port, Canal and other similar dues.

iv) Wages and other sums due to members of the vessel's complement in respect of their employment.

Social insurance premiums payable by the employer in respect of such members.

v) Claims for loss of life of or personal injury to :

a) any person on board the vessel, and

b) any other person whether on land or on water caused by the vessel or by any person on board the vessel for whose act neglect or default the Owner or the Carrier is responsible.

vi) Remuneration for salvage.

vii) Claims for repairs and maintenance of the vessel.

viii) Claims for loss of or damage to :

a) any property on board the vessel;

b) any other property whether on land or on water caused by the vessel or by any person onboard the vessel for whose act neglect or default the Owner or Carrier is responsible.

Article 3

1. The following claims shall rank in the order set out hereunder :

i) Costs arising in connection with the arrest and subsequent sale of the vessel and the distribution of the proceeds thereof.

ii) Cost of removing the wreck.

iii) Port, Canal and other similar dues.

iv) Wages and other sums due to members of the vessel's complement in respect of their employment.

Social insurance premiums payable by the employer in respect of such members.

v) Claims for loss of life or personal injury to :

a) any person on board the vessel, and

b) any other person whether on land or on water caused by the vessel or by any person on board the vessel for whose act neglect or default the Owner of the Carrier is responsible.

vi) Remuneration for salvage.

vii) Such Mortgages on the vessel as comply with the provisions of Article 1.

viii) Claims for repairs and maintenance of the vessel.

ix) Claims for loss of or damage to :

a) any property on board the vessel;

b) any other property whether on land or on water caused by the vessel or by any person on board the vessel for whose act neglect or default the Owner or Carrier is responsible.

2. The claims set out in each of the above sub-paragraphs i, ii, iii, iv, v, viii and ix of this Article shall rank pari passu as between themselves.

3. The claims set out in sub-paragraph vi of this Article shall rank in the inverse order of the time when they accrued.

4. The claims set out in sub-paragraph vii of this Article shall rank in accordance with the law of the State where the Mortgages are registered.

Article 4

1. Each Contracting State may recognize a lien in respect of claims other than those referred to in Article 2 provided however that such claims shall rank only after those set out in Article 3.

2. Each Contracting State may also recognize a right of retention in respect of the vessel provided however that such right shall not prejudice the enforcement of any of the claims referred to in Article 3.

Article 5

1. The Maritime Liens set out in Article 2 shall accrue irrespective as to whether the claims secured by such liens are against the Owner, Demise Charterer or other Charterer of the vessel concerned.

2. Subject to the provisions of Articles 7 and 8 the Maritime Liens set out in Article 2 shall follow the vessel notwithstanding any change of ownership or of flag.

Article 6

1. No Contracting State shall permit the registration of a vessel in respect of which a Mortgage is registered without the previous consent of the Mortgagee concerned.

2. No Contracting State shall permit the registration of a vessel previously registered in another State unless a certificate of de-registration is issued by the latter State.

Article 7

1. In the event of the forced sale of the vessel in any Contracting State all Maritime and other Liens, Mortgages and other encumbrances on the vessel of whatever nature shall cease to attach to the vessel, provided however that the date and the place of such sale shall be fixed at least .... days prior to such date and notice thereof shall at the same time be given to the Registrar of the register in which the vessel is registered.

2. The proceeds of such sale shall be distributed in accordance with the provisions of this Convention.

Article 8

Where the vessel is the subject of a forced sale in a non-Contracting State all Maritime and other Liens, Mortgages and other encumbrances on the vessel of whatever nature shall be deemed to have ceased to attach to the vessel in each of the Contracting States, provided however that :

a) the formalities set out in the first paragraph of Article 7 have been complied with, and

b) the proceeds of such sale shall have been distributed in accordance with the provisions of this Convention.

Article 9

1. The Maritime Liens securing the claims set out in Article 2 (i) shall be extinguished if the arrest of the vessel does not lead to a forced sale.

2. The Maritime Liens securing the claims set out in Article 2 (iii) shall be extinguished when the vessel leaves the place where such claims arose.

3. All other Maritime Liens and other Liens recognized by Contracting States shall be extinguished after a period of two years from the time at which the claims secured thereby arose, unless prior to the expiry of such period the vessel shall have been arrested, such arrest leading to a forced sale.

4. This period shall not be subject to suspension or interruption, except that in the event that the vessel should be requisitioned, time shall not count in respect of the period of such requisition.

Article 10

In the event of an assignment of a claim secured by a Maritime Lien such claim shall be transferred together with such Maritime Lien.

Article 11

No Maritime or other lien securing a claim in respect of which the Owner of the vessel concerned may limit his liability shall be enforceable after the setting up of a Limitation Fund.

Article 12

The provisions of this Convention shall also apply to vessels which are to be or are under construction in Contracting States, provided however that Mortgages on such vessels shall be registerable only in the Contracting State in which the vessel concerned is to be or is being constructed.

Article 13

Subject to the provisions of Article 12 each Contracting State shall apply the provisions of this Convention to all vessels irrespective as to whether they are registered in a Contracting State or in a non-Contracting State.

Article 14

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages and the Protocol of Signature signed at Brussels on the 10th April 1926.

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

7

(8 - 64)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

AVANT-PROJET DE CONVENTION (HYPO - 14)
SUISSE (HYPO - 15)

7

(6 - 64)

MARITIME LIENS AND MORTGAGES

ARGENTINE (HYPO - 16)

INTERNATIONAL MARITIME COMMITTEE

COMMISSION INTERNATIONALE DES PRIVILEGES
ET HYPOTHEQUES MARITIMES

AVANT-PROJET DE CONVENTION

Article 1

Les hypothèques sur les navires seront reconnues comme valables dans tous les Pays Contractants à condition que :

I. l'hypothèque ait été régulièrement constituée et inscrite en conformité avec les lois du Pays où le navire est enregistré;

II. le registre dans lequel l'hypothèque est inscrite soit un registre officiel ouvert à l'inspection publique;

III. le registre mentionne l'identité du créancier hypothécaire, le montant de l'hypothèque et la date qui suivant la loi du Pays de l'inscription déterminera le rang de l'hypothèque en regard des autres hypothèques inscrites.

Article 2

Les créances suivantes seront garanties par un privilège sur le navire :

I. les frais déboursés en vue de la saisie du navire, de sa vente ensuite de cette saisie et de la distribution du produit de la vente;

II. les frais de relèvement de l'épave;

III. les frais de port, de canal et autres frais similaires;

IV. les salaires et autres sommes dues en vertu de leur contrat d'engagement aux personnes inscrites au rôle d'équipage du navire; les cotisations de Sécurité Sociale dues par l'employeur de ces membres de l'équipage;

V. les créances du chef de mort ou lésions corporelles
   a) de toute personne se trouvant à bord du navire,
   b) de toute autre personne à terre ou sur l'eau

causés par le navire ou par le fait, la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable;

VI. les rémunérations du chef d'assistance ou de sauvetage;

VII. les créances du chef de réparations et entretien du navire;

VIII. les créances du chef de pertes ou dommages matériels

a) à tous biens se trouvant à bord du navire,

b) à tous autres biens à terre ou sur l'eau

causés par le navire ou par le fait ou la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable.

Article 3

1. Les créances suivantes prendront rang dans l'ordre ci-après :

I. les frais déboursés en vue de la saisie du navire, de sa vente ensuite de cette saisie et de la distribution du produit de la vente;

II. les frais de relèvement de l'épave,

III. les frais de port, de canal et autres frais similaires,

IV. les salaires et autres sommes dues en vertu de leur contrat d'engagement, aux personnes inscrites au rôle d'équipage du navire,

V. les créances du chef de mort ou lésions corporelles

a) de toute personne se trouvant à bord du navire,

b) de toute autre personne à terre ou sur l'eau

causés par le navire ou par le fait, la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable;

VI. les rémunérations du chef d'assistance ou de sauvetage;

VII. les hypothèques répondant aux conditions énumérées à l'art. 1;

VIII. les créances du chef de réparations et entretien du navire;

IX. les créances du chef de pertes ou dommages matériels

a) à tous biens se trouvant à bord du navire,

b) à tous autres biens à terre ou sur l'eau

causés par le navire ou par le fait ou la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable.

2. Dans chacun des § I, II, III, IV, V, VIII et IX de cet article, les créances viennent en concours entre elles au marc le franc.

3. Les créances visées au § VI de cet article prendront rang dans l'ordre inverse des dates où elles sont nées.

4. Les créances visées au § VII de cet article prendront rang dans l'ordre qui leur est reconnu par les lois de l'Etat où les hypothèques ont été inscrites.

Article 4

1. Chaque Etat Contractant peut reconnaître un privilège à d'autres créances que celles énumérées à l'article 2, à condition toutefois que ces créances ne prennent rang qu'après celles énumérées à l'article 3.

2. Chaque Etat Contractant peut également reconnaître un droit de rétention sur le navire à condition toutefois que l'exercice de ce droit ne puisse en rien entraver l'exécution des créances visées à l'article 3.

Article 5

1. Les privilèges énumérés à l'article 2 produiront leurs effets, peu importe que la créance garantie par privilège soit à charge du Propriétaire, du Locataire coque-nue ou d'un autre affréteur du navire.

2. Sous réserves des dispositions des articles 7 et 8, les privilèges maritimes énumérés à l'article 2 suivront le navire nonobstant tout changement de propriétaire ou de pavillon.

Article 6

1. Aucun Etat Contractant ne permettra l'enregistrement d'un navire grevé d'une hypothèque inscrite, sans le consentement préalable du créancier hypothécaire intéressé.

2. Aucun Etat Contractant ne permettra l'enregistrement d'un navire précédemment enregistré dans un autre Etat, si ce n'est contre présentation d'un certificat émanant de ce dernier Etat et constatant la radiation de cet enregistrement.

Article 7

1. En cas de vente forcée d'un navire dans un Etat Contractant, tous les privilèges maritimes et autres, hypothèques et autres charges sur le navire, de quelque nature que ce soit, cesseront de grever le navire à condition toutefois que la date et l'endroit de la vente auront

été fixés avec un préavis d'au moins .... jours et que le Conservateur du Registre où le navire est enregistré en aura été avisé avec le même préavis.

2. Le Produit de cette vente sera distribué en conformité avec les dispositions de la présente Convention.

Article 8

Lorsque le navire est l'objet d'une vente forcée dans un Etat non-Contractant, tous les privilèges maritimes et autres, hypothèques et autres charges sur le navire, de quelque nature que ce soit, seront censées avoir cessé de grever le navire dans tout Etat Contractant à condition toutefois que

a) les formalités énumérées à l'article 7 § 1 auront été respectées;

b) le produit de la vente aura été distribué en conformité avec les dispositions de la présente convention.

Article 9

1. Les privilèges garantissant les créances énumérées à l'article 2 § 1 s'éteindront si la saisie du navire n'aboutit par à sa vente forcée.

2. Les privilèges garantissant les créances énumérées à l'article 2 (III) s'éteindront lorsque le navire quitte l'endroit où ces créances sont nées.

3. Tous les autres privilèges maritimes ou reconnus par des Etats Contractants s'éteindront à l'expiration d'une période de 2 années à compter de la date de la naissance de la créance garantie par le privilège, sauf si, avant l'expiration de ce délai, le navire a été saisis et que cette saisie aboutit à sa vente forcée.

4. Cette période de 2 années ne sera susceptible d'aucune suspension ou interruption, sauf si le navire est réquisitionné, auquel cas le délai ne courra pas pendant la durée de cette réquisition.

Article 10

En cas de cession d'une créance garantie par un privilège maritime, la créance sera transférée avec le privilège y attaché.

Article 11

Aucun privilège maritime ou autre garantissant une créance, au regard de laquelle le Propriétaire du navire peut limiter sa responsabilité, ne pourra plus être invoqué après la constitution du Fonds de Limitation.

Article 12

Les dispositions de la présente Convention s'appliqueront également aux navires qui sont en cours de construction ou sont destinés à être construits, à condition toutefois que les hypothèques sur ces navires n'auront été inscrites que dans l'Etat Contractant dans lequel le navire est en cours de construction ou est destiné à être construit.

Article 13

Sous réserve de la disposition de l'article 12 tout Etat Contractant appliquera les dispositions de la présente Convention à tous les navires, peu importe qu'ils aient été enregistrés dans un Etat Contractant ou dans un Etat non-Contractant.

Article 14

Au regard des relations entre les Etats qui auront ratifié la présente Convention ou y adhéreront, la présente Convention remplacera et abrogera la Convention Internationale pour l'Unification de Certaines Règles relatives aux Privilèges et Hypothèques Maritimes et le Protocole de Signature, signés à Bruxelles le 10 avril 1926.

ASSOCIATION SUISSE DE DROIT MARITIME

REPONSES

I. Nous estimons qu'une révision générale de la législation internationale sur les hypothèques et privilèges maritimes est souhaitable, spécialement pour faciliter et renforcer le crédit hypothécaire.

II. Une nouvelle Convention internationale en la matière devrait d'un côté assurer la reconnaissance internationale d'une hypothèque inscrite dans un registre public et d'autre côté restreindre pour autant que possible le nombre de privilèges primant les hypothèques inscrites. Privilèges et hypothèques sont des moyens de crédit maritime, les privilèges étant plus anciens, les hypothèques plus modernes et selon l'évolution du crédit maritime pas assez protégées à cause des législations encore existantes sur les privilèges. Avant tout à l'époque actuelle où il est assez universellement reconnu qu'un droit réel ou possessoire sur une chose doit être rendu public pour un tiers intéressé ou touché sensiblement dans ses droits, il paraît difficile à maintenir pour un grand nombre de créances un privilège occulte qui existe de plein droit comme droit réel sur le navire et même ses accessoires ou donne un droit de suite contre le navire, sans que le tiers intéressé ait la possibilité de connaître l'existence d'un tel droit avant qu'il soit exercé au détriment de son droit (qui comme l'hypothèque est rendue publique). Une nouvelle Convention internationale devrait donc trouver des moyens juridiques pour rendre les privilèges publiques par une inscription sur le registre, dans lequel le navire est immatriculé. Dans plusieurs législations existent outre les hypothèques conventionnelles des hypothèques légales, pour lesquelles la loi donne le droit au créancier d'une créance garantie par une telle hypothèque légale de demander son inscription dans un registre public dans un délai assez court depuis la naissance de la créance, faute de quoi le droit réel ne pourra plus être invoqué. En cas d'urgence le juge peut provisoirement ordonner une telle inscription de l'hypothèque légale dans une procédure rapide et se réserver l'homologation dans la procédure ordinaire. Ainsi le créancier pourra facilement arriver à une inscription (provisoire) dans un délai même assez court. Si les privilèges maritimes primant les hypothèques sont conçues ainsi comme hypo-

thèques légales dont l'existence dépend d'une inscription sur le registre public prévu pour l'immatriculation du navire, ces droits seront rendus publics pour les tiers et spécialement pour les créanciers d'une hypothèque conventionnelle. Seulement pour une courte durée une créance pourrait être munie d'un privilège occulte, et si le créancier ne demande pas dans ce délai l'inscription de son privilège (comme hypothèque légale), il ne perdra pas sa créance, mais son droit réel sur le navire.

IIIa. voir réponse sous II.

IIIb. La nouvelle Convention ne pourra guère contenir des règles de droit uniforme à tous les égards. La notion de « droit réel » est différente dans les législations nationales et ne pourra pas être unifiée. L'hypothèque maritime diffère de même de législation en législation. L'assiette de l'hypothèque maritime pourrait être unifiée, et peut-être aussi les réclamations accessoires couvertes par une hypothèque (intérêts pour plusieurs années, frais d'exécution etc.). Mais avant tout les prescriptions formelles pour la constitution de l'hypothèque diffèrent, et il est difficile d'unifier le droit formel. La Convention pourrait donc se borner à fixer les conditions dans lesquelles une hypothèque sera reconnue dans un autre Etat contractant et quel droit national sera applicable à l'hypothèque en cas de vente forcée du navire à l'étranger. Par contre les règles sur les privilèges devraient être matériellement unifiées spécialement pour celles qui devraient primer les hypothèques.

IIIc. En cas de transfert de propriété ou de nationalité (pavillon) du navire les créanciers garantis par un droit réel (hypothèque ou privilège) devraient être en mesure de conserver leur droit selon la règle déjà connue dans plusieurs législations que la radiation du navire sur le registre ne pourra s'effectuer qu'avec le consentement de tous les bénéficiaires de droits inscrits. En contrepartie aucun Etat contractant ne devrait permettre l'inscription d'un navire sur ses registres que si le propriétaire fournit la preuve que le navire a été radié dans le registre où il a été immatriculé précédemment.

IVa. Oui, et sans différence si l'hypothèque a été inscrite sur le registre d'un Etat contractant ou non-contractant.

IVb. Nous serions favorables à la plus grande restriction possible des créances privilégiées primant les hypothèques antérieurement inscrites.

IVc. Oui.

IVd. Le rang des hypothèques « inter se » devrait être fixé par la loi du pays de l'immatriculation du navire (loi du pavillon). En principe c'est la règle « prior tempore, potior jure », mais il y a des

législations qui permettent le recul d'un créancier hypothécaire pour permettre l'inscription d'une nouvelle hypothèque dans un meilleur rang (système des cases hypothécaires).

Le rang entre les hypothèques et privilèges serait en principe celui que les privilèges dits internationaux (selon la Convention) puissent exclusivement primer les hypothèques, tandis que tous les autres privilèges dits nationaux prennent rang derrière les hypothèques inscrites. Pour le rang des privilèges « inter se » la décision dépendra du caractère juridique de ses droits et de leur contenu et nombre.

IVe, f, g. Seuls les droits prévus par la Convention (hypothèques inscrites et privilèges reconnus par la Convention) devraient jouir d'une reconnaissance internationale. Le droit de rétention ne pourra pas avoir un effet de droit réel ou ne pas jouir d'une priorité avant les hypothèques et privilèges reconnus par la Convention dans la distribution du prix de vente dans une vente forcée.

IVh. Si, pour arriver à une Convention internationalement acceptée, il faudra laisser aux Etats la possibilité de maintenir des privilèges nationaux qui ne pourraient toutefois jamais prendre rang avant les hypothèques et privilèges internationaux. Une exception serait concevable, si les mêmes privilèges existent dans la législation de l'Etat où l'exécution forcée contre le navire aura lieu et dans la législation de l'Etat dans lequel le navire est immatriculé.

Le créancier hypothécaire qui prête son argent sur un navire connaîtra ainsi d'avance le pays d'immatriculation et les privilèges qui pourraient faire obstacle à son droit.

IVi. Oui.

IVj, k. Non; un droit réel sur une créance est difficile à concevoir et restera occulte. Quid en cas de cession ou mise en gage de la créance de fret ? Pour écarter ses difficultés le mieux serait d'écarter le privilège sur le fret.

IVl. Si tel est praticable, oui, mais de toute façon les indemnités dues au propriétaire par l'assureur corps (casco) doivent être réservées aux créanciers hypothécaires.

Va, b. Voir notre réponse sous II. Dans notre idée la demande d'inscription tout au moins provisoire d'un privilège sur le registre du navire devrait être faite dans un délai de 3 mois, au maximum 6 mois après la naissance de la créance.

VIa, b, c. En principe les délais pour faire valoir le privilège devraient être des délais de péremption sans possibilité d'interruption.

Les causes d'extinction du privilège devraient être réglées uniformément dans la Convention.

VIIa, b. Pour le cas du changement du pavillon qui est pratiquement un transfert du navire du registre d'un Etat dans le registre d'un autre, la Convention devrait prévoir une procédure permettant aussi le transfert des droits inscrits dans le nouveau registre. Mais il ne peut pas s'agir d'un transfert pur et simple d'un droit réel (comme p.ex. d'une hypothèque inscrite) d'un registre national dans un autre, parce que la nature, l'étendue et le contenu de ce droit réel ne sont pas identiques dans toutes les législations. En général une hypothèque doit être inscrite en la monnaie nationale du pays d'immatriculation. Une hypothèque grecque p.ex. ne pourra pas être inscrite sur le registre argentin. Mais le créancier qui donne son consentement pour la radiation du navire dans un registre y compris la radiation des droits inscrits en sa faveur voudra en même temps avoir la garantie que son droit, dans une forme équivalente, sera inscrit sur le nouveau registre en cas de transfert de nationalité du navire. Sans cette garantie il ne consentira pas à la radiation et sans certificat de radiation le navire ne pourra pas être immatriculé dans un nouveau registre. La Convention pourrait à ces fins prévoir l'immatriculation du navire et des droits qui le grèvent dans un nouveau registre d'un Etat contractant à titre provisoire, c'est-à-dire sous réserve de radiation dans le registre précédent. Le jour où cette radiation intervient, l'immatriculation nouvelle prendra tous ses effets. Cette idée a déjà été discutée lors de l'élaboration d'une Convention similaire en matière fluviale au sein de la Commission Economique pour l'Europe de l'O.N.U. à Genève, et ce modèle pourrait être suivi.

VIIIa, b. La vente judiciaire c'est une mesure d'exécution forcée pour réaliser les droits des créanciers, et il en suit l'extinction des hypothèques et privilèges. L'adjudicataire dans une vente forcée acquiert la propriété originairement et non à titre dérivative, sauf, si dans les conditions d'adjudication il est exceptionnellement prévu que l'adjudicataire deviendra débiteur des hypothèques inscrites. Quand il s'agit d'une vente forcée dans un Etat non-contractant, la Convention pourra difficilement règler ce cas qui reste hors de son champ d'application. Elle pourra seulement, à titre de représailles, si l'Etat non-contractant ne reconnaîtrait pas les hypothèques inscrites, prévoir que sur le territoire des Etats contractants l'extinction de ces droits par la vente forcée ne serait pas reconnue.

IXa, b. Oui.

Xa, b, c. Le problème des affrètements coque-nue, à temps et même pour voyages consécutifs mérite une étude spéciale. Si ces affrètements sont conclus pour une durée assez longue (au moins une année p.ex.) l'affréteur ou le locataire voudrait savoir, si son droit de jouir du navire sera éteint en cas de transfert de propriété, ou s'il peut exiger de l'acquéreur du navire qu'il le laisse dans sa jouissance. Cet effet

ne pourra, si on veut aussi préserver l'acquéreur de surprises, être réalisé que si l'affrètement donne lieu à une annotation dans le registre d'immatriculation du navire. Mais une telle annotation ne pourra pas faire naître un droit réel comme une hypothèque ou un privilège, mais seulement un droit obligatoire renforcé qui permet de faire condamner l'acquéreur du navire à respecter l'affrètement, sans que l'affréteur serait limité à demander des dommages-intérêts contre son contractant de la charte-partie, le vendeur du navire. Mais il faut différencier selon qu'il s'agit d'une vente volontaire ou d'une vente judiciaire ou forcée du navire. Dans le premier cas, la règle esquissée pourra être appliquée, dans le second cas, les intérêts des créanciers hypothécaires et privilégiés demandent une autre solution. Les créanciers veulent se voir payées en cas de vente forcée, mais un affrètement irrésoluble pourrait diminuer le prix d'adjudication ou rendre la vente plus difficile. La seule possibilité d'harmoniser les intérêts de l'affréteur annoté d'une part et des créanciers inscrits d'autre part réside dans la règle « prior tempore, potior jure ». Si l'affrètement est annoté sur le registre avant l'inscription d'une hypothèque, l'adjudication du navire ne pourra se faire qu'à condition que l'acquéreur accepte l'affrètement et le respecte. Si, par contre, l'hypothèque est inscrite avant l'annotation de l'affrètement, la vente forcée devrait se faire dans l'intérêt du créancier hypothécaire, c'est-à-dire une fois avec la charge de l'affrètement et une seconde fois sans cette charge. L'adjudication qui réalise le meilleur prix pour couvrir l'hypothèque sera définitive, et si l'hypothèque ne pourra être couverte que dans une adjudication sans la charge de l'affrètement annoté, celui-ci s'éteint par l'adjudication. L'affréteur pourra comme créancier chirographaire faire valoir son dommage. Pour les hypothèques, dont la date d'inscription est contrôlable, cette solution est praticable, mais pour les privilèges qui restent tout au moins pour une assez longue durée occultes, une solution juste paraît difficilement être réalisable.

XI. Nous hésitons à approuver la proposition et nous renvoyons à nos réponses au questionnaire en matière de coordination entre la Convention de 1926 et celle de 1957. La nouvelle Convention sur les hypothèques et privilèges devrait aussi être acceptable pour les Etats qui ne sont pas prêts à ratifier la Convention de 1957 sur la limitation et qui maintiennent ainsi leur propre système de limitation avec la notion de la fortune de mer.

XII. En principe la nouvelle Convention devrait faire loi dans les Etats contractants pour tous les navires. Toutefois avec la réserve possible de ne pas l'appliquer aux navires d'Etats non-contractants. Mais avant de faire usage de la possibilité de réserve, il faudrait tenir compte des intérêts des créanciers qui peuvent être de nationaux.

XIIIa. La Suisse a incorporé textuellement dans son droit national la Convention de 1926 et elle ne connaît donc que les privilèges prévus par ladite Convention.

XIIIb. En droit suisse l'usufruit comme droit réel sur un navire est reconnu, tout au moins par les textes légaux, sans portée pratique toutefois. En outre peuvent requérir l'inscription d'une hypothèque légale le vendeur du navire en garantie de sa créance, les cohéritiers en garantie des créances résultant du partage ainsi que le réparateur (chantier) du navire, mais la demande d'inscription de ces hypothèques légales doit se faire dans un délai de trois mois. Le droit de rétention sur le navire immatriculé est d'autre part interdit.

XIIIc. Les hypothèques prennent rang selon la case hypothécaire inscrite, en principe dans l'ordre de priorité selon le temps de l'inscription. Seules les privilèges prévus dans la Convention de 1926 priment les hypothèques, si la priorité est prévue par la Convention.

XIIId. La radiation du navire dans le registre des navires suisses est subordonnée au consentement expresse de tous les bénéficiaires de droits inscrits dans le registre.

XIIIe. L'immatriculation d'un navire dans le registre suisse n'est possible que contre présentation d'un certificat de radiation du navire dans le registre où il a été immatriculé précédemment.

XIV. Il n'existe pas encore de jurisprudence suisse en matière de conflit de lois concernant les privilèges et hypothèques maritimes.

XV. Nous sommes partisan de la préparation d'une nouvelle Convention remplaçant celle de 1926, si les propos esquissés devraient être réalisés.

Bâle, avril 1964.

Association Suisse de Droit Maritime.

ASOCIACION ARGENTINA DE DERECHO MARITIMO

ANSWERS

Answer I

We believe that any legal institution may be improved if sufficient experience in its application has shown that it is necessary or desirable to do so.

Answer IIa

This will be answered according to the following questions. We must point out, however, as a general rule, that any amendments that may be made in the Convention should be justified by the fact that the flaws that it contains may have been demonstrated by actual practice. In this respect we must say that Argentina adhered to the Convention by Law of Congress Number 15.787, of 14th December, 1960, which came into operation on 20th October, 1961. Our exprerience in connection with it, therefore, is exceedingly short, and we are yet unable to express an opinion upon the results of its application in Argentine jurisdiction. Accordingly, we shall confine ourselves to making some remarks of a general nature upon the various points submitted.

Answer IIIa

We shall reply to this when answering the following questions. More specially :

Answer IIIb

The new Convention should solve any problems that may have arisen in practice when applying the present one. Should it be intended to introduce any amendments which would allow any countries which have not yet adhered to it to do so, care must be taken not to affect any of the fundamental principles which, harmonical associated, form the basis upon which the Convention rests, viz., 1) ship, freight and accessories form the « fortune de mer » destined to secure the privileged creditors; 2) reduction to the indispensable minimum required by the necessities of maritime navigation and operation, of the liens having

priority over mortgages; 3) acknowledgment by all Countries adhering to the Convention of any hypothecation or mortgage constituted in accordance with the respective national law and duly registered; 4) liens form part of the naval claims, and accordingly must secure contractual creditors contributing to the performance of the voyage and consequently to shipping operations.

Answer IIIc

Our lack of experience does not enable us to answer this question.

Answer IVa

Every hypothecation or mortgage constituted under the legislation of the flag of the ship and duly registered must be recognized by any Contracting State. Those constituted in non-Contracting States should only be recognized where there is reciprocity, that is to say, where such reciprocity exists under the domestic legislation of the State concerned, under conditions similar to those of the Convention.

Answer IVb

In our opinion they should be maintained.

Answer IVc

The liens mentioned in Article 2, sub-paragraph 5°) should be maintained. Powerful Owners have at their disposal other means to secure the claims of creditors against them. It is not so as regards small owners, who may be the owners of only one ship, which constitutes the whole of their capital. To suppress this lien would have the result of creating serious difficulties for their commercial development. We do not understand why, if the lien for remuneration for assistance and salvage, by which operation the claimant mortgagee benefits (sub-paragraph 3°) is maintained, it should be intended to suppress the lien of the claimant who has effected disbursements « pour les besoins réels de la conservation du navire » (sub-paragraph 5°), by which the said claimant also benefits.

Answer IVd

The hypothecations and mortgages must rank in the order of their respective dates of registration.

Answer IVe

In England the possessory lien belongs to common law, as the right of retention belongs to the common law of the latins, but with the difference that in the first case it is a lien, whereas in the second

it is not, or at least does not possess the characteristic of such. We are of opinion that a shipwright ought to be included among the privileged claimants, as his work benefits the vessel, and consequently also benefits the mortgagee.

Answer IVf

Such rights should rank fourth, after the remuneration for assistance and salvage and the ship's contribution in general average.

Answer IVg

Answered above.

Answer IVh

Upon this point, we are of opinion that it must be left open to domestic law to grant other liens, but in the form prescribed by paragraph 2 of Article 3 of the Convention.

Answer IVi

This question was answered at IVa. We must emphasize that it would not be just to recognize hypothecations or mortgages registered in a non-Contracting State if such State does not grant the same benefit to other States in its domestic law.

Answer IVj

The freight must be maintained as one of the securities for liens as prescribed by Article 2 of the Convention, because it is part and parcel of the « fortune de mer ».

Answer IVk

In our opinion, the freight which should be liable to a lien is the freight paid by the goods carried, that is to say, in the case of a time-charter, the freight payable to the Charterer, which includes the charterhire paid by him to the Shipowner. We believe that the concept of « voyage » mentioned in Article 2 of the Convention when referring to the freight, must be interpreted, in the case of a vessel which returns regularly, to her port of origin, as the freight paid, or to be paid, either in her outward-bound voyage, or in her return voyage, according to the time at which the lien accrued; in the case of a tramp steamer, the freight liable to a lien should be the freight on the goods shipped and the freight engaged on the same opportunity on goods not yet shipped.

The concept of « voyage » to which the freight refers according to Article 2 of the Convention, must be defined for each of the liens. Thus, as regards the liens mentioned in sub-section 1° of the said Article, it should be that of all the freights accrued up to the arrival to the last port; as regards those mentioned in sub-section 2°, all the freights corresponding to the period of the contract of engagement as provided by the last paragraph of Article 4 of the Convention; as regards those mentioned in sub-sections 3° and 4°, the freights on the goods which are on board at the time of the occurrence; as regards those mentioned in sub-section 5°, the freights on the goods already on board the ship and those which must be shipped in the course of the voyage in which the debt contracted by the Master arose.

Answer IVl

The sums mentioned in article 4 of the Convention must continue to be liable to the liens, as they form part and parcel of the value of the ship or of the freight, as those mentioned in sub-sections 1° and 2°; or the « fortune de mer », as those mentioned in sub-section 3°.

Answer Va

We consider that the periods of extinction of liens established by Article 9 of the Convention must be maintained.

Answer Vb

Such periods must run from the date on which the claim secured by the lien accrues, in accordance with the general principle applied to each claim in Article 9 of the Convention.

Answer VIa

For the purpose of securing international uniformity and guarantee for the privileged claimants, it would be advisable to establish that the periods of extinction are interrupted by the institution of an action in Court. But the special situations mentioned in paragraph 8, sub-par. j) of the report should also be taken into account.

Answer VIb

(v. paragraph 8, sub-par. j) of the report)

Answer VIa-b

The liens must subsist even if the vessel should change its registry or be de-registered, for instance, in case of shipwreck. Under this aspect, the Treaty of Montevideo, of 1940, on International Private

Navigation Law, signed by Argentina, Uruguay, Brazil, Colombia, Bolivia, Chille, Peru and Paraguay, provides in Article 3 : « As regards privileges (liens) and other real rights, the change of nationality does not prejudice the liens existing on the ship. The extention scope of these liens is governed by the law of the lawful flag of the ship at the time the change of nationality took place ».

Accordingly, it must be established that the change of flag or registry, or the de-registration, shall not interrupt the period of extinction of the liens, that is to say, that these shall subsist even when registered in a new register until the periods in question shall have expired.

In the event of a sale of the ship by a Court Order, or the constitution of a Limitation Fund according to the Convention of 1957, the Convention must require that a communication be made, through the Consul of the country of the flag of the ship in the jurisdiction of the Court ordering the sale, to the Register of the registry of the ship concerned, reporting the sale which has been ordered, in order that the parties concerned may enter an appearance in that Court and defend their rights.

The Contracting State in which the Register is situated must provide the necessary measures so that the parties concerned may be informed of the sale ordered by the Court, for which purpose a certain period may be fixed, for instance, three months, between the date of the communication to the Consul and the date of the auction, in order that any existing creditors may enter an appearance in the proceedings. During such period intervention might be given to the Consul so that he may defend the interests of the lien creditors. Should such period expire without any one entering an appearance, the intervention of the Consul would cease.

Once all the above requirements should have been complied with, the judicial sale of a ship of a Contracting State ordered by the Court of another Contracting State shall extinguish the liens, hypothecations and mortgages (with the exception of those which the buyer may take upon his charge), as from the deposit in Court of the purchase price, upon which funds the liens (privileged claims) shall be transferred, in their proper order.

Where the sale has been ordered by the Court of a non-Contracting State, whose legislation does not contain principles similar to those set out above, the liens must subsist on the vessel until the extinction period shall have expired.

The Convention might take as a precedent the prescriptions of the Convention of Geneva of 1948, relating to real rights on airships, upon these points, (Article 7), and the recent project of convention relating to the registration of liens on vessels in course of construction, of Stockholm, 1963, (Article 9), although, as regards the latter, we

consider that excessive protection afforded to secured creditors or mortgagees may render difficult or hamper the sale of a ship. Should such danger exist, it is doubtful whether the Convention would be ratified by many countries.

Answers VIIIa and b

(See answer to previous Question).

Answer IXa

We believe that since during the period of construction of a ship maritime liens may accrue, for instance, in connection with collision, assistance, or crew wages during navigation tests, or while the ship is afloat completing her equipment, the Convention should also cover hypothecations and mortgages constituted on such ships. To make a separate convention for them such as that drafted in Stockholm in 1963, might give rise to conflict between the two Conventions. On the other hand, it must be remembered that, normally, when a ship is being built by means of a loan reimbursable over a long period of time, the mortgage upon the ship under construction is thereafter transferred on to the ship when in operation, so that there must be a certain coordination between the two regimes of security.

Answer IXb

We believe the rules of the draft Convention of Stockholm relating to rights upon vessels under construction should, in their essence, be incorporated in the new Convention, coordinating them with the Convention of 1926.

Answer Xa, b, c

We are of opinion that to protect the rights of the charterer in a bare-boat charter, time-charter and charters for consecutive voyages, by means of new liens which would form a charge on the ship, would be altogether inadvisable. The charterer may secure his rights, in case of a sale, whether voluntary or by a Court order, by means of other customary securities. In any event, this protection must be carefully examined, so that it may not prejudice the other creditors, who are the regular creditors in every maritime concern.

Answer XI

We think it would be advisable to have the points to which paragraph 15 of the Report refers cleared up.

Answer XIa, b

The Convention might also be made to apply to ships of non-Contracting States, always provided that the non-Contracting State

should have incorporated the principles of the Convention in its own domestic legislation.

Answer XIIa

The maritime liens are established by Article 1377 of the Argentine Commercial Code, as follows :

1377. The following claims are privileged on the ship, and shall share in the price thereof in the order in which they are enumerated in the present article :

1. Any judicial expenses incurred in the common interest of the creditors;
2. The expenses, compensations and assistance and salvage pay due for the last voyage;
3. The navigation dues imposed by the laws;
4. The pay of Pilots and Watchmen, and the expenses of guarding ship after its entry into port;
5. The rent of warehouses for the ship's apparel and other accessories of the vessel;
6. The maintenance expenses for the ship and its apparel after its last voyage and entrance into port;
7. The pay, emoluments and compensation due in conformity with the provisions of this Code, to the Captain and the other members of the crew for the last voyage;
8. The sums due for contribution in General Average;
9. The amount of the principal and interest owing on obligations contracted by the Captain for the needs of the ship in the cases mentioned in Article 947, with due formalities;
10. The amounts raised on bottomry on the ship's hull and apparel for gear, fittings and appartenances, if the contract was made and signed before the ship left the port in which such obligations were contracted, and the insurance premiums with their accessories for the last voyage, whether the insurance be for the voyage or for a fixed time, and so far as concerns steamers which make their voyages periodically and are insured for a fixed time, the premiums corresponding to the last six months, and, in addition, in mutual insurance societies, the distributions or contributions for the last six months.
11. Compensation due to shippers and passengers for failure to deliver the things shipped, or for damage done thereto through the fault or negligence of the Captain or crew during the last voyage;
12. Any debts arising out of the construction of the ship;
13. The price of the last purchase of the ship, with interest owing for the last two years.

Mortgages, which may be constituted on ships of over 20 tons, rank after all the above liens (Articles 1351 and 1360 of the Commercial Code).

Answer XIIIb

Article 3939 of the Argentine Civil Code grants a right of retention to the holder of property belonging to another, as for instance, a ship, so that he may hold it in his possession until payment in full is made of what is owing to him on such property. This is not a lien.

Answer XIIIc

The priority between mortgages is governed by their respective dates of registration, and, if registered on the same date, by the respective hours of registration (Article 1357 of the Argentine Commercial Code), Articles 18, 20 and 24 of the Decree-Law N° 18.300/56).

Mortgages rank after the above-mentioned maritime liens established by Article 1377 (Article 1366 of the Argentine Commercial Code).

Liens in Article 1377 of the Commercial Code follow the order in which they are set out in this Article; those of same rank share in proportion to their respective amounts; but if the voyage has been commenced or continued, liens of the same nature accrued later rank prior to liens accrued earlier.

There are no other privileged rights on ships raking before the liens mentioned in Article 1377. There may be other privileged claims under common laws, but they rank after maritime liens.

Answer XIV

In accordance with the doctrine laid down by the Treaty of Montevideo, as regards liens, real rights and methods of publicity the law applicable is that of the nationality of the ship. However, in the event of the Treaty of Montevideo not applying, the lex fori may apply, that is to say, the law of the Court where the case is being tried.

Answer XV

Considering that the amendments to be introduced into the 1926 Convention must be few, we would favour the amendment of the Convention, or the drafting of a protocol.

Atilio Malvagni *José D. Ray* *Alberto C. Cappagli*

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

8

(5 - E4)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

8

(6 - 64)

Deuxième rapport (HYPO - 17)

Avant-projet de Convention (HYPO - 14)

INTERNATIONAL MARITIME COMMITTEE

COMMISSION INTERNATIONALE
CHARGEE DE L'ETUDE DES

PRIVILEGES ET HYPOTHEQUES MARITIMES

(Traduction)

DEUXIEME RAPPORT

Introduction

Les 11 et 12 avril 1964 un groupe de travail composé de MM. Francesco Berlingieri, W. Birch Reynardson, Arthur Boal, Carlo van den Bosch, Michel Dubosc, Colin Harris, Kaj Pineus, Frode Ringdal, André Vaes et le soussigné se sont rencontrés à Oxford. Mr. L. C. H. Everard faisant fonction de Secrétaire et Madame Suzanne Morris, représentant M. Albert Lilar, Président du C.M.I., assistaient également à cette réunion.

Les rapports contenant les réponses au Questionnaire avaient été envoyés par les Associations Nationales suivantes, par ordre chronologique, les Associations Suédoise, Finlandaise, Italienne, Américaine, Belge, Norvégienne, Hollandaise et Française, avant la réunion de la Commission Internationale (1).

Le contenu de ces rapports fut examiné et discuté par le groupe de travail, qui aboutit à certaines conclusions provisoires, auxquelles nous nous référerons plus loin.

Sur base de ces discussions et de ces conclusions un groupe restreint composé de MM. Francesco Berlingieri, W. Birch Reynardson, André Vaes et du soussigné se réunit le 13 avril 1964 et prépara un projet provisoire de nouvelle Convention sur les Hypothèques et Privilèges Maritimes, projet qui sera examiné au cours de la réunion de la Commission Internationale qui se tiendra à Amsterdam les 19 et 20 juin 1964. Le texte de ce projet provisoire a été imprimé à la fin de ce rapport.

(1) Un autre rapport préparé par l'Association Yougoslave a été reçu par le soussigné après la fin de la réunion.

Discussion du projet de Convention provisoire

I. Ainsi qu'il apparaît de l'étude des rapports reçus, la majorité est favorable à l'adoption d'une nouvelle Convention qui remplacerait la Convention de 1926. En fait, seule l'Association Néerlandaise a proposé de reviser la Convention de 1926 plutôt que de préparer une Convention entièrement nouvelle (2).

L'Association Française a exprimé un point de vue qui diffère sensiblement de ceux exprimés dans les autres rapports. D'après le rapport français les critiques dirigées contre la Convention de 1926 ne semblent pas justifiées et par conséquent il ne semble pas qu'il y ait un besoin urgent de reviser la Convention 1926 a fortiori d'adopter une Convention nouvelle. Toutefois, l'Association Française ne s'oppose pas à l'étude, sur le plan international, des problèmes liés aux Privilèges et Hypothèques Maritimes et autres droits similaires sur les navires.

Dans ces circonstances le groupe a décidé d'agir suivant l'opinion de la majorité.

II. Les réponses au Questionnaire font apparaître dans certains cas une grande divergence d'opinions concernant des problèmes de droit interne. En conséquence le groupe s'est rendu compte que l'élaboration de règles uniformes de droit interne acceptables par le plus grand nombre possible de pays, représenterait une tâche difficile. Cependant le groupe a jugé que c'était la seule manière d'atteindre une réelle uniformité sur le plan international, ce qui ne serait pas le cas si la solution cherchée était l'établissement ou l'établissement presqu'exclusif de règles de conflits de lois. Aussi, à l'exception de quelques points au sujet desquels le projet de Convention ci-joint se réfère au droit national, toutes les autres dispositions constituent des règles de droit interne uniformes.

III. Au point de vue du *champs d'application* de la nouvelle Convention les conclusions suivantes ont été arrêtés :

i) Le champ d'application doit être aussi étendu qu'il est pratiquement possible. Il est donc proposé que dans chaque Etat Contractant les dispositions de la Convention soient appliquées à tous les navires sans discrimination, qu'ils aient été enregistrés dans un Etat Contractant ou dans un Etat non Contractant (art. 13).

ii) En accord avec la majorité des réponses reçues, le groupe est arrivé à la conclusion provisoire que les dispositions de la Convention doivent s'appliquer aux hypothèques et aux privilèges sur les navires en construction. Il était à craindre qu'un système dans lequel les hypothèques et privilèges sur les navires en exploitation d'une part, et sur

(2) L'Association Yougoslave adopte le même point de vue.

les navires en construction d'autre part, auraient été traités dans des Conventions séparées, comme le suggèrent les réponses des Associations Norvégienne et Suédoise, aurait pu mettre en danger la garantie des créanciers privilégiés et plus spécialement celle des créanciers hypothécaires de ce dernier type de navire, au cas où certains pays adhèreraient à une des Conventions mais non à l'autre.

En conséquence l'Article 12 du projet prévoit que les dispositions de la Convention s'appliqueront également aux navires qui seront ou sont construits dans un Etat Contractant. L'Article 12 du nouveau projet est par conséquent plus étendu que le projet de Convention de Stockholm, du fait que les dispositions du nouveau projet concernant les Privilèges s'appliquent également aux navires en construction tandis que la seule référence aux privilèges dans le projet de Stockholm qui peut se trouver à l'Article 7 du projet, prévoit que : « L'ordre de préférence entre les droits inscrits conformément à la présente Convention et les privilèges maritimes ou droits réels similaires sera le même que pour les navires immatriculés après achèvement ». Cette disposition ne semble pas apporter de solution à plusieurs problèmes, spécialement à ceux qui naissent dans le cas d'un navire enregistré après son achèvement, dans un autre Etat.

D'autre part, le groupe a décidé de ne pas reprendre dans le nouveau projet les autres dispositions du projet de Convention de Stockholm, telles que celle qui régit les droits autres que les hypothèques sur les navires, ni celle qui impose aux Etats Contractants l'obligation d'offrir la possibilité d'enregistrer les navires en construction et d'inscrire des hypothèques et autres droits. Le groupe estime que si ces dispositions étaient reprises, le nouveau projet en serait alourdi sans nécessité; de plus la question de savoir si la possibilité d'enregistrement doit être rendue obligatoire semble être essentiellement de la compétence de chaque pays en particulier.

Toutefois, afin d'éviter les complications internationales qui pourraient résulter d'une situation dans laquelle un navire en construction serait enregistré dans plusieurs pays, par ex. dans le pays où il est construit et dans le pays du propriétaire pour compte duquel il est construit, la deuxième partie de l'Article 12 du nouveau projet prévoit qu'aucune hypothèque sur un navire en construction ne sera inscrite ailleurs que dans le Pays Contractant où le navire est ou sera construit, c.à.d. une disposition semblable à celle de l'Article 3 du projet de Convention de Stockholm. La contre partie de cette règle, à savoir une disposition interdisant à chaque Etat Contractant d'enregistrer un navire déjà enregistré dans un autre pays sans avoir la preuve de sa radiation dans ce dernier pays, se retrouve dans le 2ime paragraphe de l'Article 6 du nouveau projet.

iii) Pour les mêmes raisons que celles mentionnées dans le sous-paragraphe précédent, le groupe a décidé provisoirement de ne pas

adopter la suggestion faite dans les réponses de l'Association Suédoise, à savoir de préparer trois Conventions séparées, la première traitant des hypothèques maritimes et des effets de la vente forcée, la deuxième de l'enregistrement des navires en construction et la troisième des privilèges, des priorités et de la prescription.

iv) Suivant l'opinion de la majorité, le groupe a décidé de ne pas inclure dans le projet les dispositions traitant des *Chartes-Parties à long terme*. Le groupe, quoique réalisant pleinement l'importance de cette matière et la nécessité d'une législation internationale à ce sujet, croit néanmoins que l'inclusion de ce sujet, tout en n'étant pas indispensable dans une Convention traitant des privilèges et hypothèques Maritimes, comporte de si nombreux problèmes, qu'une tentative de l'inclure pourrait non seulement causer un retard considérable dans la préparation du projet final de la Convention par le C.M.I., mais pourrait en outre, si même elle était adoptée, rende cette Convention difficilement acceptable pour nombre de pays maritimes. De plus, ce sujet est déjà à l'étude de la Commission Internationale du C.M.I. sous la présidence de Monsieur Giorgio Berlingieri.

IV. *Hypothèques, Privilèges et rang*

1) L'Article 1 du nouveau projet prévoit la reconnaissance internationale de toutes les *hypothèques inscrites* sans discrimination entre celles qui ont été consenties sur un navire enregistré dans un Etat Contractant ou dans un Etat non Contractant, pourvu que certaines *conditions minimums* eu égard à *l'inscription* et à la *publicité* de l'hypothèque aient été accomplies. La référence aux « Hypothecations » (expression qui a d'ailleurs une signification toute différente du mot français « hypothèques ») et à « d'autres charges semblables », qui fait partie du texte de l'Article 1 de la Convention de 1926, n'a pas été reproduite dans le nouveau projet.

2) Comme le montrent les réponses au Questionnaire, il semble y avoir accord pour limiter le nombre des *privilèges maritimes*, à reconnaître par la nouvelle Convention, et pour décider qu'il n'y a pas de raisons valables de reconnaître un privilège aux créances mentionnées à l'Article II, sous-paragraphe 5, de la Convention de 1926.

3) La même unanimité n'existe pas en ce qui concerne la question de savoir quels autres Privilèges devront être mentionnés dans la nouvelle Convention et principalement quels sont les privilèges qui devront avoir la priorité sur les hypothèques maritimes. C'est le problème le plus difficile auquel le groupe à dû faire face. Si tous les desideratas émis dans les réponses devaient être exaucés, le résultat serait que la liste des privilèges, ayant la priorité sur les hypothèques, serait encore plus longue que dans la Convention de 1926 et par conséquent l'un

des buts principaux de la rédaction d'une nouvelle Convention, à savoir d'assurer une meilleure protection aux hypothèques, serait manqué.

Dans ces conditions, il semble nécessaire d'atteindre un compromis qui, espérons-le, sera acceptable par le plus grand nombre d'Associations Nationales.

Suivant ce compromis un nombre relativement important de privilèges maritimes sera reconnu et internationalement admis, mais une partie seulement des privilèges mentionnés aura la priorité sur les hypothèques inscrites tandis que les autres prendront rang après les hypothèques.

Les Privilèges pré-hypothécaires comprennent ceux qui naissent à l'occasion des créances suivantes :

i) les frais déboursés en vue de la saisie du navire, de sa vente ensuite de cette saisie et de la distribution du produit de la vente;

ii) les frais de relèvement de l'épave;

iii) les frais de port, canal ou autres frais similaires;

iv) les salaires etc. dus à l'équipage et les cotisations de sécurité sociale dues par l'employeur à l'équipage;

v) les créances du chef de mort ou lésions corporelles; la définition de cette créance est plus large que celle de l'Article 2, 4) de la Convention de 1926 (voir plus bas sous-paragraphe 7);

vi) les rémunérations du chef de sauvetage et d'assistance.

Les privilèges qui suivent prennent rang après les hypothèques inscrites :

aa) les créances du chef de réparations et d'entretien du navire;

bb) les créances du chef de pertes ou dommages matériels.

4) Les privilèges pré-hypothécaires peuvent être divisés en trois catégories à savoir :

a) les frais de justice qui ont été exposés au bénéfice de *tous* les créanciers;

b) les frais de relèvement de l'épave et les frais dus aux autorités portuaires, qui tous ont un rang élevé dans de nombreuses législations nationales;

c) le privilège qui garantit les créances qui, pour des raisons sociales, doivent avoir la priorité sur les hypothèques à savoir les salaires de l'équipage etc. et les indemnités dues pour lésions corporelles;

d) la rémunération du chef de sauvetage, la raison étant que toute opération de sauvetage qui réussit a pour effet de préserver le navire et dès lors d'assurer la protection des créances hypothécaires.

5) Il faut noter également que, contrairement à l'Article 2, sous-paragraphe 2 du protocole de signature de la Convention de 1926, suivant lequel chaque Etat Contractant peut prévoir dans sa législa-

tion nationale le droit de retenir ou de vendre le navire (ou épave) dans le but de récupérer les frais du relèvement de l'épave, les frais de port ou autres dommages causés par le navire, rendant ainsi illusoires les droits reconnus par la Convention elle-même, le nouveau projet propose d'accorder un privilège aux créances nées du relèvement de l'épave, et ce privilège et celui qui garantit les frais de port et de canal occupent un rang plus élevé dans la liste des priorités. L'objet de cette proposition est d'assurer une réelle uniformité internationale à ces derniers privilèges.

Pour la même raison, il a été décidé dans le nouveau projet de ne pas accorder aux Etats Contractants une liberté du genre de celle accordée dans le dit protocole de signature, sauf le droit de reconnaître dans leur législation des privilèges garantissant d'autres créances, à condition toutefois que de tels privilèges « nationaux » ne prennent rang qu'après ceux mentionnés à l'Article 2 (voir Article 4 sous-paragraphe 1).

En ce qui concerne les frais de pilotage et la contribution à l'Avarie Commune, il ne semble pas qu'il y ait une nécessité réelle d'assortir ces créances d'un privilège maritime.

6) Le problème suivant qui a été examiné par le groupe se rapporte au *droit de rétention* et au *privilège possessoire* appartenant aux constructeurs et aux chantiers de réparations des navires. En droit anglais, le privilège possessoire, quoique n'étant pas un privilège proprement dit, occupe un rang de priorité très élevé ([3]), tandis que le droit de rétention tel qu'il est reconnu dans certains autres pays, quoique n'étant pas non plus un privilège, donne au créancier la possibilité de se faire payer intégralement avant tous les créanciers privilégiés et tous les créanciers hypothécaires; le droit de rétention permet en effet au créancier de refuser la restitution de la possession du navire jusqu'à complet paiement de sa créance.

Il apparaît que les circonstances actuelles ne justifient plus que l'on accorde une garantie d'un rang aussi élevé à cette catégorie de créanciers. De même que toute autre partie qui contracte avec le propriétaire du navire (à l'exception de l'équipage, des sauveteurs, des passagers et des chargeurs), le chantier est dans une situation qui lui permet de demander au propriétaire du navire de lui fournir des garanties (par ex. une garantie bancaire), au cas où il craindrait que sa créance ne soit pas payée.

Toutefois, la majorité des réponses au Questionnaire indique le désir d'accorder dans la nouvelle Convention certaines mesures de protection aux chantiers. Dans un effort fait pour résoudre ce difficile

(3) Voir p. 7 de la réponse de l'Association Britannique de Droit Maritime.

problème, le groupe suggère un compromis suivant lequel les créances du chantier pour *l'entretien* et les *réparations* seront garanties par un privilège maritime dont le rang viendra immédiatement après celui des hypothèques inscrites, tandis que l'Article 4, paragraphe 2 du nouveau projet permet aux Etats Contractants d'introduire ou de maintenir dans leurs lois nationales un droit de rétention garantissant toutes créances quelles qu'elles soient, à condition que ce droit de rétention ne puisse restreindre les droits attachés aux créances énumérées dans le présent projet, c.à.d. les privilèges pré-Hypothécaires, les hypothèques et les privilèges post-hypothécaires.

En pratique ce compromis signifie que semblable droit de rétention ne sera apposable qu'aux créanciers ordinaires de l'armateur et, suivant la législation nationale de l'Etat Contractant, intéressé aux créanciers nantis de privilèges dits « nationaux », mentionnés au premier paragraphe du dit Article 4.

7) Le dernier des privilèges post-hypothécaires dont il est question dans le nouveau projet traite des créances du chef de pertes ou dommages matériels à des biens se trouvant à bord du navire ou à des biens se trouvant à terre ou sur l'eau, et causés par le navire ou par le fait ou la négligence ou la faute de toute personne se trouvant à bord du navire, et dont le propriétaire ou le transporteur est responsable.

Ces créances comprennent par conséquent à la fois les créances à caractère quasi-délictuel telles que par ex. les créances du chef de collision et les créances à caractère contractuel telles que les créances relatives aux dommages à la cargaison et aux bagages.

Il est à noter que la définition de cette catégorie de créances de même que de celle des créances du chef de mort ou de lésions corporelles, qui d'après le nouveau projet sont garanties par un privilège pré-hypothécaire, est « mutatis mutandis » la même que celle de l'Article 1, 1°, a) et b), de la Convention de 1957 sur la Limitation des Responsabilités des propriétaires de navires.

La définition de ces deux catégories est plus large que la définition correspondante de l'Article 2, 4) de la Convention de 1926, mais on a jugé que ce désavantage apparent se compensait par l'avantage d'avoir la même conception dans les différentes Conventions Internationales d'autant plus que la définition plus large des créances du chef de mort ou de lésions corporelles semble se justifier pour des raisons d'ordre social. En ce qui concerne les créances du chef de dommages matériels, celles-ci ne prennent rang qu'après les hypothèques, si bien que le champ d'application de cette catégorie n'entame pas la garantie accordée aux créanciers hypothécaires.

8) L'Article 3 du nouveau projet traite des privilèges et en détermine le rang suivant un ordre que l'on pourrait qualifier de tradionnel sauf qu'à la différence de la Convention de 1926 et de certaines légis-

lations nationales, les créances du chef de mort ou lésions corporelles ont priorité sur les créances du chef d'assistance. Dans chaque catégorie de privilèges les créances viennent en concours entr'elles au marc le franc, à l'exception des créances se rapportant à la rémunération du sauvetage qui prennent rang dans l'ordre inverse des dates où elles sont nées.

Finalement l'Article 3, 4) du nouveau projet se réfère à la loi nationale du pays de l'inscription pour déterminer le rang des hypothèques entre-elles.

9) La majorité des réponses est en faveur de l'abolition des privilèges sur le fret mais les opinions sont divisées quant à savoir si un privilège doit être accordé sur ce que l'Article 4 de la Convention de 1926 appelle « les accessoires ».

Considérant que dans la pratique un privilège sur le fret est rarement, si non jamais, appliqué, et qu'il en est de même des privilèges sur les « accessoires », le groupe a suggéré d'omettre dans le nouveau projet toutes références à ces privilèges. Naturellement ceci n'empêche pas les Etats Contractants de reconnaître de tels privilèges dans leur législation nationale. Que ces privilèges soient ou non applicables dans un pays autre que l'Etat Contractant dépendra des règles de droit international privé du pays en question.

V. *Extinction des Privilèges. Interruption ou suspension de la période d'extinction.*

Ici à nouveau une diversité de points de vues apparaît dans les réponses, ce qui a amené le groupe à suggérer un compromis qui est exprimé à l'Article 9 du nouveau projet.

En formulant ce compromis le groupe a poursuivi deux objectifs, à savoir :

i) l'abolition du concept « voyage » tel qu'il apparaît dans la Convention de 1926, l'interprétation de ce concept ayant donné lieu à de sérieuses hésitations;

ii) l'élaboration de règles simples et claires.

La règle principale est que tous les privilèges s'éteindront à l'expiration d'une période de *deux ans*, à compter de la date de la naissance de la créance garantie par le privilège, sauf les trois exceptions suivantes :

a) si le navire est saisi et ensuite vendu par ordre du Tribunal, tous les privilèges encore existants, cesseront de grever le navire à la suite de cette vente; voir à ce sujet : Articles 7 et 8.

b) Le privilège garantissant les frais déboursés en vue de la saisie du navire etc., prend fin si la saisie n'entraîne pas la vente..

c) Le privilège garantissant les frais de port, canal ou autres frais similaires est éteint quand le navire quitte le lieu où ces créances sont nées, la raison de cette règle étant que les autorités portuaires et les autres autorités ont la possibilité de rendre le paiement obligatoire en refusant au navire le droit de quitter le port.

Le groupe croit également qu'au cas où la période d'extinction de deux ans serait acceptée (ce qui est le double de la période établie dans l'Article 9 de la Convention de 1926) il ne semble pas exister de motifs raisonnables pour permettre une interruption ou une suspension de cette période, soit dans la nouvelle Convention soit dans la législation nationale, à une exception près à savoir quand le navire est réquisitionné. En ce cas le délai ne court pas pendant la période de réquisition.

Plus spécialement, il n'apparaît pas nécessaire de prévoir le cas d'impossibilité de saisir le navire car il semble extrêmement peu probable, qu'un créancier ne soit pas capable de saisir le navire pendant une période de 2 années.

VI. *Coordination de la nouvelle Convention et de la Convention de 1957 sur la Limitation de la responsabilité des Propriétaires de navire.*

Suivant l'opinion unanime exprimée dans les réponses et en accord avec l'Article 3, 2°) de la Convention de 1957, l'Article 11 du nouveau projet prévoit qu'aucun privilège maritime ou autre ne pourra plus être invoqué après la constitution d'un fonds de limitation.

VII. *Privilège comme Droit sur le Navire. Effets des changements de Pavillon. Cession de Privilège.*

Les articles 5, 6, sous-paragraphe 1), et 10 traitent de ces questions.

L'Article 5 dispose que la nature légale du privilège maritime est un droit « in rem ». Le premier paragraphe de cet Article déclare (peut-être sans nécessité) que les privilèges mentionnés à l'Article 2 produiront leurs effets, peu importe que le débiteur des créances garanties par privilège soit le propriétaire, le locataire coque-nue ou tout autre affréteur, tandis que le deuxième paragraphe énonce que le « droit de suite » à savoir le droit d'invoquer le privilège contre le navire en dépit d'un changement de propriétaire ou de pavillon, sauf s'ils résultent d'une vente forcée, s'exerce suivant les conditions des articles 7 et 8.

Suivant l'avis du groupe il n'est pas pensable de prévoir qu'en dépit du changement de pavillon (ou enregistrement) du navire en question, des hypothèques, inscrites antérieurement à ce changement,

demeurent en vigueur. Le nouveau projet ne contient pas et ne doit pas contenir de dispositions détaillées de droit uniforme sur l'étendue des droits conférés par une hypothèque maritime, ni sur les exigences requises pour l'octroi et l'inscription de l'hypothèque, sauf les conditions minimums mentionnées à l'Article 1. Ces droits et ces conditions peuvent varier suivant le droit national du pays de l'inscription. Dans ces conditions, une inscription automatique des hypothèques existantes dans le nouveau registre, pourrait rencontrer de sérieuses objections d'après la législation nationale du pays de la nouvelle inscription, que le pays de la première inscription soit un Etat Contractant ou un Etat non-Contractant; de même la Convention ne peut évidemment pas prévoir le cas de la radiation ou l'inscription dans un Etat non Contractant.

Afin de sauvegarder autant que possible les intérêts des créanciers hypothécaires, dans l'éventualité d'un changement de pavillon, le premier paragraphe de l'Article 6 prévoit que l'enregistrement d'un navire dans le régistre d'un Etat Contractant ne sera pas autorisée sans le consentement du créancier dont l'hypothèque avait été inscrite antérieurement sur ce navire dans un autre pays, que ce dernier soit un Etat Contractant ou un Etat non-Contractant. En cas de réengistrement d'un tel navire dans un des Etats Contractants, le créancier hypothécaire aura donc l'occasion de protéger ses droits de manière convenable.

Enfin, une disposition, déclarant que la cession d'une créance garantie par un privilège entraînera le transfert automatique du privilège lui-même, est formulée à l'Article 10. La raison de cette règle est que selon le droit de certains pays il est douteux de savoir si un privilège maritime peut être cédé.

VIII. Les effets de la vente forcée du navire font l'objet des Articles 7 et 8 du nouveau projet.

Le premier paragraphe de l'Article 7, traîtant du cas où le navire est vendu sur ordre du Tribunal d'un *Etat Contractant*, contient la disposition évidente qu'une telle vente aura pour effet que tous les priviléges, hypothèques et autres charges sur le navire, cessent de le grever, sous réserve toutefois de deux conditions minimums que la vente doit respecter, à savoir :

a) la signification de la date et de l'endroit de la vente avec un préavis minimum;

b) la modification de cette signification au réservateur du Registre où le navire est enregistré.

Suivant l'Article 8, la vente forcée dans un Etat non-Contractant aura le même effet dans la juridiction d'un Etat Contractant pourvu qu'aient été respectées les conditions édictées à l'Article 7 et que le

produit de la vente ait été distribué en concordance avec les dispositions de la nouvelle Convention. La dernière disposition à pour but de protéger dans la juridiction des Etats Contractants l'acheteur qui a acheté un navire dans une vente forcée et tout futur propriétaire du navire.

IX. L'Article final du nouveau projet contient une disposition similaire à celle de l'Article 16 de la Convention de 1957 sur la Limitation de la responsabilité des Propriétaires de Navires.

Remarques Finales

Le but du groupe en préparant le projet de Convention annexé est d'avoir un texte qui puisse servir de base pour la discussion par la Commission Internationale qui se réunira à Amsterdam les 19 et 20 juin 1964, des nombreux problèmes qui surgissent en ce domaine.

Plusieurs dispositions du projet constituent des compromis provisoires auxquels nous sommes arrivés sur base des réponses et à la suite des discussions entre les membres du groupe. Il n'est en aucune façon suggéré que les solutions proposées ne puissent être remplacées par d'autres ni être améliorées.

Amsterdam, Mai 1964.

J.T. Asser

Président de la Commission Internationale

COMMISSION INTERNATIONALE DES PRIVILEGES
ET HYPOTHEQUES MARITIMES

AVANT-PROJET DE CONVENTION

Article 1

Les hypothèques sur les navires seront reconnues comme valables dans tous les Pays Contractants à condition que :

I. l'hypothèque ait été régulièrement constituée et inscrite en conformité avec les lois du Pays où le navire est enregistré;

II. le registre dans lequel l'hypothèque est inscrite soit un registre officiel ouvert à l'inspection publique;

III. le registre mentionne l'identité du créancier hypothécaire, le montant de l'hypothèque et la date qui suivant la loi du Pays de l'inscription déterminera le rang de l'hypothèque en regard des autres hypothèques inscrites.

Article 2

Les créances suivantes seront garanties par un privilège sur le navire :

I. les frais déboursés en vue de la saisie du navire, de sa vente ensuite de cette saisie et de la distribution du produit de la vente;

II. les frais de relèvement de l'épave;

III. les frais de port, de canal et autres frais similaires;

IV. les salaires et autres sommes dues en vertu de leur contrat d'engagement aux personnes inscrites au rôle d'équipage du navire; les cotisations de Sécurité Sociale dues par l'employeur de ces membres de l'équipage;

V. les créances du chef de mort ou lésions corporelles
   a) de toute personne se trouvant à bord du navire,
   b) de toute autre personne à terre ou sur l'eau

causés par le navire ou par le fait, la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable;

VI. les rémunérations du chef d'assistance ou de sauvetage;

VII. les créances du chef de réparations et entretien du navire;

VIII. les créances du chef de pertes ou dommages matériels

a) à tous biens se trouvant à bord du navire,

b) à tous autres biens à terre ou sur l'eau

causés par le navire ou par le fait ou la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable.

Article 3

1. Les créances suivantes prendront rang dans l'ordre ci-après :

I. les frais déboursés en vue de la saisie du navire, de sa vente ensuite de cette saisie et de la distribution du produit de la vente;

II. les frais de relèvement de l'épave,

III. les frais de port, de canal et autres frais similaires,

IV. les salaires et autres sommes dues en vertu de leur contrat d'engagement, aux personnes inscrites au rôle d'équipage du navire,

V. les créances du chef de mort ou lésions corporelles

a) de toute personne se trouvant à bord du navire,

b) de toute autre personne à terre ou sur l'eau

causés par le navire ou par le fait, la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable;

VI. les rémunérations du chef d'assistance ou de sauvetage;

VII. les hypothèques répondant aux conditions énumérées à l'art. 1;

VIII. les créances du chef de réparations et entretien du navire;

IX. les créances du chef de pertes ou dommages matériels

a) à tous biens se trouvant à bord du navire,

b) à tous autres biens à terre ou sur l'eau

causés par le navire ou par le fait ou la négligence ou la faute de toute personne dont le Propriétaire ou le Transporteur est responsable.

2. Dans chacun des § I, II, III, IV, V, VIII et IX de cet article, les créances viennent en concours entre elles au marc le franc.

3. Les créances visées au § VI de cet article prendront rang dans l'ordre inverse des dates où elles sont nées.

4. Les créances visées au § VII de cet article prendront rang dans l'ordre qui leur est reconnu par les lois de l'Etat où les hypothèques ont été inscrites.

Article 4

1. Chaque Etat Contractant peut reconnaître un privilège à d'autres créances que celles énumérées à l'article 2, à condition toutefois que ces créances ne prennent rang qu'après celles énumérées à l'article 3.

2. Chaque Etat Contractant peut également reconnaître un droit de rétention sur le navire à condition toutefois que l'exercice de ce droit ne puisse en rien entraver l'exécution des créances visées à l'article 3.

Article 5

1. Les privilèges énumérés à l'article 2 produiront leurs effets, peu importe que la créance garantie par privilège soit à charge du Propriétaire, du Locataire coque-nue ou d'un autre affréteur du navire.

2. Sous réserves des dispositions des articles 7 et 8, les privilèges maritimes énumérés à l'article 2 suivront le navire nonobstant tout changement de propriétaire ou de pavillon.

Article 6

1. Aucun Etat Contractant ne permettra l'enregistrement d'un navire grevé d'une hypothèque inscrite, sans le consentement préalable du créancier hypothécaire intéressé.

2. Aucun Etat Contractant ne permettra l'enregistrement d'un navire précédemment enregistré dans un autre Etat, si ce n'est contre présentation d'un certificat émanant de ce dernier Etat et constatant la radiation de cet enregistrement.

Article 7

1. En cas de vente forcée d'un navire dans un Etat Contractant, tous les privilèges maritimes et autres, hypothèques et autres charges sur le navire, de quelque nature que ce soit, cesseront de grever le navire à condition toutefois que la date et l'endroit de la vente auront

été fixés avec un préavis d'au moins .... jours et que le Conservateur du Registre où le navire est enregistré en aura été avisé avec le même préavis.

2. Le Produit de cette vente sera distribué en conformité avec les dispositions de la présente Convention.

Article 8

Lorsque le navire est l'objet d'une vente forcée dans un Etat non-Contractant, tous les privilèges maritimes et autres, hypothèques et autres charges sur le navire, de quelque nature que ce soit, seront censées avoir cessé de grever le navire dans tout Etat Contractant à condition toutefois que

a) les formalités énumérées à l'article 7 § 1 auront été respectées;

b) le produit de la vente aura été distribué en conformité avec les dispositions de la présente convention.

Article 9

1. Les privilèges garantissant les créances énumérées à l'article 2 § 1 s'éteindront si la saisie du navire n'aboutit par à sa vente forcée.

2. Les privilèges garantissant les créances énumérées à l'article 2 (III) s'éteindront lorsque le navire quitte l'endroit où ces créances sont nées.

3. Tous les autres privilèges maritimes ou reconnus par des Etats Contractants s'éteindront à l'expiration d'une période de 2 années à compter de la date de la naissance de la créance garantie par le privilège, sauf si, avant l'expiration de ce délai, le navire a été saisis et que cette saisie aboutit à sa vente forcée.

4. Cette période de 2 années ne sera susceptible d'aucune suspension ou interruption, sauf si le navire est réquisitionné, auquel cas le délai ne courra pas pendant la durée de cette réquisition.

Article 10

En cas de cession d'une créance garantie par un privilège maritime, la créance sera transférée avec le privilège y attaché.

Article 11

Aucun privilège maritime ou autre garantissant une créance, au regard de laquelle le Propriétaire du navire peut limiter sa responsabilité, ne pourra plus être invoqué après la constitution du Fonds de Limitation.

Article 12

Les dispositions de la présente Convention s'appliqueront également aux navires qui sont en cours de construction ou sont destinés à être construits, à condition toutefois que les hypothèques sur ces navires n'auront été inscrites que dans l'Etat Contractant dans lequel le navire est en cours de construction ou est destiné à être construit.

Article 13

Sous réserve de la disposition de l'article 12 tout Etat Contractant appliquera les dispositions de la présente Convention à tous les navires, peu importe qu'ils aient été enregistrés dans un Etat Contractant ou dans un Etat non-Contractant.

Article 14

Au regard des relations entre les Etats qui auront ratifié la présente Convention ou y adhéreront, la présente Convention remplacera et abrogera la Convention Internationale pour l'Unification de Certaines Règles relatives aux Privilèges et Hypothèques Maritimes et le Protocole de Signature, signés à Bruxelles le 10 avril 1926.

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

9

(8 - 54)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

INTERNATIONAL MARITIME COMMITTEE

MARITIME LIENS AND
MORTGAGES

REPLIES TO QUESTIONNAIRE

GERMANY	(HYPO - 18)
NORWAY	(HYPO - 19)
GREAT BRITAIN	(HYPO - 21)
EIRE	(HYPO - 22)

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(8 - 64)

RÉPONSES AU QUESTIONNAIRE

GRECE	(HYPO - 20)

PRIVILÈGES ET HYPOTHÈQUES
MARITIMES

COMITÉ MARITIME INTERNATIONAL

GERMAN MARITIME LAW ASSOCIATION

REPLIES

I. New international legislation relating to maritime liens and mortgages is desirable.

II. a) The most important improvement seems in our opinion to be a restriction of those liens which secure claims arising out of contracts entered into by the master. For further improvements we may refer to our answers to the following questions.

III. a) The new Convention should deal with all problems mentioned in the report but with the exception of long term charters. For this problem see our answer to question X.

IV. a) i) We are in favour of an international recognition of maritime mortgages by all the Contracting States. The new Convention should contain a provision giving a definition of a registered mortgage, which should in our opinion be the following :

« A registered mortgage (hypothèque) means a right

a) of a claimant or his trustee (mortgagee)

b) registered in a public register of the port or State, where the ship is registered,

c) securing a claim on a certain amount of money against the shipowner or another debtor,

d) which entitles the mortgagee to a seizure of the vessel by action of a court,

e) to a judicial sale of the vessel and

f) to the payment of the claim out of the proceeds of the sale,

g) with the priority over other claims as provided for in the new Convention, in any case with priority over other claims than the legal costs, the prevailing registered mortgages and prevailing maritime liens. »

By this definition we intend to include the Anglo-American as well as the Continental types of ship mortgages. In our

opinion, items c) and g) might be omitted, but may be useful as to avoid misunderstanding. On the other hand the Convention should not require certain steps of procedure, for instance a final court judgment on the claim secured, since national laws provide for very different forms of procedure, such as the British and American right of the mortgagee to enter into the possession of the vessel without any court procedure or to have the vessel sold by a court without any jugdment on the claim or the French and German executory instruments of public notaries.

ii) A maritime mortgage should in principle be recognized either when the ship is registered in a Contracting or a non-Contracting State. For deviation from this principle see our answer under IV. i).

IV. b) The categories of claims giving rise to maritime liens as set out in Article 2 of the 1926 Convention should be reviewed in the following way :

i) The liens for law costs due to the State and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale should be restricted to those costs which have been expended from the time of the entry of the vessel into the last port, as it is already provided for the cost of guarding the vessel in Article 2 N° 1 last sentence.

ii) The liens for claims arising out of the contract of engagement of the master, crew and other persons hired on board should be restricted to wages and certain claims on purposes of social emergency (e.g. repatriation hospital-treatment). In any case no lien for master's disbursements should be granted because otherwise all efforts for a revision of Article 2 N° 5 will be useless.

iii) The liens for claims arising out of contracts entered into by the master as described in Art. 2 N° 5 should be restricted. We are of the opinion that only those claims should be secured by a lien when the master is forced to ask for a credit on the ship while the owner is unable to do so instead of him. The object of our efforts should be to give in special cases of emergency a chance for the continuation of the voyage or the preservation of the vessel and the maintenance of the crew but in any case to exclude any misuse. Therefore, a lien should be granted when, the news communications or the ways of payment between the vessel or her respective harbour and the place of the shipowner's management are interrupted or the master cannot dispose of money which had been provided for him at a place where he needs it

(e.g. war, civil war, natural catastrophy). On the other hand it should never be possible to compensate the insolvency of the owner by establishing a lien which takes precedence over the registered mortgages.

IV. c) see above.

IV. d) The rules of the Convention that govern priorities should be the following :

i) Registered mortgages « inter se » should rank according to their sequence in the register (this means normally according to their chronological order of their registration).

ii) Liens should rank before registered mortgages.

ii) The ranking of liens « inter se » should be governed by the principles already contained in Article 5 of of the 1926 Convention. The rules of Article 6 of the 1926 Convention can be abolished when the period of extinction is short. The criterion of the « voyage » did perhaps fit into the times past. It is not applicable to the modern sea-borne trade.

IV. e) i) Any general creditor of a shipowner having reached a final court decision on a payment of money should, when provided by his national law, be entitled to a judicial sale of the vessel. His claim to the proceeds should rank behind registered mortgages and such maritime liens, which have been duly established to the court. Thus, liens not duly established lose their priority.

ii) Under German law, a creditor of the shipowner has a right of retention, if he is actual in possession of the ship. Practically, only shipyards have such a right against the shipowner, but not against a court seizing the vessel. In case of a forced sale the right of retention extinguishes. We think that the right of retention — where existing — should be maintained, but without giving any claim to the proceeds of a forced sale.

IV. f) A right of retention should rank after liens and mortgages.

IV. g) No, but if municipal law grants other rights than those prescribed in our Convention, they should have no priority over those granted according to the new Convention.

IV. h) Yes, but those liens should be postponed to all other liens and mortgages granted according to our Convention.

IV. i) A Contracting State should not be allowed to discriminate against the rights resulting from mortgages having been duly registered (if the Convention gives some basic rules about those rights; see our answer to question IV. a). Against non-

Contracting States discrimination should be possible as a mean of retaliation when the non-Contracting State does not recognize mortgages duly registered in a Contracting State.

IV. j) The liens on the freight should be abolished. When — as usual in the liner service — the owner has hundreds or thousands of claims for freight the execution of the lien will be extremely difficult. The lien on the freight is a relict from the time when the owner was liable with the ship and the freight only. This system of liability is now passing away and replaced by a system as prescribed in the 1957 Convention. The freight is still of concern in some countries as a factor for counting the limitation of liabilty in cases of collision. But this system will also be replaced by the rules of the 1957 Convention in the near future.

IV. k) No answer, because j) was answered in the negative.

IV. l) Maritime liens should be enforceable only against the following other assets of the owner :

i) Compensation due to the owner for material damage sustained by the vessel and not repaired with the exception of claims under a hull insurance entered into by the owner.

ii) General average contributions due to the owner in respect of material damage sustained by the vessel and not repaired. A lien should not be exercised against compensation for loss of freight as a result of the lien on freight to be abolished and further not against remuneration for assistance and salvage because the lien on salvage remunerations is an analogy to the liens on freight.

V. a) The period of extinction should be one year in all cases other than in case of a lien for claims resulting from a collision where the period should be two years.

V. b) The period should run from the date on which the claim secured by a lien accrues.

VI. a) Yes, the Convention should give two rules only :

i) The lienor has to apply for the decision of a court, which is necessary for the forced sale of the vessel, within the period mentioned under V. If no decision is necessary, he has to apply for the judicial sale within this period.

ii) An interruption of this period should be allowed only, when no competent court accepts the abovementioned application (war, etc.).

VI. b) + c) see a).

VII. a) Yes.

VII. b) The change of the flag or of the State of registration must not influence the recognition of mortgages or liens and their rank. All special provisions as to the mortgage or the lien follow, however, the national law of the new flag or registration. This is, in our opinion, the already applied rule of most countries. As far as rights in ships under construction are concerned, the Stockholm Convention 1963 should be applicable.

VIII. a) No, we agree to the proposal of the Italian Maritime Law Association that Article 7 of the Geneva Convention 1948 concerning rights in aircrafts should apply in full and as far as the extinction of rights is concerned especially paragraph 4 of Article 7 which reads :

« No sale in execution can be effected unless all rights having priority over the claim of the executing creditor in accordance with this Convention which are established before the competent authority are covered by the proceeds of sale or assumed by the purchaser. »

VIII. b) Such provisions are necessary and desirable. The new Convention should give a rule that a forced sale by order of a court of a non-Contracting State should not result in an extinction of the rights if the rules of Article 7 of the Geneva Convention 1948 (that means the corresponding rule in our new Convention) have not been observed.

IX. a) Although this question is already dealt with in the Stockholm Convention 1963 we should combine this problem with our new Convention. States, which are not willing to grant mortgages on ships under construction should be given a chance not to ratify the Articles dealing with ships under construction by introducing a reservation to this effect into the protocol clauses. Liens on ships under construction are so rare that they have no practical importance.

IX. b) The draft Convention on the registration of rights in respect of ships under construction should, therefore, be incorporated in the new Convention.

X. a) No, we do not think that those very difficult questions should be dealt with in the new Convention. There is already a special subcommittee existing and studying these problems. When their studies are finished, the Bureau Permanent should decide on the drafting of a Special Convention on long term charters.

X. b) see our answer to question a)

X. c) see our answer to question a)

XI. a) Yes.

XII. The scope of application should be as wide as possible. Therefore the Contracting States should recognize also those rights which have accrued in a non-Contracting State and according to the law of such a State as far as the rights concerned are in principle the same than the rights described in our Convention. But a possibility of retaliation against non-Contracting States should be left open.

XIII. a) The German law recognizes the same lien as described in the 1926 Convention and— in addition — the following liens securing the following claims :

i) Claims arising out of the bottomry of the vessel. It is intended to abolish bottomry from the German law in the near future.

ii) Claims resulting from any negligent act or omission of the crew done within the scope of their employment for which the owner is liable (the most important case is the collision; see Article 2 N° 4 of the 1926 Convention).

iii) Claims of the national insurance scheme for seafarers for contributions of the owners to that scheme.

XIII. b) German law does not recognize other rights in rem on the ship than liens and registered mortgages. But there is recognized a right of retention which does not give a claim to the proceeds of the vessel from a forced sale. Moreover, any general creditor may, on the basis of a final court judgment, have the vessel sold in judicial auction and is entitled to the proceeds, ranking, however, behind registered mortgages and such maritime liens, which have been duly established to the court. This means, that other lienors, who did not establish their liens, do not receive payment.

Furthermore a shipyard can apply for a registered mortgage to secure its claims resulting from the construction of the ship or her repair.

XIII. c) i) Registered mortgages rank in the sequence of their registration in the public register.

ii) All liens have the priority over mortgages.

iii) The ranking of maritime liens inter se is in principal the same as described by Articles 5 and 6 of the 1926 Convention.

iv) Other claims (i.e. the right of retention as mentioned under b) have no priority before liens and mortgages).

XIII. d) No, if there is no consent obtained from the mortgagees the ship remains in the register, but a note is added that the ship lost the right of flying the German flag.

XIII. e) No.

XIII. f) No.

XIV. The recognition of rights in rem on a ship by German courts depends on the following criteria :

i) Title, registered or not, and registered mortgages are always recognized by German courts provided that they have been duly originated according to the law of the flag.

ii) a) Other rights in rem are recognized if the originate under the applicable national law. If the respective right has come into existence in a foreign country the respective foreign law will insofar be applied (lex rei sitae). Liens for wages are governed always by the law of the flag. If the respective right has come into existence on the high seas the law of the flag of the debtors ship will be applied. But there is one exception : If there is a collision between two German vessels in foreign national waters German law will be applied irrespective of the foreign law.

b) A right in a German vessel which has arisen according to ii) a) has moreover to correspond with a lien known in German law. This means that its economic purposes are equal and the legal requirements are similar though not equal (e.g. foreign liens for necessaries are recognized even without the master's order). If there is a « corresponding » right in German law it will be recognized in the same way and the same rank as it was a right which came in existence according to German law.

iii) The priority of rights in vessels is determined by the German law of procedure but with the exception that a foreign lien which originally ranked behind registered mortgages does not gain priority over them.

XV. We are in favour of drafting an entirely new Convention.

Hamburg, June 1st, 1964.

NORWEGIAN MARITME LAW ASSOCIATION

PROPOSED AMENDMENTS
TO
PROVISIONAL DRAFT CONVENTION ON MARITIME LIENS AND MORTGAGES SUBMITTED TO THE INTERNATIONAL SUBCOMMITTEE OF THE INTERNATIONAL MARITIME COMMITTEE (HYPO. 13-5-64)

I. Mortgages and executory liens

Art. 1

In this Convention

a) a mortgage shall mean a contractual security in a vessel for a certain indebtedness;

b) an executory lien shall mean a security in a vessel for a certain indebtedness, levied by special decree by a public authority.

Art. 2

A mortgage which has been duly executed and registered in accordance with the laws of the State where the vessel is registered shall be recognized in the Contracting States, provided

a) that the registration has taken place in an oficial register;

b) that the register and the instruments recorded therein, or authorized copies of such instruments, are open to public inspection;

c) that the registration shall include the name of the original mortgagee, the amount secured by the mortgage and the date determining the rank of the mortgage.

Art. 3

Mortgages recognized in the Contracting States shall, in case of collision of rights, take priority, one before another, in the order of registration.

The law of the State where the vessel has been registered may, however, provide that priority shall originate from the time when an application for registration was received by the registrar, provided that such application be available for public inspection.

Art. 4

1. A Contracting State shall not permit the de-registration of a vessel without the consent of all holders of registered mortgages on the vessel.

2. A Contracting State shall not permit the registration of a vessel previously registered in another State unless a certificate of de-registration has been issued by the latter State.

3. A certificate of de-registration issued in a Contracting State shall set out, in their order, all registered mortgages on the vessel.

4. Mortgages set out in a certificate of de-registration issued in a Contracting State shall be accepted for registration in another Contracting State where the vessel is being registered, retaining their priority, inter se, resulting from the original registration.

If such registered mortgages do not comply with the statutory requirements for registration in the State where the vessel is being registered the interested parties shall be given at least 60 days in which to comply such requirements, all legal effects of registration remaining in force during this period.

Art. 5

The provisions in Arts. 1 - 4 shall also apply to executory liens. Such liens shall rank with mortgages in the order set out in Art. 3.

II. Maritime liens

Art. 6

In this Convention a maritime lien shall mean a security in a vessel attaching by law to a certain claim.

Art. 7

A maritime lien shall attach to the following claims pertaining to the vessel :

1. Costs levied or awarded by the competent Court in connection with the forced sale of the vessel, including costs in respect of a necessary arrest, preservation of the vessel after commencement of the legal action and the distribution of the proceeds of the sale.

2. Cost of removal of the wreck ordered by a public authority.

3. Port, Canal and Pilotage dues and other similar dues payable for a service rendered to the vessel.

4. Remuneration for salvage.

5. Wages and other sums due to the vessel's personnel in respect of their employment and premiums for social insurance payable by the employer in respect of their employment.

6. Claims for loss of life and personal injury in respect of persons on board the vessel, and in respect of persons not on board the vessel, if caused by a person in the vessel's service for whom the owner is responsible.

7. Claims for loss of or damage to property in respect of property on board the vessel, and in respect of property not on board the vessel, if caused by a person in the service of the vessel for whom the owner is responsible.

Art. 8

The maritime liens set out in Art. 7 shall attach to the claims in question whether the person liable is the owner, demise charterer or other charterer, manager or operator of the vessel.

Art. 9

The subject matter of a maritime lien shall be the vessel with its physical accessories only.

Art. 10

All maritime liens listed in Art. 7 shall rank ahead of mortgages and executory liens.

The classes of liens enumerated in Art. 7 shall rank in the order thus set out.

Within each class the liens shall rank pari passu, but in respect of liens for salvage (class 4) the younger shall take precedence over the older.

Art. 11

A Contracting State may recognize liens in respect of claims other than those set out in Art. 7, provided that such liens shall rank after registered mortgages and executory liens.

Art. 12

Except in case of a forced sale as provided for in Arts. 18 and 19 the maritime liens set out in Art. 7 shall be unaffected by change of flag or ownership of the vessel.

Art. 13

Unless otherwise has been agreed the assignment of a claim secured by a maritime lien shall also entail the transfer of such lien.

Art. 14

Where a claim secured by a maritime lien or other lien is subject to limitation of liability such lien shall be enforceable only for the limited amount of the claim. When a limitation fund has been set up such lien shall not be enforceable.

Art. 15

All maritime liens listed in Art. 7 shall be extinguished after a period of one year from the time when the corresponding claim arose.

If the claim has been adjudicated the lien shall be extinguished if legal action to enforce it has not been taken within one year of the date of final judgment.

The national law of each Contracting State shall determine the legal actions required for the interruption of the prescription periods.

Art. 16

The Contracting States shall apply the provisions of Arts. 6 - 15 to all vessel, irrespective of their State of registry.

III. Forced sale

Art. 17

Prior to the forced sale of a vessel in a Contracting State the competent authority of such State shall give ..... days advance notice of the time and place of the forced sale to all known holders of mortgages, executory liens and maritime liens in the vessel. The said authority shall endeavour to obtain information of the identity of such holders from the registrar of the register in which the vessel is entered and from the vessel's registered owner.

Art. 18

1. In the event of a forced sale of a vessel in a Contracting State all mortgages, liens and other encumbrances shall cease to attach to the vessel, provided that

a) the vessel is within the territory of the State in question and in the custody of its competent authorities at the time of the sale;

b) the sale is effected in accordance with the law of the State in question.

2. Out of the proceeds of the sale the holders of mortgages, executory liens and maritime liens shall be satisfied in the order of priority set out in this Convention.

Art. 19

In the event of a forced sale of a vessel in a non-Contracting State all mortgages, liens and other encumbrances shall be deemed to have ceased to attach to the vessel in the Contracting States provided that the requirements set out in Arts. 17 and 18 have been met.

13/6 1964.

ASSOCIATION HELLENIQUE DE DROIT MARITIME

REPONSES

I. *INTRODUCTION*

1. L'Association Hellénique de Droit Maritime a examiné avec intérêt le remarquable rapport de M. J.T. Asser sur les privilèges et les hypothèques maritimes, ainsi que le questionnaire qui y est joint.

2. L'Association Hellénique, bien que ne partageant pas tous les griefs exprimés par M. Asser au sujet de la Convention de 1926, se joint bien volontiers à l'idée de réexaminer la question des privilèges et des hypothèques maritimes, à condition toutefois que l'effort qui sera entrepris contribue à la cause de l'unification du droit maritime, c'est-à-dire qu'il soit accompli par le plus grand nombre possible d'Etats participants au Comité Maritime International.

3. Avant de répondre au questionnaire, joint au rapport de M. J.T. Asser, nous devons rendre hommage à la Convention de Bruxelles de 1926, qui a rendu de très grands services aux affaires maritimes depuis son adoption.

4. Bien que la Grèce n'ait pas ratifié la Convention précitée, ses dispositions ont été et sont encore applicables aujourd'hui à de nombreux navires battant pavillon hellénique.

Tous les actes ministériels autorisant l'enregistrement des navires, en vertu de l'article 13 du D.L. 2687-1953 sur « les investissements et la protection des capitaux étrangers » contiennent une disposition relative à l'application de la Convention.

5. D'ailleurs la récente législation hellénique, contenue dans le Code de Droit Maritime Privé (L. 3816 du 26/28-2-1958), s'est approprié plus ou moins les dispositions de la Convention de 1926.

6. Néanmoins, la dite législation hellénique n'a pas adopté toutes les dispositions de la Convention en ce qui concerne les privilèges et n'a retenu notamment qu'un nombre de privilèges plus restreint que celui prévu dans la Convention.

Nous estimons que la dite législation hellénique, dont la traduction est annexée au présent rapport, peut être utile aux travaux de la Commission.

II. *REPONSES AU QUESTIONNAIRE*

1. Ainsi que nous l'avons précédemment exposé, notre Association considère qu'un réexamen de la législation internationale relative aux privilèges et hypothèques maritimes est souhaitable.

2. Nous traitons ci-dessous, en répondant aux questions spéciales, les points qui doivent de l'avis de notre Association être réexaminés.

3. Mises à part les questions traitées ci-dessus, nous croyons qu'une législation internationale sur les privilèges et hypothèques maritimes, en dehors des questions déjà traitées par la Convention de 1926, doit résoudre un problème de base, celui du conflit des lois. L'anarchie qui domine la jurisprudence internationale est bien connue. Elle aboutit en fait à anéantir les droits du créancier hypothécaire, lorsque, par exemple, le navire est vendu à tel ou tel Etat avec lequel il n'a aucun autre lien que celui de la lex fori.

Nous estimons que la réglementation internationale des privilèges et hypothèques maritimes doit contenir une clause stipulant que c'est toujours le droit du pavillon qui doit régir les privilèges et les hypothèques maritimes, indépendamment de l'Etat où les créanciers font valoir leurs droits.

4. a) Notre Association est favorable à la reconnaissance internationale des hypothèques, dûment mentionnées dans le registre public dans lequel le navire est enregistré, que ce dernier appartienne à un Etat contractant ou non, à condition qu'une publicité satisfaisante soit assurée au registre de cet Etat.

b) et c) Nous estimons que le nombre des privilèges reconnus par la Convention doit être limité, surtout par la suppression des créances mentionnées à l'article 2 sous-paragraphe 5.

d) Le rang des hypothèques ne peut pas être autre que celui de leur enregistrement. Pour l'application de cette règle, l'enregistrement des hypothèques doit préciser la date et l'heure de l'enregistrement. Pour le reste, le système de la Convention de 1926 peut être en principe retenu, et si possible simplifié en une disposition analogue à celle de l'article 206 de notre Code de Droit Maritime Privé.

e) f) g) h) Notre Association n'admet aucune reconnaissance internationale de droits sur les navires autres que les privilèges, et considère que la Convention doit interdire aux Etats contractants de maintenir ou de créer de tels droits dans leurs systèmes juridiques internes.

i) Nous estimons qu'aucune raison n'existe de distinguer entre droits résultant d'une hypothèque enregistrée dans un Etat contractant ou dans un Etat non contractant.

j) k) Etant donné que le fret est devenu un instrument de crédit très important pour l'entreprise maritime et qu'il fait l'objet de cession au créancier nous considérons que les privilèges ne doivent plus s'étendre au fret.

l) Nous sommes d'avis que l'article 4 de la Convention de 1926 peut être aboli.

5. Un délai d'un an doit être prévu pour la prescription des privilèges. En plus, en cas de vente contractuelle du navire, nous esti-

mons que le privilège doit continuer à subsister, à condition qu'il ait été reconnu à l'égard de l'acquéreur du navire par voie judiciaire, l'action devant être introduite dans un délai extinctif de trois mois à compter de la transcription du contrat de vente dans le registre d'immatriculation.

6. En raison des différents systèmes existant dans les divers Etats nous sommes d'avis que la Convention ne doit pas contenir de dispositions relatives à l'interruption du ou des délais d'extinction.

7. Nous estimons qu'ils est absolument nécessaire pour une Convention sur les hypothèques et les privilèges de régler le cas du changement de pavillon du navire, en statuant que les hypothèques et les privilèges légalement acquis sous l'ancien pavillon doivent produire leurs effets sous le nouveau pavillon, à condition que dans un délai, dont la durée doit être spécifiée, l'hypothèque soit de nouveau inscrite au nouveau registre et que l'ayant-droit au privilège exerce son droit.

8. Nous croyons qu'une vente forcée, quelle que soit l'autorité qui l'a ordonnée, doit avoir comme effet l'extinction de tous les droits de privilèges ou d'hypothèques. Autrement le système de vente forcée risque d'en être gravement affecté.

9. Nous estimons comme nécessaire l'établissement d'une clause relative aux hypothèques sur les navires en construction, mais nous ne croyons pas opportun d'incorporer à la Convention sur les hypothèques et les privilèges le projet de Convention sur l'enregistrement des droits des navires en construction.

10. Bien que le problème soulevé soit très important, nous croyons qu'il ne peut pas être réglé dans le cadre de la Convention dont il est question.

1. Il faut faire en sorte d'éviter les contradictions entre les diverses Conventions internationales, mais il est toutefois nécessaire que cet effort n'aboutisse pas à la création d'autres contradictions.

12. Nous estimons que la Convention doit avoir le champ d'application le plus large possible.

13. Nous annexons à la présente réponse la traduction des dispositions visées du droit hellénique.

14. Le Code Civil hellénique prévoit que les droits réels sur le navire sont régis par la loi du pavillon. Mais bien que, généralement, les privilèges maritimes soient considérés comme ayant la force d'un droit réel, la jurisprudence considère les règles relatives aux privilèges comme règles procédurales, et applique la lex fori.

15. Notre Association est d'avis que l'amendement de la Convention est la meilleure voie possible.

Athènes, le 8 juin 1964. *Theodoros B. Karatzas*

Secrétaire Hon.

CODE HELLENIQUE DE DROIT MARITIME PRIVE

CHAPITRE VIII

De l'hypothèque maritime

Article 195

Seule la volonté des parties constitue un titre pour l'acquisition d'une hypothèque maritime.

Une hypothèque peut être constituée aussi sur un navire en construction à condition qu'il soit immatriculé.

Article 196

Le droit d'acquérir une hypothèque maritime est accordé en vertu d'une déclaration faite devant notaire.

La déclaration, outre les mentions requises par le droit commun, doit énoncer la description du navire aux termes des articles 2 et 4 du présent Code, le numéro d'immatriculation y compris, ainsi qu'élection de domicile de la part du créancier au lieu où le registre des hypothèques maritimes est tenu. A défaut d'élection de domicile, les significations relatives à l'hypothèque peuvent être adressées au procureur du ressort où le registre d'hypothèques maritimes est tenu.

Article 197

L'hypothèque commence à exister du moment de l'inscription en forme due dans le registre d'hypothèques du ressort du port d'attache du navire.

Article 198

A défaut d'une assurance suffisante le créancier a le droit de faire assurer le navire contre les risques maritimes aux frais du débiteur jusqu'à concurrence du montant du prêt majoré de trente pour-cent.

Si le débiteur ne paie pas les primes d'assurance le créancier a le droit d'exiger le paiement immédiat de la dette.

Le droit hypothécaire s'exerce sur le bénéfice d'assurance également.

Les dispositions des articles 190 al. 3 et 194 s'appliquent sur l'hypothèque maritime également. L'article 1287 du Code Civil n'est point applicable.

Article 199

Toute inscription d'hypothèque maritime postérieure à l'inscription d'une saisie conservatoire ou d'une saisie-exécution, est nulle et sans effet.

Article 200

La disposition de l'article 537 al. 4 du Code de Commerce s'applique également sur hypothèque maritime.

Article 201

Le changement du port d'attache ou du nom d'un navire hypothéqué sans le consentement des créanciers hypothécaires donné par écrit est interdit.

Dès l'inscription du nouveau nom dans le registre d'immatriculation l'autorité portuaire du port d'attache du navire en donne avis au conservateur du registre d'hypothèques maritimes afin qu'il effectue les modifications nécessaires.

Article 202

Toute convention d'aliénation d'un navire hypothéqué, entraînant la perte de la nationalité hellénique, est nulle si elle est faite sans le consentement des créanciers hypothécaires.

Article 203

Toute hypothèque établie sur un navire au moment où il acquiert la nationalité hellénique, continue à subsister pour autant que d'après la loi de la nationalité précédente l'hypothèque ait été acquise par inscription dans un registre public et qu'elle ait été inscrite dans le registre des hypothèques maritimes hellénique dans les soixante jours qui suivent l'immatriculation du navire en tant que navire grec.

Article 204

Pour le reste des dispositions du Code Civil relatives à l'hypothèque immobilière sont appliquées par analogie.

CHAPITRE IX

Des privilèges maritimes

Article 205

Sont privilégiés sur le navire et le fret dans l'ordre ci-dessous seules les créances suivantes :

a) les frais de justice encourus dans l'intérêt commun des créanciers, les droits et les taxes grevant le navire, les impôts afférants à la navigation ainsi que les frais de garde et de conservation depuis l'entrée du navire dans le dernier port;

b) les créances résultant du contrat d'engagement du capitaine et des autres gens de l'équipage ainsi que les droits de la Caisse des Pensions des Marins;

c) les dépenses et rénumérations dues pour assistance, et sauvetage;

d) les indemnités dues aux navires, les passagers et les cargaisons pour abordage ou heurts des navires.

Les privilèges sont préférés à l'hypothèque maritime.

Les créances privilégiées du même rang viennent en concurrence au marc le franc.

En matière de créances résultant d'assistance et de sauvetage, celles qui sont nées ultérieurement sont préférées à celles nées antérieurement.

Article 207

En cas de vente contractuelle du navire le privilège continue à subsister à condition qu'il ait été reconnu à l'égard de l'acquéreur du navire par voie judiciaire l'action devant être introduite dans un délai extinctif de trois mois à compter de la transcription du contrat d'aliénation, dans le registre d'immatriculation.

Article 208

Outre les causes générales d'extinction le privilège s'éteint par la vente du navire aux enchères.

Article 209

Le privilège ne s'exerce pas sur l'indemnité d'assurance.

Décret législatif N° 3899/1958
portant loi sur l'hypothèque de préférence sur navires

Article 1

1. En fait d'hypothèque maritime il est convenu de stipuler que le créancier a le droit d'entreprendre la gestion du navire (hypothèque de préférence) du moment de l'échéance de sa créance.

2. La prise de la gestion du navire par le créancier peut également avoir lieu dans tout autre cas prévu par l'acte constitutif de l'hypothèque de préférence.

Article 2

Le droit d'acquérir une hypothèque de préférence est accordé en Grèce en vertu d'un contrat passé par devant notaire et à l'étranger soit selon la forme requise en Grèce soit selon celle requise dans le pays où l'hypothèque est constituée.

Article 3

Le contrat d'hypothèque de préférence outre les mentions requises par le droit commun doit aussi énoncer : a) le titre d'acquisition de la propriété du navire, le nom, l'indicatif international, le port et le numéro d'immatriculation, les dimensions du navire comme elles résultent du certificat de jaugeage, la nature de la force motrice et la puissance nominale de la machine; b) élection du domicile dans le ressort du Conservateur des Hypothèques. A défaut d'élection du domicile, les significations afférant à l'hypothèque de préférence peuvent être faites au Procureur, du ressort où le Registre d'Hypothèques est tenu.

Article 4

L'hypothèque de préférence ne peut être constituée que sur le navire entier. Elle peut être constituée aussi sur un navire en construction à condition qu'il soit immatriculé.

Article 5

Hormis le droit dont l'article 1 du présent Décret-Loi, par le contrat d'hypothèque de préférence peut être conféré au créancier tout autre droit en vue d'une sûreté majeure de sa créance, y compris le droit d'aliéner le navire sans recours à la vente publique.

Article 6

1. Jugements étrangers afférents à des obligations dérivant d'une hypothèque de préférence ou bien actes reçus par des officiers étrangers, exécutoires dans le pays où ils ont été rendus, sont exécutoires en Grèce

sans revision au fond, encore que le débiteur poursuivi soit un ressortissant Grec. L'exequatur est toujours ordonné par le Président du Tribunal de Première Instance.

2. Outre le débiteur, sont appelés à l'audience si possible, les créanciers hypothécaires ou préférentiels antérieurement inscrits.

3. Le Président ne peut pas renvoyer la cause au Tribunal et l'ordonnance n'est susceptible d'aucune voie de recours ordinaire ou extraordinaire.

4. La sentence autorisant l'exécution, ne peut être exécutée que 24 heures après sa signification.

Article 7

La prise de la gestion est notifiée sans délai au Conservateur des Hypothèques Maritimes, afin que mention soit faite dans le registre hypothécaire. Mention est faite également toutes les fois que la gestion prend fin.

Article 8

Par la prise de la gestion le créancier préférentiel hypothécaire n'est pas privé de son droit à avoir recours à la vente forcée du navire pour le paiement de sa créance.

Article 9

Dès la prise de la gestion, la possession du navire passe au créancier qui exploite le navire pour son propre compte aux fins de l'encaissement de sa créance. La prise de la gestion n'est pas entravée du fait que le navire se trouve en cours de voyage, mais le créancier est tenu à achever le voyage commencé avant la prise de la gestion.

Article 10

Le créancier entré dans la gestion du navire a le droit d'accomplir tout acte et conclure toute convention connexe à la gestion et exploitation du navire mais qui n'engage pas toutefois le navire pour une durée supérieure à un an de la date fixée pour le paiement de sa dette.

Article 11

Tout montant encaissé par le créancier durant la gestion et l'exploitation du navire, déduction faite des dépenses afférentes, est porté en compensation de sa créance. Il peut être stipulé que le créancier doit rendre compte de sa gestion.

Article 12

L'hypothèque de préférence garantit le capital, les intérêts échus et les frais.

Article 13

L'acquittement de la créance de quelque façon qu'il soit fait, met fin à la gestion du navire par le créancier hypothécaire préférentiel. Si l'acquittement est contesté, le créancier est tenu à fournir les éléments de sa gestion.

Article 14

La prise de la gestion du navire par un créancier hypothécaire préférentiel donne droit à tout autre créancier hypothécaire ordinaire ou préférentiel antérieurement inscrit d'exiger le paiement immédiat de sa créance.

Article 15

Le Conservateur des Hypothèques Maritimes doit mentionner sans délai toute inscription ou radiation d'hypothèque ordinaire ou préférentielle dans le livre d'hypothèques que le capitaine est obligé à tenir à bord avec les autres documents réglementaires. Si le navire se trouve hors du ressort du Conservateur des Hypothèques, à la requête de ce dernier adressée par poste, télégraphe ou tout autre moyen adéquat, la mention visée à l'alinéa précédent est faite par l'autorité portuaire ou consulaire du ressort où se trouve le navire.

Article 16

La mention visée à l'article précédent énonce :

1. Le prénom, nom, domicile et profession du créancier et du débiteur.
2. La date du titre et de son inscription dans le registre hypothécaire.
3. Le montant de la créance.
4. La date de l'échéance de la créance.
5. Dans le cas de radiation, la date du document de l'acquittement et de ce qu'elle fut portée dans le registre.

Article 17

Le capitaine doit avoir à bord copie dûment légalisée par le Conservateur des Hypothèques du titre constitutif de toute hypothèque inscrite dans le livre prévu dans l'article 15 du présent Décret-Loi grevant le navire. Le capitaine doit présenter à tout ayant un intérêt légitime la copie dont l'alinéa précédent ainsi que le livre doit l'article 15.

Article 18

A défaut d'une assurance suffisante, le créancier hypothécaire préférentiel a le droit de faire assurer le navire contre les risques de mer et de guerre aux frais du débiteur, jusqu'à la concurrence du

montant du prêt, majoré de trente pour-cent. Si le débiteur ne paie pas la prime d'assurance, le créancier peut réclamer le paiement immédiat de la dette. La créance garantie par une hypothèque de préférence, peut être exercée sur le bénéfice d'assurance.

Article 19

Si le navire est perdu ou a subi des avaries diminuant substantiellement sa valeur, le créancier hypothécaire préférentiel peut exiger le paiement immédiat de la créance. Le droit dont l'alinéa précédent est exclu lorsque les avaries ne sont pas causées par une faute du débiteur et celui-ci offre une sûreté adéquate.

Article 20

Toute hypothèque ordinaire ou de préférence constituée sur un navire au moment où celui-ci acquiert la nationalité hellénique continue à subsister pour autant que d'après la loi de la nationalité précédente, l'hypothèque ait été acquise par inscription dans un registre publique et qu'elle ait été inscrite dans le registre hypothécaire Grec dans les 60 jours qui suivent l'immatriculation du navire en tant que navire Grec.

Article 21

Le rang chronologique de l'inscription de l'hypothèque détermine la priorité de tout créancier ordinaire ou préférentiel. Les hypothèques inscrites le même jour viennent en concurrence.

Article 22

Pour le reste sont appliquées les dispositions des articles 195 à 205 du Code du Droit Maritime Privé.

Article 23

Les dispositions des articles 1 à 22 sont appliquées à des navires d'une jauge brute supérieure à 500 tonneaux. L'application de ces dispositions peut être étendue par Décret Royal à des navires d'un jaugeage inférieur.

Article 24

1. En fait des Autorités Consulaires Helléniques auprès desquelles l'exercice de l'Administration de la Marine Marchande est confiée à un Officier du Corps Portuaire, l'admission définitive de navires grecs sans égard à leur capacité et la conservation des registres d'immatriculation de toute classe ainsi que des hypothèques maritimes y compris les livres y afférant selon les provisions en vigueur, peut être exercée par le dit officier, d'après Décret Royal issu à l'instance des Ministres de la Justice et de la Marine Marchande.

2. Les navires inscrits dans les registres tenus par les Autorités Consulaires selon l'alinéa 1, sont obligatoirement transcrits dans un registre d'un port de l'Etat.

3. Par Décret Royal issu à l'instance des Ministres de la Justice et de la Marine Marchande seront déterminés :

a) La procédure de la transcription des navires et leur report des registres relatifs aux registres d'immatriculation et des hypothèques maritimes ainsi qu'aux autres registres d'un port de l'Etat.

b) La conservation des dits registres après la transcription des navires dont l'alinéa - du présent article, le but de leur conservation et les inscriptions à y passer.

c) Les pièces justificatives exigées pour l'admission d'un navire autant que navire grec par les Autorités Consulaires conformément à l'alinéa du présent article.

d) Tout autre détail pour l'exécution du présent article.

Article 25

L'affirmation assermentée de la propriété d'un navire, prévue par la dernière alinéa de l'article 6 du D.R. du 14.11.1836 sur la Marine Marchande est remplacée par une déclaration sous seing privé, soumise par l'acquérant à l'Autorité de l'immatriculation.

La déclaration écrite de promesse et de garantie prévue par les articles 12, 13 et 14 du D.R. du 14.11.1836 est abrogée.

BRITISH MARITIME LAW ASSOCIATION

REPLIES

I. Yes.

II. a) Not applicable.

II. b) We go into greater detail about desirable improvements in later replies to this questionnaire. We believe that the following improvements are especially important :

1. We consider that the Convention, as at present drafted, accords too low a priority to rights of mortgagees, by subordinating them to the very extensive number of claims which give rise to maritime liens as enumerated in Article 2. In England, as will be seen from the Commentary pages 3 and 4, Maritime Liens are very restricted and attach only in respect of claims for damage done by a ship, salvage wages and master disbursements. The rights of mortgagees, therefore, take priority over the vast majority of claims which may be made against the vessel. We suggest that this is as it should be.

We agree that creditors should be entitled to enforce their claim by proceedings « in rem » against a ship. In this connection we should recall that the United Kingdom has ratified the Arrest of Ships Convention 1952 which enumerates an extensive list of claims in respect of which proceedings « in rem » are available. To accord the right to proceed « in rem » does not, of course, imply that a Maritime Lien attaches to the claim (though Maritime Liens can only be enforced by proceedings « in rem »). Not do proceedings « in rem » affect the priority of the various claimants including mortgagees.

2. Quite apart from the substantive criticism mentioned above, we are of the opinion that numerous drafting amendments are required to avoid ambiguities and uncertainties in the present text. We mention these in more detail below (see in particular reply to Question IV b) 1).

III. a) An indication of our view as to the requirements of a new Convention has been given in our reply to Question II.

III. b)We are in favour, if possible, of a new Convention providing for rules of uniform law covering all the problems in the report.

III. c) We think that consideration should be given to the question as to whether all Maritime Claims under the Arrest Convention should be brought into this Convention. Further, we would suggest that provision should be made in the Convention to cover the forced sale of

ships, wreck raising and the possessory lien under English law. (See reply to Question IV b) iii).

IV. 1) Yes.

IV. 2) Yes.

In the United Kingdom the position as regards the recognition and enforcement of foreign mortgages and charges on ships has changed in the last few years. Whilst a foreign judgment against a ship has always been recognised and enforced by proceedings « in rem » in the Admiralty Court (see e.g. *Minna Craig S.S.Co. v. Chartered Mercantile Bank of India (1897) 1 Q.B.)*, the Courts in the United Kingdom had no jurisdiction to consider disputes respecting foreign mortgages and charges. Prior to 1956 the Admiralty jurisdiction of the High Court was limited, in general terms, to mortgages registered under the Merchant Shipping Act. Thus the registered mortgagee of a British ship could enforce his security by arrest in the Admiralty Court, whereas the mortgagee of a foreign ship, duly registered in accordance with the law of the flag of the ship, had no right to arrest such ship in a British port.

However, since the passage of the Administration of Justice Act 1956, the Admiralty jurisdiction has been extended to hear and determine any claim in respect of a mortgage of or a charge on a ship or any share therein whether the ship is British registered or not, wherever the claim may arise and to all morgages and charges, whether registered or not and whether legal or equitable including mortgages and charges created under foreign law.

IV. b) i) We are of the view that the claims listed in Article 2 to which Maritime Liens attach are too numerous. Paragraph 5 of Article 2 should be omitted « in toto ». With modern means of communication the right of the Master to pledge his ship is unnecessary. We would also suggest that the claims set out in the other paragraphs should be restricted as follows :

Paragraph 1.

a) « *Law costs due to the State* ». These words are wide enough to cover any legal costs due to the State. We believe that what is meant is Court Fees and we suggest that this restricted term should be employed.

b) « *Expenses incurred in the common interest of creditors in order to preserve the vessel or to procure her sale and the distribution of the proceeds of sale* ».

We suggest that this provision lacks clarity and is, in any event, too widely drafted. Such expenses should be restricted to the costs of arrest, sale and distribution of funds arising therefrom.

c) « *The cost of watching and preservation* ».
We suggest that this should be deleted from the paragraph.

Paragraph 2.

« *Claims arising out of the contract of engagement of the Master, crew and other persons hired on board* ».

We think it right that the Master and crew should be entitled to the security provided by a Maritime Lien in respect of their wages. But we suggest that this paragraph is too wide both in respect of the category of persons included and in respect of the causes of action which should be restricted to wages and other similar payments (insurance, pensions, etc.). The expression « claims arising out of contract of engagement » is wide enough to include, for example, a claim made by a third party in respect of the beach of a term of the contract of engagement by the Master, etc. (i.e. the breach of the undertaking of a Master to use all reasonable means to make and keep the ship seaworthy under the Merchant Shipping Act). As regards the categories of persons included in the provisions, the words « other persons hired on board » might include, for example, stevedores, repairers and even surveyors. We think that the expression should be limited to « persons of the ships complement ».

Paragraph 3.

This provision extends the present scope of Maritime Liens under English law, which is restricted to salvage alone. We think it reasonable to extend the lien to ship's contribution to General Average, but to exclude « assistance » as being unnecessarily wide.

Paragraph 4.

This provision is somewhat loosely drafted and extends the scope of existing English Maritime Liens. We suggest that indemnities for bodily injury to passengers or crew; indemnities for loss of or damage to cargo to baggage (which are all insurable risks) should be omitted.

Paragraph 5.

To be deleted. See above.

IV. b) ii) No comment.

IV. b) iii) We are of the opinion that the categories of claims giving rise to maritime liens under the Convention should be extended as follows :

1. Although Harbour Authorities may enforce their claims for tonnage and harbour dues (Art. 2, 1) and for damage caused to docks etc. (Art. 2, 4), we are of the view that they should also be entitled to a maritime lien in respect of the costs of wreck raising. We think

it best that this should be recognized in the Convention itself, rather than in te Protocol of Signature.

2. As already indicated, we think that the possesory lien should rank as a maritime lien, thereby giving additional security to ship builders and repairers.

IV. c) Yes. See above under IV b) i).

IV. d) i) As between registered mortgages « inter se » ?

The date of registration of the mortgage (and not its creation) should regulate its priority.

ii) As between registered mortgages and liens ?

Priority over registered mortgages should be accorded to a severely restricted number of Maritime Claims. We appreciate that the system of priority set out in Article 2 was the subject of very lengthy International discussions and that agreement was reached after concessions made by the various parties to these discussions (for details see the report of C.M.I. Meeting 1904/1925 and Diplomatic Conferences 1910/1926). In these circumstances we think it might be unwise to suggest a different system.

iii) As between liens « inter se » ?

Here again we consider that the system set out in Article 5 though differing from that adopted in the United Kingdom is workable. We, therefore, do not recommend any changes apart from a clear definition of the « voyage », wich is omitteed from the Convention. We have referred to this in the Commentary. We can see no objection to omitting the concept of voyage from the Convention.

IV. e) Yes. See above.

In addition we think that, in order to avoid conflict with the Arrest Convention 1952, all Maritime claims enumerated in Article 1 of that Convention which are not included in Article 2 of the 1926 Convention on Mortgages and Maritime Liens should be granted recognition in the Convention as claims in respect of which a right in rem exists.

IV. f) The Maritime claims mentioned in e) above should be postponed to all maritime liens and mortgages.

IV. g) To allow Contracting States to create such rights would be contrary to the intention of this Convention.

IV. h) No, for the same reason as in g) above.

IV. i).

1) in a Contracting State ?

Yes.

2) in a non-Contracting State ?

Yes. See IV a) 2) above.

IV. j) We are firmly against the lien being enforceable against freight earned by the ship. If this is not accepted it would be necessary

to define the freight to be attached. We believe that this would be extremely difficult.

IV. k) See reply to j) above.

IV. l) No.

V. a) Two years would seem a reasonable period in respect of all Maritime claims.

V. b) Time should run from the date on which the claim accrues and in the case of General Average, this should be deemed to be the date on which the adjustment is completed.

VI. a) We are in principle against any interruption, though appreciate that such interruption might be found necessary for example in the case of requisition.

VI. b)Not applicable.

VI. c) See reply to Question VI a).

VII. a) Yes.

VII. b) Clearly when a vessel registered in a Contracting State is sold to a national of another Contracting State, the mortgages and liens should survive. The Convention should contain appropriate provisions covering the administrative operation of re-registering mortgages in the new country of registry. Where, however, the vessel is sold by the national of a non-Contracting State, it is impossible to impose the provisions of the Convention on the latter. The only way that any attempt can be made to safeguard the position of a mortgagee would be to provide in the Convention that mortgages, like Maritime Liens, attach to the ship into whose-soever possession she may pass. We have already suggested that this should be so (see reply to Question 1).

VIII. a) No. We think that whilst the purchaser of a ship sold by a Court be entitled to the vessel free of all encumbrances, all registered mortgages and liens on such ships should not be extinguished, but that, instead, they should attach to the proceeds of sale.

VII. b) No. While such a provision would clearly be desirable, it would be ineffective.

IX. a) and b) Yes. In principle we think it logical to have one comprehensive Convention covering both ships in commission and under construction.

X. a) No. While we appreciate that the position of a Charterer should be safeguarded, we think that this is an entirely separate topic from that dealt with in this Convention, which deals with security for services rendered, damage done or money advanced. We do not, however, wish to imply that the Convention on registration of Charter Parties should not be independently pursued.

X. b) Not applicable.

X. c) Not applicable.

XI. Yes, we think it wise to provide that on the setting up of a limitation fund the creditors sharing in the fund will do so « pari passu » without being entitled to any priority resulting from a lien securing their claims. But the setting up of a limitation fund should in no way prejudice the rights of mortgagees.

XII. a) We think that the Convention should be applied as widely as possible, and that its provisions should apply in contracting countries to all vessels irrespective of their flag. Indeed, this is the position in the United Kingdom (see our reply to Question IV a) 2).

XIII. a) In view of a request received from members of Mr. Asser's Working Group we have prepared a detailed commentary on the position in English Law.

We, therefore, answer the questions briefly as follows :

The maritime liens recognized in English Law are wages, damages done by a ship, salvage and disbursements.

XIII. b).

i) Possessory Liens.

Yes. See commentary.

ii) Statutory Liens ?

Yes. See commentary.

iii) A right of retention not giving rise to a maritime lien ?

Yes. A right of retention is given to ship repairers and Port Authorities in circumstances where money is owed for services rendered.

XIII. c) See commentary.

XIII. d) Yes, we believe it is. It should, however, be noted that the Merchant Shipping Acts 1894 S. 44 and 1906 S. 52 make provision for the retention on registers of mortgages when a ship is sold and is reregistered.

XIII. e) Yes.

XIII. f) At the present stage of our examination of this topic, we reply in the negative.

XIV. Mortgages and charges created under foreign law are recognized in this country as matters of *substance* (i.e. in the sense understood in private international law). As a matter of *procedure claims* will be enforced by an action « in rem ». The question of priority claims would, however, be governed by English Law for this is a matter for the « lex fori ».

XV. We are in favour of preparing an entirely new Convention.

COMMENTARY

ON THE INTERNATIONAL CONVENTION OF 1926 AND COMPARISON WITH ENGLISH LAW

Article 1

Article 1 lays down the categories of rights over a ship which may be registered. These are :

1) *Mortgages*. This must include both legal and equitable mortgages. A legal mortgage is one which is registered under the *Merchant Shipping Act 1894 s. 31-46*. All other mortgages are equitable. It is to be noted that all claims in respect of mortgages or charges, whether registered or not, and whether legal or equitable and including those created under foreign law, on any ship or share are within the Admiralty jurisdiction; see *Administration of Justice Act 1956 (4 & 5 Eliz. 2) Sec. 1 (1) (c)* which provides that « The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims : any claim in respect of a mortgage of or any charge on a ship or any share therein »; and Sec. 1 (4) « The preceding provisions of this section shall apply :

a) in relation to all ships and aircraft, whether British or not and whether registered or not and wherever the residence or domicile or their owners may be;

b) in relation to all claims, wheresoever arising (including in the case of cargo or wreck salvage claims in respect of cargo found on land) and

c) so far as they relate to mortgages or charges, to all mortgages and charges whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law;

Provided that nothing in this sub-section shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Acts 1894-1954. »

2) *Hypothecations*. This in English law means Bottomry and Respondentia. The Master has authority to pledge the ship and freight in circumstances of unforesseen necessity or distress to raise the funds required for the voyage. This is Bottomry. If the cargo alone is hypothecated then this is Respondentia. Though such hypothecations are obsolete in practice, they still form part of the jurisdiction « in rem » and « in personam » of the Admiralty Court — see *Administration of Justice Act sec. 1 (1 (r)*. The Court car hear and determine « (r) any claim arising out of Bottomry ». In practice both Bottomry and Respondentia are obsolete in English law. The will not be further considered.

3) *Other charges.* In the *St. Merriel (1963) 1 Ll.L.Rep. 63 at p. 68,* Hewson J. defined « other charge » by reference to shipping statutes which contain the words « a charge upon the ship ». In particular he referred to :

a) *Merchant Shipping Act 1894 S. 513 (2)* which reads : « Any damage sustained by an owner or occupier in consequence of the exercise of rights given by this Section » (which deals with the right to pass and repass over adjoining land when the vessel is wrecked stranded or in distress) « shall be a charge on the vessel, cargo or articles in respect of or by which the damage is occasioned, and the amount payable in respect of the damage shall in case of dispute be determined and shall in default of payment, be recoverable in the same manner as the amount of salvage is under this part of this Act determined or recoverable ».

b) *Merchant Shipping Act 1906 S. 35 (2) :* « If the expenses » (expenses, that is, attendant on the illness, hurt or injury of a seaman) « are not so repaid the amount thereof shall with costs be a charge upon the ship and be recoverable from the Master or from the owner of the ship for the time being either by ordinary process of law or in the Court and in the manner in which wages may be recovered by seamen ».

c) *Merchant Shipping Act 1906 S.42 (1) & (2) :* « These expenses (expenses of relief of distressed seamen) shall be a charge upon the ship (recoverable) either by ordinary process of Law or in the court and manner in which may be recovered by seamen ».

Article 2

Article 2 lays down the classes of claim in respect of which Maritime liens attach under the Convention. The article also lays down their priority, but this question is dealt with more specifically under Article 3. The Article lays down the items of the ship's adventures to be subject to such liens (e.g. Freight and accessories) but again this is dealt with in detail below under Article 4.

The maritime liens listed in the Convention are far more numerous than the maritime liens recognized by English law. Liens of all kinds recognized by English law are as follows :

1) *Maritime Liens.*

a) *Bottomry & Respondentia :* see above under Article 1.

b) *Salvage of Property.*

The lien salvage is created by rendering salvage services to a maritime res, or in certain circumstances by the saving of life from a ship. The lien attaches to the ship freight and cargo severally, but not jointly and each is liable to contribute towards the salvage in proportion to its value, but cannot except in cases of express agreement

be made liable for the salvage due from the other. The lien accrues immediately upon performance of the salvage services.

c) *Wages.*

The lien for wages attaches provided these have been earned under an ordinary mariner's contract. So long as the master and crew have earned their wages the fact that they were engaged by someone who had no right to engage them is irrelevant.

d) *Disbursements and Liabilities.*

The master has a lien on the ship for disbursements made or liabilities incurred on account of the ship. This lien is only in respect of disbursements made or liabilities incurred by the master by virtue of his general authority and in the ordinary course of his employment for which he can pledge owner's credit.

e) *Dammage done by a ship.*

This lien arises when damage is done by the ship to another ship or property; see *The Tolten (1946) P. 135 (C.A.)* where a wharf in Spain was damaged, and *Mersey Docks and Harbour Board v. Turner, The Zeta (1893) A.C. 468* where a ship collided with a pier head. This is the case whether the casualty occurs on the high seas or in the body of a country, that is to say on any inland waterway. There must be some wrongful act of navigation of the ship from want of skill or from negligence of the persons by whom she was navigated, being at the time of the damage her owners or the servants of her owner, or having the possession and control of her by their authority. Thus where the crew of a ship cast off the moorings of another ship, and the latter was damaged as a result, it was held that no lien attached to the ship whose crew cut the moorings; *Currie v. McKnight (1897) A.C. 97*. So where Charterers have the control or where any persons are allowed to have possession for the purpose of using or employing her in the ordinary manner, they may be deemed to have authority to subject her to liens and, therefore, make her liable for their negligence. Where the person in charge or possession of the ship has no such authority no lien arises e.g. wilful damage by the Master. But see Article 13 inf. and *The Castlegate (1893) A.C. 38* for some further discussion on this matter.

2. *Statutory Liens.*

A statutory lien attaches when the proceedings are commenced in an action « in rem » in the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage, or any County Court having Admiralty jurisdiction. Under the Administration of Justice Act 1956 Sec. 3 (2) « the Admiralty jurisdiction of the High Court may be invoked by an action « in rem » against the ship or property in question » in the following claims :

Sec. (a) «any claim to the possession or ownership of a ship or to the ownership of any share therein;

Sec. (b) any question arising between co-owners of a ship as to possession, employment or earnings of that ship;

Sec. (c) any claim in respect of a mortgage of or a charge on a ship or any share therein;

Sec. (s) any claim for the forfeiture or condemnation of a ship or of the goods which are being or have been carried or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure or for droits of Admiralty. »

Under Sec. 3 (3) of the Act it is provided that where there is a maritime lien or other charge on any ship for the amount claimed the jurisdiction of the High Court may be invoked by an action « in rem ».

Under Sec. 3 (4) « where a person who would be liable on the claim (for a list of which see details infra) in an action « in personem » was, when the cause of action arose, the Owner or Charterer of, or in possession or in control of the ship, the Admiralty jurisdiction of the High Court may (whether the claim gives rise to a maritime lien or not) be invoked by an action « in rem » against :

a) that ship, if at the time when the action is brought, it is beneficially owned as respects all the shares therein by that person; or

b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid. »

The above provisions concerne the following claims under the Administration of Justice Act Sec. 1.

d) any claim for damage done by a ship;

e) any claim for damage received by a ship;

f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the Owners, Charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

g) any claim for loss of or damage to goods carried in a ship;

h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

j) any claim in the nature of salvage...;

k) any claim in the nature of towage in respect of a ship...;

l) any claim in the nature of pilotage in respect of a ship...;

m) any claim in the nature of goods or materials supplied to a ship for her operation or maintenance;

n) any claim in respect of construction repair or equipment of a ship or dock charges or dues;

o) any claim by the Master or member of the crew of a ship for wages and any claim by or in respect of a Master or member of the crew of a ship for any money or property which, under any of the provisions of the Merchant Shipping Acts 1894-1954 is recoverable as wages or in the Court and in the manner in which wages may be recovered;

p) any claim by a Master, shipper, charterer or agent in respect of disbursements made on account of a ship;

q) any claim arising out of an act which is or which is claimed to be a general average act;

r) any claim arising out of Bottomry.

A statutory lien attaches when proceedings are commenced in an Admiralty action « in rem ». It differs from a maritime lien in that a maritime lien attaches to the ship at the moment of the occurrence which gives rise to the claim, whereas a statutory lien attaches only on the issue of a writ. Both forms of lien travel with the ship into whosoever possession she may pass. It is imposed by law and not entered into by agreement as are mortgages and pledges.

3. *Possessory Lien.*

A possessory lien is the right of a person in whose possession a ship or her appurtenances is or are, te retain possession thereof. Such charges indeed have a very high priority, but no lien. Such a right belongs to one who repairs, alters or otherwise bestows labour or skill upon a ship and retains possession of it. There is no power to realize the security, even though expenses and inconvenience must be incurred in keeping it. (Also it is to be noted that Harbour and Dock Authorities generally have a right under their private statutes to detain vessels in respect of damage to the harbour or dock works. The right arises where the Authority's special Act incorporates the *Harbour Dockse and Piers Clauses Act 1847 (10 & 11 Vict. C. 27) S. 74* or includes similar provisions. The mere right to detain does not involve a right to sell and has been held to amount to a possessory lien : see *Mersey Docks & Harbour Board v. Hay, The Countess (1923) A.C. 345.* Harbour and dock authorities can also detain and sell a ship in respect of dock and harbour dues : see *Harbour, Docks and Piers Clauses Act 1847 S. 44.* They can take possession and remove and sell wrecks and other obstructions).

It will be seen from the foregoing that though there are but few maritime liens known to English law, the statutory liens, giving a right to proceedings « in rem » as listed by the Administration of Justice Act 1956 are numerous and to a large extent correspond to the maritime liens listed by the Convention, upon which the following comments and comparisons with English law are made :

« *Law costs and fees, etc.* »

The charges of the marshall give rise to an overriding right; otherwise such costs can as a consequence be paid out of the proceeds of sale; and indeed the court almost invariably orders that the court fees and costs shall be a first charge on the proceeds of the ship or the fund in court. But under English law such charges do not of themselves give rise to a lien.

« *Tonnage dues, light or harbour dues and other public taxes of the same character* ».

Under existing English law there is no maritime lien for such dues. However in most cases dock and harbour authorities have the power to detain and sell for dues under their special act, either by express terms or by incorporation of the *Harbour, Docks, and Piers Clauses Act 1847 B. 44.* The effect of this power is to give a claim for dock dues priority over all other claims, even over those maritime lien holders : *The Emilei Millon (1905) 2 K.B. 817.* So far as concerns light dues, their recovery is provided for under the Merchant Shipping Act 1894 S. 649, 650 en 655. The right to distress for light dues is inferior to a maritime lien and cannot be effected when a ship is inferior to a maritime lien and cannot be effected when a ship is under arrest by the court : *The Westmoreland (1845) 2 Wm. Rob. 394.* If the words « other public taxes of the same character » cover statutory charges for removing wreck then this merely preserves existing English law, since dock owners and harbour authorities claims to wrecks which they have removed take priority over all other claims : *The Sea Spray (1907) P. 133.* « Pilotage dues ». Under English law pilotage dues are usually collected by the pilotage authority under byelaws made under the *Pilotage Act 1913 S. 171 (f).* Under S. 149 (1) of that Act those dues are recoverable in the same way as fines under the Merchant Shipping Act 1894 : that is to say, they are recoverable as civil debts and can be levied by distress on the ship : see *Merchant Shipping Act 1894 S. 681 (2) S. 693.* But, presumably, as in the case of light dues, (see above) this right of distress is inferior to a maritime lien. In addition it was held in *The Ambatielos (1923) P. 68* that an action « in rem » lies for pilotage dues but that is was doubtful whether there was a maritime lien in respect of them; and that, if there was a lien, it probably ranked with seamen's wages. The lien for pilotage dues is now statutory, see above Administration of Justice Act Sec. 1 (1) 1.

« *The Cost of watching and preservation from the time of the entry of the vessel into the last port* ».

The last port must mean the port in which the ship was arrested. This provision may cover the facts in such a case as *the Carolina (1875)*

34 LT 399, where it was held that a seaman retained in the service of the ship after he had arrested her in an action for wages could not have judgment for wages accrued after the date of the arrest, but could only obtain a subsistence allowance by way of costs. Or the words may cover the case of *The Rene (1922) 128 LT 96* the ship was under arrest had supplied ballast which was necessary for the preservation of the ship, was not entitled to priority over other necessaries men.

Article 2 (2)

« *Claims arising out of the contract of engagement of the Master, crew and other persons hired on board* ».

Under English law a seaman has by the law of Admiralty and independently of statute, a maritime lien for his wages : this includes money earned otherwise than on board the ship such as subsistence money viaticam and wages accrued due after dismissal, see *The British Trade (1924) P. 104.* The Convention raises two questions. There is doubt whether there is a lien for damages for breach of the contract of service as distinguished from wages e.g. damages for wronguful dismissal. It has been said that such a lien exists but this appears to conflict with the judgment in *The British Trade* (supra). There is also the question of whether a lien exists for wages due under a special contract as distinguished from an ordinary mariners contract : the answer is also in doubt in view of the judgment in *The British Trade.*

As regards the master he also has a lien for wages under *Merchant Shipping Act 1894 S. 167,* though his lien is postponed to the seaman's lien — *The Mons (1932) P. 109.* Under the same section of the Act the master has a lien for disbursements. « Disbursements » were defined by Lord Esher in *The Orients (1895) P at p. 55* as follows : « The real meaning of the word « disbursements » in Admiralty practice is disbursements by the master which he makes himself liable for in respect of necessary things for the ship for the purpose of navigation which he as master of the ship is there to carry out — necessary in the sense that they must be had immediately — and when the owner is not there able to give the order, and he is not so near to the master that the master can ask for his authority and the master is therefore obliged necessarily to render himself liable in order to carry out his duty as master.

Article 2 (3)

« *Remuneration for assistance and salvage* ».

Salvage gives rise to a maritime lien. Assistance, of itself, to nothing. Assistance is in the context, a rather loose term anyway.

« *And the contribution of the vessel in general average* ».

This gives rise to a statutory lien, but not to a maritime lien.

Article 2 (4)

« *Indemnities for collision or other accident or navigation* ».

This coincides with the maritime lien for damage. It is to be noted that the general words specify an accident of navigation. « *Also for damage caused to works forming part of harbours, docks and navigable ways* ». This is equivalent to the maritime lien for damage. « *Indemnities for personal injury to passengers or crew* ». This gives rise to a statutory lien : see Administration of Justice Act 1956 Sec. 1 (L). It is true that the Act specifies merely « goods » which does not, as does the Convention, specifically include baggage.

Article 2 (5)

« *Claims resulting from contracts entered into or acts done by the master, etc.* »

This clearly corresponds to the maritime lien for « Bottomry » and « Respondentia ».

Article 3

Article 3 lays down the priority of mortgages, hypothecations and other charges. Priority of liens is dealt with in Articles 5 & 6. Since it is impracticable to deal separately with priority of mortgages etc. and liens the provisions of Articles 5 & 6 in that respect will also be considered here.

According to English law it would seem that the determination of the priority of liens over one another rests on no rigid application of any rules, but on the principle that equity shall be done to the parties in the circumstances of each particular case. *The Stream Fisher (1927) P. 73.* There is however a general order of priority and there are general rules which in the absence of special circumstances the court tends to apply. After payment of the marshal's charges and expenses, the right of a dock and harbour authority exercising its power under the provisions of the *Harbour Docks and Piers Clauses 1847* or other similar provisions of its special Act, to detain a ship in respect of dock and harbour dues or to take possession of and sell a wreck in respect of conservancy charges overrides all maritime liens. Next in order of priority are maritime liens. These usually rank above mortgages and statutory liens. A mortgage generally has precedence over a statutory lien. A possesory lien ranks after all liens which have attached before, and before all liens which attach after the possessory lien holder has taken possession of the ship.

« Other charges ». The meaning of this term was considered by the « St. Merriel » (see above under Article 1). These charges take priority over statutory liens. The following is a summary of the principles applicable :

1. The Marshall's charges expenses etc. are in practice paid in priority to all claims; priorities are determined in relation to the net fund available thereafter or alternatively if an arresting plaintiff pays the charges etc. in accordance with his undertaking he will recover the sum paid as costs.

2. The costs of the plaintiff in whose action the res was arrested up to the moment of arrest and including the cost of arrest, and later costs up to and including appraisement and sale, either of that plaintiff or where the order for appraisement and sale was obtained in a different action of the plaintiff in a different action are accorded priority over all other claims, whether for costs or not. These apart, cost are ranked with or immediately after the claim in respect of which they arise.

3. A possessory lien, although postponed to earlier maritime liens has priority over subsequent liens maritime or not. If the court orders a possessory lien holder to relinquish possession, the order will include protection for any rights he may prove to have.

4. 1) Salvage has priority over :

a) earlier damage

b) earlier salvage, if distinct and on a different occasion

c) earlier wages

d) earlier claims to forfeiture by the Crown

e) subsequent possessory liens

f) necessaries

g) execution creditors causing the ship to be seized by the sheriff after the salvage services were rendered, and the sheriff claiming in respect of his charges and expenses

h) mortgages.

2) Salvage claims in respect of the same casualty rank « pari passu».

3) Claims for life salvage have priority over claims for salvage of property.

5. 1) Damage has priority over :

a) earlier salvage

b) wages

c) subsequent possessory liens

d) necessaries

e) execution creditors and sheriff, as in 4 (1) (g), supra

f) mortages.

2) Damage ranks « pari passu » with damage, earlier or later.

6. 1) Wages have priority over :

a) earlier salvage

b) subsequent possessory liens

c) necessaries

d) execution creditors and sheriff, as in 4 (1)(g), supra

e) mortgages.

2) Masters' wages and disbursements both rank as masters' wages.

3) Masters' wages and disbursements rank, suject to (6) infra « pari passu ».

4) Crews' wages have priority over masters' wages and disbursements.

5) Crews' wages rank, subject to (6) infra, « pari passu ».

6) Where salvage is interposed between wages earned before and wages earned after the services, the later-earned wages have priority over the earlier-earned.

7) Wages include repatriation expenses, subsistence allowance etc.

8) Special considerations apply in certain circumstances where a master is also a part-owner.

7. Mortgage priorities are as follows :

1) British registered mortgages have priority by registration over earlier (or later) unregistered or foreign mortgages even though there is notice of the unregistered or foreign mortgage.

2) British registered mortgages have priority inter se according to date of registration.

3) Mortgages have priority over necessaries unless the ship was already under arrest for the necessaries when the mortgage was entered into.

4) Unregistered and foreign mortgages have priority inter se according to the dates when they were entered into, subject to the rules of equity governing equitable mortgages.

5) A mortgage has no priority over a possessory lien, for a possessory lien has priority over all claims except earlier maritime liens.

6) A mortgage has no priority over a maritime lien.

8. Necessaries usually have a very low priority.

1) When a ship has been arrested in a necessaries action, the necessaries have priority over mortgages entered into after the arrest.

2) Under similar conditions, necessaries have priority over an execution by wich a sheriff seizes the arrested ship.

3) Necessaries rank « pari passu » « inter se » and no date is of any consequence.

9. Contractual claims, e.g. for breach of charterparty, seem to rank as if the claims were claims in respect of necessaries.

Article 4

Article 4 lays down those items, in addition to the ship to which the lien attaches. These are extensive and go far beyond the provisions of English law.

The word « accessories » is not apt to describe such items as « compensation », general average contributions, and remuneration.

In England the moment the damage is done by the ship, the lien attaches to her hull, tackle, apparel, furniture and freight. That freight is attachable was decided in *The Leo (1862) Luch 444*. See generally, *The Mary Ann (1865) L A I A & E 8*. The lien does not originate in possession, and it follows the ship into whosoever possession it may pass and continues even after the ship is wrecked. It may, therefore, be enforced against the wreckage *Harmer v. Bell, The Bold Buccleugh (1852) 2 Moo P.C. c 267*. The lien on freight can however only be enforced in company with the lien on the ship being consequential to that lien : *Morgan v. Castlegate S.S. Co., The Castlegate (1893) A.C. 38*.

Under existing law the freight to which a maritime lien attaches is the freight which the vessel is engaged in earning at the time when the lien arises *The Orpheus (1871) L.R. 3 & E 308*. It includes subfreight due to a charterer and not to the Owner *The Andalina (1886) 12 P.D.1*. It has never been decided whether passage money is included, but it is more than doubtful in view of the fact that freight cannot be arrested apart from the ship.

Article 5

Article 5 deals with the question of priorities which has been dealt with under Article 3 above.

It is, however, interesting to note English law as regards « the voyage ». In *Board of Trade v. Baxter (1907) A.C. 373* Lord Loreburn said :

« It must in each case be a question of fact what is a voyage, and in ascertaining what it is a court may regard the following among other considerations : the duration of the venture in point of time and its unity : its geographical limits and direction; whether new cargoes are shipped or new charters made or ports visited in orderly succession and in particular whether there has been a sailing from and afterwards a return to the United Kingdom ».

Many claims giving rise to a lien will arise when a ship is not on any « voyage » in the ordinary sense of the word, but in port; e.g. dock dues. See also *Letricheux c. Dunlop (1891) 29 Sc. LO 182*. « I think the word voyage must be taken to embrace the period of preparation at the port of departure and the period spent at the port of destination until the cargo has been delivered ».

Article 6

Article 6 deals with questions of priority which are discussed above under Articles 3 & 5.

This Article also deals with the question of claims for wages and disbursements extending over several voyages, but all falling within one contract of engagement. These are to rank with claims attaching

to « the last voyage ». The last voyage must presumably mean the last voyage prior to the arrest. The question of the voyage generally is dealt with above : see Article 5 sup.

Article 7

The Article deals with the situation arising where there are two or more claims with a separate limit of liability in respect of each claim. The limitation fund must not be taken to be diminished (e.g. in particular where the limit of liability is the value of the ship and her freight) by such separate prior incidents. In English law such claims rank as between incident and incident, and subject always to the rules of priority dealt with above, « pari passu » — see *The Stream Fisher (1927) P 73.*

Under English law the limit of liability is now governed by the *Merchant Shipping (Liability of shipowners and Others) Act 1958* enacting the 1957 Limitation Convention and, therefore, the value of the proviso which lays down rights where the value of the ship is greater than £ 23.13.10. per ton is less than was formerly the case.

The effect of the Article can perhaps be explained by the following illustration. Suppose a ship has three successive collisions on the same voyage (a not impossible occurrence, see *The Stream Fisher (1927) P 73)* : further suppose her value after the first collision is £ 8,000, after the second £ 4,000 and after the third collision £ 2,000 and that on each of the three collisions she does £ 10,000 worth of damage to the other ship. The effect of this will be that there are claims to the extent of £ 30,000 to be satisfied out of a ship worth £ 2,000. If the claimants could only prove for the sum to which the shipowner could limit his liability in respect of each collision, the first claimant would take 4/7 of the fund, the second 2/7 and the third 1/7th. Article 7 attempts to make it clear that each claimant can prove in full without regard to the limit of liability in his case, and if so each claimant will take one third. The proviso to the Article appears to be necessary to prevent a conflict with the rules as to limitation of liability while the value of the ship is greater than the statutory limits laid down. See above.

Article 8

This Aticle corresponds with English law, see *The Bold Buccleugh 7 Moo P.C. 267* which was a case dealing with maritime liens.

Article 9

Article 9 provides for the extinction of liens. The lien ceases to exist. Under English law claims to enforce liens are liable to be stature barred. No action is maintainable to enforce a lien against a vessel in respect of any damage or loss to another vessel, her cargo or freight

or any property on board her or damages for loss of life or personal injuries caused by the fault of another vessel, or in respect of any salvage services unless proceedings are commenced within two years from the date when the damage, loss or injury was caused or when the salvage services were rendered. *Maritime Conventions Act 1911, (1 & 2 Geo 5 C 57) s. 8.* It is important to note that this section only affects procedure and not the substantive rights of the parties; it does not extinguish the lien or the cause of action, but only says that no action can be brought to enforce it. The restriction applies in the case of all Her Majesty's ships, as it applies in the case of other ships. Any court having jurisdiction to deal with those proceedings may however extend the time to such extent and on such conditions as it thinks fit, and except in the case of Her Majesty's ships, must if satisfied that there has not during that period been any seasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity. The provisions as to Her Majesty's ships are governed by the *Crown Proceedings Act 1947 (10 & 11 Geo 6 c 44).*

An action to enforce the maritime lien for seamen's wages must be brought within six years from the date on which the cause of action accrued : *Limitation Act 1939 (2 & 3 Geo 6 c 21). s. 2 (1) & (6).* This is subject to extension where a party is under disability : see ibid s 22.

Maritime liens other than those for collision, salvage and for seamen's wages are not limited to any time for enforcement, but travel with the ship into whosoever possession she may come, but they may be lost through lack of reasonable diligence in enforcing them. A maritime or statutory lien is extinguished by giving bail or a guarantee to prevent the arrest or secure the release of the res in an action to enforce the lien, by the arrest and sale of the ship in an action « in rem » by a court of competent jurisdiction, whether English or foreign, *(see Castrique v. Imrie (1870) L.R. 4 H.L. 414)* by assignment without sanction of the court (see *The Petone (1917) P 198)* and by failure to bring in the claim arising from it within the time ordained by the court in limitation proceedings. The court may, however, allow such a claim to be proved after the time fixed, but before the court has distributed the fund : see *The Zoe 1886 11 P.D. 72.*

Possessory liens are extinguished by payment, by yielding up possession, or by arrest of the ship by a court of competent authority. See : *The Scio (1867) L.R. 1 AXE 353.*

It will be seen that the Convention differs materially from existing English law. Indeed there is nothing in the Convention which corresponds at all closely with existing English law.

Article 10

Article 10 reproduces existing English law in allowing freight to be arrested in the hands of the Master or other agent. That is to say that an agent who in the course of his employment receives money on behalf of his principal to which the principal has in fact no title, is not, as a rule, liable to repay the money, or to pay a party suing, if he has actually paid it over to his principal without notice of the third party's claim. *Buller v. Harrison (1772) 2 Coup 565.* There is an exception to this rule in the case of a lien on sub-freight under a charterparty, and in such a case the lien cannot be exercised after the money has been paid to an agent *(Tagart, Beaton & Co. v. James Fisher & Sons (1903) 1 KB 391).*

So far as concerns the applicability of the principle to accessories, this is unknown to English law.

Article 11

Article 11 provides that there are no special conditions of proof and leaves it to the national law to maintain current requirements in certain special cases. This does not conflict with English law.

Article 12

Article 12 deals with the procedure and machinery which must be laid down. Under the *Merchant Shipping Act 1894 s. 5.* provision is made for the keeping of register books in respect of every registered British vessel. These books are kept by Registrars of British ships at various ports in the United Kingdom and Commonwealth. Apart from certain details regarding the ownership of the vessel, and of her name and construction or details, the only other permissible entry, which may be recorded is in respect of any mortgage of the ship or share (see Sec. 31). British ships carry on board a Certificate of Registry, but this contains no details of mortgages, hypothecations and other charges.

Article 13

Article 13 provides that a lien is in future to attach to a demised ship. It has been doubted whether this is so under existing English law. Though there are cases which support the view (see below) it may be questioned whether they can be reconciled with leading cases. In the *Castlegate (1893) A.C. 38* the words of Brett L.J. in *The Parlement Belge (1880) 5 P.D. 197* were expressly approved by the House of Lords. What Breet L.J. said was « Though the ship has been in collision and has caused injury by reason of the negligence or want of skill or those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner

as if « she were in charge of a compulsory pilot ». Lord Watson in *The Castlegate* stated the principle « inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his presonal liability ». The contrary view to the effect that those having possession and control of the vessel by the owners authority can render her liable to for instance a lien for damages is supported by *The Ripon City (1897) P 226*. Thus, it is said charterers who have the control or any persons who are allowed to have the possession of a ship for the purpose of using or employing her in the ordinary manner are deemed to have authority to subject her to liens and so to make her liable for their negligence. But this presumption is not absolute and may be refuted by showing that the person navigating the ship did not derive any authority from the owners : *The Sylvan Arrow (1923) P 220* or that the injured party is precluded by the terms of a contract from recovering against them. *The Tasmania (1888) P.D. 110*. When the person in charge or possession of the ship has no such authority, express or implied no lien arises, as is well settled. Thus, there is no lien for wilful damage by the master, or for his wilful acts *The Omid (1842)* nor as a servant or on behalf of the owner : *Yeo v. Tatem The Orient (1871) L.R. 3 P.C. 696*. See also *The Lemington (1874) 2 Asp M.C. 475* where the vessel was chartered in circumstances in which the charterer had the sole and absolute management of the vessel and the appointment of her crew. It was held that the ship was liable in proceedings « in rem » Sir R. Phillimore said « A maritime lien attaches to a ship for damage done through the negligence of those in charge of her in whosoever possession she may be, if that damage is inflicted whilst in the course of her ordinary and lawful employment authorised by her owners ».

Article 14

Article 14 lays down how Contracting States may apply the Convention. The provisions do not appear to conflict with English law.

The Convention would appear to provide that the provisions apply to all vessels of Contracting States and to vessels of non-Contracting States where the « national law » so provided. Paragraph 2 of the Article provides that Contracting States may withhold the benefits of the Convention from the national of a non-Contracting State.

Article 15

Article 15 provides that vessels owned by the State shall not be subject to the Convention. This corresponds to English law. A maritime lien does not attach when the « res » belongs to the Crown or is owned by a foreign state : see *The Constitution (1879) 4 P.D. 39* and *The Parlement Belge (1880) 5 P.D. 197 C.A. The Crown Proceedings Act 1947 10 & Geo 6 c. 44 s. 20 (1)* does not authorize proceedings « in

rem » in respect of any claim against the Crown, or the arrest, detention or sale of any of Her Majesty's ships or aircraft or any cargo or other property belonging to the Crown or give to any person any lien on any such ship, cargo or other property. See also *Administration of Justice Act 1956 s. 7 (3)*. If proceedings « in rem » are instituted in the reasonable belief that the property did not belong to the Crown, the court if satisfied of this may upon terms order the proceedings to be treated as if « in personam » against the Crown or other person to be sued : *Crown Proceedings Act 1947 s. 29 (2)*. When a ship is under requisition by the Crown or a foreign state no lien attaches in respect of damage done by her whilst under requisition : see *The Sylvan Arrow (1923) P. 220*. But where salvage services are rendered to a ship under requisition and her owners derive some benefit from those services a maritime lien does attach, although it is unenforceable whilst the ship remains under requisition : *The Meandros (1925) P. 61*.

Article 16

Article 16 expressly preserves the competence of the national courts, the existing forms of procedure and the methods of execution. In particular the Article preserves special modes of procedure, for example those in respect of possessory and statutory liens not covered by the Convention. Further it may be noted that under Article 3 the substance of such liens not covered by the Convention and which exist under the national law are expressly preserved.

IRISH MARITIME LAW ASSOCIATION

REPLIES

I. Yes. In our opinion international legislation relating to Maritime Liens and Mortgages is necessary and desirable, particularly if it leads to more international uniformity.

II. a) The Republic of Ireland did not ratify or accede to the 1926 Convention. The United Kingdom of Great Britain and Northern Ireland did not accede to the 1926 Concention.

II. b) The purpose of the Convention on Maritime Liens and Mortgages is to bring about international uniformity in this branch of the Law so that the rights of those who advance money on the security of a ship will be the same in each country. The primary purpose of a Convention is to increase the security of mortgagees. Anything which reduces the value or effectiveness of the security defeats the aim. Anything which strengthens the position of a mortgagee in states other than that in which the mortgage is registered assists the primary aim.

We think that Article 8 of the 1926 Convention, under which claims secured by a lien follow the vessel into whatever hands it may pass, seriously reduces the value of mortgages and that the principle expressed in Article 8 should be changed. If owner « A » allows a lien to arise against a ship and if he sells the ship to owner « B » who knows nothing of the lien, then a mortgagee from « B » takes his security subject to the lien. We think it should be permissible, but not obligatory, for a person having a claim secured by a lien to register the lien in the register of ships and that a bona fide purchaser, without notice of a non-registered lien, should take the ship free from unregistered liens. Then a mortgagee from such a bona fide purchaser would not be subject to unregistered liens.

III. a) A new convention should change Article 8 of the 1926 Convention in accordance with our answer to II b). It should also reduce the number of liens and should redefine the liens to be recognised.

III. b) If the new Convention is to be of value, it must be accepted and made part of the domestic law by many of the states which did not accept the Convention of 1926. It would be a mistake to endanger acceptance of the new Convention by trying to deal with controversial

matters. The more problems which can be solved by the new Convention, the better but anything that is likely to endanger general acceptance of the new Convention should not be pressed.

III. c) Mortgages on ships under construction present many problems. We think that such mortgages should be recognised and that it should be possible to register them. In our view, the register of ships should contain a new part, giving details of ships under construction and the mortgages affecting them; these mortgages should be automatically transferred to the part of the register dealing with a ship whenever that ship is registered. Moreover, the new Convention should contain provisions dealing with arrest, limitation of actions and ships under construction which will correspond in principle to the provisions of the Conventions dealing with arrest, limitation and ships under construction.

IV. a) i) Yes.

IV. a) ii) Yes. The object of the Convention should be to bring about a greater measure of uniformity in the domestic law of the different states. When the courts of a contracting state are dealing with a mortgage which is entered in the register in the case of a ship which is registered in a non-contracting state, we see no reason why the court of the contracting state should not deal with the mortgage in accordance with the terms of the new Convention, provided always that the requirements for registration in each state are approximately the same.

IV. b) The categories of events giving rise to claims for maritime liens set out in Article 2 of the 1926 Convention should be reduced in number and extent. Every recognised maritime lien which is preferred tot a registered mortgage reduces the value of the security to the mortgagee and in the case of large advances, makes it necessary for the mortgagee to carry out time wasting enquiries. Modern conditions of communications and the right of arrest have made many formerly recognised liens unnecessary.

The Convention should recognise all liens which can be covered by insurance, e.g., salvage, General Average, collision, removal of wrecks and damage to persons or to property because mortgagees can always stipulate for insurance against these claims. The insurance company could then give security to those claiming under such liens and the vessel would be free to sail and the security would not be affected.

We think that paragraph 5 of Article 2 of the 1926 Convention should be repealed. There is no objection to giving the Master a lien on the ship for monies expended *by him* but we think it altogether wrong the contractual creditors should have liens for amounts due under contracts made by the Master.

IV. c) Yes. We agree that paragraph 5 of Article 2 should be repealed.

IV. d) i) Registered mortgages should rank « inter se » in the order in which they are registered.

ii) Those liens which we suggest should be retained should be preferred to all registred mortgages to the extent that they are not effectively covered by insurance.

iii) Contractual liens should rank « inter se » in inverse order. The later which has attached being preferred to the earlier. Delictual liens should rank « inter se » according to the date of the events which gave rise to them. Delictual liens and contractual liens should rank « inter se » according to the date of the events which gave rise to them.

IV. e) Yes. A right of detention should be granted and we think that it could be granted without prejudicing the security of mortgagees or the holders of other maritime liens. A creditor or claimant can usually obtain security for his claim by way of bail or a guarantee by detaining a ship. In this way, he can have a fund set up within the jurisdiction of which the vessel is detained, out of which he can have his claims satisfied. As bail or the guarantee is usually put up by someone other than a shipowner, the rights of mortgagees and holders of maritime liens would not be affected.

IV. f) The rights of detention should not interfere with the order of priorities of maritime liens and mortgages. We distinguish between the mere right to detain a vessel from a lien which gives the right to arrest and force a sale of the vessel. The right of detention is a weapon to be used to obtain security by bail or otherwise.

IV. g) No.

IV. h) We see no reason why the contracting states should not be allowed te recognise other liens provided they are postponed to all registered mortgages and to all the liens listed above (Answer to question IV. b).

IV. i) Yes.

ii) Yes, provided the requirements for registration in non-Contracting State are reasonable.

IV. j) We are of opinion that liens should, in certain specified circumstances, be enforceable against freight earned by the ship.

IV. k) Freight earned by an owner should be liable to a lien if it has been earned by the owner of the vessel who was owner at the time when the lien arose. Freight earned by a charterer should be liable to a lien if the charterer was in possession of, or using the vessel, at the time when the lien arose.

IV. l) Yes.

V. a) A period of one year from the date of the events which gave rise to the lien, provided there has been a reasonable opportunity of arresting the ship in the jurisdiction of any of the contracting states. If no such opportunity has occurred, the period should be two years.

V. b) We suggest that the time should run from the date upon which the claim accrues.

VI. a) Yes, subject to the right of the court to extend the time for special circumstances.

VI. b) The only causes which should be listed are those which prevent the holder of a maritime lien from taking steps to enforce his lien, e.g.; if a vessel is requisitioned, the holder of a maritime lien can hardly enforce his lien. There should be no extention of time after the holder of a maritime lien has had an opportunity to arrest the vessel and thus obtain adequate security independent of the lien.

VI. c) No. We think that interruptions of the period should be allowed.

VII. a) Yes.

VII. b) In the event of a change of flag from a Contracting State tot a Contracting State, we suggest that mortgages and liens should be unaffected.

In the event of a change of flag from a non-Contracting State to a Contracting State, we suggest that the same rule should be applied, provided that the requirements for registration in the non-Contracting State meet the reasonable minimum requirements which should be laid down.

In the event of a change of flag from a Contracting State to a non-Contracting State or from a non-Contracting State to a non-Contracting State, we would apply the same rules subject to the same proviso.

VIII. a) Yes.

VIII. b) It would be desirable but entirely ineffective.

IX. a) Yes, but the new Convention should be in accord with the Convention drafted in Stockholm in 1963.

IX. b) Yes.

X. a) i) and ii) No.

X. b) In view of our answer to a) above which is No, a reply to this question is not necessary.

X. c) We do not think that this matter is suitable for inclusion in the proposed Convention and, accordingly, we leave it to the Law of the Court seized of the case.

XI. Yes. The limitation fund is set up for the benefit of those having claims arising out of the incident which gives rise to the liability and only those claimants are entitled to participate in it. The holder of a maritime lien which arises out of an event in respect of which the owner is entitled to limit his liability should have no priority in claiming against the limitation fund over any of the other claimants who have rights against the fund.

XII. a) In our opinion, the Courts in a Contracting State should apply the terms of the Convention in any case coming before them, whether the vessel is registered in a Contracting or a non-Contracting State. Also, every effort should be made to persuade the Contracting States to make the terms of the Convention part of their domestic law. The fact that a State has ratified the Convention does not necessarily make it part of the domestic law.

XII. b) Yes. This is why it is so important to get the Contracting States to agree to amend their domestic law so that it contains provisions similar to those of the convention. In the Republic of Ireland, the ratification of a convention by the National Parliament does not make any of the provisions of the convention a part of the domestic law.

XIII. a) The maritime liens recognised by the law of the Republic of Ireland are :

1. Liens for salvage.
2. Liens for bottomry bonds.
3. Liens for seamens wages.
4. Liens for disbursements and liabilities of the Master.
5. Liens for damage caused by the ship to persons or property.
6. Liens for life salvage.
7. Liens for the expenses of the Receiver of Wrecks.

Harbour authorities have the right to board, seize and sell a ship for arrears of harbour and tonnage dues. The maritime mortgages recognised by the law of the Republic of Ireland are those entered in the register and as against an owner mortgages or charges created by lien though not registered.

XIII. b) i) Yes.

ii) Yes, in the Republic of Ireland provided that the lien was created by a statute of the British Parliament passed before the 6th December, 1922 or by a statute of the National Parliament passed after 6th December, 1921.

iii) Yes, in the sense that the High Court has power to arrest a ship for claims which do not give rise to a maritime lien.

XIII. c) i) Date of registration in the register decides priority.

ii) Maritime liens referred to in XIII a) have priority over registered mortgages.

iii) Salvage ranks before all others.

iv) Registered mortgages rank first.

XIII. d) No.

XIII. e) Yes.

XIII. f) A person may not transfer or mortgage or transfer any mortgage of a ship registered on the national register of the Republic

of Ireland without the consent of the Minister for Transport & Power and if he does so, the transaction is null and void.

XIV. The Republic of Ireland has not adopted or ratified the 1926 Convention. The law enforced in the Republic of Ireland in relation to conflict of laws is substantially the same as the law in force in England.

If a foreign ship is involved in a legal wrong committed within the territorial waters of the Republic of Ireland (soon to be 6 miles) the law to be applied in any case arising out of the wrong is the law of the Republic of Ireland. If one owner of a foreign ship sues another owner of a foreign ship in the Irish Courts for anything done outside the territorial waters of Ireland, the law applicable is the law of the Republic of Ireland.

The validity of a mortgage on a ship is judged by the law of the place where the ship is registered unless the parties have agreed that another law is to be applied to the transaction.

The validity of a lien arising out of anything done in the Republic of Ireland to a foreign ship is decided by the law of the Republic of Ireland.

XV. By preparing an entirely new convention which should replace the 1926 Convention.

INTERNATIONAL MARITIME COMMITTEE

MARITIME LIENS AND MORTGAGES

10

(1 - 65)

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

COMITE MARITIME INTERNATIONAL

INTERNATIONAL MARITIME COMMITTEE

MARITIME LIENS AND MORTGAGES

10

(1 - 65)

DENMARK (HYPO - 23)

CANADA (HYPO - 24)

DANISH ASSOCIATION OF INTERNATIONAL MARITIME LAW

REPLIES

I. The Danish Branch have the opinion that the present legislation relating to maritime liens and mortgages has in practice worked well in changing circumstances for the shipping industry. There is no urgent need for an alteration although an alteration might be considered desirable, but only provided that acceptance of such new legislation could be expected from the majority of the major seafaring nations.

II. The Convention might in our view need clarifying redrafting on various points.

As a special problem we would mention that we find it very essential to obtain the widest possible international acknowledgment of registered mortgages, and also improve the security granted to such mortgages

The priority of the various groups of Maritime Liens might be discussed with a view of alteration therein, but, in our view the present priority has by and large worked satisfactorily and has not given rise to any unreasonable results.

As far as Maritime Liens based upon the master's legal authority is concerned, we see no real reason for retaining such Maritime Lien. In view of the easy communications between the various parts of the world it is our opinion that this part of the clause is no longer necessary and is outdated, although it might be of importance especially for smaller shipowners.

IIIa, b, c. In our view there is no need for an overall revision.

IVa. (i) Yes it would in our opinion be essential that maritime mortgages are so recognized.

(ii) As to mortgages in a non-Contracting State the question should be decided on the merits, and such mortgages should only be recognized if they fulfil the convention's requirements such as to registration etc.

IVb. Please see our reply re Question II.

IVc. We feel inclined to agree, but although there may not nowadays be the same reason for maritime liens for these claims the rule may still be of importance for smaller shipowners.

IVd. (i) The priority between mortgages should be decided on the basis of the date they have been filed for registration. Mortgages filed on the same date should have equal priority.

IVd. (ii) The registered mortgages should in our view come after the Maritime Liens.

IVd. (iii) We would prefer to maintain the rules as they are as far as the enumeration is concerned, but would be prepared to consider an alteration in the present Rules as to priority timewise, for instance so that the Maritime Liens are given priority in accordance with the enumeration irrespective of their time of accrual.

IVe. We have the opinion that the convention should recognize the right of retention as having priority before the mortgages and may be before the maritime liens. The right of retention should be restricted to claims which have resulted in improvement of the ship, for instance repair bills. No right of « retention » should be given for claims without any connexity.

IVf. Already replied to under (e).

IVg. The Contracting States should not be allowed to create any such rights beyond the rights known today.

IVh. In order to obtain uniformity the Contracting States should in principle not be allowed to grant such liens.

IVi. (ii) We agree that the Contracting State should not discriminate as far as mortgages duly registered in Contracting States are concerned. As far as mortgages registered in non-Contracting States are concerned the question should be decided in its merits.

IVj. We are of the opinion that the liens should only be enforceable against the vessel and not in accessories.

IVk. In view of our negative answer to IV. (j) no answer is required.

IVl. No.

Va. In principle we find that the periods now fixed in the convention are acceptable.

VIa. We agree that the convention should state under which circumstances the period of extinction could be interrupted and further

that such interruption should only take place through legal proceedings, incl. filing claims in bankruptcy.

VIIa. We agree that the convention should deal with the problems connected with a change of flag and refer to the present rules in the Danish legislation summarized in our answer as XIII d) and e).

VIIIa. Yes, we agree that the convention should provide that enforced sale in accordance with the requirements in the convention in a contracting state should extinguish all registered mortgages and liens.

VIIIb. Our answer is no.

IXa. We would find it preferable not to have the Convention incorporated but to solve each problem in separate conventions. Great differences exist in this field between the various national laws, but probably such incorporation might at a later stage be made.

Xa. We are definitely of the opinion that the new convention should not deal with these questions.

XI. Yes, we think it would be advisable.

XIIa. It would in our opinion be important to give the new convention as wide an application as possible.

XIII. Denmark has introduced the contents of the convention in its legislation with some minor differences in wording. Further Denmark has as number 6 given maritime liens to claims for insufficient or incorrect information in Bills of Lading, which lien, however, has rank after contractual mortgages.

XIIIb. Danish law recognizes a right of retention although such claim may not give a rise to maritime liens. The right of retention has priority before the mortgage and often also before the maritime liens.

XIIIc. The priority between mortgages is decided upon the date of registration. Mortgages registered on the same day have equal priority.

XIIIc. (ii) Mortgages respect maritime liens, except the maritime lien mentioned under XIII (a).

XIIIc. (iii) According to Danish law the priority between maritime liens arising on the same voyage is in principle decided in accordance with the enumeration under the Article 2 of the convention, which has been incorporated in the Danish law. For maritime liens arising on different voyages priority is given to the maritime liens arising on the last voyage.

XIIIc. IV) The right of retention has priority before registered mortgages and often also before the Maritime Liens.

XIIId. It is not possible to have a vessel deleted without the mortgagees being notified, and the deletion cannot take place until 30 days after dispatch of the notification unless the mortgagee agrees.

XIIIe. No it is not possible to have a vessel entered into the register without production of such evidence.

XIIIf. No we do not think so.

XIV. It is not possible to give any definite rule on these conflicts of law questions. Presumably the Danish Courts would apply « lex loci » as to whether a lien was created, but the rules as to rank and priority would be decided be « lex fori ».

XV. We would prefer to have amendments to the 1926 Convention and refer to our reply to question I.

Copenhagen, 7th September, 1964.

N.V. Boeg
Chairman of the Association.

CANADIAN MARITIME LAW ASSOCIATION

REPLIES

Schedule « A »

C.M.L.A. ANSWERS TO C.M.I. QUESTIONNAIRE ON MARITIME MORTGAGES AND LIENS

I. Yes. Necessary and desirable.

II. a) Not applicable.
b) Entirely new convention is required.

III. a) To define and rank all Liens affecting ships on a basis of maximum agreement of countries concerned.
b) No.
c) No.

IV. a) i) Yes.
ii) Yes, when conditions of Registration are the same.
b) i) ii) & iii) This is under consideration.
c) This is under consideration.
d) i) The Mortgages should rank in order of registration.
ii) & iii) There are special Canadian Laws to be considered.
e) No, but this problem is under further study.
f) Not applicable.
g) No.
h) Yes, they should be allowed.
i) i) and ii) Yes, provided that conditions and rules for registration in non contracting states comply with the Convention.
j) Yes.
k) The Lien should be the same as in English Law.
l) No.

V. a) 2 years.
b) From date the claim accrued.

VI. a) No.
b) Not applicable.
c) No interruptions should be allowed.

VII. a) Yes.
b) All rights covered by the Conventions should continue to be recognised.

VIII. a) Yes, provided there is provision for public notice of sale.
b) Yes, provided requirements of the convention have been met.

IX. a) Yes.
b) Yes.

X. a) No. Subject to further study by our Special Committee.
b) Not applicable.
c) Our Special Committee are studying this matter.

XI. Yes.

XII. Wide.

XIII. a) Yes.
b) Our basis Law is same as English Law but we have special Statutory Liens and rights of retention.
c) A detailed reply will be given later.
d) No, in practice.
e) No in practice.
f) This is receiving our further study.

XIV. Canadian Laws of conflict generally same as English Law.

XV. Preparation of entirely new Convention.

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

II

(1 - 65)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

TROISIEME RAPPORT (HYPO - 25)
PROJET DE PORTOFINO (HYPO - 27)
REUNION D'AMSTERDAM (HYPO - 29)

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(1 - 65)

THIRD REPORT (HYPO - 26)
PORTOFINO DRAFT (HYPO - 28)
NORWEGIAN AMENDMENTS (HYPO - 19)
AMSTERDAM MEETING (HYPO - 30)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

TROISIEME RAPPORT

Introduction

La Commission Internationale des « Privilèges et Hypothèques » s'est réunie à Amsterdam les 19 et 20 juin 1964. Des membres représentant 14 Associations Nationales c.-à-d. l'Argentine la Belgique le Canada, la France, l'Allemagne, l'Italie, les Pays-Bas, le Portugal, la Suède, la Suisse, le Royaume-Uni, les Etats-Unis et la Yougoslavie assistaient à cette réunion.

Suivirent également cette réunion Mr. L.C.H. Everard et Mr. L. Van Varenbergh, en qualité de secrétaires et Mme S. Morris, représentant le Président du Comité Maritime International.

En dehors des Rapports déjà mentionnés dans le 2e Rapport du soussigné (daté de mai 1964) et émanant des Associations Belge, Anglaise, Néerlandaise, Finlandaise, Française, Italienne, Norvégienne et Américaine, un rapport a encore été reçu de l'Association Allemande, tandis que l'Association Norvégienne avait envoyé un Projet de Convention Internationale (qualifié ci-après de « Projet Norvégien ») (Hypo-19) que cette Association proposait de substituer au Projet préparé à Oxford le 13 avril 1964 par le petit groupe de travail mentionné à la page 1 de ce 2e Rapport et annexé à celui-ci. Ce dernier projet sera dorénavant qualifié de « Projet d'Oxford ».

Au début de la réunion, le délégué de l'Association Française a déclaré que son Association, ayant revu le problème de savoir si la révision de la Convention de 1926 sur les Privilèges et Hypothèques ou la préparation d'une nouvelle Convention relative à ce sujet étaient souhaitables en principe, avait modifié son optique dans son Rapport (Document Hypo 11) et se ralliait à présent à l'idée de la rédaction d'une nouvelle Convention à soumettre à la prochaine Conférence plénière du Comité Maritime International.

Donnant suite aux avis exprimés par la majorité des Rapports reçus antérieurement, la Réunion décida unanimement de préparer une nouvelle Convention plutôt que de tenter une révision de la Convention de 1926. Elle a d'autre part décidé de prendre comme base de ses travaux le Projet d'Oxford, tout en tenant compte du texte du Projet Norvégien au fur et à mesure de l'examen des articles correspondants du Projet d'Oxford.

THIRD REPORT

Introduction

The International Subcommittee on Maritime Liens and Mortgages met in Amsterdam on the 19th and 20th June 1964. Members representing fourteen National Associations, namely those of Argentine, Belgium, Canada, France, Germany, Italy, the Netherlands, Norway, Portugal, Sweden, Switzerland, the United Kingdom, the United States and Yougoslavia assisted at the Meeting. The Meeting was further attended by Mr. L.C.H. Everard and Mr. L. van Varenbergh who acted as joint secretaries and Mrs. S. Morris, representing the President of the Comité Maritime International.

Besides the Reports already mentioned in the Second Report of the Undersigned (dated May 1964), namely from the Belgian, British, Dutch, Finnish, French, Italian, Norwegian and U.S. Associations, a Report had also been received from the German Association, while the Norwegian Association had submitted the draft of an International Convention (hereinafter referred to as «the Norwegian draft» (Hypo-19) which this Association proposed to substitute for the draft which had been prepared at Oxford on the 13th April, 1964, by the small group mentioned on page 1 of the said Second Report and which was annexed to that Report. The latter draft will hereinafter be referred to as « the Oxford draft ».

At the very outset of the Meeting, the delegate from the French Association made a statement to the effect that his Association, upon reconsidering the question whether a revision of the 1926 Convention on Maritime Liens and Mortgages or the preparing of a new Convention in this field would in principle be desirable, had changed the opinion expressed in its Report (document Hypo-11) and now adhered to the view that a new Convention should be drafted and submitted to the next Plenary Conference of the Comité Maritime International.

Following the view expressed by the majority of the Reports previously received, the Meeting decided unanimously to prepare a new Convention rather than to attempt a revision of the 1926 Convention. It further decided as a matter of procedure to take the Oxford draft as the basis of its work, while dealing with the contents of the Norwegian draft as and when the corresponding provisions of the Oxford draft

La Réunion s'est poursuivie pendant deux jours et a permis de discuter de façon complète le texte des deux Projets et de nombreux points qui ont surgi à l'occasion de cet examen, ainsi que nombre d'amendements proposés par diverses délégations.

Eu égard à la grande divergence entre les avis émis, il fut nécessaire de recourir au vote sur un grand nombre d'articles et d'amendements présentés et seul un petit nombre de décisions fit l'objet d'une unanimité. A l'issue du 2e jour un Comité de Rédaction composé de Mr. Fr. Berlingieri, Mr. Birch Reynardson, Mr. Rein, Mr. A. Vaes et le soussigné fut désigné pour préparer un Projet remanié en fonction des décisions prises par le Sous-Comité International.

Le texte du Projet Norvégien ainsi qu'un résumé des débats de la Réunion, préparé par Mr. Everard avec la collaboration de Mr. Van Varenbergh et de Mme Morris sont annexés à ce rapport (Annexes I et II) (Hypo-29).

Les 25 et 26 septembre 1964, le Comité de Rédaction s'est réuni à Portofino et a préparé un projet remanié annexé au présent Rapport et qualifié « Projet de Portofino » (Hypo-27).

LE PROJET DE PORTOFINO

A. *Remarques d'ordre général.*

1. Comme il appert du Résumé mentionné ci-dessus, la plupart des décisions prises par la Commission Internationale étaient des décisions de principe.

Même dans les cas assez rares où la Commission Internationale a adopté un texte particulier, cette décision fut prise à charge de confier la rédaction finale au Comité de Rédaction. Aussi ce Comité de Rédaction disposait-il d'une certaine latitude au point de vue rédactionnel.

En accomplissant sa tâche, le Comité de Rédaction s'est efforcé de suivre de la façon la plus fidèle, les décisions rappelés ci-dessus à une exception près, qui sera expliquée plus bas.

D'autre part le Comité de Rédaction a modifié l'ordre des articles du Projet d'Oxford de manière à arriver à une suite plus logique et plus raisonnée des diverses dispositions. Ainsi les articles 1 à 3 du Projet de Portofino traitent des hypothèques maritimes, les articles 4 à 9 des privilèges maritimes, les articles 10 et 11 de la vente forcée du navire et des effects de cette vente sur les hypothèques, privilèges et autres charges grevant le navire, l'article 12 des hypothèques et privilèges sur les navires en construction et l'article 13 de la sphère d'application de la Convention, tandis que l'article 14 prévoit qu'entre Pays Contractants, la nouvelle Convention remplacera la Convention de 1926.

2. La différence la plus importante entre le Projet d'Oxford et le Projet de Portofino réside en ceci qu'alors que l'article 3 du Projet

would come up for discussion. The Meeting which continued for two days, had the opportunity of fully discussing the contents of both drafts and many points which were raised in connection therewith, among which a number of amendments proposed by various delegations. As a result of the great diversity of the opinions expressed, a vote had to be taken on a large number of the provisions and amendments submitted and only relatively few decisions were carried unanimously. At the end of the second day the Meeting appointed a Drafting Committee, composed of Mr. Fr. Berlingieri, Mr. Birch Reynardson, Mr. Rein, Mr. Vaes and the Undersigned for the purpose of preparing a revised draft based on the decisions of the International Subcommittee.

The text of the Norwegian draft as well as a Summary of the proceedings of the Meeting which Summary was prepared by Mr. Everard with the assistance of Mrs. Morris and Mr. van Varenbergh ar attached to this Report (Hypo-30).

On the 25th and 26th September 1964, the Drafting Committee met at Portofino and prepared a revised draft (the « Portofino draft ») which is attached to this Report (Hypo-28).

THE PORTOFINO DRAFT

A. *General remarks.*

1. As is shown by the above-mentioned Summary, most of the decisions taken by the International Subcommittee were decisions of principle. Even in the rare instances in which the Subcommittee adopted a particular text, this was done subject to final drafting by the Drafting Committee. Consequently a certain amount of latitude was granted to the Drafting Committee with respect to drafting problems. In carrying out its duties the Drafting Committee attempted to follow as closely as possible its terms of reference, i.e. the decisions above referred to, with one exception which will be explained hereunder. On the other hand, the Drafting Committee changed the order of the articles of the Oxford draft so as to arrive at a more logical and more appropriate sequence of the several provisions concerned. Thus the Articles 1 tot 3 of the Portofino draft deal with maritime registered mortgages, the Articles 4-9 with maritime liens, the Articles 10 and 11 with the forced sale of the vessel and its effects of such sale in respect of the mortgages, liens and other encumbrances attaching to the vessel, Article 12 with registered maritime mortgages and maritime liens on ships under construction and Article 13 with the scope of the Convention, while Article 14 provides that as between the Contracting States the new Convention shall replace the Convention of 1926.

2. The most important difference detween the Oxford draft and the Portofino draft lies in the fact that whereas Article 3 of the Oxford

d'Oxford prévoit que deux catégories de privilèges maritimes, à savoir ceux qui garantissent les créances du chef de frais de réparation et d'entretien du navire et ceux qui concernent les dommages dits « matériels » prennent rang après les hypothèques inscrites, suivant l'article 5 du Projet de Portofino, tous les privilèges maritimes prennent rang avant les hypothèques.

Deux autres modifications substantielles ont été apportées par le Sous-Comité International à la suite de décisions longuements débattues. La première consiste dans la suppression du privilège garantissant la créance du chef de frais de réparation et d'entretien, en tant que privilège garantissant la créance du chef de frais de réparations et d'entretien, en tant que privilège maritime reconnu par la Convention; la seconde dans l'adjonction du privilège garantissant la créance du chef de contribution en avarie commune, prenant rang au marc le franc avec le privilège relatif aux créances du chef d'assistance et de sauvetage.

3. L'attention particulière est attirée sur la décision de la Commission Internationale de ne pas inclure dans la Convention, l'article 11 du Projet d'Oxford ou toute autre disposition d'une portée similaire, et ce nonobstant le fait que tous les Rapports reçus précédemment avaient exprimé l'avis qu'il était souhaitable que la Convention contienne une règle de cet ordre. Présumant que la nouvelle Convention dans sa forme définitive ne contiendra aucune référence à un Fond, il n'y a guère de crainte au sujet d'une contradiction entre la Convention de 1957 sur la Limitation de Responsabilité et la nouvelle Convention et dès lors une disposition éliminant semblable contradiction n'a point paru requise.

B. *Commentaire sur les divers articles du Projet de Portofino.*

Article 1

(Caractère exécutoire des hypothèques inscrites)

Le Commission Internationale a émis l'opinion unanime que la nouvelle Convention ne devrait définir ni la notion de l'hypothèque maritime, ni celle du privilège maritime. Il fut rappelé que dans les pays qui ont adhéré à la Convention de 1926, l'absence de semblables définitions dans la Convention, n'a donné lieu à aucune difficulté dans la pratique et que la situation est la même dans d'autres pays dans lesquels on a invoqué des hypothèques ou des privilèges étrangers.

D'autre part il a été décidé de ne pas reproduire les mots « gages sur navires » figurant à l'article 1 de la Convention de 1926 (« other similar charges upon vessels » dans le texte anglais), ces mots étant trop vagues et non en concordance avec le droit maritime moderne.

Toutefois, tenant compte que la notion légale du « mortgage » maritime anglosaxon diffère de la notion de l'« hypothèque maritime »,

draft provided that two categories of maritime Liens, namely those securing claims for repairs and maintenance of the vessel and claims for so-called « property damage », rank after registered mortages, according to Article 5 of the Portofino draft *all* maritime liens take priority over registered mortgages.

Two further important changes of substances were effected as a result of long debated decisions by the International Subcommittee. The first of these changes consists in the deletion of the aforesaid lien in respect of repairs and maintenance as a maritime lien recognized under the Convention; according to the second change a lien securing claims for contribution in general average has been inserted ranking pari passu with the lien in respect of claims for salvage.

3. Special attention is drawn to the decision of the International Subcommittee not to include in the Convention Article 11 of the Oxford draft or any provision of a similar tenor, notwithstanding that all the Reports received previously expressed the view that it would be desirable for the new Convention to contain a rule to that effect.

Assuming that the new Convention in its final form will contain no reference to any « fund », there would seem to be little fear for a conflict between the 1957 Convention on Limitation of Liability and the new Convention and therefore no real need for a provision that would eliminate the possibility of such conflict.

B. *Comments on the several Articles of the Portofino draft.*

Article 1

(Enforcement of registered mortgages)

The International Subcommittee expressed the unanimous view that the new Convention should not define either the concept of a maritime mortgage or that of a maritime lien. It was stated that in the countries which are parties to the 1926 Convention the fact that no such definitions appear in that Convention had not given rise to any practical difficulties and that the same obtained in other countries in which the enforcement of a foreign registered mortgage or a foreign maritime lien had been sought.

On the other hand it was decided not to reproduce the words « other similar charges upon vessels » appearing in Article 1 of the 1926 Convention (« gages sur navires » in the authentic French text), as these words are either too vague or not in accordance with modern maritime law.

Considering, however, that the legal concept of an Anglosaxon maritime mortgage differs from that of the « hypothèque maritime » as known in a number of Continental countries, the Drafting Committee suggests to refer in the final text to both concepts. Thus whereever in the final English text a mortgage or mortgages are mentioned,

comme dans nombre de législations continentales, le Comité de Rédaction suggère de reproduire dans le texte final les deux notions. En conséquence partout où, dans le texte anglais, il sera parlé de « mortgage », ce mot sera suivi de « hypothèques » entre guillemets.

Et inversément chaque emploi du mot hypothèque sera suivi de « mortgage » entre guillemets. Ainsi le début de l'article 1 du projet de Portofino se lira en français ainsi : «Les hypothèques et les « mortgages » sur des navires de mer... etc. » et en anglais « Mortgages and « hypothèques » on seagoing vessels... etc... ».

Les autres modifications de l'Article 1 sont généralement d'ordre rédactionnel et ne nécessitent pas de commentaires spéciaux sauf que le sous-paragraphe (c) peut donner lieu à des difficultés dans le pays dont la législation permet d'inscrire une hypothèque maritime non au nom du créancier, mais au « porteur ». Comme cette situation semble n'exister que dans un ou deux pays, le Comité de Rédaction n'a pas jugé utile de le prévoir dans le sous-paragraphe (c) ; les Pays intéressés pourront sans doute, lors de la signature de la Convention, faire, si nécessaire, une réserve relative à cette situation particulière.

Article 2
(Radiation d'immatriculation et réimmatriculation d'un navire hypothéqué)

Cet article comprend une combinaison de certaines dispositions du Projet d'Oxford et du Projet norvégien. Tel que cet article est actuellement rédigé il a un double objet : d'abord éviter une solution de continuité entre la radiation de l'immatriculation d'un navire dans un Etat Contractant et sa réimmatriculation dans un autre et *ensuite* de prévoir qu'aucune radiation d'immatriculation ne sera possible dans un Etat Contractant sans le consentement préalable de tous les créanciers hypothécaires.

Article 3
(Rang des hypothèques inscrites entre elles)

Cet article reproduit la règle prévue à l'article 3, par. 4 du projet d'Oxford.

Article 4 (1)
(Nomenclature des privilèges maritimes)

Il est souligné que le 1er paragraphe de cet article paragraphe qui donne le relevé des catégories de privilèges maritimes reconnus aux termes de la Nouvelle Convention, ne mentionne plus le privilège relatif aux frais provoqués par la saisie et la vente subséquente du navire et la distribution de son prix, privilège qui venait en tout premier

such mention should be followed by « hypothèque » or « hypothèques », these words being put between quotation marks. Conversely in the French text every reference to hypothèque or hypothèques should be followed by the word « mortgage » or « mortgages », also between quotation marks. In this way, the beginning of Article 1 of the Portofino draft would read in the English text :

Mortgages and « hypothèques » on seagoing vessels... etc.

and in the French text :

Les hypothèques et les « mortgages » sur des navires de mer... etc.

The further changes in Article 1 are mostly drafting changes and do not call for any specific comment, except that sub-paragraph (c) might perhaps give rise to difficulties in those countries, the legislation of which allows a registered maritime mortgage to be registered, not in the name of a specific creditor, but to « bearer ». In view of the fact that this situation seems to obtain only in one or two countries, the Drafting Committee thought it advisable not to provide therefor in Article 1, sub-par. (c); if necessary, the countries concerned when signing the new Convention could perhaps make a special reservation dealing with this particular problem.

Article 2
(Deregistration and reregistration of mortgaged vessel)

This article *contains a combination of certain provisions of the Oxford draft and of the Norwegian draft. As the article reads now it is meant to achieve two objects,* firstly *the avoidance of any gap between deregistration of a vessel in one Contracting State and its reregistration in another, and* secondly *that no deregistration in a Contracting State will be possible without the previous consent of all mortgagees.*

Article 3
(Ranking of registered mortgages « inter se »)

This article reproduces the principle set out in Article 3, par. 4 of the Oxford draft.

Article 4 (1)
(List of maritime liens)

Attention is drawn to the fact that *the first paragraph* of this Article which *paragraph* lists the categories of maritime liens recognized under the new Convention, does *not* mention *any more* a lien in respect of costs arising in connection with the arrest and subsequent sale of the vessel and the distribution of the proceeds thereof, which lien appeared as the highest ranking lien in Articles 2 and 3 of the Oxford draft.

lieu dans les articles 2 et 3 du Projet d'Oxford. L'article 9, par. 1 de ce projet prévoit que ce privilège s'éteint lorsque la saisie n'aboutit pas à la vente forcée du navire, disposition existant déjà dans la loi interne de nombreux pays.

Comme la règle de l'article 9 (1) du Projet d'Oxford a été unanimement approuvée par la Commission Internationale, le Comité de Rédaction estime qu'il serait plus logique d'adopter un autre système. Aux termes de ce système la notion du privilège maritime attachée à ces frais a été supprimée, tandis que l'article 11 (2) du Projet de Portofino prévoit que ces frais seront prélevés en premier lieu sur le produit de la vente forcée. Théoriquement ces frais deviennent une charge, grevant en 1er lieu le produit de la vente, mais en pratique le résultat est le même que celui du système adopté dans le Projet d'Oxford.

En ce qui concerne les catégories de privilèges maritimes reconnus à l'article 4, il est référé à la remarque générale n° 2 ci-dessus.

Enfin, la dernière phrase de l'Article 4 (1) contient plutôt une clarification rendue nécessaire au regard de la dispositions d'ordre général de l'article 7 (1) qui reproduit et étend quelque peu la règle prévue à l'Article 5 du Projet d'Oxford.

Article 4 (2)

Ce 2e paragraphe a été inséré en suite d'une décision prise par la Commission Internationale. Tenant compte des règles spéciales de responsabilité pour les dommages nucléaires, reproduites dans les différentes Conventions Internationales relatives à cet objet, l'octroi de privilèges maritimes garantissant des réclamations concernant des dommages de cette nature paraît superflu outre que ces privilèges amoindriraient sans justification suffisante la valeur des hypothèques.

Article 5
(Rang des privilèges maritimes entre eux et vis-à-vis des hypothèques inscrites)

Après la remarque générale n° 2 ci dessus, un commentaire complémentaire de l'Article 5 paraît inutile, sauf que de même que dans l'hypothèse de plusieurs créances du chef d'assistance et de sauvetage, les privilèges garantissant les créances du chef de contribution en avarie commune, viendront entre eux dans l'ordre inverse de la date de la naissance de ces créances.

Article 6 (1)
(Privilèges nationaux)

La Commission Internationale a décidé de maintenir le principe mentionné au 1er paragraphe de l'Article 4 du Projet d'Oxford, et per-

Article 9, par. 1 of the Oxford draft provided that this lien would be extinguished in the event that the arrest of the vessel should not lead to a forced sale, which provision reflects that which is already the domestic law of a number of countries.

The principle set out in Article 9 (1) of the Oxford draft having been unanimously approved by the International Subcommittee the Drafting Committee felt that it would be more logical to provide for another system. According to that system the legal concept of a maritime lien in respect to the costs referred to has been abolished, whereagainst Article 11 (2) of the Portofino draft provides that these costs shall first be paid out of the proceeds of a forced sale. Theoretically those costs become a first charge against the said proceeds, but in practice the result will be the same as that of the system adopted by the Oxford draft.

As regards the categories of maritime liens recognized in Article 4, reference is made to General Remark Nr. 2 above.

Finally the last sentence of Article 4 (1) merely contains a clarification necessary in connection with the more general provision of Article 7 (1) which latter provision reproduces and samewhat extends the rule laid down in Article 5 (1) of the Oxford draft.

Article 4 (2)

This paragraph was inserted to a decision taken by the International Subcommittee. Considering the specific rules on liability for nuclear damage as set out in the several International Conventions in this field, the granting of maritime liens securing claims for such damage would seem superfluous, besides lessening without sufficient justification the security of the mortgagee.

Article 5
(Ranking of maritime liens « inter se » and with respect to registered mortgages)

After what has been mentioned in General Remark Nr. 2 above, little further need be said on the subject of Article 5, except that likewise as in the case of several liens for salvage accruing, liens securing claims for contribution in general average shall also rank in the inverse order of the time when such claims accrued.

Article 6 (1)
(« National » liens)

The International Committee decided to maintain the principle set out in the first paragraph of Article 4 of the Oxford draft, allowing

mettant aux Pays Contractants de prévoir des privilèges dits « nationaux » garantissant des créances autres que celles énumérées à l'Article 4 du Projet de Portofino, à condition cependant que ces privilèges prennent rang après tous les privilèges maritimes et les hypothèques reconnus par la Convention. Dès lors ces privilèges « nationaux » ne jouiront pas de la reconnaissance internationale aux termes de la Convention.

Le rang de ces privilèges entre eux ou au regard des droits des créanciers ordinaires sera déterminé par la Loi Nationale du Pays, qui aura créé ces privilèges ou par le Droit International Privé du For. En tout cas ces privilèges « nationaux » ne donneront pas lieu à un droit de suite après le changement de propriété du navire.

Article 6 (2)
(Droit de rétention)

Ce paragraphe reproduit la disposition de l'article 4 (2) du Projet d'Oxford.

Article 7
(Privilèges maritimes garantissant des réclamations à l'égard d'autres débiteurs que l'armateur. « Droit de suite »)

Voir l'article 5 du Projet d'Oxford et aussi la dernière phrase de l'article 5 du Projet de Portofino.

Dans le 2e par. le mot « Immatriculation » a remplacé le mot « Pavillon » pour le motif que le pays du pavillon battu par le navire n'est pas nécessairement toujours le même que le pays dans lequel le uavire est immatriculé.

Article 8
(Extinction des privilèges maritimes)

Cet article s'occupe de l'extinction des privilèges maritimes. Pour les raisons exposées dans le commentaire de l'article 4 le 1er par. de l'article 9 du Projet d'Oxford a été supprimé. La Commission Internationale a décidé de supprimer égelement le 2e par. du même article pour le motif que dans bien des cas les frais de port de canal et autres frais similaires ainsi que les frais de pilotage ne sont susceptibles de naître qu'au moment du départ du navire.

Finalement le Comité de Rédaction propose d'ajouter deux autres cas dans lesquels les privilèges maritimes ne s'éteindront pas automatiquement à l'expiration de la période de 2 ans, ces cas étant la faillite et la liquidation forcée du propriétaire du navire. La raison de cette ajoute est que suivant la loi nationale de beaucoup de pays ces événements rendent légalement impossible une saisie du navire et rendent automatiquement inopérantes les saisies effectuées avant la survenance de ces événements.

contracting States to grant so-called « national » liens in respect of claims other than those listed in Article 4 of the Portofino draft, provided however that such liens shall rank after all the maritime liens and the registered mortgages recognized under the new Convention. These « national » liens would therefore not enjoy international recognition under the Convention. What will be their rank either « inter se » or with respect to the claims or ordinary creditors, will depend on the private international law of the forum. Moreover such « national » liens will not give rise to a « right in rem » (« droit de suite ») after a charge of ownership of the vessel.

Article 6 (2)
(Right of retention)

This paragraph reproduces the provision of Article 4 (2) of the Oxford draft.

Article 7
(Maritime liens securing claims against other than shipowner. « Droit de suite »)

Vide article 5 of the Oxford draft and also the last sentence of Article 5 of the Portofino draft.

In the second paragraph the word « registration » has been substituted for « flag », as the country of the flag flown by a ship need not always be the same as the country in which she is registered.

Article 8
(Extinguishing of maritime liens)

This article deals with the extinction of maritime liens. For the reasons set out in the comments on Article 4 the first paragraph of Article 9 of the Oxford draft had to be deleted. The International Subcommittee decided to delete also the second paragraph of the said Article on the ground that in many instances port, canal and other waterway dues as well as pilotage due are apt to arise only at the time of the vessel's departure.

Finally, the Drafting Committee proposes to add two further events *in which maritime liens will not become automatically extinguished after the expiring of the two years' period, these events being* the bankrupty and the compulsory liquidation of the vessel's owner. *The « ratio » of that provision lies in the fact* that under the domestic law of many countries these events make it unlawful for an arrest of the vessel being made and that all arrests operated prior to those events occurring are automatically vacated.

Comme un privilège maritime s'éteint en même temps que s'éteint la créance qu'il garantit ou que celle-ci est éteinte par prescription, même si cette extinction survenait avant l'expiration du délai de deux ans, une disposition expresse prévoyant cette hypothèse a été considérée comme superflue.

En ce qui concerne le mot « saisie », la Commission Internationale entend ce terme comme s'appliquant aussi bien à la saisie conservatoire qu'à une saisie exécution, tandis que les mots « réquisition » et « réquisitionner » doivent être compris dans leur sens le plus large et visent dès lors aussi bien la réquisition en propriété que la réquisition en usage.

Article 9
(Cession ou subrogation de créances garanties par un privilège maritime)

Voir article 10 du Projet d'Oxford.

Articles 10 et 11
(Vente forcée d'un navire dans un Etat contractant)

Alors que l'article 7 du Projet d'Oxford contenait des dispositions relativement simples au point de vue de la vente forcée du navire par un Etat Contractant, les articles 10 et 11 du Projet de Portofino exposent avec plus de détails les conditions qui précéderont ou suivront semblable vente et notamment la publicité requise en vue de la vente, la distribution du produit de vente, l'extinction de toutes les hypothèques inscrites, des privilèges et autres charges et la radiation de l'immatriculation du navire dans le registre où il est inscrit. Ansi l'article 10 impose à l'Autorité compétente du pays dans lequel le navire a été saisi et doit être vendu l'obligation de faire connaître avec un préavis d'au moins 30 jours, le lieu et la date de la vente, à tous les créanciers hypothécaires inscrits et connus, aux créanciers nantis d'un privilège, ainsi qu'au conservateur du registre dans lequel le navire est immatriculé, et à cet effet de faire le nécessaire pour se procurer les noms et adresses de ces différents créanciers en s'adressant au conservateur et à l'armateur. Il est bien certain que les dispositions de l'article 10 constituent des exigences minimum et qu'il est laissé à la Loi nationale de l'Etat Contractant toute liberté de promulguer des exigences complémentaires au point de vue publicitaire si ce pays le juge utile.

L'Article 11 du Projet de Portofino met en évidence les conséquences de la vente. A cet égard les hypothèques, privilèges et autres charges ne cesseront de grever le navire qu'à la double condition d'abord que la vente ait eu lieu dans la juridiction de l'Etat Contractant dans lequel le navire avait été saisi et ensuite que les exigences de la loi nationale de cet Etat et de la Convention, aient été respectées, ces exigences étant celles prévues à l'article 10 en ce qui concerne la publicité de la vente

As obviously a maritime lien would be extinguished at the same time when the claim secured thereby was extinguished or became time barred, even although this should occur prior to the expiring of the two years' period, an express provision to that effect was considered to be redundant.

As regards the term «arrest», the International Subcommittee understood this term as applying to both conservatory and executory measures, while the words «requisitioned» and «requisition» are intended to be taken in their broadest sense, referring to requisition of title as well as of use.

Article 9
(Assignment of and subrogation in maritime lien)

Vide : Article 10 of the Oxford draft.

Articles 10 and 11
(Forced sale of vessel in Contracting State)

While Article 7 of the Oxford draft contained relatively simple provisions dealing with a forced sale of the vessel in a Contracting State, Articles 10 and 11 of the Portofino draft set out in greater detail the conditions precedent to and the consequences of such sale, namely the publicity required in connection with the intended sale, the distribution of the proceeds of the sale, the extinguishing of all registered mortgages, liens and other encumbrances and the deregistration of the vessel from the register in which it is registered. Thus Article 10 imposes on the competent authority of the country in which the vessel has been arrested and will be sold, the duty to give at least thirty days' notice of the time and place of the sale to alle known registered mortgagees and lien creditors and to the registrar of the register in which the vessel is registered and for that purpose to endeavour to obtain the names and addresses of such mortgagees and creditors from the said registrar and from the vessel's owner. Obviously the provisions of Article 10 constitute minimum requirements, it being left to the national law of the Contracting State to enact all such further requirements as to publicity as each Contracting State will deem fit.

Article 11 of the Portofino draft sets out the aforementioned consequences of the sale. Of those the vacating of all mortgages, liens and other encumbrances is subordinated to two conditions having been fulmilled, firstly, that the sale is effected in the jurisdiction of the Contracting State in which the ship was arrested and, secondly, that the requirements of the national law of such State and those of the Convention have been complied with, the latter requirements being those contained in Article 10 relating to the publicity with respect to the

et de l'article 11, 2°, en ce qui concerne la distribution du produit de la vente. Les charges mentionnées au 1er par. de l'article 11 visent et comprennent les privilèges « nationaux », les saisies du navire, et d'une manière générale toutes autres charges sur le navire qui peuvent être nées sous l'empire d'une loi nationale que celle-ci celle d'un Pays Contractant ou d'un Pays non-Contractant, mais cette expression ne vise pas les chartes-parties. La grande majorité des rapports qui ont été communiqués prouve que la nouvelles convention ne doit pas compreudre de dispositions relatives à des chartes-parties; d'ailleurs à la réunion de la Commission Internationale, aucune proposition n'a été formulée à cet égard. En conséquence le Projet de Portofino ne résoud pas le problème de savoir si une charte-partie cesse de produire ses effets ou non à raison de la vente forcée du navire affrété; ce problème devra dès lors être tranché suivant la Loi Nationale.

L'attention est en outre attirée sur le fait que les articles 10 et 11 s'appliquent également, chaque fois que le navire, objet d'une vente forcée, est immatriculé dans un pays non contractant. Dans cette hypothèse il peut se faire que les dispositions de l'article 11 (1°) ne soieut pas reconnues et appliquées dans les pays non-contractants.

L'article 11, 2°, s'explique de lui-même et ne nécessite aucun commentaire.

Le 3e par. de l'article 11 a été ajouté, en fonction d'une décision de la Commission Internationale. Son objet est de protéger un acheteur de bonne foi qui a acheté un navire dans une vente forcée, et d'éviter ainsi une situation semblable à celle qui s'est présentée dans le procès anglais « The Acrux » (Lloyds Report 1/1962, 405). Le même 3e par. prévoit que si un navire immatriculé dans un Etat contractant est l'objet d'une vente forcée et que si les exigences prévues au par. 1 sous par. a et b, y compris les exigences de l'article 10, ainsi que celles mentionnées au par. 2, ont été observées, le Conservateur qui par définition est un Conservateur d'un des Etats Contractants, délivrera à l'acheteur un certificat de radiation. L'article 11, 3°, en conséquence rend impérative la radiation du navire dans l'hypothèse prévue.

C'est à l'occasion des problèmes concernant la vente forcée du navire que le Comité de Rédaction s'est départi des instructions qu'il avait reçues. Il est rappelé qu'alors que l'article 7 du Projet d'Oxford traite de la vente forcée du navire dans un Etat Contractant, l'article 8 du même projet contient une disposition similaire concernant pareille vente dans un Etat non-Contractant. Lors de la discussion des articles 7 et 8 du Projet d'Oxford la Commission Internationale a décidé de remplacer ses articles par les articles 17 18 et 19 du Projet norvégien en confiant la rédaction définitive de ces textes au Comité de Rédaction. L'article 19 de ce dernier projet contient une règle aux termes de laquelle, en cas de vente forcée d'un navire dans un Etat non-Contractant, toutes les hypothèques, les privilèges et autres charges seront sensés avoir cessé

sale and in Article 11 (2) relating to the distribution of the proceeds of the sale. The encumbrances mentioned in the first paragraph of Article 11 refer to and include the so-called « national » liens, arrests of the vessel and generally all such other charges on the vessel as may have been created under any system of national law, whether of a Contracting State or of a non-Contracting State, but not to charters. The large majority of the Reports received indicate that the new Convention should not include provisions with respect to charters, while at the Meeting of the International Subcommittee no proposal was made to that effect. Consequently, the Portofino draft does not solve the problem as to whether or not a charter is terminated through the forced sale of the vessel concerned, which problem is therefore to be decided by national law.

Attention is further drawn to the fact that the Articles 10 and 11 are also applicable whenever the vessel being the object of the forced sale is registered in a non-Contracting State. In that case it may occur that the provisions of Article 11 (1) would not be recognised and applied in non-Contracting States.

Article 11 (2) is self explanatory and does not require any comment.

The third paragraph of Article 11 has been added pursuant to a decision of the International Subcommittee. Its purpose is to protect a bona fide purchaser who has purchased a vessel in a forced sale, and therefore to avoid a situation like that in the English case of « The Acrux » (Lloyd's Rep. 1/1962, 405) from arising. The said third paragraph provides that if a vessel registered in a Contracting State is the object of a forced sale and if the requirements set out in paragraph 1, sub-paragraph (a) and (b) — including by reference the requirements of Article 10 — and those set out in paragraph 2 have been complied with, the registrar who per definition is a registrar of one of the Contracting States shall issue to the purchaser a request of deregistration. Article 11 (3) therefore makes it also mandatory that in the event described therein the vessel will be deregistered.

It is in connection with problems surrounding a forced sale of the vessel that the Drafting Committee departed from its terms of reference. It will be remembered that while Article 7 of the Oxford draft dealt with the forced sale of the vessel in a Contracting State Article 8 of the said draft contained similar provisions relating to such sale in a non-Contracting State. When discussing the Articles 7 and 8 of the Oxford draft, the International Subcommittee decided to have those articles replaced by articles 17, 18 and 19 of the Norwegian draft, subject to final drafting. Article 19 of the last mentioned draft sets out of a vessel in a *non-Contracting State* all mortgages, liens and other encumbrances would be *deemed te have ceased to attach* to the vessel in all Contracting

de grever le navire dans tous les Etats Contractants, à condition que certaines exigences au point de vue publicité aient été observées.

En conséquence cette décision incluait une directive pour le Comité de Rédaction de tenter la rédaction d'un article contenant cette règle. Toutefois après une longue et épuisante discussion le Comité de Rédaction, quoique réalisant parfaitement l'importance du problème, a cependant décidé de ne pas suivre cette directive particulière pour la raison majeure qu'au cas où un navire immatriculé dans un Etat non-contractant devait être l'objet d'une vente forcée dans un autre Etat non-contractant, la fiction de la radiation de toutes les hypothèques aurait peu de sens et serait sans utilité pratique tant que l'on n'aurait pas la certitude que ces hypothèques feraient l'objet d'une radiation dans le Registre de l'Etat non-contractant dans lequel le navire est immatriculé; en effet il est évident que la Convention ne pourrait pas imposer l'obligation de radier ces hypothèques aux Autorités d'un Etat non-contractant. C'est dans ces circonstances que le Comité de Rédaction a décidé de ne rédiger aucune disposition visant le cas d'une vente forcée dans un Etat non-contractant. Le Comité suggère que ce problème particulier soit, si on le désire, revu à la prochaine Conférence du Comité Maritime International.

Article 12
(Navires en construction)

La question de savoir s'il y avait lieu de traiter le problème des hypothèques inscrites ou non et des privilèges maritimes grevant un navire en construction, a fait l'objet d'un long débat au cours de la réunion de la Commission Internationale. A la fin de ce débat le Sous-Comité tenant compte qu'une Convention Internationale relative aux privilèges et hypothèques maritimes, qui ne s'appliquerait pas à des navires en construction, serait nécessairement incomplète, pour le motif que cette Convention laisserait sans décision la question de savoir si les hypothèques et les privilèges, nés pendant la période de construction, devraient être reconnus comme valables, et quel serait leur ordre respectif, non seulement entre eux, mais également au regard des hypothèques et privilèges naissant après l'achèvement et la délivraison du navire par le chantier naval, a décidé qu'au regard de la nouvelle convention les deux catégories d'hypothèques et de privilèges devraient être traités de la même manière. D'autre part, il a été décidé dans la Convention relative aux navires en construction adoptée à la Conférence de Stockholm, ne serait traité dans la nouvelle Convention; ceci notamment en ce qui concerne le caractère obligatoire de l'inscription des droits relatifs à des navires en construction. En conséquence l'article 12 du projet de Portofino prévoit que les dispositions de la Convention s'appliqueront également à des navires en construction à la condition toutefois que :

States, subject to certain requirements as to publicity having been complied with. Consequently the terms of reference referred to above included an instruction to the Drafting Committee to attempt the drafting of an article containing the same rule. However, after a long and exhaustive discussion the Drafting Committee, although fully realizing the importance of the problem, nevertheless decided *not* to carry out this particular instruction, the main reason of this decision being that in the event that a vessel *registered in a non-Contracting State* should be the object of a *forced sale in another non-Contracting State*, the fiction of a vacation of all mortgages would serve little or no useful effect so long as there would be no certainly that such mortgages would have been deleted in the *register of the non-Contracting State* in which the vessel was registered, as obviously the Convention could not impose the duty of deleting such mortgages on the authorities of a *non-*Contracting State. Under those circumstances the Drafting Committee refrained from drafting any provision dealing with a forced sale in a non-Contracting State. The Committee suggests that this particular problem should, if so desired, be reconsidered by the next Conference of the Comité Maritime International.

Article 12
(Vessels under construction)

The question as to whether or not registered maritime mortgages effected and maritime liens accruing in respect of a vessel when under construction, was the subject of a lengthy debate by the Meeting of the International Subcommittee.

At the end of the debate the International Subcommittee, considering that an International Convention on Maritime Liens and Mortgages which would not apply to ships under constructions, would necessarily be incomplete, as it would leave undecided whether mortgages effected and liens accruing during the period of construction would have to be recognised and enforced and which would have to be recognised and enforced and which would be their respective priorities, not only «inter se», but also with respect to mortgages effected and liens accruing after completion and delivery of the vessel by the shipyard, decided that for the purposes of the new Convention both categories of mortgages and liens should be treated in the same manner. On the other hand, it was decided that, apart from the aforegoing, none of the other matters provided for in the draft Convention relating to registration of rights in respect of ships under construction which draft Convention was adopted at the Stockholm Conference, should be touched upon in the new Convention, such as the compulsory registration of rights in respect of ships under construction. Accordingly, Article 12 of the Portofino draft states that the provisions of the Convention shall also apply

a) d'une part, seules les hypothèques qui auraient été inscrites dans l'Etat où le navire est en construction, seront reconnues comme exécutoires, rendant ainsi impossible pour un Etat contractant d'admettre l'inscription d'une hypothèque sur un navire qui est en construction dans un autre Etat, qu'il s'agisse d'un Etat contractant ou non, et

b) qu'aucune créance née avant le lancement du navire ne sera garantie par un privilège maritime pour le motif que semblable créances n'auraient pas un caractère typiquement maritime. En conséquence toutes les créances nées pendant la période qui précède le lancement du navire, telles que des créances du chef de dommages corporels ou de dommages matériels, n'auront aucune priorité avant un véritable privilège maritime et avant une hypothèque inscrite, nés pendant ou après le moment où le navire sera deveneu flottant.

Article 13
(Etendue de la Convention)

Cet article reproduit l'article 13 du Projet d'Oxford et a pour but de donner à la Nouvelle Convention une sphère d'application aussi large que possible.

Article 14
(Abrogation de la Convention de 1926
entre Etats-Contractants)

Pas de commentaires.

Toutes les Association sont invitées à envoyer leurs commentaires relatifs au Projet de Portofino à la Firme Henry Voet-Génicot à Anvers, au plus tard le 31 mars 1965.

Amsterdam, novembre 1964.

J.T. Asser
Président de la Commission Internationale.

to vessels under construction, but this application is qualified by two proviso's, namely :

a) that only such mortgages shall be enforceable, as are registered in the State, where the vessel is under construction, thus making it practically impossible for a Contracting State to register a mortgage on a vessel which is under construction in any other State, whether a Contracting or non-Contracting State;

b) that no claims accruing prior to the launching of the vessel shall be secured by a maritime lien as such claims would not have a typically «maritime» character. Consequently any claims accruing during the prelaunching period, such as for loss of life, personal injury or property damage, will not have any priority overriding any «real» maritime liens and any mortgages registered, whether during or subsequently to the time when the vessel becomes waterborne.

Article 13
(Scope of Convention)

This Article which reproduces Article 13 of the Oxford draft, intends to give to the provisions of the new Convention as wide as possible an application.

Article 14
(Abrogation of 1926 Convention as between Contracting States)

No comment.

All national Associations are requested to forward their Reports on the Portofino draft to Messrs. Henry Voet-Génicot, Antwerp, not later than the 31st March 1965.

Amsterdam, November 1964.

J.T. Asser
President of the International Subcommittee.

PROJET DE CONVENTION

(PROJET DE PORTOFINO)

Article 1

Les hypothèques et « mortgages » sur les navires de mer seront reconnus exécutoires dans tous les Pays Contractants à condition que :

a. L'Hypothèque ou mortgage ait été régulièrement constitué et inscrite dans un Registre, en conformité avec les lois du Pays où le navire est immatriculé.

b. Le Registre ainsi que tout acte auquel il se réfère et qui est déposé chez le Conservateur soient ouverts à l'inspection publique, et que

c. Le Registre mentionne le nom et l'adresse de la personne en faveur de laquelle l'hypothèque ou le mortgage ont été constitués, le montant garanti et la date qui, suivant la loi du Pays de l'inscription, détermine son rang au regard des autres hypothèques ou mortgages.

Article 2

1. Sauf dans le cas prévu à l'article 11 § 3 aucun Etat Contractant ne permettra la radiation de l'immatriculation d'un navire sans le consentement de tous les titulaires des hypothèques ou mortgages inscrits.

2. Un navire immatriculé dans un Etat Contractant et grevé d'une hypothèque ou d'un mortgage, ne sera pas susceptible d'être immatriculé dans un autre Etat Contractant, sinon contre production d'un certificat émis par le 1° Etat, attestant que le navire sera radié le jour où la nouvelle immatriculation aura eu lieu et à condition que celle-ci ait été effectué dans les 30 jours. Lorsque pareil certificat aura été émis, aucune inscription de droits au regard du navire ne sera plus autorisée par cet Etat au cours de la dite période.

Le certificat dont question à l'alinéa 2 mentionnera avec leur rang respectif tous les hypothèques et mortgages sur le navire.

3. Le navire ne sera admis à l'immatriculation dans un autre Etat Contractant que si les hypothèques et mortgages mentionnés dans le

DRAFT CONVENTION

(PORTOFINO DRAFT)

Article 1

Mortgages and hypothecs on seagoing vessels shall be enforceable in Contracting States provided that :

a) such mortgages or hypothecs have been duly effected and registered in accordance with the law of the State where the vessel is registered;

b) the register and any instrument referred to therein and filed with the registrar are open to public inspection; and

c) the register specifies the name and address of the person in whose favour the mortgage of hypothec has been effected, the amount secured and the date which, according to the law of the State of registration, determines the rank as respects other registered mortgages and hypothecs.

Article 2

1. Subject to the provisions of paragraph 3 of article 11, no Contracting State shall permit the deregistration of a vessel without the consent of all holders of registered mortgages and hypothecs.

2. A vessel registered in a Contracting State on which a mortgage or hypothec is registered shall not be eligible for registration in another Contracting State unless a certificate has been issued by the former State that the vessel will be deregistered on the day when the new registration is effected, provided that the new registration is effected within 30 days. When such certificate has been issued no registration of rights in respect of the vessel shall be allowed by the said State during such period of time. The certificate mentioned shall set out in order of priority all registered mortgages and hypothecs on the vessel.

3. The vessel shall not be accepted for registration in another Contracting State unless the mortgages and hypothecs set out in the certifi-

certificat sont acceptés pour inscription dans cet Etat, en conservant leur rang comme indiqué dans ce certificat.

Article 3

Les hypothèques ou mortgages occuperont entre eux le rang qui leur est reconnu par la loi du pays où ils sont inscrits.

Article 4

1. Les créances suivantes seront garanties par un Privilège Maritime sur le navire :

(i) Les frais de relèvement de l'épave du navire légalement ordonné par les Autorités Compétentes.

(ii) Les frais de port, de canal et autres frais similaires.

(iii) Les salaires et autres sommes dues en vertu de leur contrat d'engagement, aux membres de l'équipage du navire.

(iv) Les créances du chef de mort ou lésions corporelles.

a) se rapportant à des personnes se trouvant à bord du navire.

b) se rapportant à des personnes ne se trouvant pas à bord du navire, si les dommages ont été causés par le propriétaire du navire ou par une personne au service du navire et dont le Propriétaire est responsable.

(V) Les créances du chef d'assistance et de sauvetage et du chef de contribution en avarie commune.

(Vi) Les créances de nature quasi délictuelle du chef de pertes ou dommages matériels.

a) se rapportant à des personnes se trouvant à bord du navire

b) se rapportant à des personnes ne se trouvant pas à bord du navire si les dommages ont été causés par le propriétaire du navire ou par une personne au service du navire et dont le Propriétaire est responsable. Le mot « propriétaire » utilisé à cet article sera censé comprendre le locataire coque nue, l'affréteur, l'armateur gérant ou l'exploitant du navire.

2. Aucun privilège maritime ne grèvera le navire pour sûreté de réclamations relatives à des pertes de vie humaines ou lésions corporelles ou pour pertes et dommages matériels provenant ou résultant de propriétés radioactives ou d'une combinaison de propriétés radioactives avec des propriétés toxiques, explosives ou autres propriétés dangereuses de combustible nucléaire ou de produits ou déchets radioactifs.

Article 5

1. Les privilèges énumérés à l'article 4 auront la priorité sur les hypothèques ou mortgages.

2. Les privilèges énumérés à l'article 4 prendront rang dans l'ordre suivi à cet l'article.

cate mentioned in paragraph 2 are accepted for registration by such State, retaining their priority as set out in the certificate.

Article 3

Mortgages and hypothecs shall rank as between themselves in accordance with the law of the State where they are registered.

Article 4

The following claims shall be secured by maritime liens on the vessel :

(i) Costs of removal of the wreck of the vessel lawfully ordered by competent authorities.

(ii) Port, canal and other waterway dues and pilotage dues.

(iii) Wages and other sums due to members of the vessels's complement in respect of their employment.

(iv) Claims for loss of life or personal injury :

a) in respect of persons on board the vessel;

b) in respect of persons not on board the vessel if caused by the owner of by a person in the service of the vessel for whom the owner is responsible.

(v) Claims for salvage and for contribution in general average.

(vi) Claims in tort for loss of or damage to property not on board the vessel, if caused by the owner or by a person in the service of the vessel for whom the owner is responsible.

The word « owner » mentioned in this article shall be deemed to include the demise or other charterer, manager or operator of the vessel.

Article 5

1. The maritime liens set out in article 4 shall take priority over mortgages and hypothecs.

2. The maritime liens set out in article 4 shall rank in the order listed.

3. The maritime liens set out in each of the subparagraphs (i), (ii), (iii), (iv) and vi) of article 4 shall rank pari passu as between themselves.

3. Les privilèges énumérés à chacun des § 1, 2, 3, 4 et 6 de l'article 4 viennent en concours entre eux au marc le franc.

4. Les privilèges prévus au § 5 de l'article 4 prendront rang entre eux dans l'ordre inverse des dates où les créances garanties par ces privilèges sont nées. Les créances du chef de contribution en avarie commune seront censées être nées à la date à laquelle l'événement donnant lieu à avarie commune s'est produit.

Article 6

1. Chaque Etat Contractant peut reconnaître des privilèges pour garantir des créances autres que celles énumérées à l'article 4 à condition toutefois que ces privilèges ne prendront rang qu'après les hypothèques ou mortgages répondant aux exigences de l'article 1.

2. Chaque Etat Contractant peut également reconnaître un droit de rétention sur le navire à condition toutefois que l'exercice de ce droit ne puisse en rien porter préjudice à l'exercice ni d'un privilège, maritime énuméré à l'article 4 ni d'une hypothèque ou d'un mortgage répondant aux exigences de l'article 1.

Article 7

1. Les privilèges maritimes énumérés à l'article 4 naîtront, peu importe que les créances garanties par ces privilèges soient à charge du Propriétaire, du locataire coque nue, d'un affréteur, d'un armateur gérant ou d'un exploitant du navire.

2. Sous réserve des dispositions de l'article 11, les privilèges maritimes énumérées à l'article 4 suivront le navire nonobstant tout changement de propriétaire ou d'immatriculation.

Article 8

1. Les Privilèges Maritimes énumérées à l'article 4 s'éteindront à l'expiration d'une période de deux années à compter de la date de la naissance de la créance garantie par le privilège sauf si, avant l'expiration de ce délai :

A le navire a été saisi et que cette saisie conduit à la vente forcée du navire, ou

B. si le propriétaire est déclaré en état de faillite, ou

C. en état de liquidation forcée.

2. La période de deux années dont question ci-dessus ne sera susceptible d'aucune suspension ou interruption, sauf qu'au cas où le navire est réquisitionné, le délai ne courra pas pendant la durée de cette réquisition.

Article 9

La cession d'une créance et/ou la subrogation dans les droits d'une créance garantie par un privilège maritime énuméré à l'article 4, comporte la cession ou la subrogation simultanée du privilège.

4. The maritime liens set out in sub-paragraph (v) of article 4 shall rank in the inverse order of the time when the claims secured accrued. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was done.

Article 6

1. Each Contracting State may grant liens to secure claims other than those referred to in article 4, provided however that such liens shall rank after all mortgages and hypothecs which comply with the requirements of article 1.

2. Each Contracting State may also grant rights of retention in respect of the vessel provided however that such rights shall not prejudice the enforcement of the maritime liens set out in article 4 or of mortgages or hypothecs which comply with the requirements of article 1.

Article 7

1. The maritime liens set out in article 4 arise irrespective as to whether the claims secured by such liens are against the owner, demise or other charterer, manager or operator of the vessel.

2. Subject to the provisions of article 11, the maritime liens securing the claims set out in article 4 follow the vessel notwithstanding any change of ownership or of registration.

Article 8

1. The maritime liens set out in article 4 shall be extinguished after a period of two years from the time when the claims secured thereby arose unless, prior to the expiry of such period, (a) the vessel has been arrested, such arrest leading to a forced sale, (b) the owner is declared bankrupt, or (c) the owner goes into compulsory liquidation.

2. The two year's period referred to in the preceding paragraph shall not be subject to suspension or interruption; provided however that should the vessel be requisitioned, time shall not count in respect of the period of such requisition.

Article 9

The assignment of or subrogation in a claim secured by a maritime lien set out in article 4 entails the simultaneous assignment of or subrogation in such maritime lien.

Article 10

Avant la vente forcée du navire dans un Pays Contractant l'autorité compétente de ce Pays fera connaître, avec un préavis d'au moins un mois, la date et l'endroit de cette vente à tous les titulaires d'hypothèques ou de mortgages inscrits, à tous les titulaires de privilèges maritimes et au Conservateur du Registre où le navire est immatriculé. A cet effet l'autorité compétente s'efforcera d'obtenir les noms et adresses de ces titulaires de ce Conservateur et du Propriétaire du navire mentionné au Registre.

Article 11

I. En cas de vente forcée du navire dans un Etat Contractant tous les hypothèques, mortgages, privilèges et autres charges, de quelque nature que ce soit, cesseront de grever le navire, à condition toutefois :

a) qu'au moment de la vente, le navire avait été saisi dans la juridiction d'un Etat Contractant.

b) que la vente a été poursuivie en conformité avec la loi de ce Pays et les dispositions de la présente Convention.

II. Les frais taxés par le Tribunal et provoqués par la saisie, la vente qui s'en est suivie et la distribution du prix seront payés en premier lieu, par prélèvement sur le produit de cette vente.

Le solde de ce produit sera distribué entre les titulaires des privilèges maritimes, des hypothèques inscrites et des mortgages inscrits en conformité avec les dispositions de la présente Convention.

III. Lorsqu'un navire immatriculé dans un Etat Contractant est l'objet d'une vente forcée dans un Etat Contractant, le Conservateur délivrera à la requête de l'acheteur un certificat de radiation à condition bien entendu que les exigences mentionnées aux alinéas 1 (a et b) et 2 du présent article auront été observées.

Article 12

Les dispositions de la présente Convention s'appliqueront également aux navires en construction à condition toutefois que :

a) seuls les hypothèques et mortgages qui auront été inscrits dans l'Etat où le navire a été construit, seront reconnus exécutoires.

b) les Privilèges Maritimes énumérés à l'article 4 ne grèveront le navire que si les créances garanties par ces privilèges sont nées après que le navire sera devenu flottant.

Article 10

Prior to the forced sale of a vessel in a Contracting State, the competent authority of such State shall give at least 30 days notice of the time and place of such sale to all known holders of registered mortgages, registered hypothecs and maritime liens set out in article 4 and to the registrar of the register in which the vessel is registered. For this purpose the said authority shall endeavour to obtain the names and addresses of such holders from the said registrar and from the owner of the vessel.

Article 11

1. In the event of the forced sale of the vessel in a Contracting State all mortgages, hypothecs, liens and other encumbrances of whatever nature shall cease to attach to the vessel, provided however that :

(a) at the time of the sale the vessel has been arrested in the jurisdiction of such Contracting State; and

(b) the sale has been effected in accordance with the law of the said State and with the provisions of this Convention.

2. The costs awarded by the Court and arising out of the arrest and subsequent sale of the vessel and the distribution of the proceeds shall first be paid out of the proceeds of such sale. The balance shall be distributed among the holders of maritime liens, registered mortgages and registered hypothecs in accordance with the provisions of this Convention.

3. When a vessel registered in a Contracting State is the object of a forced sale, the registrar shall issue, at the request of the purchaser, a certificate of deregistration, provided always that the requirements set out in paragraph 1, sub-paragraphs (a) and (b) and paragraph 2 of this article have been complied with.

Article 12

The provisions of this Convention shall also apply to vessels which are under construction, provided however that :

(a) only such mortgages and hypothecs as have been registered in the State in which the vessel is under construction shall be enforceable;

(b) the maritime liens referred to in article 4 shall attach to the vessel only if the claims secured thereby accrue after the vessel has become waterborne.

Article 13

Tout Etat Contractant appliquera les dispositions de la Présente Convention sauf stipulations contraires, à tous les navires de mer, peu importe qu'ils aient été immatriculés dans un Etat Contractant ou dans un Etat non-Contractant.

Article 14

Au regard des relations entre les Etats qui ratifieront la présente Convention ou y adhéreront, la présente Convention remplacera et abrogera la Convention Internationale pour l'Unification de Certaines Règles relatives aux Privilèges et Hypothèques Maritimes et le Protocole de signature signés à Bruxelles le 10 avril 1926.

Article 13

Unless otherwise provided in this Convention the Contracting States shall apply the provisions of this Convention to all sea-going vessels irrespective as to whether they are registered in a Contracting State or in a non-Contracting State.

Article 14

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the unification of certain rules relating to Maritime Liens and Mortgages and the Protocol of Signature signed at Brussels on the 10th April 1926.

NORWEGIAN MARITME LAW ASSOCIATION

PROPOSED AMENDMENTS
TO
PROVISIONAL DRAFT CONVENTION ON MARITIME LIENS AND MORTGAGES SUBMITTED TO THE INTERNATIONAL SUBCOMMITTEE OF THE INTERNATIONAL MARITIME COMMITTEE (HYPO. 13-5-64)

I. Mortgages and executory liens

Art. 1

In this Convention

a) a mortgage shall mean a contractual security in a vessel for a certain indebtedness;

b) an executory lien shall mean a security in a vessel for a certain indebtedness, levied by special decree by a public authority.

Art. 2

A mortgage which has been duly executed and registered in accordance with the laws of the State where the vessel is registered shall be recognized in the Contracting States, provided

a) that the registration has taken place in an oficial register;

b) that the register and the instruments recorded therein, or authorized copies of such instruments, are open to public inspection;

c) that the registration shall include the name of the original mortgagee, the amount secured by the mortgage and the date determining the rank of the mortgage.

Art. 3

Mortgages recognized in the Contracting States shall, in case of collision of rights, take priority, one before another, in the order of registration.

The law of the State where the vessel has been registered may, however, provide that priority shall originate from the time when an application for registration was received by the registrar, provided that such application be available for public inspection.

Art. 4

1. A Contracting State shall not permit the de-registration of a vessel without the consent of all holders of registered mortgages on the vessel.

2. A Contracting State shall not permit the registration of a vessel previously registered in another State unless a certificate of de-registration has been issued by the latter State.

3. A certificate of de-registration issued in a Contracting State shall set out, in their order, all registered mortgages on the vessel.

4. Mortgages set out in a certificate of de-registration issued in a Contracting State shall be accepted for registration in another Contracting State where the vessel is being registered, retaining their priority, inter se, resulting from the original registration.

If such registered mortgages do not comply with the statutory requirements for registration in the State where the vessel is being registered the interested parties shall be given at least 60 days in which to comply such requirements, all legal effects of registration remaining in force during this period.

Art. 5

The provisions in Arts. 1 - 4 shall also apply to executory liens. Such liens shall rank with mortgages in the order set out in Art. 3.

II. Maritime liens

Art. 6

In this Convention a maritime lien shall mean a security in a vessel attaching by law to a certain claim.

Art. 7

A maritime lien shall attach to the following claims pertaining to the vessel :

1. Costs levied or awarded by the competent Court in connection with the forced sale of the vessel, including costs in respect of a necessary arrest, preservation of the vessel after commencement of the legal action and the distribution of the proceeds of the sale.

2. Cost of removal of the wreck ordered by a public authority.

3. Port, Canal and Pilotage dues and other similar dues payable for a service rendered to the vessel.

4. Remuneration for salvage.

5. Wages and other sums due to the vessel's personnel in respect of their employment and premiums for social insurance payable by the employer in respect of their employment.

6. Claims for loss of life and personal injury in respect of persons on board the vessel, and in respect of persons not on board the vessel, if caused by a person in the vessel's service for whom the owner is responsible.

7. Claims for loss of or damage to property in respect of property on board the vessel, and in respect of property not on board the vessel, if caused by a person in the service of the vessel for whom the owner is responsible.

Art. 8

The maritime liens set out in Art. 7 shall attach to the claims in question whether the person liable is the owner, demise charterer or other charterer, manager or operator of the vessel.

Art. 9

The subject matter of a maritime lien shall be the vessel with its physical accessories only.

Art. 10

All maritime liens listed in Art. 7 shall rank ahead of mortgages and executory liens.

The classes of liens enumerated in Art. 7 shall rank in the order thus set out.

Within each class the liens shall rank pari passu, but in respect of liens for salvage (class 4) the younger shall take precedence over the older.

Art. 11

A Contracting State may recognize liens in respect of claims other than those set out in Art. 7, provided that such liens shall rank after registered mortgages and executory liens.

Art. 12

Except in case of a forced sale as provided for in Arts. 18 and 19 the maritime liens set out in Art. 7 shall be unaffected by change of flag or ownership of the vessel.

Art. 13

Unless otherwise has been agreed the assignment of a claim secured by a maritime lien shall also entail the transfer of such lien.

Art. 14

Where a claim secured by a maritime lien or other lien is subject to limitation of liability such lien shall be enforceable only for the limited amount of the claim. When a limitation fund has been set up such lien shall not be enforceable.

Art. 15

All maritime liens listed in Art. 7 shall be extinguished after a period of one year from the time when the corresponding claim arose.

If the claim has been adjudicated the lien shall be extinguished if legal action to enforce it has not been taken within one year of the date of final judgment.

The national law of each Contracting State shall determine the legal actions required for the interruption of the prescription periods.

Art. 16

The Contracting States shall apply the provisions of Arts. 6 - 15 to all vessel, irrespective of their State of registry.

III. Forced sale

Art. 17

Prior to the forced sale of a vessel in a Contracting State the competent authority of such State shall give ..... days advance notice of the time and place of the forced sale to all known holders of mortgages, executory liens and maritime liens in the vessel. The said authority shall endeavour to obtain information of the identity of such holders from the registrar of the register in which the vessel is entered and from the vessel's registered owner.

Art. 18

1. In the event of a forced sale of a vessel in a Contracting State all mortgages, liens and other encumbrances shall cease to attach to the vessel, provided that

a) the vessel is within the territory of the State in question and in the custody of its competent authorities at the time of the sale;

b) the sale is effected in accordance with the law of the State in question.

2. Out of the proceeds of the sale the holders of mortgages, executory liens and maritime liens shall be satisfied in the order of priority set out in this Convention.

Art. 19

In the event of a forced sale of a vessel in a non-Contracting State all mortgages, liens and other encumbrances shall be deemed to have ceased to attach to the vessel in the Contracting States provided that the requirements set out in Arts. 17 and 18 have been met.

13/6 1964.

RESUME DE LA
REUNION DE LA COMMISSION INTERNATIONALE

Amsterdam, les 19 et 20 juin 1964

I. PREAMBULE

Au cours d'une réunion du Bureau Permanent du Comité Maritime International tenue en juin 1963, il fut décidé de constituer un Sous-Comité International sous la présidence de M. J.T. ASSER pour étudier la possiblité d'une révision de la Convention de 1926 relative aux Privilèges et Hypothèques maritimes.

Un groupe de travail fut formé en vue de préparer les discussions du Sous-Comité : ce groupe de travail se réunit une première fois à Amsterdam le 7 décembre 1963. En janvier 1964 un rapport préliminaire auquel était joint une questionnaire, préparé par le Président du Sous-Comité International, fut envoyé aux Associations Nationales (texte anglais Hypo-1 — texte français Hypo-2). Au cours des mois suivants des réponses furent reçues de plusieurs Associations Nationales.

Les 11 et 12 avril 1964, le groupe de travail se réunit à Oxford pour examiner les réponses reçues. Les conclusions provisoires de ce débat se retrouvent dans le 2me Rapport de M. Asser (texte anglais Hypo-12 — texte français Hypo-17). Sur base des discussions et conclusions du groupe de travail, une petite équipe, composée de MM. J.T. Asser, Fr. Berlingieri, W.R.A. Birch Reynardson et A.G. Vaes, rédigea un avant-projet de nouvelle Convention relative aux Privilèges et Hypothèques Maritimes (Hypo-13 — Hypo-14).

Cet avant-projet devait servir de base aux discussions du Sous-Comité International au cours de la réunion des 19 et 20 juin 1964 à Amsterdam. Cet avant-projet sera désigné ci-après sous le nom de « Projet d'Oxford ».

II. LE SOUS-COMITE

Des délégués de 14 Associations Nationales ont assisté à la réunion du Sous-Comité International qui était composé comme suit :

Président :	Mr. J.T. Asser,
Argentine :	J. Domingo Ray,
Belgique :	A. G. Vaes,
Canada :	P. Beck,

SUMMARY OF THE MEETING OF THE INTERNATIONAL SUBCOMMITTEE

Amsterdam, June 19th and 20th 1964

I. INTRODUCTION

At a meeting of the Bureau Permanent of the Comité Maritime International held in June 1963 it was decided to set up an International Subcommittee under the chairmanship of Mr. J.T. ASSER to study the possibility of a revision of the 1926 Convention relating to Maritime Liens and Mortgages.

For the purpose of preparing the discussions of the Subcommittee a working-group was formed, that met for the first time in Amsterdam on December 7th, 1963. In January, 1964, a Preliminary Report together with a Questionnaire prepared by the Chairman of the International Subcommittee, was sent to the National Associations (English text: Hypo-1; French text: Hypo-2). In the following months Replies to the Questionnaire were received from several National Associations.

On April 11th and 12th, 1964, the working-group met in Oxford to discuss the Replies received. The provisional conclusions arrived at by the group are contained in Mr. Asser's Second Report of May, 1964 (English text: Hypo-12; French text: Hypo-17). On the basis of the working-group's discussions and conclusions a small group, composed of Messrs. J.T. Asser, Fr. Berlingieri, W.R.A. Birch Reynardson and A. Vaes, prepared a provisional draft of a new Convention on Maritime Liens and Mortgages (English text: Hypo-13); French text: Hypo-14) to serve as a basis for the discussions of the International Subcommittee at its meeting in Amsterdam on June 19th and 20th, 1964.

This provisional draft will hereinafter be referred to as the « Oxford-draft ».

II. THE SUBCOMMITTEE

Delegates of 14 National Associations assisted at the Meeting of the International Subcommittee, which was composed as follows :

Chairman :	Mr. J.T. Asser,
Argentina :	J. Domingo Ray,
Belgium :	A. Vaes,
Canada :	P. Beck,

France :	M. Dubosc,
Allemagne :	A. Roscher,
	E. vom dem Hagen,
Italie :	Fr. Berlingieri,
	R. Berlingieri,
Pays-Bas :	J.A.L.M. Loeff,
	W.E. Boeles,
Norvège :	A. Rein,
	F. Ringdal,
Portugal :	J.A. Correa de Barros,
Suède :	K. Pineus,
	C. Palme,
Suisse :	W. Müller,
Royaume-Uni :	W.R.A. Birch Reynardson,
	C. Harris,
Etats-Unis :	A. Boal,
Yougoslavie :	E. Pallua.

Assistèrent également à la réunion : Madame S. Morris représentant M. Albert Lilar, Président du Comité Maritime International, et MM. Everard et Van Varenbergh, en qualité de secrétaires.

III. PROBLEMES PRELIMINAIRES

Au début de la réunion, le délégué de la France déclare qu'à présent son Association se rallie à l'optique des autres Associations, suivant laquelle une révision de la Convention de 1926 est souhaitable.

Le Sous-Comité procéda ensuite à la discussion relative à 3 problèmes d'un caractère préliminaire :

a) *Base de la Discussion.*

Quelques jours avant la réunion, l'Association Norvégienne envoya une série d'amendements au Projet d'Oxford, sous forme d'un projet de nouvelle Convention.

Le Sous-Comité décida de prendre le Projet d'Oxford comme base de la discussion et de tenir compte du Projet norvégien pour les dispositions correspondantes, (le projet norvégien sera annexé au présent Résumé).

b) *Nouvelle Convention ou Révision de la Convention de 1926 ?*

En conformité avec la grande majorité des réponses reçues des Associations Nationales au Questionnaire (question XV), le Sous-Comité a décidé de s'efforcer de préparer une nouvelle Convention plutôt que d'amender la Convention de 1926 ou de rédiger un nouveau Protocole à cette Convention.

France :	Dubosc,
Germany :	A. Roscher,
	E. von dem Hagen,
Italy :	Fr. Berlingieri,
	R. Berlingieri,
Netherlands :	J.A.L.M. Loeff,
	W. E. Boeles,
Norway :	A. Rein,
	F. Ringdal,
Portugal :	J.A. Correa de Barros,
Sweden :	K. Pineus,
	C. Palme,
Switzerland :	W. Müller,
United Kingdom :	W.R.A. Birch Reynardson,
	C. Harris,
United States :	A. Boal,
Yougoslavia :	E. Pallua.

The meeting was also attended by Mrs. S. Morris representing Mr. Albert Lilar, President of the C.M.I., and by Mr. L.C.H. Everard and Mr. L. van Varenbergh, who acted as secretaries.

III. PRELIMINARY QUESTIONS

At the start of the meeting the French delegate stated that his Association now shares the other Associations' view that a revision of the 1926 Convention is desirable.

The Subcommittee then proceeded to discuss three questions of a preliminary character :

a) *Basis of Discussions.*

A few days before the meeting a number of proposed amendments to the Oxford-draft were received from the Norwegian Association, these amendments being submitted in the form of a draft for a new Convention.

The Subcommittee agreed to adopt the Oxford-draft as the basis of its discussions and to deal with the Norwegian draft in connection with the corresponding provisions of the Oxford-draft. (The Norwegian draft will be attached to this summary).

b) *New Convention or revision of the 1926 Convention ?*

In accordance with the great majority of the Replies received from the National Associations to the Questionnaire (question XV), the Subcommittee decided to concentrate on preparing a new Convention rather than on amending the 1926 Convention or on drafting a new Protocol to the latter Convention.

c) *Navires en construction.*

La question de savoir si le nouveau projet de Convention devrait ou non être applicable aux navires en construction fut longuement débattue.

Une délégation proposa de supprimer l'article 12 du Projet d'Oxford. Cette délégation faisait valoir que cette disposition semblait écarter complètement le projet de Convention relatif aux navires en construction (Stockholm 1963), sans d'autre part reprendre les dispositions de ce projet prévoyant l'inscription obligatoire des droits relatifs à ces navires.

D'autres délégations firent observer que le Projet d'Oxford ne s'occupe des navires en construction qu'en ce qui concerne les hypothèques et les privilèges sur ces navires et que ce n'était nullement l'intention des auteurs du Projet d'Oxford de substituer leur projet au projet de Stockholm.

Il faut d'autre part souligner que le Projet de Stockholm et plus particulièrement l'art. 1 de ce projet (qui impose aux Etats Contractants l'obligation de prévoir dans leur loi nationale la tenue d'un registre public où seront inscrits les drois relatifs aux navires en construction) a rencontré une sérieuse opposition dans plusieurs pays. Il est dès lors probable que ces pays adhéreraient à une Convention relative aux Hypothèques et Privilèges Maritimes mais non à une Convention du genre du projet de Stockholm. Dans ces conditions il semble qu'une Convention relative aux Privilèges et aux Hypothèques Maritimes devrait également s'occuper des Privilèges et Hypothèques sur les navires en construction et en tout cas au point de vue de la vente de pareils navires dans un pays autre que celui dans lequel le navire est immatriculé ou a été construit. Cette solution apparaît d'autant plus nécessaire, selon ces délégations, que les débats avaient démontré que la notion du « navire en construction » est loin d'être la même dans la loi nationale de nombreux pays.

Par 12 voix contre 1 (une délégation n'était pas encore présente) le Sous-Comité se prononça en faveur d'une disposition se rapportant aux Privilèges et Hypothèques sur des navires en construction, dans l'hypothèse de la vente de pareil navire dans une Juridiction autre que celle du pays où le navire a été construit, étant entendu que le texte exact de cette disposition fera l'objet d'une mise au point lorsque l'on abordera la discussion de l'art. 12 du Projet d'Oxford.

IV. LE PROJET D'OXFORD

Article 1

Par 6 voix contre 3 (4 abstentions; une délégation non encore présente) il est décidé de maintenir le système du Projet d'Oxford (sans définition) et de ne pas suivre le système de l'art. 1 du Projet norvégien.

c) *Ships under Construction.*

The question whether or not the new draft Convention should also apply to ships under construction was discussed at lenghts.

One delegation proposed te delete art. 12 of the Oxford-draft. This delegation argued that the said article seems to entirely set aside the draft Convention relating to ships under construction (Stockholm 1963) without at the same time taking over the provisions of that draft providing for the compulsory registration of rights in respect of such ships. Other delegations pointed out that the Oxford-draft deals with ships under construction only in connection with mortgages and liens on such ships and that it has not been the intention of the authors of the Oxford-draft to have this draft replace the Stockholm-draft. It was further argued that the Stockholm-draft, and in particular article 1 of said draft (imposing on the Contracting States the obligation to provide in their domestic law for an officiel public register of rights in respect of ships under construction), had met with serious opposition in a number of countries. Consequently, the probability exists that such countries would adhere to a Convention on Maritime Liens and Mortgages but not to a Convention on the lines of the Stockholm-draft. Under these circumstances it would seem that a Convention of maritime liens and mortgages should also deal with such liens and mortgages on ships under construction, at any rate with respect to the sale of such ship effected under the jurisdiction of a State other thant the State in which such ship is registered or has been built. This would be the more necessary, these delegations went on, as the discussions had made it clear that the concept « ship under construction » is not the same in the domestic law of various countries.

By 12 votes to 1 (one delegation not yet being present) the Subcommittee decided in favour of a provision with respect to maritime liens and mortgages on ships under construction in the event of a sale of such ship in a jurisdiction other than that of the country where it had been built, it being understood that the exact contents of such provision would be dealt with when art. 12 of the Oxford-draft would come up for discussion.

IV. THE OXFORD-DRAFT

Article 1

By 6 votes to 3 (4 abstentions; one delegate not yet present) it is decided to maintain the system of the Oxford-draft (no definitions) and not to follow the system of art. 1 of the Norwegian draft.

1re phrase: par 9 voix contre 2 (2 abstentions; une délégation non encore présente) il est décidé d'insérer à la 1re ligne du texte anglais les mots « sea-going » avant le mot « vessels » (le mot « navire » dans le texte français ne nécessite pas cette clarification). Les mots « another registerable rights » (et autres droits susceptibles d'être incrits) sont ajoutés après le mot « Mortgages » (Hypothèques) (8 voix contre 5; une délégation non encore présente) et les mots « and enforceable » sont ajoutés après le mot « valid » à l'unanimité (et exécutoires).

Sous-paragraphe i) : Le mot « accordance » remplace « according » (sans incidence sur le texte français).

Sous-paragraphe ii) : Il est décidé à l'unanimité de remplacer cet alinéa par l'alinéa b) de l'article 2 du projet novégien modifié comme suit : « que le Registre et les actes qui y sont inscrits ou les copies de ces actes soient publics et ouverts à toute inspection ».

Sous-paragraphe iii) : Une proposition pour remplacer les mots « the amount of the Mortgage » (le montant de l'Hypothèque) par les mots « the amount secured by the Mortgage » (le montant garanti par l'Hypothèque) est adoptée à l'unanimité.

En ce qui concerne l'exigence que le Registre devra mentionner le nom du créancier hypothécaire, il a été constaté que dans certains pays, la Suède par ex., le nom du créancier hypothécaire et dans d'autres, la Norvège par ex., la cession d'une hypothèque ne sont pas inscrits. En conséquence cette question a été envoyée au Comité de Rédaction, qui sera désigné à l'issue de cette réunion. Une proposition allemande d'ajouter à cet article un nouvel alinéa prévoyant que la manière dont les hypothèques et autres droits susceptibles d'être inscrits, seront rendus exécutoires, sera réglée par la lex fori, est adoptée à l'unanimité.

Article 2

Sous-paragraphe i) : D'une manière générale, l'expression « costs arising in connection with the arrest etc. » (les frais déboursés en vue de la saisie etc.) a paru trop large. Aussi a-t-il été décidé de restreindre ce privilège aux : « Frais taxés par le Tribunal et résultant de la saisie etc. ».

Sous-paragraphe ii) : La question s'est posée de savoir si ce privilège garantira également les frais de relèvement de l'épave exposés, p. ex. par le propriétaire d'un port privé ou si ce privilège doit être limité aux frais exposés par des Autorités Publiques. Un amendement néerlandais octroyant un privilège aux frais de relèvement d'épave « ordonné ou exécuté dans l'intérêt général » fut repoussé par 6 voix contre 6 (2 abstentions). Finalement l'Art. 7, sous-paragraphe 2 du Projet norvégien, modifié sur base du paragraphe 1 sous-paragraphe 2) du Protocole de Signature de la Convention de 1926, fut adopté par 13 voix contre une. En conséquence ce sous-paragraphe sera en sub-

First sentence : By 9 votes to 2 (2 abstentions; one delegation not yet present) it is decided to insert in the first line of the English text the word « sea-going » before the word « vessels » (the word « navire » in the French text needs no clarification). The words « and other registerable rights » are inserted after the word « Mortgages » (8 votes to 5; one delegation not yet present) and the words « and enforceable » are inserted after the word « valid » (unanimous).

Subparagraph i) : The word « according » should read « accordance ».

Subparagraph ii) : It is unanimously decided to replace this subparagraph by subparagraph b) of article 2 of the Norwegian draft modified as follows : « that the register and such instruments, or authorized copies of such instruments, as may be filed therein are open to public inspection ».

Subparagraph iii) : A proposal to replace the words « the amount of the Mortgage » by the words : « the amount secured by the Mortgage » is unanimously adopted.

With regard to the requirement that the register shall specify the name of the Mortgagee it was stated that in some countries (e.g. Sweden) the name of the Mortgagee and in others (e.g. Norway) the transfert of a Mortgage are not registered. Therefore, this matter is referred to the drafting committee that wil be appointed at the end of the meeting. A German proposal to add a new paragraph to this article to the effect that the way in which mortgages and other registerable rights are enforced shall be subject to the lex fori is unanimously adopted.

Article 2

Subparagraph i) : It was generally felt that the meaning of the words « costs arising in connection with the arrest etc. » is too broad. It was decided to restrict this lien to : « Costs awarded by the Court and arising out of the arrest etc. »

Subparagraph ii) : The question is discussed whether this lien should also attach to the costs of wreck-removal by, for example, a private dockowner or whether it should be limited to such costs incurred by public authorities. A Dutch amendment to grant a lien to costs of wreck removal « ordered or done in the public interest » was defeated by 6 votes to 6 (2 abstentions). Finally, art. 7 subparagraph 2 of the Norwegian draft as amended on the basis of paragraph I subparagraph 2) of the Protocol of Signature to the 1926 Convention was adopted by 13 votes to 1. Consequently this subparagraph will, sub-

stance rédigé comme suit : « Les frais de relèvement d'épave ordonné par les Autorités administrant les ports, bassins etc... »

Sous-paragraphe iii) : Un amendement allemand proposant d'ajouter « other waterway » (autres voies navigables) et un amendement norvégien proposant l'ajoute des « droits de pilotage » sont adoptés. Une proposition norvégienne d'ajouter les mots « payable for a service rendered to the vessel » (dus pour un service rendu au navire) est rejetée.

Sous-paragraphe iv) : Il fut signalé que le texte du Projet d'Oxford (autres sommes dues) pourrait être considéré comme comprenant les dépenses du capitaine, qui, suivant l'avis unanime du Sous-Comité, ne doivent pas être garanties par un privilège. D'autre part des réclamations du chef de rupture de contrat d'engagement devraient être incluses. La question est renvoyée au Comité de Rédaction.

Sous-paragraphe v) : La délégation néerlandaise propose de ne pas accorder de privilèges aux créances du chef de mort ou lésions corporelles ni aux créances du chef de pertes ou dommages matériels; cette proposition n'est soutenue par aucune autre délégation. Un amendement britannique tendant à remplacer les mots « Le Propriétaire ou le Transporteur », figurent à la fin de ce paragraphe par les mots « le Propriétaire, le locataire coque nue ou leurs préposés » est rejeté par 4 voix contre 7 et 3 abstentions. La délégation norvégienne propose un amendement basé sur l'art. 7, par. 6 conjuguée avec l'art. 8 du Projet norvégien et libellé comme suit, sauf modifications rédactionnelles :

« Les créances du chef de mort ou lésions corporelles de personnes se trouvant à bord du navire ou de personnes ne se trouvant pas à bord du navire, si elles sont causées par le propriétaire, le locataire coque nue, ou un autre affréteur, gérant ou exploitant du navire ou par une personne dont le propriétaire... etc... sont civilement responsables ». Cet amendement est adopté par 9 voix contre 1 et 4 abstentions.

Sous-paragraphe vi) : Il est décidé d'ajouter les créances du chef de contributions en avarie commune.

Sous-paragraphe vii). Ce paragraphe est discuté par rapport à l'art. 3 par. 1 sous- par. viii) et l'art. 4 par. 2 du Projet d'Oxford.

Plusieurs délégations ont souligné que le droit de rétention, tel qu'il peut être reconnu par la loi nationale, en vertu de l'art. 4. par 2 du Projet d'Oxford serait, en fait, dépourvu de toute efficacité si la nouvelle Convention n'accorde pas un privilège aux créances du chef de réparations et entretien du navire et ce avec un rang élevé p. ex. le même rang que les frais de port et de canal et en tout cas avant les hypothèques. Suivant ces délégations, l'argument qu'un chantier naval est en mesure de vérifier la situation financière de l'armement, n'est valable que s'il s'agit de la construction d'un navire et ne tient pas lorsqu'il s'agit de réparations où il est parfois difficile de connaître même l'idendité de l'armateur. D'autre part, pour des motifs d'ordre

stantially, read as follows: « Costs of removal of the wreck ordered by the authority administering harbours, docks, etc. »

Subparagraph iii): A German amendment to insert « other waterway » dues and a Norwegian amendment to insert pilotage dues are adopted.

A Norwegian proposal to add the words « payable for a service rendered to the vessel » is withdrawn.

Subparagraph iv): It is observed that the text of the Oxford-draft (« other sums due to etc. ») might be construed as to include the Master's disbursements, to which in the Subcommittee's unanimous opinion a lien should not attach.

On the other hand, claims for breach of contract should be included. The matter is referred to the drafting-committee.

Subparagraph v): The Dutch delegation submits that a lien should not attach either to claims for loss of life or personal injury or to claims for loss of or damage to property; this submission finds no support from the other delegations. A British amendment to replace the words « Owner or the Carrier » at the end of this subparagraph (sub b) by the words « Owner, demise charterer or their servants » is defeated by 4 votes to 7 (3 abstentions). The Norwegian delegation proposes an amendment, based on art. 7 sub 6 in conjunction with art. 8 of the Norwegian draft and reading — subject to final drafting — as follows:

« Claims for loss of life of or personal injury to persons on board the vessel or persons not on board the vessel, if caused by the owner, demise charterer or other charterer, manager or operator of the vessel or by a person for whom the owner etc. is responsible ». This amendment is adopted by 9 votes to 1 (4 abstentions).

Subparagraph vi): It is decided to add claims for contribution in general average.

Subparagraph vii): This subparagraph is discussed in connection with art. 3 par. 1, subpar. viii) and art. 4, par. 2, of the Oxford-draft.

Some delegations pointed out that a right of retention, as may be granted by domestic law under art. 4, par 2 of the Oxford-draft would, in fact, be without any value at all unless the new Convention should attach a lien to the claims for repairs and maintenance of the vessel with a high priority, e.g. of the same rank as Port and Canal dues etc. at any rate ranking above mortgages. The argument, these delegations went on, that the shipyard is in a position to inquire into the financial status of the shipowner applies only to the building of ships but not in the case of repairs, where it is sometimes even difficult to establish

pratique ou commercial, il arrive fréquemment que le chantier ne peut demander le paiement d'avances ou une garantie pour le plein montant de sa créance. Pour ces motifs et prenant en outre en considération que la valeur du navire a augmenté ensuite des réparations effectuées, ces délégations ont proposé qu'un privilège soit accordé aux chantiers de réparation primant les hypothèques, mais limité aux réclamations du chef de réparations proprement dites (non de frais d'entretien) et qui ne produira ses effets qu'aussi longtemps que le navire sera resté en possession du chantier.

Cette proposition est vivement combattue par d'autres délégations. Ces délégations font valoir en premier lieu qu'il a été admis que l'un des objectifs majeurs du Projet de Convention est de renforcer la situation des Hypothèques et de réduire en conséquence dans la mesure du possible le nombre de privilèges primant les hypothèques. D'autre part, la notion de Droit de Rétention varie sensiblement dans plusieurs pays et il sera donc pratiquement impossible d'en donner une définition pouvant satisfaire tout le monde. Ces délégations pensent que la situation des chantiers de réparations n'est pas de nature à justifier l'octroi d'un privilège à leurs créances. Le chantier doit savoir si les réparations sont commandées par l'armateur ou par ses assureurs; si elles sont commandées par l'armateur, le chantier sera en mesure de s'informer et d'exiger, si nécessaire, des garanties. Enfin ces délégations ne partagent point l'opinion que les réparations augmentent nécessairement la valeur du navire. Pour toutes ces raisons ces délégations proposent de supprimer le sous-paragraphe vii) de l'art. 2 et le sous-paragraphe viii) de l'art. 3 du Projet d'Oxford.

Trois votes ont été émis :

1. Le principe de l'art. 4 paragraphe 2 du Projet d'Oxford est adopté par 10 voix contre 2 et 2 abstentions.

2. La proposition d'accorder un privilège aux créances du chef de réparations, primant les hypothèques, mais valable seulement tant que le navire est en possession du chantier, est rejetée par 3 voix contre 9 et 2 abstentions.

3. La proposition de supprimer l'art. 2 sous-paragraphe vii) et l'art. 3 sous-paragraphe viii) du Projet d'Oxford est adoptée par 7 voix contre 4 et 3 abstentions.

Sous-paragraphe viii) : Ce paragraphe a été discuté en même temps que le sous-paragraphe ix) à l'art. 3. Il est décidé d'adopter le texte de l'art. 7 sous-paragraphe 7) du Projet Norvégien modifié comme suit, (sujet à vérification rédactionnelle) :

« Les créances d'indemnités du chef de pertes ou dommages matériels à des biens ne se trouvant pas à bord du navire, s'ils sont causés par le propriétaire, le locataire coque nue ou un autre affréteur, gérant ou exploitant du navire ou par une personne dont le propriétaire... etc... sont civilement responsables ».

the identity of the shipowner. Furthermore, for practical or commercial reasons the shipyard often cannot demand either full payment in advance or a guarantee. For these reasons and taking also into account that the ship's value is increased by the repairs, these delegations propose that a lien should be granted to shiprepairers ranking above mortgages but limited to claims for repairs (not for maintenance) and enforceable only during the time that the ship is in the repairer's possession.

This proposal is strongly contested by other delegations. In the first place, these delegations pointed out, it is generally agreed that, as one of the major objects of the draft-Convention is to strenghten the position of the mortgagee, the number of liens ranking above mortgage should be reduced as much as possible. Moreover, the concept of the right of retention varies considerably in a number of countries and therefore would make it practically impossible to find a definition that would be satisfactory to everybody. These delegations did not think that the shiprepairer's position is such as to justify a lien in respect of his claim. He would know wheter the repairs are ordered by Underwriters or by the Owners; in the latter case he will be in a position to make inquiries and require a guarantee if necessary. Finally, these delegations dit not share the view that the ship's value is necessarily increased by the repairs. For these reasons they proposed to delete subparagraph vii) of article 2 and subparagraph viii) of article 3 of the Oxford-draft.

Three votes were taken :

1. The principle or article 4, paragraph 2, of the Oxford-draft was adopted by 10 votes to 2 (2 abstentions).

2. The proposal to attach a lien to claims for repairs, ranking above mortgages but enforceable only as long as the ship is in the repairer's possession is defeated by 3 votes to 9 (2 abstentions).

3. The proposal to delete article 2, subparagraph vii) and article 3, subparagraph viii) of the Oxford-draft is adopted by 7 votes against 4 (3 abstentions).

Subparagraph viii) : This subparagraph was dealt with in conjunction with subparagraph ix) of article 3. It was decided to adopt the text of art. 7, subparagraph 7) of the Norwegian draft modified as follows (subject to final drafting) :

« Claims in tort for loss of or damage to property not on board the vessel, if caused by the owner, demise charterer or other charterer, manager or operator of the vessel or by a person for whom the owner etc. is responsible ».

La délégation allemande pense que quoique le Projet d'Oxford ait supprimé à juste titre les créances mentionnées à l'art. 2, sous-paragraphe 5 de la Convention de 1926, il apparaît raisonnable d'accorder un privilège primant les hypothèques aux créances nées dans des cas spéciaux d'urgence.

L'opinion générale du Sous-Comité est qu'une disposition de cette nature serait sans efficacité pratique et qu'il serait extrêmement difficile, sinon impossible, de donner une définition satisfaisante de l'« urgence ». Cette suggestion fut en conséquence retirée.

Article 3

Paragraphe 1, sous-paragraphe vi) : Une proposition norvégienne de ranger les créances du chef d'assistance et de sauvetage et du chef de contribution d'avarie commune après les frais de Port et de Canal et autres voies navigables et les frais de Pilotage, mais avant les salaires etc., est rejetée par 4 voix contre 9 et 1 abstention.

Paragraphe 1, sous-paragraphe viii) : Ce paragraphe est supprimé (voir art. 2 vii).

Paragraphe 1, sous-paragraphe ix) : Le délégué des Etats-Unis fait ressortir que selon lui une Convention dans laquelle les créances du chef de pertes et dommages matériels viendraient après les hypothèques serait inacceptable dans son pays. Il propose que le Sous-Comité se prononce d'abord sur la question de principe de savoir si certaines créances du chef de pertes et dommages matériels seront privilégiées avant les hypothèques.

Par 9 voix contre 3 et 2 abstentions, le Sous-Comité se prononce en faveur de ce principe et procède ensuite à la discussion pour déterminer quelles créances seront privilégiées avant les hypothèques.

Une proposition norvégienne accordant un privilège avant les hypothèques à toutes les créances mentionnées à l'art. 7 sous-paragraphe 7 du Projet norvégien est rejetée par 5 voix contre 6 et 3 abstentions.

Une proposition allemande reconnaissant le privilège avant les hypothèques aux créances mentionnées au texte amendé de l'art. 7 - 7° du Projet norvégien est adoptée par 12 voix contre 2 et 2 abstentions (voir plus haut art. 2 sous-paragraphe viii).

Paragraphes 2 et 3 : Les règles énoncées sous ces 2 paragraphes du Projet d'Oxford sont adoptées, à condition de subir un remaniement rédactionnel, compte tenu des modifications apportées au paragraphe 1 de cet article. En vue de l'insertion des créances du chef de contribution en avarie commune à l'art. 2, sous-paragraphe vi), le Sous-Comité exprime l'avis unanime que ces créances naîtront à la date du sacrifice.

Paragraphe 4 : Les mots « entre elles » seront ajoutés après les mots « prendront rang ».

The German delegation suggested that, although the Oxford-draft quite rightly abolishes the claims mentioned in art. 2, subparagraph 5, of the 1926 Convention it might be reasonable to attach a lien ranking above mortgages to such claims if accrued in cases of special emergency.

The Subcommittee's general opinion was that a provision to that effect would be of no practical value and that it would be extremely difficult if not impossible to give a satisfactory definition of «emergency». The suggestion was then withdrawn.

Article 3

Paragraph 1, subparagraph vi): A Norwegian proposal to rank the claim for remuneration for salvage and for contribution in general average after the Port, Canal, other waterway and pilotage dues but before wages etc. is defeated by 4 votes to 9 (1 abstention).

A British proposal to rank these claims after wages etc. but before claims for loss of life etc. is defeated by 7 votes to 7.

Paragraph 1, subparagraph viii): This subparagraph is deleted (vide above ad article 2, subparagraph vii).

Paragraph 1, subparagraph ix): The United States delegate emphasizes that in his opinion a Convention in which the claims for loss of or damage to property will rank behind mortages will be unacceptable to his country. He proposes that the subcommittee shall first decide whether in principle, certain claims for loss of or damage to property shall rank before mortgages.

With 9 votes to 3 (2 abstentions) the Subcommittee decides in favour of this principle and then proceeds to discuss which claims of this nature shall rank before mortgages.

A Norwegian proposal that all claims mentioned in the original text of article 7, subparagraph 7, of the Norwegian draft shall rank before mortgages is defeated by 5 votes to 6 (3 abstentions).

A German proposal to the effect that the claims mentioned in the revised text of article 7, subparagraph 7, of the Norwegian draft (see above ad article 2, subparagraph viii) shall rank before mortgages is adopted by 12 votes to 0 (2 abstentions).

Paragraph 2 and 3: The substance of these paragraphs of the Oxford-draft is adopted, subject to redrafting on account of the changes made in paragraph 1 of this article. In view of the insertion of claims for contribution in general average in article 2, sub-paragraph vi), the Subcommittee expresses its unanimous opinion that such claims accrue on the date of the sacrifice.

Paragraph 4: The words « inter se » are inserted after the word « rank ».

Article 4

Paragraphe 1 : La question de l'influence du changement de pavillon sur les privilèges nationaux est évoquée. Il semble que parfois c'est la lex fori, parfois la loi du pavillon, parfois aussi la loi du pays où les réparations ont été effectuées, qui est appliquée. Il est décidé de laisser le texte inchangé mais de subsituer le mot « grant » (garantie) au mot « recognize » (reconnaître).

Paragraphe 2: idem.

Article 5

Paragraphe 1 : Il est décidé de remplacer ce paragraphe par l'art 8 du Projet norvégien, sauf à soigner sa rédaction.

Paragraphe 2: Ce paragraphe sera légèrement modifié au point de vue rédactionnel de façon à rendre clair que le droit de suite ne s'applique pas aux privilèges nationaux.

Article 6

Paragraphe 1 : Le mot « enregistrement » est remplacé par « la radiation de l'enregistrement ». Ce paragraphe est adopté.

Paragraphe 2: Est adopté.

La délégation norvégienne propose d'ajouter 2 paragraphes à cet article (Art. 4 - 3° et 4° du Projet norvégien) prévoyant le cas de radiation de l'enregistrement et de nouvel enregistrement dans un autre pays avec l'accord du créancier hypothécaire. Plusieurs délégations, d'accord avec l'idée maîtresse de cette proposition, expriment cependant des doutes au sujet de la possibilité pratique de réenregistrer dans un pays des hypothèques primitivement inscrites dans un autre pays. Le Président propose en conséquence de voter sur le principe de la proposition norvégienne et de renvoyer la question au Comité de Rédaction, si le principe est admis. Le Sous-Comité adopte le principe par 8 voix contre 3 et 3 abstentions.

Articles 7 et 8

Ces articles sont remplacés par les articles 17, 18 et 19 du Projet norvégien, à charge de revoir la rédaction de ces articles. Dans l'art. 19 du Projet norvégien, la référence à l'art. 18 du même projet est supprimée.

Une proposition allemande d'ajouter qu'une vente forcée ne peut avoir lieu, sauf si tous les droits qui ont rang avant la créance du créancier, qui poursuit la vente, et qui ont été reconnus par l'autorité compétente seront couverts par le produit de la vente ou pris en charge par l'acheteur, n'est pas appuyée et est retirée.

Article 4

Paragraph 1 : The question is discussed of the effect of a change of flag on national liens. It appears that sometimes the lex fori, sometimes the law of the flag and sometimes the law of the State where the repairs were made or the services rendered is applied.

It is decided to keep this paragraph as it is but to substitute the word « grant » for the word « recognize ».

Paragraph 2 : This paragraph is also adopted with substitution of the word « grant » for the word « recognize ».

Article 5

Paragraph 1 : It is decided to replace this paragraph by article 8 of the Norwegian draft, subject to some redrafting.

Paragraph 2 : This paragraph will be slightly redrafting in order to make it clear that the « droit de suite » does not apply to national liens.

Article 6

Paragraph 1 : The word « registration » should read : « deregistration ».

This paragraph is adopted.

Paragraph 2 : This paragraph is adopted.

The Norwegian delegation proposes to add two further paragraphs to this article (article 4, paragraph 3 and 4 of the Norwegian draft), which will be applicable in the case of deregistration and subsequent registration in an other country with the consent of the mortagee. A number of delegations, although in agreement with the underlying idea of the proposal, express their doubts as to the actual possibility of the reregistration in one country of mortgages effected in an other country. The chairman therefore suggests to vote on the principle of the Norwegian proposal and to refer this matter to the drafting-committee if the principle is adopted. The Subcommittee adopts the principle by 8 votes to 3 (3 abstentions).

Articles 7 and 8

These articles are replaced by the articles 17, 18 and 19 of the Norwegian draft, subject to final drafting. In Article 19 of the Norwegian draft the reference to article 18 of said draft is deleted.

A German Proposal to add that a forced sale cannot be effected unless all right ranking above the claim of the executing creditor which are established before the competent authority are covered by the proceeds of the sale or asumed by the purchaser finds no support and is withdrawn.

Une proposition britannique d'insérer une disposition prévoyant qu'en cas de vente forcée un certificat de radiation sera délivré est acceptée, avec une réserve de la délégation suisse concernant l'« ordre public ».

Article 9

Paragraphe 1: adopté.

Paragraphe 2: Il est remarqué que les créances mentionnées à ce paragraphe naissent précisément au moment du départ du navire; il est décidé de supprimer ce paragraphe.

Paragraphe 3: La délégation norvégienne fait valoir que cette disposition entraînerait l'obligation de saisir le navire même pour de modestes créances.

Cette délégation propose de remplacer ce paragraphe par l'art. 15 du Projet norvégien. Cette proposition est rejetée par 7 voix contre 7. Une proposition norvégienne et allemande tendant à l'extinction des privilèges prévus à cet article à l'expiration d'une année est rejetée par 4 voix contre 7 et 3 abstentions. Le délégué suisse fait observer que suivant la législation de certains pays des créances s'éteignent après une période d'un an ou même de 6 mois. C'est pourquoi, sans insister pour soumettre sa proposition au vote, il souhaite exprimer sa préférence pour une disposition prévoyant que les privilèges prévus à ce paragraphe s'éteindront après 2 années ou après une période plus courte correspondant à celle à l'issue de laquelle la créance garantie par privilège se prescrit.

Ce paragraphe est adopté mais pour des motifs de clarté il est décidé de dire expressément que le mot « saisie » comprend aussi bien la saisie conservatoire que la saisie exécutoire.

Paragraphe 4: Ce paragraphe est adopté après une brève discussion concernant la portée du mot « réquisition ». A l'unanimité le Sous-Comité exprime l'opinion que cette expression doit être comprise dans son sens le plus large.

Article 10

Cet article est adopté avec l'ajoute des mots « et en cas de subrogation » après les mots « en cas de cession d'une créance garantie par un privilège maritime ».

Article 11

La délégation norvégienne expose que le but de l'art. 14 de son Projet est de permettre à un armateur d'invoquer sa limitation de responsabilité sans devoir constituer un Fonds de Limitation.

D'autre part il est souligné que cet article a été inséré dans le Projet d'Oxford pour éviter des divergences entre la nouvelle Conven-

A British proposal to insert a provision to the effect that in the event of a forced sale a certificate of deregistration shall be delivered is accepted, with a reservation by the Swiss delegation in respect of the « ordre public ».

Article 9

Paragraph 1 : This paragraph is adopted.

Paragraph 2 : It is observed that the claims mentioned in this paragraph arise practically at the moment of departure. It is decided to delete this paragraph.

Paragraph 3 : The Norwegian delegation argues that this provision would make it necessary to arrest the ship even for small claims.

This delegation proposes to replace this paragraph by article 15 of the Norwegian draft. This proposal is defeated by 7 votes to 7. A Norwegian and German proposal to the effect that the liens referred to in this paragraph shall expire after one year is defeated by 4 votes to 7 (3 abstentions). The Swiss delegate observes that under the law of some countries claims are extinguished after a period of one year or even six months.

Therefore, without insisting on a vote, he wishes to record his preference for a provision that the liens referred to in this paragraph shall be extinguished after two years or after such shorter period as the claim to which the lien attaches shall become time-barred.

This paragraph is adopted, but for the sake of clarity it is decided to state explicity that the word « arrest » comprises a conservatory as well as an executory arrest (« saisie conservatoire ou exécutoire »).

Paragraph 4 : This paragraph is adopted after a short discussion about the meaning of the word « requisition ». The Subcommittee is unanimous of the opinion that this word should be taken in its broadest sense.

Article 10

This article is adopted with the insertion of the words « and subrogation in » after the words « assignment of ».

Article 11

The Norwegian delegation explains that the purpose of article 14 of their draft is to enable the shipowner to invoke the limitation of his liability without setting up a limitation fund.

On the other hand it is pointed out that this article has been inserted in the Oxford-draft so as to avoid discrepancies between the

tion et la Convention de 1957 relative à la limitation de responsabilité des armateurs.

Après une longue discussion la délégation norvégienne retire l'art. 14 de son projet et propose de supprimer l'article 11 du Projet d'Oxford. Cette proposition est adoptée par 7 vois contre 5 et 2 abstentions.

Article 12

Une proposition de la délégation allemande de supprimer les mots « Etat Contractant » est adoptée à l'unanimité.

Une proposition de la délégation suédoise de supprimer les mots « ou sont destinés à être construits » est adoptée à l'unanimité.

Il est en outre décidé que les dispositions du Projet de Convention relatives aux privilèges maritimes ne s'appliqueront que lorsque le navire en construction sera flottant.

Article 13

Cet article est adopté avec la suppression des mots : « sous réserves de la disposition de l'art. 12 ».

Article 14

Cet article est adopté.

Article Final

Il est décidé d'ajouter un article prévoyant que la nouvelle Convention ne s'appliquera pas aux privilèges garantissant des créances du chef de dommages causés par un sinistre nucléaire.

A l'occasion d'une question posée par les délégations norvégienne et allemande, le Sous-Comité exprime son opinion unanime que les privilèges maritimes grèveront uniquement le navire lui-même et non par exemple les indemnités d'assurance, la créance de l'armateur du chef de dommages subis par son navire, les contributions en avarie commune, le fret etc.

Finalement un Comité de Rédaction est constitué, composé de Messieurs Asser, Fr. Berlingieri, Birch Reynardson, Rein et Vaes. Ce Comité préparera un Projet de Convention en textes anglais et français en se basant sur les décisions prises par le Sous-Comité. Se projet de Convention sera envoyé le plus rapidement possible à tous les membres du Sous-Comité.

new Convention and the 1957 Convention relating to the limitation of the liability of shipowners.

After a long discussion the Norwegian delegation withdraws article 14 of their draft and proposes to delete article 11 of the Oxford-draft. This proposal is adopted by 7 votes to 5 (2 abstentions).

Article 12

A proposal of the German delegation to delete the words « Contracting State(s) » is unanimously adopted.

A proposal of the Swedish delegation to delete the words « are (is) to be or » is unanimously adopted.

It is further decided that the provisions of the draft Convention with respect to maritime liens shall only apply when the ship under construction is waterborne.

Article 13

This article is adopted with the deletion of the words « Subject to the provisions of article 12 ».

Article 14

This article is adopted.

Final Article

It is decided to add an article to the effect that the new Convention shall not apply to liens securing claims for damage caused by nuclear events.

With respect to a question put by the Norwegian and German delegation the Subcommittee expressed its unanimous opinion that maritime liens should attach to the ship only and not, for example, to insurance sums, owner's claims for damages to the ship, contributions in general average, freight etc.

Finally, a drafting-committe was appointed composed of Messrs. Asser, Fr. Berlingieri, Birch Reynardson, Rein and Vaes. This committee will prepare a draft-Convention in English and French based on the decisions made by the Subcommittee. The draft-Convention will be sent as soon as possible to the members of the Subcommittee.

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

ERRATUM

11

CORRIGENDUM

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

certificat sont acceptés pour inscription dans cet Etat, en conservant leur rang comme indiqué dans ce certificat.

Article 3

Les hypothèques ou mortgages occuperont entre eux le rang qui leur est reconnu par la loi du pays où ils sont inscrits.

Article 4

1. Les créances suivantes seront garanties par un Privilège Maritime sur le navire :

(i) Les frais de relèvement de l'épave du navire légalement ordonné par les Autorités Compétentes.

(ii) Les frais de port, de canal et autres frais similaires.

(iii) Les salaires et autres sommes dues en vertu de leur contrat d'engagement, aux membres de l'équipage du navire.

(iv) Les créances du chef de mort ou lésions corporelles.

a) se rapportant à des personnes se trouvant à bord du navire.

b) se rapportant à des personnes ne se trouvant pas à bord du navire, si les dommages ont été causés par le propriétaire du navire ou par une personne au service du navire et dont le Propriétaire est responsable.

(v) Les créances du chef d'assistance et de sauvetage et du chef de contribution en avarie commune.

(vi) Les créances de nature quasi délictuelle du chef de pertes ou dommages matériels relatifs à des biens ne se trouvant pas à bord du navire si les dommages ont été causés par le propriétaire du navire ou par une personne au service du navire et dont le Propriétaire est responsable. Le mot « propriétaire » utilisé à cet article sera censé comprendre le locataire coque nue, l'affréteur, l'armateur gérant ou l'exploitant du navire.

2. Aucun privilège maritime ne grèvera le navire pour sûreté de réclamations relatives à des pertes de vie humaines ou lésions corporelles ou pour pertes et dommages matériels provenant ou résultant de propriétés radioactives ou d'une combinaison de propriétés radioactives avec des propriétés toxiques, explosives ou autres propriétés dangereuses de combustible nucléaire ou de produits ou déchets radioactifs.

Article 5

1. Les privilèges énumérés à l'article 4 auront la priorité sur les hypothèques ou mortgages.

2. Les privilèges énumérés à l'article 4 prendront rang dans l'ordre suivi à cet l'article.

cate mentioned in paragraph 2 are accepted for registration by such State, retaining their priority as set out in the certificate.

Article 3

Mortgages and hypothecs shall rank as between themselves in accordance with the law of the State where they are registered.

Article 4

1. The following claims shall be secured by maritime liens on the vessel :

(i) Costs of removal of the wreck of the vessel lawfully ordered by competent authorities.

(ii) Port, canal and other waterway dues and pilotage dues.

(iii) Wages and other sums due to members of the vessels's complement in respect of their employment.

(iv) Claims for loss of life or personal injury :

a) in respect of persons on board the vessel;

b) in respect of persons not on board the vessel if caused by the owner of by a person in the service of the vessel for whom the owner is responsible.

(v) Claims for salvage and for contribution in general average.

(vi) Claims in tort for loss of or damage to property not on board the vessel, if caused by the owner or by a person in the service of the vessel for whom the owner is responsible.

The word « owner » mentioned in this article shall be deemed to include the demise or other charterer, manager or operator of the vessel.

2. No maritime lien shall attach to the vessel securing claims for loss of life or personal injury or for loss of or damage to property which arise out of or result from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Article 5

1. The maritime liens set out in article 4 shall take priority over mortgages and hypothecs.

2. The maritime liens set out in article 4 shall rank in the order listed.

3. The maritime liens set out in each of the subparagraphs (i), (ii), (iii), (iv) and vi) of article 4 shall rank pari passu as between themselves.

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

12

(5 - 65)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

Projet de Porto Fino
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Comments on Porto Fino
Draft

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

DANISH ASSOCIATION OF INTERNATIONAL MARITIME LAW

COMMENTS

Prepared by Mr. Bjarne Fogh

I. The Danish branch has studied the draft convention worked out by the draft committee during its conference in Portofino in September, 1964.

The Danish branch is — as already stated in its reply to the questionnaire previously sent out — of the opinion that there is no urgent need for a new convention as the present legislation has by and large worked satisfactorily.

We find, however, that an alteration with a view of obtaining the widest possible international acknowledgement of registered mortgages and a strengthening of the position of such mortgages would be desirable, provided such alteration could be expected to be accepted by the majority of the seafaring nations.

The Portofino draft might be used as a basis for such further discussions, but we cannot agree to several of the principles laid down in the Portofino draft, and in addition thereto we also have objections to the drafting in several articles, altough this may be a question of redrafting only. Without going into details at present we would give the following comments :

Article 1

II. We find the principles laid down in this article acceptable. In our reply to the questionnaire we have — like most of the other associations — mentioned that the position of the mortgages registered in a non-contracting state should be judged upon the merits. We find that the requirements of article 1, item a)-c) appropriately set out the minimum requirements for recognizing the mortgage registered in a non-contracting state.

We feel that the draft as now worded will not be fully compatible with the legal and administrative system in various countries, for instance will several countries presumably not have an official called the

registrar. Certain questions might also arise as to mortgages issued to bearer, mortgages which have not been issued for a specific amount and in respect of transfer of mortgages.

Article 2

We are of course fully in agreement with the principle laid down herein. We would, however, recommend an alteration to make the article follow the Danish law on this point. According to the Danish law of Ships' registration a vessel cannot be deleted from the Ships' registration until the registration office has notified the holders of registered rights and 30 days have elapsed after the despatch of the notification, provided the holders of such rights do not agree to a deletion before the expiry of the 30 days. For a vessel being acquired from abroad it is a requirement for registration that a certificate of deletion from the foreign register is produced, including an enumeration of the registered rights which — when the vessel has been acquired from a contracting state — will be transfered to the Danish register retaining their priority.

In the beginning the reference should be made to article 11 without mentioning specifically paragraph 3.

Article 3

We would recommend that the convention should include a rule as to the priority between mortgages and suggest that the priority should be decided on the basis of the date when the mortgage was filed for registration. If the mortgages should be filed the same date, their position should be equal.

Article 4

The Danish branch is of the opinion that the present enumeration of claims secured by maritime liens is by and large adequate. We note that the Portofino draft on several points suggests an extension and has on the other hand on other points restricted the present rules.

ad (i) No comments.

ad (ii) We have no comments except that the French text does not include pilotage dues.

ad (iii) No comments.

ad (iv) Whereas claims for loss of life and personal injury at present are only secured by maritime lien if they are in respect of persons on board the vessel, the draft proposes to extend this rule also to persons not on board. This might in certain cases turn to be a considerable extension, and we do not think that such extension is reasonably motivated.

ad (v) The French text does include « assistance ». This has been left out in the English text.

ad (vi) No comments.

The Portofino draft is using a very wide interpretation of the concept « owner », and we would prefer either the present wording or alternatively the wording used in the Oxford draft.

The Portofino draft suggests the deletion of several important groups of claims which so far have been secured by maritime lien i.e.

a) Damage to property onboard the vessel

As article 4 (vi) is worded, no maritime lien will arise in respect of damage to cargo or other property onboard the vessel. We very much doubt if this has been the intention as the chances for having the convention generally accepted if the Portofino draft is maintained on this point, would appear rather remote.

b) Masters' authority

We quite agree that as a general rule there is no real basis for maintaining maritime liens for claims based on contractual obligations undertaken by a master, but we will, however, stress that for smaller owners, fishing vessels etc., the rule may have quite some practical importance. We would, therefore, suggest that the present position in this respect should be maintained for vessels up to a certain tonnage.

Article 5

Subject to our comments in respect of article 4 we can in principle agree to the proposed system which in an important simplification of the present rules.

Article 6

We would have preferred that the contracting states should not be allowed to grant such liens, but may accept the proposed wording provided it is generally accepted.

As far as the right of retention is concerned we cannot accept the deletion of such right which the proposal in fact amounts to.

In our view a right of retention with priority before the contractual mortgages and probably also before the maritime liens should be recognized in respect of claims which have resulted in improvement of the vessel, especially claims for repairs. If the right of retention is thus restricted the granting of such right of retention would not prejudice or adversely affect the position of the contractual mortgagees or even the holders of maritime liens.

Article 7

See our comments ad article 4 (vi).

Article 8

We would prefer a time limitation of 1 year which at present with the easy means of communication should be sufficient, and for certain claims an even shorter time of limitation might be justified. To avoid arrests without any real purpose we would, therefore, suggest that any legal proceedings should be sufficient.

Article 9

No comments.

Article 10

No comments.

Article 11

We do not think an arrest necessary, but the presence of the vessel within the jurisduction should be sufficient.

Article 12

No comments.

Copenhague, 16th March, 1965

N. V. BOEG, Chairman of the Association

NETHERLANDS ASSOCIATION OF MARITIME LAW
NEDERLANDSE VERENIGING VOOR ZEERECHT

COMMENTS

Remarks on the Draft Convention relating to Maritime Liens and Mortgages (Revised text dated Portofino, 26th September, 1964).

The Netherlands Association wishes to extend its thanks to the International Subcommittee and the Drafting Committee for the time and efforts spent on preparing the Draft Convention under examination. In the opinion of the Association the Drafted convention contains many improvements over the Convention of Brussels.

Nevertheless the draft has given rise to some observations and suggestions, which will follow hereunder.

Article 1

The Association is of opinion that the convention should contain a definition of « Mortgages and hypothecs ». It is recommended to follow the definition of these rights, given in art. I, 1 sub. d of the Geneva Convention on the International Recognition of Rights in Aircraft dated 19th Janu. 1948, viz : « Mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness », which has the further advantage of using the same language in both Conventions dealing with such rights. The Association is in favour of substituting the word hypothèque for the word hypothec. As the Convention intends to better protect the financing of ships by mortgages, it should be limited to contractual mortgages, and the hypothèques légales which is some countries exist, should not be considered as mortgages under the Convention.

If the above suggestion is adopted the first sentence of art. 1 should read « Mortgages, hypothèques and similar rights on seagoing vessels, which are contractually created as security for payment of an indebtedness, shall be enforceable in Contracting States, provided that » etc.

The Association recommends that art. 1 sub b be substituted by the words « The register and any instrument referred to therein and

filed with the registrar are open to public inspection; and any person shall be entitled to receive from the registrar duly certified copies or extracts of the particulars recorded at a reasonable charge. The new provisions were taken from the Geneva Convention referred to above. Il would appear to be useful to provide that certificates must be available, and at a reasonable charge.

It is recommended to insert in art. 1, c after the word « date » the words « and other particulars », as other particulars than the date may be decisive for the rank of the mortgage. In some countries it is possible to agree that an older mortgage shall take a rank after a mortgage of more recent date.

The Association is however in favour of adding to art. 1 a second paragraph, adopting a provision similar to that of art. III paragraph 3 of the Geneva Convention :

« If the law of a Contracting State provides that the filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purpose of this convention. In that case adequate provision shall be made to ensure that such document is open to the public ».

Article 4

In this article, like in art. 1, the Association should like to have a definition. It proposes to alter the first sentence as follows « The following claims shall be secured by maritime liens, i.e. shall be preferred on the proceeds of a vessel in a forced sale ».

One of the reasons why is was felt that the Brussels Convention should be materially changed or alltogether replaced by a new Convention was the number and the nature of the maritime liens ranking before mortgage. In the draft under examination some liens, which in the Convention of 1926 ranked before mortgage, have been abolished, but on the other hand new liens have been created, without sufficient grounds. In this way one of the main purposes of the new Convention, viz. the better protection of the interests of the mortgages would not be obtained.

The Association has serious objection to the introduction of liens for claims against parties other than the owner or demise charterer.

Only in the rarest exception should liens be granted on properties not belonging to the debtor. Such liens give rise to all sorts of procedural and legal difficulties and should be treated with the utmost caution. In any case liens granted to claims on charterers and operators seriously affect the position of the mortgage, especially where such claims follow the ship irrespective of change in ownership.

For the reasons set out above, the number and categories of claims secured by maritime liens should be restricted to a minimum. In the

opinion of the Association there is no compelling necessity, which justifies the maritime liens enumerated in this article under I, IV and VI.

Prima facie the maritime liens for claims for loss of life (IV) and for claims in tort for loss of or damage to property (VI) would seem a justifiable protection for those who were wronged by an insolvent shipowner. However, in view of the present wide spread Government insurance (social security) for employed persons, and private insurance in the other fields, the Association is not satisfied that a protection in the form of maritime liens is indispensable.

Claims referred to under IV and VI, if accumulated, may accrue to very substantial amounts, which would materially affect the position of the mortgages.

The Association is in favour of deleting these maritime liens.

In the opinion of the Association a limited maritime lien should be given to the shiprepairer, whose right of retention is abolished in article 5. Such lien should only be given in respect of a claim for repairs in the strictest sence, excluding maintenance, alterations, newbuildings, etc., and only to the shipyard which has possession of the vessel at the time it is arrested. As the repairs have increased the value of the vessel, the shipyards is entitled to the same protection as the salvor. Such a right is moreover indispensable to the shipyards which often at a very short notice are called upon to effect repairs. It is also in the interest of the shipowners that repairs can commence before other security is provided.

Article 6

Paragraph 2 of this article should be extended with the words « nor the delivery of the vessel to the purchaser in a forced sale », in order to remove all doubt that the right of retention cannot be relied upon against such purchaser.

Article 7

The objection to paragraph 1 has been dealt with under article 4.

Article 8

Paragraph 1 provides that the liens shall be extinguished in two years unless, within that time, the vessel is arrested, the owner is declared bankrupt or goes in voluntary liquidation. It is clear that the lien in the last two cases is not extinguished by the expiry of the two years, but it is not clear how the position is, if the arrest is lifted, or the bankruptcy or liquidation reversed or revoked, or the vessel sold by the liquidator in a private sale.

The Association suggests to delete the words « such arrest leading to a forced sale » in art. 8.1. (a) and to add after the word liquidation « provided that such arrest bankruptcy or compulsory liquidation lead to a forced sale ».

Article 10

The Association is in favour of replacing this article by a paragraph, inspired by art. VII, 2 sub b of the Geneva Convention, in the following words :

« The executing creditor shall supply to the Court or other competent authority a certified extract of the recordings concerning the vessel. He shall give public notice of the sale at the place where the vessel is registered as to nationality, in accordance with the law there applicable, at least one month before the day fixed, and shall concurrently notify by registered letter, if possible by airmail, the registered owner and the holders of registered rights in the vessel, according to their addresses as shown on the register ».

It seems preferable to leave it to the creditor to give notice of the sale, as serious delay might arise if this task is imposed on officers of State.

Article 11

The Association suggests to replace the words « in the event » in paragraph 1 by the word « through », and the words « is the object » in paragraph 3 by the words « has been the object ».

COMITE MARITIME INTERNATIONAL FINLAND BRANCH

COMMENTS

General

In the explanations on the Draft it is stated that the Continental hypothèque differs from what is known in English law as mortgage. The difference seems to be that a hypothèque through a registration act gives to a creditor, in case the registered debt is not paid, a right to satisfy his claim through the sale of the ship, whereas a mortgage means the mortgager who is indebted to the mortgagee in principle hands over the ownership of the vessel to the mortgagee who again in return hands back the ship to the mortgager to use the ship in order to enable him to pay the debt. While there is thus a difference in principle between a Continental hypothèque and the English mortgage, in practice the latter is a right of the same contents as the former. For this reason it seems superfluous to refer in the Convention both to hypothèque and mortgage. It would seem sufficient that in the English text the word « mortgage » is used and in the French text the word « hypothèque ».

On the other hand, as the purpose of this Convention is to regulate the conditions, on which a mortgage holder shall have his rights safeguarded, then it would seem natural that these rights should be defined. The definition proposed in the Norwegian Draft would seem to cover the point.

Article 1

c) In Finland a document specifying the bearer as having a claim for a certain amount of money against the shipowner can be registered as mortgaging the vessel, The name and address of the person, in whose favour the mortgage has been effected, does not necessarily appear in the register, but it is usual that the bearer or a new bearer respectively of such a document informs the registry of his name and address, so that in case where necessary, e.g. a forced sale, the register authorities can inform the bearer.

Article 2

1) It is easy to foresee cases where a holder of a mortgage, for reasons of his own, would oppose the deregistration of a vessel. He

might have specific reasons for not wanting to see the vessel transferred to another flag or to another owner. In our Law, when a vessel is sold abroad without the consent of a mortgage holder, the mortgager becomes personally liable for the debt in question and the mortgagee is entitled immediately to enforce his claim irrespective of whether the debt is otherwise due for payment or not. Thus the mortgage holder cannot prevent the deregistration, but he will be satisfied by the debt being paid.

2) and 3) seem to mean that if formalities cannot be concluded within 30 days, then the registration will not take place. The time seems short. According to our present Law, if a vessel is transferred from a foreign registry to Finnish registry and if certain mortgages have been properly registered in the ship in her foreign registry, then those mortgages will remain in force for a whole year. If the mortgage holders want their rights to be further protected, then, before the expiration of the said year, they shall have to have their rights duly registered according to Finnish Law.

Article 3

No comments.

Article 4

No comments.

Article 5

According to Article 8 maritime liens shall be extinguished after a period of two years. Therefore for instance claims for loss of life arisen 1965 would rank pari passu as between similar claims arising in 1967. As claims for loss of life might amount to very substantial amounts, it could be possible that such claims, combined over 2 years, would make a salvor's claim for salvage, which has taken place at the end of the 2 year period, quite illusory.

This difficulty does not arise under the 1926 Convention, because there is a limit set by reference to the voyage.

Article 6

No comments.

Article 7

No comments.

Article 8

In order to avoid arrests without any real purpose we would suggest that a writ of summons to the Court in such a case should stop the prescription from running. See also our comments at Article 5.

Article 9

No comments.

Article 10

The 30 days notice seems short and there seems to be no reason why this should not be extended to say 60 days.

Article 11

No comments.

Article 12

When drafting this Article regard has to be had to the stipulations in the Stockholm Draft Convention on ships under construction and particulary to its Article 5, which enables the holder of certain rights in ships, other than monetary claims, to have such rights registered.

According to Finnish Law the owner of ship under construction in Finland for Finnish account can have the ship registered in order to also have a mortgage registered in same. This is possible as soon as the building has proceeded so far that the ship can be identified.

Helsinki/Helsingfors, March 22nd, 1965
Comité Maritime International
Finland Branch

Rudolf Beckman, President *B. Appelqvist, Secretary*

SWEDISH ASSOCIATION OF INTERNATIONAL MARITIME LAW

COMMENTS

Introduction

The Swedish Association appointed a committee to study this draft. The committee consisted of the following members : Messrs. B. Bylund, R. Heden, L. Hagberg, C. Palme and K. Pineus. This committee having given its advice to the Association, the Association begs to report as follows :

General Observations

Sweden has ratified the 1926 Convention on Liens and Mortgages and introduced the provisions of the Convention in the Swedish Maritime Code in a form appropriate to that Code. However, Sweden has now denounced the Convention. While we believe that this was done primarily to avoid possible difficulties in coordinating the 1926 Convention with the 1957 Convention on Limitation of Liability, we venture to assume that the fact that the 1926 Convention has met with little international approval may have contributed to this step. We understand that also Denmark, Finland and Norway have denounced the 1926 Convention. In our mind, these actions underline the need to prepare the new Draft Convention in such a way that it can obtain a wide international approval.

Subject to the observations mentioned below, we think the Portofino Draft well suited to form the basis of a new Draft Convention on the subject of Liens and Mortgages.

However, when dealing with Liens, Mortgages and Hypothecs where the basic concepts as to the contents and meaning might well be different in various countries we believe it worth while to try to agree on definitions on some of the terms used in the Draft. The efforts made in the Norwegian Draft (Report N° 11, pages 32/33) might prove helpful. Such definitions might appear as an introduction to the Draft and constitute Article 1.

THE VARIOUS ARTICLES

The various Articles of the Portofino Draft elicit the following comments.

Article 1

We understand the word « enforceable » in the first alinea to mean that the Contracting State shall recognise Mortgages and Hypothecs subject to their fulfiling the requirements under (a) - (c). If the word is intended to convey any special meaning, we should like to have this made clear.

If our suggestion about definitions is adopted, this term had better be one of those to be dealt with.

(c) Under our law, the name and address of the person in whose favour the Mortgage or Hypothec has been effected does not necessarily appear in the register, but the bearer of the document may inform the registry of his name and address, should he so desire. If that is done the authorities will inform him of a forced sale of the vessel, etc.

As this system has been in operation for some sixty years with us, we are somewhat surprised to learn that it is felt essential to say that the register must specify the name and address « of the person in whose favour the Mortgage or Hypothec has been effected ». Would it not be sufficient to say that should the parties so desire, the register should set it out.

Article 2

We believe the time limit of 30 days appearing in paragraph (2) will prove too short and would suggest that a time limit of 60 days be adopted.

As for paragraph (3) we read this to mean that Mortgages and Hypothecs, when transferred from one country to another, shall retain their rank and their values but that the formalities to be followed and the right acquired under the new flag should conform wih that national law and in fact become a right under that national law. Whether any clarification of the text is necessary to put this beyond doubt is, we take it, a matter of drafting.

Article 3

No comments.

Article 4

We are well aware that arguments can be put forward in favour of the idea of retaining the Liens for damages to ship's own cargo or luggage appearing in Article 2 (4) of the 1926 Convention. Still, as the general trend of the new Draft is to strengthen the position of the long term creditors and to do away with those Liens which are not absolutely essential and as moreover cargo transported on board the ship is regularly covered by insurance, we are prepared to support the Portofino

Draft which does not grant a Lien for claims for damage to ship's own cargo or luggage.

As for rank, we hold that claims for salvage and contribution in general average should move up and come immediately after the Lien for claims for Port dues etc. (ii) and become (iii). Unless salvage operations are undertaken, no values would be left from which to pay the other types of claims which are granted Liens on the ship.

We submit, in order to avoid difficulties of interpretation as to the scope of the provisions in respect of Port dues etc. that this paragraph should read :

« Port, canal and other waterway and pilotage dues payable for services rendered to the vessel ».

In (vi) the Draft uses the expression « claims in tort » and the French version « créance de nature quasi delictuelle ». Both expressions are somewhat difficult to assimilate in our law. We submit that this type of claim had better be described as « claims not based on contract » or some similar neutral expression which does not have a too close connection with a particular system of law.

As for the last alinea of Article 4, we note that it is specially said that demise charterers etc. are put on par with owners and that the same provision appears in Article 7 (1) but not in Article 8 (1). We take it that this is one of the consequences of not having any initial Article containing definitions in the Draft Convention. Do the Draftsmen mean to convey that the ruling on parity between owners and demise charterers etc. applies only to Article 4 and 7 but not to Article 8 ?

Article 5

No comments.

Article 6

We should much prefer that the Contracting State were prevented from granting additional Liens even if they rank after the Liens, Mortgages and Hypothecs of the Convention (« national liens », for short).

Under a conflict of law rule, a « national lien » duly created might well be recognised in a Contracting State although that State does not admit a Lien under its own national law for such claims. This situation, which is not only a theoretical one, will always cause trouble and lead to unhappy consequences. Even if the national liens rank after the right of the Convention, the enforcement of a national lien by arrest or otherwise might well cause harm or at least inconvenience for those creditors who have a Lien, a Mortgage or a Hypothec under the Convention.

If it proves impossible to do away entirely with national liens, we should at any rate like them to be as few as possible. They should be restricted to ships flying the flag of the Contracting State that has granted the national lien in question.

Article 7

We refer to our question under Article 4 last alinea compared with Article 7 (1) and 8 (1).

Article 8

Unfortunately, this Article is not acceptable to us in its present shape and, unless amended, will probably make it impossible for us to recommend that the Convention be accepted by our country.

The Article lays down i.a. that the Liens shall be extinguished after two years unless the ship is arrested and this arrest leads to a forced sale, or the owner is declared bankrupt or goes into compulsory liquidation.

Whether a claim is of such a nature as to give rise to a Lien on the ship is often a controversial question which might well have to be settled by an action in Court. To us, it seems obvious that a writ of summons to the Court in such a dispute should stop the prescription from running. An arrest of the ship, with its corrollary to put up security for unlawful arrest, followed by the subsequent sale of the ship is a very serious affair indeed. The idea that a creditor in order to stop the prescription from running out should have to resort to such a drastic step seems to us out of all proportion to what should be the proper requirements for interruption of the prescription.

We are aware that the two years period and the arrest constituted an effort to make a « package deal », that is to say reduce the number of measures available to interrupt prescription against the normal time being extended from one to two years.

Unfortunately, we cannot accept the one or the other. We think that one year should be retained as the general rule.

To us, the Article dealing with this problem which appears in the Norwegian Draft has much appeal (Report N° 11, page 35, Article 15). Still, we should prefer to try to be even more explicit in the Convention than in the said Draft.

We submit a text reading somewhat as follows :

« All maritime Liens listed in Article 4 shall be extinguished after a period of one year from the time when the corresponding claim arose.

The prescription period shall be interrupted only if (i) a writ of summons to the Court in respect of the claims is issued, or (ii) the claim is duly submitted to arbitration, or (iii) the owner or other person liable for the claim is declared bankrupt or (iv) goes into compulsory liquidation.

If the claim has been adjudicated, the Lien shall be extinguished if legal action to enforce it has not been taken within one year of the date of the final judgment or arbitration award ».

If it should prove impossible to obtain general agreement on the second paragraph as set out above, subject naturally to such redrafting of the text as may prove necessary, one might have to resort to national law in the way appearing in the Norwegian Draft which says in this respect the following :

« The national law of each Contracting State shall determine the legal actions required for the interruption of the prescription period ».

Article 9 and 10

No comments.

Article 11

We understand from Report N° 11, page 17, that the « encumbrances » mentioned in this Article refer to and include the so-called « national liens ». We have of course nothing against the idea that the forced sale of the vessel should clear it also from the said type of liens. Whether this can be achieved by the insertion of a provision to that effect in an international Convention dealing with maritime Liens, Mortgages and Hypothecs we are not prepared to say.

Except for this question mark, we have no comments to offer in respect of Article 11.

Article 12

This Article makes the Draft Convention applicable to ships under construction. If the Draft Convention, including this Article, is accepted by the C.M.I., we suppose that the 1963 Draft Convention on Ships under Construction will not lead to any further action. For the time being, we are prepared to accept this result but reserve our Liberty of action, should the Draft Convention on Liens, Mortgages and Hypothecs not be accepted.

Article 13 and 14

No comments.

We suppose that in what is termed « clause de style » or in the permissible reservations will appear a provision that makes it possible to include the content of the Convention in national legislation « in a form appropriate to that legislation ».

Stockholm, March 26th, 1965
Swedish Association of
International Maritime Law

Kaj. Pineus, President *Claës Palme, Hon. Secretary*

NORVEGIAN MARITIME LAW ASSOCIATION

COMMENTS

The Norwegian Maritime Law Association, on receipt of the Third Report by Mr. Asser, appointed a working group to study and provisionally report on the Portofino Draft. This working group consisted of Dr. Sjur Braekhus, Mr. H. P. Michelet, Mr. Alex. Rein and Mr. Frode Ringdal. Their report has been submitted to the Board of de Association and the Association now begs to report as follows.

We find that the Portofino Draft is well suited to form the basis of the discussions in New York provided that a proposal for the co-ordination of article 12 and the 1963 Draft Convention on ships under construction will be worked out.

Our comments to the articles of the Portofino Draft are as follows :

Article 1

It is understood that both the English and the French texts of the Convention shall be authentic. The French text puts the word mortgages within quotation marks, thereby indicating that it refers to the English conception of a mortgage, which is a *contractual* security in a vessel for a certain indebtedness. The English text, however, refers to mortgages and hypothecs, and a hypothec in the English sense is something different from a continental « hypothèque ». We suggest that the English text should read :

« Mortgages and « hypothèques »... ».

Our reason for proposing this formal amendement is a material one. A French « hypothèque » includes a security levied by decree of a public authority, but it is doubtful whether the English word hypothec as the same meaning. As we see it, it is essential that « hypothèques » levied by public decree are eligible for registration on line with mortgages.

Re b) : We propose that the words « and filed with the registrar » be deleted. In our opinion it is a minimum requirement that any instrument referred to in the register shall be available for inspection.

Re c) : A mandatory requirement that the name and address of the original mortgagee shall be specified in the register gives rise to difficulties in countries where the normal practice is to issue mortgages to the bearer. In our opinion this requirement is not necessary and could be deleted without any harm.

Firstly, one can never rely upon the registered mortgagee to be the actual mortgagee as one cannot, for practical reasons, require that all transfers shal be registered.

Secondly, it is common practice in countries where mortgages are issued to named mortgagees that the original registered holder is not the mortgagee himself, but an agent who will transfer the instrument to the real mortgagee as soon as all formalities have been complied with.

Thus, as we can never expect the register to indentify the actual holder of the right, we may just as well recognize mortgages issued to to the bearer.

Article 2

Sub-paragraph 1.

We are afraid that the wording here is too rigid. It will be neccessary to give the Contracting States the right to rid the registers of obsolete registrations, particularly with regard to vessels which have physically ceased to exist, whether or not the registered mortgagees are willing to consent to deregistration.

We propose the following addition to the present text : « ... except in cases where the vessel has physically ceased to exist ».

Sub-paragraph 2.

If all holders of registered mortgages have agreed to the immediate deregistration of a vessel, there is no apparent need to resort to the complicated procedure set out in this sub-paragraph. We therefore suggest the following amendement : (underlining the additional words) :

« A vessel registered in a Contracting State on which a mortgage or hypothec is registered shall not be eligible for registration in another Contracting State unless a certificate has been issued by the former State that the vessel *has been deregistered,* or will be deregistered... ».

Article 3

We take it that this article shall apply also in cases where a mortgage has originally been registered in country A and then transfered, in accordance with article 2, to country B. After the registration in country B the laws of this country shall govern the ranking. We may illustrate the point by one example :

A first and a second priority mortgage has been registered on a vessel in a country where, under the national law, the second mortgage

will automatically move up and succeed to the rank of the first priority mortgage when the latter has been redeemed. Both mortgages are then transferred to country B which has no such rule, and the certificate on the strength of which the transfer has been effected does not mention the right accorded to the second priority mortgage in country A. Then the first priority mortgage is redeemed. In such a case we take it that the second priority mortgage in accordance with the laws of country B will retain its original priority.

Article 4

Sub-paragraph 1 (i)

We strongly recommend that claims for salvage and for contribution in general average shall rank together with costs of removal of a wreck. It seems to us indispensable that costs incurred for the purpose of saving a vessel must be covered prior to the fruits of the salvage being distributed to others. If the award for salvage is not accorded first priority and the prospective salvors suspect the vessel to be burdened by maritime liens on better priority, the salvors may be reluctant to invest money in the enterprise. This is not in the interest of any maritime lien holders.

Apart from this, practical difficulties will be encountered as the removal of a wreck ordered by a competent authority may also be salvage in the proper sense. Where salvage of a wreck is contemplated on a « no cure — no pay » basis as a business proposition the salvor, we take it, will obtain a maritime lien for his claim for salvage award if he can persuade the competent authority to issue an order for the removal of the wreck. Whether or not it is necessary to have a wreck removed is a question of discretion. By exercising that discretion the authorities will, in fact, decide the ranking of maritime liens.

Sub-paragraph 1 (iv).

According to b) there shall be a maritime lien for a claim for loss of life or personal injury « caused by the owner ». This wording is too wide as it includes losses caused by the owner without any connection with the operation of the ship. We suggest the following wording : (underlining the additional words) :

> « b) in respect of persons not on board the vessel if caused by the owner *in direct connection with the operation of the vessel* or by person in the service of the vessel... ».

Sub-paragraph 1 (vi).

In our proposed amendements to the Oxford Draft (Hypo - 19) we advocated that maritime liens should be accorded to « claims for loss

of or damage to property in respect of property on board the vessel and in respect of property not on board the vessel ». The international subcommitee at Amsterdam decided (Hypo - 30) to accord maritime liens only to claims for loss of or damage to property not on board the vessel. This decision is reflected in the Portofino Draft.

The Norwegian Association is not in favour of this restriction. The professed purpose of the efforts to restrict the number of claims secured by maritime liens is to strengthen the long time credit. It should be borne in mind, however, that maritime liens in respect of cargo claims do not harm the mortgagees if the owner of the vessel is adequately protected by insurance against such claims. Not only may the owner protect himself by insurance (Protection and Indemnity insurance) in respect of cargo claims, but the mortgagee has the means to see to it himself that the owner is so protected. A maritime lien for such claims will, therefore, be an incentive to the mortgagee to see to it that insurance is effected and the mortgagee will suffer only in cases where he has neglected to satisfy himself that the owner is properly protected.

Secondly, if there is no maritime lien for cargo claims the cargo owner will get practically no protection in cases where the vessel is encumbered by mortgages and liens up to its full value. The claimant, admittedly, may arrest the vessel, but if the owner can show that its value does not exceed the encumbrances he cannot be compelled to put up any security in consideration of its release. It is hard to imagine that cargo interests will accept such a situation.

The wording of sub-paragraph 1 (vi) must be amended in the same way as sub-paragraph 1 (iv), b).

We suggest the following wording of sub-paragraph 1 (vi) :

« Claims in tort for loss of or damage to property on board the vessel or not on board the vessel if caused by the owner in direct connection with the operation of the vessel or by a person in the service of the vessel for whom the owner is responsible ».

We propose to remove the last paragraph of sub-paragraph 1 to article 7 and will deal with that in our comments to article 7.

Article 5

Sub-paragraph 3.

If sub-paragraph 1 (i) of article 4 shall include only the costs of removal of wrecks there seems to be little need for a ranking provision as a wreck can hardly be removed more than once. If there is to be a provision, it must be the one set out in sub-paragraph 4 of article 5. If our proposal with regard to sub-paragraph 1 (i) of article 4 is adopted, it goes without saying that sub-paragraph 4 of article 5 must apply.

Article 6

Sub-paragraph 1.

We propose that « national liens » may only be granted in respect of national ships, and we therefore propose the following wording :

« Each Contracting State may grant liens in ships registered in the State to secure claims... ».

Article 7

Sub-paragraph 1.

We fully appreciate that the last paragraph of sub-paragraph 1 of article 4 is necessary in addition to this sub-paragraph, but we suggest that the two provisions should be set out together so as to prevent the impression that the same thing is being dealt with in two places.

The term « operator of the vessel » may give rise to certain doubts. We suggest that a maritime lien shall attach even if the claim is against an operator who has obtained posession by illegal means, say by piracy. We therefore suggest to use the term « actual operator of the vessel ».

We propose the following wording of article 7, sub-paragraph 1 :

« The maritime liens set out in article 4 arise irrespective as to whether the claims secured by such liens are against the owner, demise or other charterer, manager or actual operator of the vessel. The word « owner » in article 4 shall be given the same construction ».

Article 8

Sub-paragraph 1.

We dare say that if, apart from bankruptcy, the only way to break the prescription of a maritime lien is to arrest the vessel for the purpose of effecting a forced sale the Convention will not be acceptable in this country. Under such a system claims for relatively small amounts such as wages etc., will receive very little benefit by having a maritime lien attached to them.

We consider it essential that the prescription period may be interrupted by a writ of summons to a competent court and by invoking arbitration where arbitration has been agreed.

We agree that the declaration of bankruptcy shall interrupt the prescription period and we agree in principle that « compulsory liquidation » shall have the same effect. As the system of the so called compulsory liquidation may vary very much from country to country, we suggest that a reference to the national law would be advisable.

In case of bankruptcy or compulsory liquidation we suggest that the period of prescription shall be interrupted only in respect of claims which have been duly filed with the receiver within the time limits stipulated by the national law.

We think that a one year prescription period will be sufficient.

We further propose that a new prescription period shall run from the time final judgment has been obtained.

Accordingly, we propose the following wording of sub-paragraph 1 :

« 1. The maritime liens set out in article 4 shall be extinguished after a period of one year from the time when the claim secured thereby arose unless, prior to the expiry of such period, (a) a writ of summons in respect of the claim has been issued to a competent court or (b) the claim has been duly submitted to arbitration or (c) the owner is declared bankrupt or has gone into liquidation in accordance with the national law of the Contracting State, and the claim has been duly filed with the receiver in accordance with the national law.

When a claim has been adjudicated the lien shall be extinguished if legal action to enforce it has not been taken within one year of the date of final judgment ».

Sub-paragraph 2.

In our opinion it is very difficult to provide for the fate of maritime liens in case of requisition. A requisition may very well be effected by the government of the country where the vessel is registered, and the government may recognize liens wich have attached prior to the requisition. In such case there is no need to extend the prescription period. On the other hand, to provide that the period shall be extended in cases where the claimant is barred from interrupting the period by service of writ will be very difficult in practice.

Article 11

Sub-paragraph 1.

With regard to (a) it seems to us that the point is not whether the vessel has been arrested in the jurisdiction of a Contracting State, but whether the vessel is in the jurisdiction of the said State when the forced sale is effected. Further, the point is not whether the vessel has been arrested, which in many countries is impossible in case of bankruptcy etc., but whether it is in the custody of the competent authorities at the time of the sale. We would prefer the wording of article 18 of our proposed amendements to the Oxford Draft (Hypo - 19).

Article 12

With regard to this article we must call the attention to the fact that a Draft Convention relating to the registration of rights in respect of ships under construction has already been adopted by the Comité Maritime International at the Stockholm Conference in 1963. It will be necessary to gear the present Draft to the Stockholm Draft prior to its presentation in New York.

Article 14

Those States which have ratified the 1926 Convention will have to terminate their obligations under that Convention prior to acceeding to the present one. Article 14 therefore seems unnecessary. We hope that many States which did not ratify the 1926 Convention will ratify the new one. One cannot, therefore, say that this Convention shall, in respect of the relations between States who acceede to it, « replace and abrogate » the 1926 Convention.

We propose that this aricle be deleted.

Oslo, March 29, 1965.
Den Norske Sjöretts-Forening
(Norwegian Maritime Law Association)

Alex. Rein, President *Frode Ringdal, Hon. Secretary*

GERMAN MARITIME LAW ASSOCIATION

COMMENTS

1. In article 1 subpara c)

« insert the word « facts » instead of the word « date ».

The law of the state which is applicable according to Art. 3 may rule that the rank of a mortgage does not depend only from the date of registration but from other facts also.

2. In Article 1 add a new para 2 reading

« The right of a mortgagee to enter into the possession of the vessel or to sell her privately cannot be executed by virtue of this convention».

This rule is intended to remote possible obstacles from ratifying the new convention by those states which generally do not allow any private execution of rights but only a judicial one.

3. Article 2 to be deleted and replaced by the following new Article 2.

« (1) A vessel entered into the register of a contracting state can be registered in another contracting state in accordance only with the following procedure of transfer :

a) The register to whom the owner applies for the new registration of the vessel, inserts the entries applied for including those in favour of any third person, but notes in the register that the effect of this insertion is subject to the condition that the former registration of the vessel is deleted;

b) the registrar in whose register the vessel had so far been inserted, deletes the insertion against submission of the extract from the register of the new insertion and the approval in writing of the owner and all holders of mortgages or hypothecs and issues a certificate of deletion stating the date of deletion. The registrar cannot refuse the deletion, unless the vessel is to be registered in his own register or in any other register of his own state;

c) upon submission of the certificate of deletion the registrar who has inserted the new registration, deletes in his register the note

made pursuant to subpara a), inserts the date of the deletion of the former insertion and issues the Certificate of Registry.

(2) For the application of this Article the registrars are entitled to contact each other directly. Any letters or documents may be written in the language of the register sending them ».

The wording of this new Article is taken from Article 11 of the ECE draft convention on the registration of inland navigation craft. We prefer this draft to Article 9 of the Stockholm Draft Convention 1963 and even Article 2 of the Portofino Draft considering the following reasons :

The Portofino Draft offers no chance to comply with the statutory requirements for registration in the new state if those requirements differ from that of the old state. If — for example — a certain mortgage registered in the old state is not eligible for registration in the new state, Art. 2 of the Portofino Draft will give no possibility to transfer the vessel from one register to the other at all. Art. 9 of the Stockholm Draft tries to overcome this difficulty by para 3 which is, however, not quite clear. It seems to us that this Art. 9 para 3 is not suitable to avoid any period of interruption between the deregistration and the new registration. Art. 11 of the ECE draft convention on the other hand does not require an absolute congruence of either national law in case the mortgagee and the shipowner agree on the new registration and furthermore it avoids any gap in time between the old registration and the new registration.

4. In Article 4 para 1 subpara iii add the words

« With the exception of claims for masters' disbursements on account of the vessel ».

This addendum is drafted in respect of sec. 167 para 2 of the Merchant Shipping Act. 1894 and other similar legislation, which includes such disbursements under the master's lien for wages.

5. In connection with Article 4 para 1 subpara iii we beg for a clarification whether social insurance premiums, which had been included in the Oxford Draft but not in the Portofino Draft, are or are not to be secured by a lien.

6. In article 4 para 1 subpara iv *delete the text under a) and b)*

This text is superfluous since Article 7 para 1 limits all the claims for personal injury which are secured by a lien.

7. In Article 4 para 1 a new subpara vii *should be inserted reading*

« Claims for loss or damage to property on board the vessel if

caused by the carrier or by a person in the service of the vessel for whom the carrier is responsible ».

Contrary to the deliberations of the Amsterdam meeting, claims for damage to cargo on board the vessel are covered by this new wording. We feel that the value of the Bill of Lading depends i.a. from the security given to the holder by a lien especially in case where the carrier is not the owner of the vessel.

8. Article 4 para 2 should be deleted

Article 7 para 1 covers all corresponding situations.

9. Article 7 para 1 should read

« The maritime liens set out in Article 4 arise irrespective as to whether the claims secured by such liens are against the owner, demise charterer or operator of the vessel ».

This amendement is intended to clarify possible doubts about the meaning of the words « other charterer » and « manager ».

10. Article 8 should read

« (1) The maritime liens set out in Article 4 shall be extinguished after a period of one year, in the case of claims, however, which are exclusively in tort of two years, from the time when the claims secured thereby arise unless, prior to the expiry of such period, a) the vessel has been arrested, such arrest leading to a forced sale, b) the lienor has sued the vessel in rem, c) the owner is declared bankrupt or d) the owner goes into compulsory liquidation.

(2) The periods referred to etc... ».

These amendements intend to shorten the period of extinction in the interest of the mortgagees. Only in these cases, where the lienor may meet extraordinary difficulties to find out the debtor of his claim i.e. in collision cases the period should be two years.

Art. 8 para 1a) of the Portofino Draft requires an arrest of the vessel even for small claims and even in cases where the claims have not been adjudicated by a court. Moreover, crew members and passengers who have been bodily injured may often not be able to dispose of the means for an arrest but for a mere suit. Therefore, an action in rem should be sufficient to interrupt the period of extinction. The merits of these arguments are in our opinion higher than the advantage of the publicity, possibly given by an arrest of the vessel in contrast to a mere suit.

11. In Article 10 para 1 the words « 30 days » should be replaced by the words « 60 days ».

This amendment is selfexplanatory.

12. Article 10 should be amended by the following paras 2 and 3

« (2) All notices mentioned in this article shall be sent directly to the holders and to the registrar by registered airmail.

(3) The national legislation for the execution in the vessel and for the distribution of the proceeds of the vessel should not be less favourable to alien mortgagees, lienors, debtors and owners of a vessel then to nationals of the country where a forced sale takes place ».

These amendements are selfexplanatory.

13. In Art. 12 para 1

« insert the words « especially Art. 2 » after the words « this convention » ».

This amendement intends to clarify that Art. 2 is applicable even in those cases which might also be covered by article 9 of the Stockholm Draft Convention on the registration of rights in respect of ships under construction.

14. Article 14 should be replaced by the following context

« Each state which ratifies this convention or accedes to it undertakes to denounce the international convention for the unification of certain rules relating to maritime liens and mortgages and the protocol of signature signed at Brussels on April 10th, 1926 ».

To explain the proposed new Article 14 the following example may be useful :

States A and B have ratified the 1926 Convention States B and C but not state A will ratify our new convention. A vessel of state C will be sold in state B. A national of state A tries to execute a maritime lien according to Article 2 (5) of the 1926 Convention (master's contracts). The court of state B has to apply two contradictory conventions in this case. To avoid any situation alike state B has to to denounce the 1926 Convention.

We may draw the attention to the fact that the French translation of the Portofino Draft differs widely from its English version. Our proposals are based on the English text.

Hamburg, March 30th, 1965

BRITISH MARITIME LAW ASSOCIATION

PROVISIONAL COMMENTS

Article 1

We note with approval the omission, from the Amsterdam draft, of the phrase « other registrable rights ». The present drafting is precise. But we consider that the word « seagoing » should be omitted from the English text. In particular, in view of the inclusion of vessels under construction (Article 12), the qualification is inappropriate. A vessel under construction is unlikely to be seagoing.

a) We consider that paragraph (a) should be amended to read « such mortgage and hypothecs have been duly effected and registered in accordance with the law of the State where the vessel is or was registered at the time such mortgage or hypothec was registered ». It is possible that a court may have to enforce a mortgage effected in accordance with the law of a state where the vessel was registered at an earlier date under another flag.

b) We approve the words in paragraph (b) « the register and any instrument referred to therein » as being more precise than « such instruments as may have been filed therein, etc... », as in the Amsterdam draft.

c) In paragraph (c) we consider that the inclusion of the name and address of the person in whose favour the mortgage or hypothec has been effected is a necessary improvement. There are two drafting corrections. In paragraph (b), Line 3 should read « mortgage *or* hypothec » and Line 7 should read « determines *its* rank ».

Article 2

1. We approve the wording of the proviso which has been added. This is necessary because, when the vessel is the object of a forced sale, the Registrar does not require the consent of the mortgagee to issue such a certificate (see Article 11 (3). We agree that this Article should apply to Contracting State only. It is impraticable to legislate for non-Contracting States.

2. In paragraph (2) we find the word « said » in line 7 confusing and think this should be amended so that line 7 should read « be allowed by the « former » State ».

3. We consider that paragraph 3 would be clearer if drafted in the positive form to read « The vessel shall be accepted for registration in another Contracting State only if the mortgages and hypothecs set out in the Certificate mentioned in paragraph 2 are accepted for registration by such State, and retain their priority as set out in the Certificate ».

Article 3

We question whether this Article is necessary or even desirable in that nnless provision is made to the contrary, which it is not, the position must be as stated.

Article 4

1. We note and approve the ommission of the lien for costs awarded by the Court; such costs arise after the vessel has been sold and all liens have been extinguished. There is now adequate provision for the payment of such costs in Article 11 (2).

(i) We approve the redrafting of this Clause. The words « lawfully ordered by a competent authority » are, we think, an improvement on the earlier drafting which was too restrictive.

(ii) We have no comment.

(iii) We have no comment.

(iv) We consider that the present drafting of this Clause is too wide. A maritime lien could arise in respect of a claim which had no connection whatever with the vessel; for example, a claim by a person injured by a shipowner driving his car would rank as « a claim for personal injury in respect of persons not on board the vessel if caused by the owner ». We are of the view that claims secured by a maritime lien must have some causal link with the vessel and we suggest that a maritime lien should arise only if the loss of life or personal injury to persons not on board is caused in the navigation or management of the vessel, or in the loading or discharging of her cargo, passenger or bunkers.

(v) We remain of the opinion that claims for salvage and General Average should take priority over claims for Personal Injury. These claims preserve the « res » and should logically take priority.

(vi) We consider that this Clause should be restricted as in (iv). In Article 4 there is no lien for shiprepairers.

We cannot support this omission. In English law a possessory lien is granted in such cases. Such a lien altough postponed to earlier mari-

time liens, has priority over mortgages and subsequent liens, maritime or not. If a Court orders a possessory lien holder to relinquish possession, the order will provide that his rights be protected, if he proves that he has such rights. We believe that a shiprepairer should be protected in this way. The objection to the present draft is that under Article 6, it is provided that rights of retention, though they may be granted, shall not prejudice the enforcement of maritime liens or mortgages. We think that this destroys any security given to the shiprepairer and that the Article should be amended (see below Article 6).

2. We see no good reason for this provision. Il a maritime lien arises in respect of loss of life, personal injury, and property claims for « non nuclear incidents », we think it all the more reasonable that maritime liens should arise where damage accurred through a nuclear incident.

Article 5

We have no comment.

Article 6

1. We have set out our objections to the postponement of rights of retention so far as shiprepairers are concerned under Article 4 above.

2. We make the following suggested amendment to cover the position.

« Each Contracting State may grant a lien or right of retention to secure claims other than those referred to in Article 4; provided however that such liens, other than liens for repairs or necessaries, shall rank after all maritime liens and registered mortgages or hypothecs and that such right of retention shall not prejudice the enforcement of any maritime liens or registered mortgages or hypothecs as aforesaid ».

Article 7

We have no comment, apart from amending the words « as to » to « of ».

Article 8

We believe that paragraph 1 should be redrafted to read :

« The maritime liens set out on Article 4 shall be extinguished after a period of two years from the time when the claims secured thereby arose. There shall be no extinction if, prior to the expiry of such period :

a) the vessel has been arrested, such arrest leading to a forced sale.

b) the owner is bankrupt.

c) the owner is in compulsory liquidation ».

Article 9

We have no comment, other than to suggest the following correction in the drafting. In line I delete « of » after the word « assignment » and change « in » after the word « subrogation » to « of ». Similarly delete « of » in line 5 and substitute « of » for « in » in line 6.

Article 10

We believe that this Article is too loosely drafted.

The Competent Authority should be obliged to give notice of the sale to all holders of registered mortgages and hypothecs. This can be done by requesting their names and addresses from the appropriate Registrar. Notice should also be given to all known holders of maritime and other liens and proper advertissements should be published in shipping papers.

Article 11

1. We welcome the amendment of this Article. The Amsterdam text was, we considered, quite unacceptable.

We would suggest that the second « with » in line 2 of paragraph 1 (b) should be deleted.

We have no comment.

Article 12

We have no comment.

Article 13

We have no comment apart from the suggestion that the words « irrespective as to » should be deleted and the words « no matter » substituted.

Article 14

We have no comment.

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

COMMENTS

We are setting forth our Commitee's suggested changes in the Portofino Draft. The deletions are in Parenthesis and the additions are in italics.

Article 1

Mortgages (and hypothecs) *or hypothèques* on seagoing vessels shall be enforceable in *all the* Contracting States provided that :

a) such mortgages or (hypothecs) *hypothèques* have been duly effected and registered in accordance with the law of the State where the vessel is registered;

b) the register specifies the name and address of the person in whose favour the mortgage (of hypothec) *or hypothèque* has been effected, the amount secured and the date which, according to the law of the State of registration, determines the rank as respects other registered mortgages (and hypothecs) *or hypothèques and maritime liens.*

Article 2

1. Subject to the provisions of Paragraph 3 of article 11 no Contracting State shall permit the deregistration of a vessel without the consent of all holders of registered mortgages (and hypothecs) *or hypothèques.*

2. A vessel registered in a Contracting State on which a mortgage (or hypothec) *or hypothèque and maritime lien* is registered shall not be eligible for registration in another Contracting State unless a certificate has been issued by the former State that the vessel has been or will be deregistered (on the day) *as of the date* when the new registration is effected, provided the new registration is effected within 30 days and notice of such new registration is given to the issuing State within the 30 days period.

When such certificate has been issued no registration of rights in respect (of) *to* the vessel shall be allowed by the (said) *issuing* State

during such period of time. The Certificate (mentioned) shall set out in order of priority all registered mortgages (and hypothecs) *or hypothèques* on the vessel.

3. The vessel shall not be accepted for registration in another Contracting State unless the mortgages (and hypothecs) *or hypothèques* set out in the certificate mentioned in Paragraph 2 are accepted for registration by such State, retaining their priority as set out in the certificate.

Article 3

Mortgages (and hypothecs) *or hypothèques* shall rank as between themselves in accordance with the law of the State where they are registered *except as otherwise provided in Paragraph 3 of Article 2.*

Article 4

1. The following claims shall be secured by maritime liens on the vessel :

a) Costs of removal of the wreck of the vessel lawfully ordered by competent authorities.

b) Claims for salvages and for contribution in general average.

c) Port, canal, *pilotage* (and other waterway dues) *and other similar dues.*

d) 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.*

e) Claims for loss of life or personal injury : in respect of persons on board the vessel; *and* in respect of persons not on board the vessel if caused in *direct connection with the operation of* the vessel by the owner or by a person in the service of the vessel for whom the owner is responsible.

f) Claims in tort for loss of or damage to property *on board and* not on board the vessel, if caused *in direct connection with the operation of the vessel* by the owner or by a person in the service of the vessel for whom the owner is responsible.

The word « owner » *wherever* mentioned in this (article) *Convention* shall be deemed to include the demise (or other) charterer, (manager or operator) of the vessel.

2. No maritime lien shall attach to the vessel securing claims for loss of life or personal injury or for loss of or damage to property which arise out of or result from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Article 5

1. The maritime liens set out in Article 4 shall take priority over mortgages (and hypothecs) *or hypothèques.*

2. The maritime liens set out in Article 4 shall rank in the order listed.

3. The maritime liens set out in each of the sub-paragraphs 1 a), c), d), e) and f) of Article 4 shall rank pari passu as between themselves.

4. The maritime liens set out in sub-paragraph (v) b) of Article 4 shall rank in the inverse order of the time when the claims secured thereby accrued. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act (was done) *took place.*

Article 6

1. Each Contracting State may grant liens to secure claims other than those referred to in Article 4, provided, however, that such liens shall rank after all mortgages (and hypothecs) *or hypothèques* which comply with the requirements of Article 1 *except that maritime liens valid at the time of the original registry shall take priority over the mortgage or hypothèque.*

2. Each Contracting State may also grant rights of retention in respect of the vessel, provided, however, that such rights shall not prejudice the enforcement of the maritime liens set out in Article 4 or of mortgages or (hypothecs) *hypothèques* which comply with the requirements of Article 1.

Article 7

1. The maritime liens set out in Article 4 arise irrespective as to whether the claims secured by such liens are against the owner, demise or other charterer, manager or operator of the vessel.)

Subject to the provisions of Article 11, the maritime liens (securring the claims) set out in Article 4 *and as provided for in Article 6 shall* follow the vessel notwithstanding any change of ownership or registration.

Article 8

1. The maritime liens set out in Article 4 *and those provided* for in Article 6 shall be extinguished after a period of two years from the time (when) the claims secured thereby arose, unless prior to the expiry of such period, (a) the vessel has been arrested (such arrest leading to) *for the purpose of enforcing a maritime lien by way of* a forced sale; (b) the owner is declared bankrupt, or (c) the owner goes into compulsory liquidation.

2. The two years' period referred to in the preceding paragraph shall not be subject to suspension or interruption; (provided however) except that should the vessel be requisitioned; time shall not (count in respect of) *run during* the period of such requisition.

Article 9

(The assignment of or subrogation in a claim secured by a maritime lien set out in Article 4 entails the simultaneous assignment of or subrogation in such maritime lien.)

The assignee or subrogee of a claim secured by a maritime lien shall have all the rights of the original lienor.

Article 10

Prior to the forced sale of a vessel *pursuant to a court order* in a Contracting State, the competent authority of such State shall give at least 30 days notice of the time and place of such sale to all known holders of registered mortgages, registered (hypothecs) *hypothèques* and maritime liens set out in Article 4 and to the registrar of the register in which the vessel is registered. For this purpose the said authority shall endeavour to obtain the names and addresses of such holders from the said registrar and from the owner of the vessel.

Article 11

1. In the event of the forced sale of the vessel *pursuant to a court order* in a Contracting State, all mortgages, (hypothecs) *hypothèques*, liens and other encumbrances of whatever nature shall cease to attach to the vessel, provided, however, that :

a) at the time of the sale the vessel has been arrested in the jurisdiction of such Contracting State; and

b) the sale has been effected in accordance with the (law of the said State and) *provisions of this Convention as supplemented by the laws of said State.*

2. The costs awarded by the Court and arising out of the arrest and subsequent sale of the vessel and the distribution of the proceeds shall first be paid out of the proceeds of such sale. The balance shall be distributed among the holders of maritime liens, registered mortgages and registered (hypothecs) *hypothèques* in accordance with the provisions of this Convention to the extent necessary to satisfy their claims.

3. When a vessel registered in a Contracting State is the subject of a forced sale *pursuant to a court order*, the registrar shall issue, at the request of the purchaser, a certificate of deregistration, provided always that the requirements set out in paragraph 1, sub-paragraphs (a) and (b) and paragraph 2 of this article have been complied with.

Article 12

The provisions of this Convention shall also apply to vessels which are under construction, provided, however, that :

(a) only such mortgages and hypothecs as have been registred in the State in which the vessel is under construction shall be enforceable;)

Until it has become waterborne such a vessel may be registered only in the State in which it is under construction; and

b) the maritime liens referred to in Article 4 shall attach to the vessel only (if the) *for claims* (secured thereby) *which accrue* after the vessel has become waterborne.

Article 13

Unless otherwise provided in this Convention the Contracting States shall apply the provisions of this Convention to all sea-going vessels irrespective as to whether they are registered in a Contracting State or in a non-Contracting State.

Article 14

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the unification of certain rules relating to Maritime Liens and Mortgages and the Protocol of Signature signed at Brussels on the 10th April, 1926.

ASSOCIATION YOUGOSLAVE DE DROIT MARITIME

RAPPORT

Le projet de Portofino a réussi à fournir, selon l'avis de la Commission nationale de l'Association Yougoslave de Droit Maritime, un excellent instrument de travail pour arriver à une révision de la Convention de 1926, généralement acceptable. Le Projet a simplifié essentiellement l'assiette des privilèges et la détermination de leur rang en abolissant des notions qui ne correspondent plus à la pratique contemporaine, ce qui facilitera l'application de ses dispositions. D'autre côté le Projet a prêté beaucoup d'attention aux problèmes relatifs à la tutelle des intérêts des créanciers hypothécaires dans le moment délicat du transfert du navire du registre d'un Etat Contractant à un autre et dans le moment de la vente forcée du navire dans un Etat différent du pays d'immatriculation du navire.

En ce qui concerne les détails de la réglementation proposée, nous présentons les observations suivantes :

Article 1

Le texte de cet article donne satisfaction à nos scrupules en ce qui concerne la nécessité de tenir compte dans la Convention de l'hypothèque et du mortgage dans les deux langues officielles du C.M.I.

Article 2

La disposition du paragraphe 3 de cet article, qui nous semble en principe extrêmement utile, présentera des difficultés dans les pays dans lesquelles on ne connait pas le mortgage, quand il s'agit du transfert d'un navire sous pavillon des pays à mortgage. Peut-être serait-il possible d'éviter cette difficulté en introduisant dans le Projet l'idée contenue dans l'amendement de l'Association Allemande de Droit Maritimé à l'article 1, paragraphe 2 du Projet d'Oxford/HYPO 13/, en ce qui concerne l'effet matériel de la reconnaissance internationale des hypothèques et mortgages nationaux. Evidemment cela pourrait comporter des risques pour l'adoption de la Convention. Bien que la formule allemande nous paraît assez séduisante, nous croyons qu'il ne sera pas

possible de trouver un texte donnant satisfaction aux exigences de tous les systèmes juridiques, difficulté dont les rédacteurs du Projet de Portofino ont certainement eu conscience et c'est pourquoi on sera peut-être obligé de se tenir au texte tel qu'il est proposé dans le Projet de Portofino, laissant aux législations nationales le soin de résoudre le problème posé par le paragraphe 3 de l'article 2. Cette solution permettra d'atteindre le but essentiel de la Convention qui est d'assurer l'effet international de l'hypothèque et du mortgage, seul objet de nos efforts.

Article 3

Il nous semble qu'il serait préférable d'user dans cet article d'une façon appropriés le texte de l'article 6 de l'Avant-projet de Stockholm. On éviterait de cette manière l'incertitude qui pourrait résulter de la possibilité de l'existence des législations réglant la question du rang selon des principes qui permettraient des exceptions à la règle de l'ordre chronologique des inscriptions ou des demandes d'inscriptions. Evidemment le principe de l'ordre chronologique est le seul qui donne des garanties suffisantes aux créanciers hypothécaires.

Article 4

Nous n'avons pas d'objections au texte sauf en ce qui concerne les sub-paragraphs IV b/ et VI b/. Le texte actuel de ces sub-paragraphs qualifie les créances qui y sont privilégiées en usant le mot « causés ». Il nous semble qu'en ce mot on pourrait arriver à la conclusion que des créances peuvent naître sans fautes des personnes qui y sont mentionnées, c'est-à-dire qu'on pourrait interpréter ces dispositions comme introduisant le principe de responsabilité causale. Pour éviter des malentendus facheux nous considérons qu'il serait utile de substituer dans les deux sub-paragraphes IV et VI aux mots « ont été causés » les mots « résultant du fait imputable à la faute du ».

Article 8, litt. A

Un des buts de cette disposition est d'empêcher la continuation du privilège par des actes qui ne sont pas connus par tous les créanciers privilegiés et hypothécaires actuels ou éventuels. La saisie qui conduit à la vente forcée du navire n'est pas le seul acte qui donne des garanties suffisantes dans ce sens parce que ce rôle pourrait bien être rempli par l'adnotation de l'action judiciaire entreprise en vue de la réalisation du privilège dans le registre des navires du pays d'immatriculation du navire/ainsi qu'il est prévu dans la Section 30, Subsection g/a du Ship Mortgage act. 1920. Ainsi on éviterait d'obliger les créanciers privilegiés d'épuiser dans tous les cas tous les moyens allant jusqu'à la vente forcée du navire.

Article 11

Il nous semble que le texte anglais de l'article 11, § 1, litt. a/ qui précise qu'au moment de la vente forcée le navire doit être dans la juridiction du même Etat contractant « such Contracting State » soit le texte qui reflet exactement la pensée des rédacteurs du Projet de Portofino. Il faudrait corriger le texte français dans le même sens.

Article 13

A notre avis le principe de la réciprocité devrait être appliqué aux dispositions de cet article.

Il reste a voir si les dispositions des articles 12 et 15 de la Convention de 1926 ne devraient être maintenus dans la nouvelle convention. Il nous semble que ces dispositions ne sont pas devenues caduques et qu'elles conservent une importance pratique.

Enfin il nous semble qu'il faudrait insister sur la coordination de la nouvelle Convention avec la Convention sur la limitation de la responsabilité des propriétaires de navires de mer de 1957. En ce qui concerne un tel texte il suffirait peut-être, pour ne pas provoquer trop de controverses, de constater que les privilèges des créances soumises à la limitation de responsabilité ne peuvent plus être exercés pour ces créances quand les conditions de l'article 2, § 4 de la Convention de 1957 seront réunies.

En concluant nous sommes de l'avis que le Projet de Portofino n'est pas alourdi par l'adoption des solutions trop détaillées, qui bien qu'elles pourraient sembler utiles ne feraient que rendre plus difficile l'adoption, application et interprétation de la nouvelle Convention.

Zagreb, 31 mars 1965.

Vladislav Brajkovic
Président de l'Association Yougoslave de Droit Maritime

E. Pallua
N. Percic
Rapporteurs

ASSOCIATION TURQUE DE DROIT MARITIME

RAPPORT

Le Comité Maritime turc a examiné le projet de convention intitulé « Projet Portofino » et a considéré que ce projet peut être pris comme base pour l'élaboration d'une convention au sujet des privilèges et hypothèques maritimes. D'une façon générale, le Comité est d'accord sur la nécessité d'une révision de la Convention de 1926 et approuve dans son ensemble les réformes proposées. Il a cependant des réserves sérieuses sur plusieurs points.

Il faut noter tout d'abord que le texte français n'est pas tout à fait conforme au texte anglais et nécessite une mise au point.

Nous sommes d'avis d'autre part que le projet est équivoque sur de nombreuses questions et nécessite par suite une nouvelle rédaction.

Quant au contenu du projet nous avons l'honneur d'attirer votre attention sur les observations suivants :

1. Nous suggérons en premier lieu d'ajouter au paragraphe (c) de l'article premier le mot « initial » après le mot « l'inscription » pour apporter au texte plus de précision. Il ne faut pas en effet oublier que les hypothèques ou mortgages constituées dans un pays peuvent être transmises au registre d'un autre Etat et susciter par conséquent un doute sur le sens des mots : « suivant la loi du pays de l'inscription ».

2. Nous proposons en second lieu d'ajouter au paragraphe 1er de l'article 2, la disposition suivante : « Toutefois lorsque le navire perd la nationalité de l'Etat au registre duquel il est inscrit, aucun acte de disposition ne peut plus être inscrit sur ledit registre ». Nous croyons que cette disposition est nécessaire pour que les Etats ne soient pas tenus de tenir des registres pour des navires qui ont déjà perdu leur nationalité originaire.

3. On constate que le deuxième paragraphe du même article a pour but de prévenir qu'un navire soit inscrit sur plusieurs registres appartenant à des Etats différents. Mais cette disposition ne peut à notre avis suffir à atteindre ce but. Il faut donc que le nouveau conservateur du registre mette d'office l'ancien conservateur au courant du nouvel acte d'inscription. Il faut en outre que les actes de disposition

inscrits sur le nouveau registre n'aient d'effet qu'à la condition suspensive de radiation des inscriptions de l'ancien registre.

4. L'article 3 qui règle le rang des hypothèques successives nous paraît équivoque dans le cas d'inscription de plusieurs hypothèques dans différents pays. Il est nécessaire d'y apporter plus de clarté. Comment devra-t-on en effet déterminer le rang de ces hypothèques ? Est-ce la loi de l'inscription première ou celle de l'Etat de l'inscription dernière qu'on devra prendre en considération pour la détermination du rang ? Tous les deux systèmes ont chacun de leur côté des inconvénients importants. Le mieux est peut-être de régler la question par une disposition supplémentaire tranchant le fond de la question. En tout cas la proposition du Comité Maritime norvégien est plus claire et mérite d'être retenue sur ce point.

5. En ce qui concerne l'article 4, il faut tout d'abord remarquer que le paragraphe (ii) de cet article n'est pas tout à fait conforme au texte anglais. Car « port, canal and other waterway *dues* » sont plutôt « les taxes de port de canal etc. » et non les « frais de port, de canal, etc. ».

D'autre part le paragraphe 4 de cet article n'est pas tout à fait clair. On a un doute sur le point de savoir si la condition à laquelle le paragraphe (b) est soumis s'étend aussi au cas prévu dans le paragraphe (a). Pour dissiper ce doute il faut unifier les paragraphes (a) et (b) dans une même phrase de façon à ce que la condition à savoir « si les dommages ont été causés par le propriétaire du navire ou par une personne au service du navire et dont le propriétaire est responsable » s'étende aussi au cas prévu au paragraphe (a) du même article.

6. Nous constatons que l'article 4 ne prend pas en considération les « surrogates » c'est-à-dire les valeurs qui remplacent le navire. A notre avis c'est là une lacune importante. Car si les privilèges ne s'étendent pas aux surrogates, l'acte illicite d'un tiers aura pour conséquence de faire perdre au créancier privilégié son privilège sur le navire sans que le dommage - intérêt dû par le tiers remplace le navire. Cela nous paraît inadmissible.

Quant aux créances privilégiées énumérées dans ledit article, on remarque que cette disposition prive l'affréteur de son privilège pour des créances nées de la perte ou de l'avarie de la marchandise. Le propriétaire de celle-ci peut en effet toujours s'assurer contre les risques de l'expédition.

Nous proposons d'autre part que les créances du chef d'assistance et de sauvetage soient préférées aux créances énumérées au paragraphe (iv) du même article, car le recouvrement de ces dernières créances dépend du résultat obtenu par le sauveteur. Par conséquent il est plus équitable de reconnaître au sauveteur une préférence par rapport aux

autres créanciers prévus à l'article 4. Cette préférence aura par ailleurs pour effet d'encourager le sauveteur dans son entreprise de sauvetage.

Quant à la créance née de la contribution en avaries communes, nous pensons qu'il est inutile de lui accorder un rang primant les hypothèques. Cette créance n'est d'ailleurs pas limitée d'après la Convention de Bruxelles de 1957. Si l'on accepte notre proposition, le paragraphe 4 de l'article 5 devient alors inutile. Ce paragraphe est d'ailleurs à remanier, car en cas de sauvetage d'un navire, entrant dans un port de refuge ou en cas d'assistance à un navire en danger, pour lui aider à gagner un port de refuge, il sera extrêmement difficile de déterminer le rang des créances nées du sauvetage et de l'avarie commune. Par conséquent si l'on ne supprime pas ce paragraphe il est nécessaire d'y apporter plus de clarté. Il faut noter d'autre part que le texte français du paragraphe 4 de l'article 5 qui détermine le rang des créances énumérées au paragraphe 5 de l'article 4 n'est pas tout à fait conforme au texte anglais dudit paragraphe, car la date « à laquelle *l'événement* donnant lieu à avarie commune s'est produit » n'est pas toujours la date de *l'acte* d'avarie commune (the date on which the general average act was done).

7. Nous croyons qu'il est nécessaire d'apporter une précision au paragraphe (b) de l'article 8 qui détermine les cas d'extinction du privilège, car il est erronné d'admettre l'extinction du privilège par suite de la simple déclaration en faillite. Ce n'est que par la liquidation de la faillite que les privilèges doivent prendre fin.

8. En ce qui concerne l'article 11, il faut tout d'abord remarquer que le texte du paragraphe III dudit article n'est pas tout à fait le même dans les deux textes, car les mots « dans un Etat Contractant » n'existe pas dans le texte anglais. Il faut les y ajouter.

D'autre part ce n'est pas la radiation mais c'est plutôt un certificat attestant que le navire est exempt de privilège et d'hypothèque que l'acquéreur a besoin d'obtenir du conservateur du registre. Le texte doit en conséquence être remanié.

ASSOCIATION FRANÇAISE DU DROIT MARITIME

I
PREMIER RAPPORT

1. L'Association Française du Droit Maritime a pris connaissance du rapport de M. J. T. Asser du mois de novembre 1964, ainsi que du projet de Convention, dit projet de Portofino. Elle a accordé à l'un et à l'autre document toute l'attention que méritent un effort aussi consciencieux et un travail aussi considérable, auquels elle désire rendre le juste hommage qui leur est dû.

La date récente à laquelle le projet a été distribué n'a pas encore permis un examen détaillé du sujet. Pressés de faire connaître son opinion pour le 31 mars, l'Association Française ne peut donc indiquer aujourd'hui que sa position générale.

II. Il lui est apparu au cours de son étude que le projet de Portofino abordait deux questions différentes : 1°) la reconnaissance et l'organisation sur le plan international des droits réels inscrits sur les navires (hypothèques et mortgages); 2°) le régime des privilèges maritimes et leur conflit avec les droits précédents.

Sur le premier point, il existe une timide ébauche de solutions dans l'art. 1 de la Convention de 1926. Ce texte est probablement insuffisant pour résoudre toutes les difficultés; aussi est-il permis de parler de vide législatif dans ce domaine, qu'il est utile de combler. L'Association Française reconnaît toute l'importance de la question, qui réclamerait une solution alors même qu'il n'existerait aucun privilège maritime et qui, par ailleurs, est en quelque sorte préjudicielle à toute autre mesure d'amélioration du crédit hypothécaire. Aussi approuve-t-elle l'effort constructif dont témoigne en ce sens le projet de Portofino, notamment dans ses art. 1, 2, 3 et 11. Elle se réserve toutefois de proposer certains amendements ou adjonctions, qu'elle pense être, sous peu, en mesure de faire connaître de façon plus précise.

III. Dans la mesure où il traite des privilèges maritimes, le projet de Portofino apparaît par contre totalement inacceptable à l'Association Française. Elle ne proposera même pas d'amendements, qui ne seraient

que des replâtrages insuffisants pour en faire un édifice valable. Reprenant ici les termes de son premier rapport, elle entend s'en tenir, jusqu'à plus ample informé, à la Convention de 1926, qui lui paraît préférable au projet de Portofino.

Elle admet que cette Convention de 1926 puisse ne pas être absolument parfaite; mais à l'expérience elle a donné satisfaction dans son ensemble et l'Association Française n'éprouve pas le besoin d'en changer. De toute façon, le projet de Portofino, dont les dispositions, aux effets parfois contradictoires, paraissent être le résultat de préférences plus ou moins subjectives, n'apporte aucun remède sérieux à ce qui, dans l'opinion de l'Association Française, constitue les imperfections les plus marquées de la Convention de 1926; il les aggrave plutôt.

L'Association Française est donc d'avis que, si l'on ne veut pas se satisfaire de la Convention de 1926, l'étude de la question serait à reprendre en entier, sur des bases et dans un esprit sensiblement différents de ceux du projet de Portofino. L'Association Française y serait disposée, mais elle doute qu'il soit possible d'aboutir d'ici le congrès de New York.

IV. Enfin, le projet de Portofino ne parle absolument plus des difficultés de coordination avec les dispositions de la Convention de Madrid. L'Association Française insiste pour que la question soit reprise, car il ne suffit malheureusement pas de passer ces difficultés sous silence pour les supprimer, ni de les ignorer pour leur trouver une solution. Cette politique de l'autruche ne peut conduire bien loin.

P. CHAUVEAU
Président de l'Association française

SIMONARD
Président de la Commission

II

DEUXIEME RAPPORT

I. L'Association française est partie de ce postulat que la raison pour laquelle la Convention de 1926 n'a pas été ratifiée par certains Pays, et pour laquelle sa modification est actuellement demandée, se trouve être que cette Convention ne favorise pas suffisamment le développement du crédit hypothécaire, surtout dans l'économie actuelle de l'Armement maritime.

De ce point de départ on se trouve aussitôt conduit à rechercher ce qui peut entraver l'utilisation de ce crédit, entendu dans le sens d'un crédit conventionnel garanti par un droit sur le navire, hypohèque ou morgage. Après consultations des représentants des banques françaises, mon Association s'est trouvée confirmée dans cette opinion que la garantie constituée par le navire était comprise, en plus de la perte ou destruction possible du bâtiment par un événement de mer, pour les deux raisons principales suivantes : A) La non reconnaissance de la garantie, hypothèque ou mortgage, par les tribunaux du lieu de la saisie et vente du navire. Si le navire est saisi à l'étranger, ces tribunaux peuvent être conduits à lui dénier tout effet, voire toute existence en leur Pays, pour des raisons de forme ou de fond, telle l'absence de tout droit équivalent dans leur propre législation, ou l'inobservation de certaines règles de celle-ci. B) L'existence d'autre droits, de caractère occulte, dits privilèges, en nombre indéterminé et variables suivant le lieu de la saisie, qui seraient susceptibles d'être préférés aux créanciers hypothécaires. Il existe ainsi un problème de conflit entre hypothèques et privilèges quant au rang de préférence à leur accorder, qui a été le principal souci des auteurs de la Convention de 1926.

II. L'Association Française a estimé que les deux questions ci-dessus énoncées formaient deux problèmes plus ou moins indépendants l'un de l'autre. En effet la Reconnaissance Internationale des Hypothèques et Mortgages aurait besoin d'être organisée même s'il n'existait pas de créances privilégiées. Autrement ces créanciers hypothécaires ne pouvant pas se prévaloir de leur droit hypothécaire seraient réduits au rang de créanciers chirographaires, et tenus de subir leur concours, dès l'instant où le navire serait saisi et vendu dans un Pays où leur droit n'est pas reconnu.

Par ailleurs le conflit entre céanciers privilégiés et créanciers hypothécaires ne se conçoit que si le droit n'existe pas puisque le prétendu créancier hypothécaire n'est plus qu'un créancier chirographaire, à l'égard duquel la préférence du créancier privilégié ne se peut discuter.

La solution de la première question est donc préjudicielle. Et s'il peut y avoir intérêt pratique à résoudre les deux simultanéement, il reste que cela n'est pas indispensable, les deux questions demeurant indépendantes l'une de l'autre.

III. L'association Française a compris que le projet dit de PORTO FINO visait à résoudre l'ensemble du problème. Malheureusement elle se trouve en désaccord fondamental et définitif avec la solution proposée par l'art. 4 du projet à la seconde difficulté. Le désaccord porte non pas sur des questions de rédaction, mais sur les principes de base qui peuvent inspirer cet article, pour autant qu'il soit possible de par-

ler de principes directeurs là où l'empirisme et la préférence subjective paraissent avoir été les seules guides d'un choix douteux.

Fermement décidée à rejeter toute Convention qui contiendrait un article de semblable inspiration, et convaincue que cette seconde difficulté a besoin d'être entièrement réexaminée, elle a pensée par contre que la première question de « La Reconnaissance Internationale des Hypothèques et Mortgages » pourrait fournir matière à accord indépendant à la Conférence de New York. Même si l'accord atteint outre-Atlantique était limité à ce seul point, cela constituerait déjà un progrès sérieux pour le développement du crédit hypothécaire; c'est au surplus un préalable essentiel. Et il n'est pas interdit d'espérer que, par la suite, on puisse finalement aboutir à une entente sur le second point après meilleur examen.

C'est pour faciliter cet accord au moins limité qu'elle présente son contre-projet. Il est essentiel de bien comprendre que, d'un objectif plus restreint que celui de Porto-Fino, il tend exclusivement à la « Reconnaissance Internationale des Hypothèques et Mortgages maritimes». Il laisse volontairement de côté tout ce qui peut consacrer les Privilèges, sans pour autant apporter d'entrave à la solution ultérieure de leur statut, ni au fonctionnement des dispositions de l'actuelle Convention de 1926 y relatives.

IV. Sur le problème de la Reconnaissance Internationale des Hypothèques, il reprend les principales dispositions du projet de Porto-Fino, même si par respect de la syntaxe ou par souci de classement il leur donne une autre présentation; mais il contient aussi quelques adjonctions ou variantes, dont la principale est la subrogation au navire de l'indemnité d'assurance du corps. Cette disposition, destinée à prémunir les créanciers hypothécaires contre la perte du bâtiment, donne une valeur légale à ce qui est déjà de pratique conventionnelle. Parmi les quesques autres différences il en est auxquelles l'Association Française attache de l'importance. Elles participent néanmoins du caractère de simples variantes que le rapprochement des textes suffit à mettre en lumière, et sur lesquelles toutes explications verables pourront être fournies à New York, à moins que vous n'estimiez préférable de les résumer préalablement par écrit.

III

PROJET DE CONVENTION

(ammendé par l'Association Française)

Article 1

Les hypothèques et mortgages, constitués conventionnellement et inscrits sur un navire sont reconnus par tous les Etats contractants s'ils satisfont aux conditions ci-après.

Article 2

Les droits énumérés à l'article précédent, quel que soit le lieu de leur constitution, devront :

a) être valablement constitués conformément à la loi de l'Etat contractant où le navire est immatriculé lors de leur constitution, l'acte constitutif pouvant être établi soit en la forme requise dans le pays d'immatriculation, soit en la forme admise dans le pays où l'acte est passé;

b) être régulièrement inscrits sur un Registre officiel de l'Etat d'immatriculation et conformément à la loi de cet Etat; ce Registre devra : 1° mentionner le nom et l'adresse du titulaire du droit, le montant garanti, la date et le rang de l'inscription; 2° être accessibles au public soit par consultation directe, soit par délivrance gratuite ou moyennant taxes raisonables à la requête de toute personne, de copies certifiées conformes, qui feront foi jusqu'à preuve contraire.

Article 3

Toutes les inscriptions relatives à un navire seront effectuées sur un seul et même Registre. Leurs effets à l'égard des tiers sont déterminés par la loi du pays d'inscription.

Article 4

Les dispositions précédentes s'appliquent également aux navires en construction, le pays de construction devant être considérés comme pays d'immatriculation pour les besoins de cette application.

Article 5

Tout navire doit avoir, parmi les papiers de bord, un extrait du Registre mentionnant les hypothèques ou mortgages inscrits et les mon-

tants garantis. Cet extrait ne devra pas avoir plus de 3 mois de date. Il indiquera l'adresse du Service chargé de la tenue du Registre.

Article 6

Si le navire est perdu, sont subrogées au navire jusqu'à concurrence la valeur de celui-ci :

a) l'indemnité d'assurance du corps du navire

b) et, à défaut d'assurance, ou si elle est insuffisante, les indemnités dues par des tiers à raison de cette perte.

Si le navire est seulement avarié, les mêmes subrogations ont lieu à concurrence du montant des avaries que le propriétaire ne ferait pas réparer.

Le créancier inscrit aura contre les débiteurs une action directe et le paiement fait par eux ne sera pas libératoire s'il est fait au mépris des droits du dit créancier.

Article 7

Les inscriptions des droits énoncés à l'article 1er ne peuvent être rayés sans main levée préalable amiable ou judiciaire.

Article 8

Hors le cas prévu à l'article 12, toute vente à un étranger d'un navire grevé d'un des droits énoncés à l'article 1er sera sans effet tant que :

a) toutes les inscriptions n'auront pas été rayées conformément à l'article 7;

b)ou que ces inscriptions n'auront pas été réinscrites sur le nouveau Registre d'immatriculation d'un Etat contractant, avec le rang qui leur est attribué par la loi du pays de leur inscription.

Article 9

Aux fins d'application de l'article précédent, l'immatriculation d'un navire dans un nouvel Etat contractant ne sera pas admise :

1. si les conditions de l'article précédent ne sont pas réunies;

2. si, en outre, il n'est pas produit un certificat émis par l'Etat d'immatriculation actuelle du navire attestant que le dit navire sera radié avec effet du jour où la nouvelle immatriculation aura eu lieu, sous condition que celle-ci soit effectuée dans les trente jours.

Aucune inscription nouvelle ne sera autorisée pendant ce délai. Le certificat ci-dessus prévu devra mentionner, avec leur rang respectif, tous les droits inscrits au jour de son émission.

Article 10

Si la législation du pays où l'immatriculation est demandée ne permet pas l'inscription de ces droits tels qu'ils sont inscrits, les intéressés disposeront d'un délai de soixante jours pour satisfaire aux exigences de cette législation, tous les effets juridiques de l'inscription précédente demeurant en vigueur pendant cette période.

Article 11

Sans préjudice des dispositions pénales pouvant exister dans les législations nationales, la vente d'un navire grevé de droits énoncés à l'article 1er est nulle et sans effet, si elle doit entraîner l'immatriculation d'un navire dans un pays non contractant.

Article 12

Au cas de vente forcée d'un navire grevé d'un des droits prévus à l'article 1er, la propriété sera transférée, libre de ces droits s'ils ne sont repris en charge par l'acquéreur, à la condition que cette vente soit effectuée conformément aux dispositions ci-après.

Article 13

La procédure de vente forcée est celle prévue par la loi de l'Etat où la vente est effectuée. Les effets sont ceux prévus par la présente convention et par la loi de l'Etat où le navire est immatriculé.

Les dispositions minima suivantes devront être respectées :

a) le créancier poursuivant doit remettre au Tribunal ou à toute autre autorité compétente un extrait certifié conforme des inscriptions prises sur le navire;

b) la date et le lieu de la vente sont fixés au moins six semaines à l'avance;

c) au moins un mois avant le jour fixé pour la vente, le poursuivant doit :

1. en faire l'annonce au lieu où le navire est immatriculé, conformément aux dispositions de la loi du lieu d'immatriculation;

2. prévenir par lettre recommandée à l'article 1er, à l'adresse portée au Registre d'inscription, de la date et du lieu de la vente.

JAPANESE MARITIME LAW ASSOCIATION

OBSERVATIONS
ON
THE PROVISIONAL DRAFT CONVENTION

The Japanese Maritime Law Association have the pleasure to make the following observations respecting the Provisional Draft Convention on Maritime Liens and Mortgages (hereinafter to be referred to as the new Convention) which was prepared by Messrs. J.T. Asser, Francesco Berlingieri, W. Birch Reynardson and André Vaes for consideration by the Meeting of the International Subcommittee held at Amsterdam on June 19 and 20, 1964.

The Japanese Association agrees on the necessity and desirability of an international unification of laws on these matters. In order to throw light on the points of difficulty that seem to us to be involved in the new Convention, however, we would like to present the commentary remarks as follows :

Article 1

We understand that a Contracting State may interpret the word « mortgages » referred to in this Article so as to include open-end Mortgages *(Höchsbetragshypothek)*, and therefore that « the amount of mortgages » mentioned in sub-paragraph iii) means the maximum amount of the future advances to be secured by such mortgages as well as the amount of a specified debt.

Article 2

This Article refers only to liens on the vessel, while it is suggested in the second Report prepared by Mr. Asser that each Contracting State may provide for liens freight and accessories in its domestic legislation, and that extra-territorial validity of the latter liens is a question of private international law. This approach of the new Convention may be approved as an outcome of practical necessity to reach an international agreement on this matter.

It is unanimously agreed in the Japanese Association to give lien status to all those claims specified in Sub-paragraph i) to viii) of this Article. However, as regards towage, pilotage, stevedoring services and general average contributions which are no longer to be secured by liens under the new Convention, some of our members hold the view that lien status should be restored to these claims.

The claims referred to in Sub-paragraph i), i.e., costs arising in connection with the arrest and subsequent sale of the vessel, should be construed, in our opinion, to include the costs of watching and preservation after the arrest (cf Japanese Commercial Code, Art. 842, 1); 1926 Convention, Art. 2, 1)).

Although the meaning of « port, cannal and other similar dues » provided for in Sub-paragraph iii) is not always clear, we think that wharfage should fall *de lege lata* within the category of these dues.

According to Mr. Asser's Second Report, the definition of the categories of the claims for loss of life or personal injury as are provided for in Sub-paragraph v) is « mutadis mutandis » the same as that of Article 1, 1), a) and b) of the 1957 Convention of the limitation of liability of shipowners ". We, too, think it desirable to bring the two Conventions into proper correlation in this regard for the reason of « the advantage of having the same concepts in different international conventions ». Thus, we suggest that the claims which give rise to liens should not be confined to those for loss of life or personal injury caused « by any person on board the vessel », but be expressly extended, in conformity with the provisions of Article 1, 1), b) of the 1957 Convention on the limitation of liability of shipowners, to the claims for loss of life or personal injury caused *by any person engaged in vessel's service whether on board or on land for whose act, neglect or default the shipowner is responsible*. The same observations will be made to those claims as specified in Sub-paragraph viii).

The words « claims for repairs and maintenance of the vessel » as used in Sub-paragraph vii) may read not to include the claims for supplies necessary for the continuation of the voyage. If not included, we are of the opinion that there should be an additional express provision for giving lien status to the latter claims.

Article 3

We agree, as a rule, on the provisions of this Article concerning priorities among the maritime liens and mortgages, except for the categories of the claims specified in Paragraph 1, Sub-paragraph viii), i.e., claims for repairs and maintenance of the vessel, together with those for supplies if they are to be added according to our suggestion as mentionned above. Some of our members are of the opinion that such claims should be ranked prior to the mortgages on the vessel.

Article 4

Under Japanese law, a person having a right of retention may only retain the property until his claim has been fully satisfied, and he has no right to obtain satisfaction of his claim out of such property in preference to other creditors. Then, it is provided that in case the property thus retained is put for sale at public auction by anyone else, whether he is a judgment creditor or a creditor whose claim is secured by a preferential right such as a maritime lien or mortgage, a successful bidder is not entitled to receive the delivery of the property auctioned off until he has paid the claim secured by the right of retention. (Sale by Public Auction Law, Art. 2, 3); Code of Civil Procedure, Art. 717, 1), Art. 649, 3) Consequently, the exercice of right of retention. results as matter of fact in reducing a price to be offered by a bidder, so that it sometimes occurs that those who have enforced maritime liens or mortgages by public auction may not obtain out of the proceeds full satisfaction of their claims. This will be also the case that happens to the enforcement of the claims as provided for in Article 3 of the new Convention when Japan adopts it. Legally speaking, however, we do not think that the right of retention under Japanese law as such does « prejudice » the enforcement of these claims, not merely because the existence of the right of retention itself is by no means a legal bar for a person having any of these claims to take the proceedings for its enforcement, but because the right of retention does not, as pointed out above, include a preferential right to the proceeds of the property auctioned off. If, contrary to our interpretation, such effect of the right of retention in Japanese law as mentioned here is to be considered contradictory to the provisions of Paragraph 2 of this Article, we are afraid that Japan should be faced to a considerable extent its general law of property before it introduces into its domestic law the new Convention as it is with this particular Article.

Article 6

The word « registration » used in Paragraph 1 of this Article should be replaced with the word « de-registration ».

Article 7

We understand that the procedure for forced sale or sale by public auction, i.e., sale made in the mode prescribed by law under the process of the court, is to be governed by the law of the country in which such sale takes place. In the light of the fact that there is diversity in a great degree as to the law of procedure for such sale among various countries, the proviso of this Article seems to us to go too far. We would rather consider it sufficient if only the new Conven-

tion provides that the notice to the effect that such sale is to be made should be given to the Registrar of the register in which the vessel is registred, thus leaving the manner of fixing the date and place of such sale as well as the formalities of publicity thereof entirely to the domestic legislation of each Contracting State (cf. 1926 Convention, Art. 9, Paragraph 5). It should be added here, however, that we agree to the provisions of this Article to the extent that all maritime liens and mortgages together with any other encumbrances on the vessel should be extinguished in case of the forced sale thereof in any Contracting State.

Article 9

We consider the two-year period referred to in Paragraph 3 of the Article too long; it should be shortened to one year (cf. Japanese Commercial Code, Art. 847, 1)).

Postscript : Since the booklets Nos 10 and 11 have not reached us yet, our observations as set out above are made only with reference to the booklets Nos 1 - 9. We shall be ready to present our supplementary observations, if we find it necessary to make them when we receive the subsequent issues.

Teruhisa Ishü, President
Isuneo Ohtori, Secretary

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

13

(6-65)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

Projet de Porto Fino
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ITALIE	(HYPO - 44)

Comments on Porto Fino
Draft

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

CANADIAN MARITIME LAW ASSOCIATION

REPORT

The general subject of Maritime Liens and Mortgages has been under study by a special Committee, with special reference to the third report of the CMI International Sub-committee indentified by the number 11 (1-65).

Having regard to the broad scope of the original questionnaire, to the reports received of the meetings in Oxford, Amsterdam and Portofino, to the replies and comments of numerous National Associations, we wish to convey how much we are impressed with the brevety of the Portofino draft, covering as it does nevertheless all the essential aspects of the complexe subject under study.

The essential aim of strengthening the mortgage is well served and the draft shows a salutary resistance to any diluting of that strength by adding elsewhere to the things for which the ship is to be made the security.

The Canadian Association shares the views expressed by the Swedish and Danish Association — and perhaps others — that on the whole things have worked and continue to work very well; where situations of financial difficulty may have arisen there has been no *aggravation* of hardship under the prevailing patterns and it is doubtful whether there would really be any under even more extensive simplifying.

It is therefore only in a sense of constructive criticism that the Canadian Association has to reserve its position on several parts of the Portofino draft and in consequence on any approving of the Convention as a whole. In making comments herein on each Article of the Portofino draft Convention we elucidate our views on various provisions that at present appear to us to be capable of being improved by change. Where we are concerned with changes of substance, we have included draft texts to show our proposed amendements.

We make the suggestion that a new Article might be incorporated to provide for the use by Contracting States of a uniform mortgage document for registration purposes, with a specimen form being scheduled to the Convention text. The aim here is to avoid the undue disclosure of private business that could result from the public inspection of instru-

ments filed with a registrar (v. Article 1 b of the Portofino text), where in some jurisdictions the « instrument filed » may be the actual mortgage contract embodying by reference and « as fully as if set out » a building contract, a loan agreement, a charterparty and a variety of ancillary and subsidiary documents.

Article 1

The aspect of « undue disclosure » that arises under the sub-paragraph of the general remark immediately preceding.

Article 2

There would appear to be considerable doubt that the provisions of sub-paragraph 1 could be acceptable to the Governments of many countries; a mortgage securing a small ad hoc permanent loan from any foreign lender would have the effect of forcing the country of registration to both imprison and keep custody of the ship within its registry, a situation which would constitute an encroachment upon sovereignty.

Recognizing the interest of the bona fide mortgage lender, the following draft amendment is proposed.

Portofino Text	Canadian proposed admendment
Subject to the provisions of paragraph 3 of Article 11, no Contracting State shall permit the deregistration of a vessel without the consent of all holders of registered mortgages and hypothecs.	Other than as provided in paragraph 3 of Article 11, whenever an application for deregistration is not accompanied by an endorsement from each registered holder of a mortgage or hypothec, the registrar shall give to each such holder a notice of the application to deregister and allow 30 days thereafter before acting upon the application.

Some difficulty may arise over the duty which the last sentence of sub-paragraph 2 impose upon the *registrars* to rule upon and declare in their certificates, the priority inter se of the mortgages and hypothecs registered against a vessel.

The desirability of the provision is manifest but in practice the resulting delay through the imposed need for co-operation between the registrar and the Department of Justice of his country could have, in practice, the effect of completely destroying the shipowner's reasonable freedom to dispose of his property.

The Canadian Association cannot dispel its doubts as to the practicability of these provisions as to establishing « priority » in sub-paragraphs 2 and 3 of this Article 2.

Article 3

This appears to be satisfactory if the « priority » problem in Article 2 (paragraphs 2 and 3) is resolved in the manner proposed; otherwise for transferred ships there would be a ranking as in the country from which the ship has been transferred and *not* as in the new country of registration.

Article 4

As regards the item (ii), where pilotage is in so many places just optional, non official, industry-controlled and the like, it should not be included.

The Canadian Association favours the ranking of the above item (ii) to fifth place with the present items (iii), (iv) and (v) moving up to become (ii), (iii) and (iv).

The closing sentence of this Article 4 seems like one of those dilutions of the strength of the mortgagee's position; it seems like an attempt to weave a wider web in which the shipowner can become entangled. Other than demise chartering and managing or operating for the Owner or demise charterer, all chartering and all so called managing or so called operating of a vessel are simply variations of carriage contracts made by the Owner, i.e. such charterers, managers of operators are merely the « shipper » in one of his forms and Owners cannot in equity be burdened with liens on their ships for third party claims upon their shippers. It is equally unjustifiable for the ship to become the security for claims by third parties against the shipowner's shipper, whether this shipper makes himself a charterer or stays as a « mere » bill of lading holder. The following change is proposed :

(Final sentence)

Portofino text	Canadian Proposed Amendement
The word « Owner » mentioned in this Article shall be deemed to include the demise or other charterer, manager or operator of the vessel.	The word « Owner » mentioned in this Article shall be deemed to include any demise charterer and any manager or operator acting for the Owner or demise charterer.

Article 5

Does not the preservation achieved by the salvor, from which all benefit, need to be rewarded ? A change in paragraph 2 is suggested as follows :

Portofino text	Canadian Proposed Amendement
The maritime liens set out in article 4 shall rank in the order listed.	The maritime liens set out in Article 4 shall rank in the order listed, except that claims under sub-paragraph (iv) of Article 4 shall take priority of rank over claims under sub-paragraph (i) to (iii) of Article 4 which accrued prior to the Salvage or General Average Act.

Also, should not the final sentence of sub-paragraph 4, also refer to salvage ?

Article 6

No comment.

Article 7

The sub-paragraph 1 will require a change similar to that proposed for the final sentence of Article 4 and for the same reasons.

Article 8
(Paragraph 1)

The intended meaning of paragraph 1 may become clearer by a re-drafting.

The question does arise whether a 2 year period is fair as regards Salvage and General Average. For General Average particularly, where the Owner declares the General Average and requires the cargo to provide cash or security before he will release it, any sacrificed cargo will not be paid in full if the Owner withholds the ship's contribution to the General Average fund. General Average adjustments often take more than 2 years to complete and the maritime lien of the sacrified cargo upon the ship would then be extinguished. Granted that it may be valuable to seek to speed up Salvage and General Average cases, the 2 years time does seem a little short.

Article 9

No comment.

Article 10

No comment.

Article 11
(Paragraph 3)

The words « and paragraph 2 of this Article » should surely be omitted. There cannot be a just case for depriving the purchaser of proper commercial use of the vessel (that he has bought at a forced sale) once he has parted with his money in payment of the price; it cannot reasonably be asked that he should wait until the judicial distribution of the avails of the sale amongst the claimants thereon.

If the purchaser is alien to the country of registration then deregistration would become mandatory in most countries due to lack of qualification.

Article 12

The Canadian Association is divided in its views as to whether this extension to vessels under construction is really sensible and therefore no specific comment.

Article 13

No comment.

Article 14

No comment.

ITALIAN MARITIME LAW ASSOCIATION

REPORT

The Third Report of Mr. Jan Asser and the « Portofino Draft » have been carefully examined by a Committee consisting of prof. Raffaele Albano, prof. Francesco Berlingieri, prof. Antonio Lefebvre d'Ovidio and prof. Plinio Manca; the recommendations of this Committee, which have been approved by the Italian Maritime Law Association, are the following :

Article 1

In the first line in the English text the word «hypothèques» should be used instead of « mortgages ».

Article 2

In the second paragraph at lines 4 and 5 the words « the new registration is effected » should be replaced by the words « the registration in such other Contracting State is effected ». The purpose of this amendment is only to make quite clear that the (new) registration which causes the deletion from old registrer is the announced registration in the Contracting State.

Article 4

In paragraph 1 (iii) social insurance premiums should be added.

Article 11

In paragraph (1) (a) the words « has been arrested » should be deleted and the word « is » should be added. In fact whilst the past tense in incorrect, the present tense (is under arrest) would not avoid all problems, since in some countries the arrest is not always a preliminary step to the forced sale. It is felt that the fact that the vessel is in the jurisdiction of the Contracting State is sufficient.

In paragraph (3) at line 2 the words after « of a forced sale », the words, « in a contracting State » should be added. It is felt that this article should deal only with forced sales in Contracting States.

Article 14

The provision that the new Convention shall replace and abrogate the 1926 Convention in respect of the relations between States which ratify such new Convention or accede to it is not clear. If in fact the Contracting States shall, according to Art. 13 of the Portofino Draft, apply the provisions of the new Convention to all sea-going vessels irrespective as to whether they are registered in a Contracting State or in a non-Contracting State, after the coming into force of the new Convention the old one cannot be applied any more. It follows that the Contracting States which have ratified or adhered to the 1926 Convention must denounce it in compliance with its Art. 21 and the new Convention will take effect as from the time when the denunciation will operate, namely after one year.

Rome, 12th April 1965.

Giorgio Berlingieri
President

COMITÉ MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

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MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

Projet de Porto Fino
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MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

ASSOCIATION SUISSE DE DROIT MARITIME

REPONSES

Remarques générales

Dans ses articles 4 et 5 le projet essaye de trouver un compromis acceptable entre les intérêts du crédit hypothécaire et ceux des créanciers des événements maritimes dont les privilèges auront la priorité sur les hypothèques ou mortgages. Nous regrettons toutefois que le projet n'ait pas pu restreindre la liste des privilèges primant les hypothèques, parce que nous considérons que tout renforcement possible du crédit hypothécaire serait dans l'intérêt du commerce maritime.

Le projet ne se prononce d'autre part pas sur l'assiette des hypothèques et privilèges, spécialement les indemnités d'assurance et indemnités dues par des tiers pouvant être grevées par ces droits. Il paraît être indispensable que l'assurance-corps soit réservée comme garantie pour les créanciers hypothécaires. La Convention devrait régler le sort de ces accessoires juridiques du navire qui peuvent se substituer à lui selon les législations applicables. Une uniformité serait hautement désirable. Nous proposons donc qu'il soit tenu compte de ce problème dans la rédaction définitive de la Convention. Si l'assiette des privilèges et hypothèques ne devaient pas faire l'objet d'une règle uniforme dans la Convention, celle-ci devrait tout au moins contenir une disposition de droit international privé pour clarifier selon quel droit national les effets d'une hypothèque ou d'un privilège seront jugés. On pourrait par exemple prévoir que les effets d'une hypothèque seront régis par la loi du pays d'immatriculation et ceux d'un privilège par la loi du pays dans lequel l'exécution forcée aura lieu, sans que les effets des privilèges selon cette loi puissent nuire aux hypothèques au-delà des règles de la Convention. Sans une telle disposition l'article premier sur la reconnaissance internationale d'une hypothèque restera incomplet et difficile à appliquer.

Article 2

La procédure prévue à l'alinéa 2 et 3 de l'article 2 n'est pas mûrement réfléchie. Nous donnons la préférence à la proposition allemande contenu dans le document HYPO 36. L'alinéa 2 prévoit seule-

ment le cas du transfer d'un navire grevé d'une hypothèque d'un pays dans un autre, mais non le cas d'un navire non grevé de tels droits, pour lequel la Convention devrait également prévoir que l'immatriculation sur un nouveau registre d'un Etat contractant ne pourra être effectuée que contre production d'un certificat de radiation dans le registre précédent. Ainsi on évite toute double immatriculation et on garantit en même temps le droit de propriété peut-être plus important encore que celui d'un créancier.

Entre l'alinéa 2 et l'alinéa 3 il existe une certaine incongruité. D'un côté on ne permet une nouvelle immatriculation que contre présentation d'un certificat de radiation, et d'autre côté on ne permet pas la nouvelle immatriculation que si les hypothèques sont acceptées pour inscription sur le nouveau registre de l'autre Etat contractant. Si un certificat de radiation est présenté, cela veut dire, que selon l'alinéa premier les titulaires des hypothèques aient consenti à la radiation du navire tale quale, et non sous réserve que leurs droits seront repris sur le nouveau registre. En outre il y a des législations selon lesquelles les droits inscrits sont caducs par le fait de la radiation du navire lui-même. Comment de tels droits disparus pourront-ils être acceptés pour une nouvelle inscription ? Quid au cas où le préposé du nouveau registre n'accepte pas l'inscription p.ex. d'une hypothèque constituée selon un autre droit national, mais qu'il se trouve en présence d'un certificat de radiation en vertu de l'alinéa 2 ? Quelle transformation juridique de l'hypothèque sera nécessaire ? Pour une transformation faudra-t-il le consentement du titulaire et du débiteur ? Les créanciers hypothécaires ne donneront enfin leur consentement à la radiation que s'ils ont déjà la garantie que leur droit sera de nouveau inscrit sur le nouveau registre avec les mêmes effets. Et si le préposé du nouveau registre refuse l'inscription contre toute prédiction ? Il y a aussi des législation qui pour l'immatriculation d'un navire venant de l'étranger prévoient une procédure de publication préalable de la requête d'inscription pendant un délai plus ou moins long. Les 30 jours prévus à l'alinéa 2 seront donc certainement trop court. Ces remarques non complètes mais à titre d'exemples devraient démontrer que le système et la rédaction de l'article 2 sont à remanier, de préférence selon la proposition allemande citée.

Article 8

La période pour l'extinction des privilèges devrait être ramenée à une année. Il est dans l'intérêt du crédit hypothécaire ainsi que de tout acheteur d'un navire que la période d'insécurité sera aussi courte que possible.

Les cas d'interruption de la période d'extinction du privilège sont limités à la saisie-exécutoire (parce qu'elle doit mener à une vente forcée, et la saisie-conservatoire ne suffit donc pas) et à la faillite

ou à la liquidation forcée. Ceci exigerait du créancier de faire toujours les démarches juridiques les plus rigoureuses, seulement pour interrompre le délai de prescription. Cette solution est critiquable. Il faudrait prévoir qu'une simple action judiciaire ou poursuite selon la loi du lieu de la procédure devrait avoir le même effet. Deux cas d'extinction du privilège sont en outre omis : la prescription de la créance garantie et l'extinction de la créance elle-même, étant donné que le privilège ne pourra avoir qu'un effet accessoire. Si selon la loi applicable en espèce une créance se prescrit dans 6 mois ou une année (si pour les privilèges on garde les 2 ans) il serait inconcevable que le privilège garderait ses effets malgré que la créance garantie ne pourra plus être adjugée.

Les cas proposés pour sauvegarder le privilège malgré le laps de temps ne tiennent ensuite pas compte du fait qu'il faut toujours une action quelconque du créancier qui veut éviter l'extinction ou la prescription. Le créancier qui ne réagit pas dans le délai prévu par la loi est présumé de renoncer à son droit. Cet effet connu ne pourra pas être écarté par une action d'un autre créancier plus vigilant. Le projet parle tout simplement de la saisie, de la faillite et de la liquidation forcée, sans dire que seul le créancier qui a demandé l'ouverture de ces procédures pourra se prévaloir de la prolongation du privilège. Il serait inconcevable qu'un créancier qui ne s'intéressait plus à son privilège et le laissait éteindre puisse profiter qu'un autre créancier ait encore demandé l'ouverture de la faillite par exemple une journée avant l'extinction du privilège du premier créancier. Il faut donc que tout créancier qui veut éviter l'extinction de son privilège agisse lui-même en justice. Il ne faut pas seulement penser au débiteur, mais aussi aux autres créanciers spécialement hypothécaires qui ont un intérêt a ne pas voir leur créance exposée à la concurrence ou même à la priorité d'autres créanciers qui n'ont pas agi. Si un créancier vigilant ouvre une action pour la sauvegarde de son droit et continue après jugement la procédure d'exécution, il risquerait par sa vigilance qu'il fasse interrompre le cours de la prescription pour d'autres créanciers qui n'ont pas agi. L'article 8 tel qu'il est conçu ne pourra donc pas trouver l'approbation.

Article 11

A l'alinéa 3 il est généralement prévu que le navire sera radié dans le registre du pays d'immatriculation si une vente forcée a eu lieu dans un autre Etat contractant. Cette règle n'est pas complète. D'abord la radiation seulement sur demande de l'acheteur sans preuve sera difficile. Il faudrait tout au moins la présentation du procès-verbal d'adjudication. Ensuite la vente forcée peut avoir lieu en vertu d'un jugement qui ne sera jamais exécuté dans le pays d'immatriculation,

soit à la base d'une convention existante entre les deux pays sur la reconnaissance et l'exécution des jugements, soit qu'il s'oppose à « l'ordre public » de l'Etat qui devrait le reconnaître. Si un Etat n'est pas obligé à reconnaître et à exécuter un jugement condamnant le propriétaire du navire au payement d'une somme d'argent, cet Etat ne pourra a fortiori pas être contraint à reconnaître les effets de l'exécution du jugement dans un autre pays c'est-à-dire procéder à la radiation de l'immatriculation qui dans plusieurs législations est identique avec la perte de la propriété. Le propriétaire ainsi dépossédé ne pourra plus faire valoirs son droit, même si le navire se trouve de nouveau dans la juridiction du pays où il avait été enregistré avant la vente forcée. Le système serait admissible pour la vente forcée pour faire payer un créancier hypothécaire ou privilégié selon la Convention. Mais la Convention parle de tous privilèges et autres charges et personne ne saura pour quelle créance de droit civil ou public un Etat inventera des privilèges possibles selon l'article 6 de la Convention. L'alinéa 3 de l'article 11 parle enfin de toute vente forcée pour n'importe quelle condamnation du propriétaire. Il est donc indispensable qu'une réserve surtout de « l'ordre public » sera insérée dans la Convention.

Association Suisse de Droit Maritime.

Bâle, en mai 1965.

ASSOCIATION HELLENIQUE DE DROIT MARITIME

OBSERVATIONS

I. OBSERVATIONS GENERALES

L'Association Hellénique de Droit Maritime a longuement examiné le projet de Convention Internationale concernant les hypothèques maritimes et les privilèges (projet de Portofino).

Au cours de cette étude, les membres de cette Association ont beaucoup apprécié le travail assidu que les membres du Sous-Comité International chargés de la rédaction du projet ont fourni. Néanmoins, l'Association Hellénique ne se trouve guère d'accord avec les principes énoncés dans le dit projet.

Ce projet favorise de loin les privilèges maritimes, institution qui, déjà, à l'époque de la Convention de 1926, a été considérée comme une forme de sûreté réelle, vraiment périmée, surtout à cause de son caractère occulte qui peut faciliter des pratiques abusives.

L'Association Hellénique avait indiqué, dès son premier rapport, que la législation grecque récente, (article 205 du Code de Droit Maritime Privé 1957), avait adopté un nombre de privilèges aussi restreint que possible. Elle estime que la restriction des privilèges répond aux impératifs du droit de notre ère et considère que l'amendement de la Convention de 1926 ne peut amener qu'à la limitation du nombre des privilèges, à l'instar du dit article 205 du Code Hellénique. Pourtant, elle serait disposée, dans un esprit de coopération internationale, à reconnaître des privilèges et à examiner quelques cas particuliers. Mais elle n'est de toute manière pas disposée à contribuer à l'alourdissement du fardeau des privilèges dont l'effet immédiat sera de diminuer la valeur réelle de l'hypothèque.

Par contre, les dispositions de la Convention qui régissent les hypothèques sont plus ou moins insuffisantes et doivent, par conséquent, être reconsidérées.

En conclusion, l'Association Hellénique ne considère pas que la révision de la Convention de 1926 est pour le moment mûre. La Convention de 1926 est dans son ensemble beaucoup plus satisfaisante que le projet de Portofino. Il vaut donc mieux retenir l'ancienne convention

que procéder à une révision sans la certitude que la nouvelle convention donnera des solutions plus équitables que l'ancienne.

Le sujet de révision de la Convention de 1926 peut être amplement discuté lors de la prochaine Conférence du Comité Maritime International à New York, mais il faudra éviter de prendre des décisions définitives.

II. OBSERVATIONS SUR LES DIVERSES DISPOSITIONS DE LA CONVENTION

1. *Utilisation des termes « hypothèque » et « mortgage ».*

Relativement à l'utilisation jointe des termes « hypothèque » et « mortgage », il est à noter que malgré les différences de détail qui existent entre le mortgage du système juridique des pays anglo-saxons et l'hypothèque des pays de tradition romaine, ces deux institutions sont identiques quant à leur traits principaux. Par conséquent, le terme français « hypothèque » peut normalement être traduit en anglais par le terme « mortgage » et vice-versa. L'utilisation du double terme dans le texte de la Convention n'est pas nécessaire et peut en outre provoquer des interprétations erronées.

A ce propos, il est à noter que l'existence, en droit anglais, d'une autre institution appelée « hypothecation » et dont la nature juridique est différente de celle du mortgage, pourrait éventuellement donner lieu à des interprétations erronées.

Il est donc nécessaire d'utiliser, dans la Convention, une terminologie plus exacte, à savoir « hypothèque » dans le texte français et « mortgage » dans le texte anglais.

D'ailleurs l'utilisation de cette double terminologie pourrait provoquer des difficultés considérables de traduction en d'autres langues, lors de la procédure de ratification.

D'autre part le danger de confusion, que la double terminologie vise à éliminer, pourrait facilement être écarté par l'insertion, dans le texte de la Convention, d'une définition de l'hypothèque et du mortgage, à l'instar de l'article 1 du projet norvégien.

2. *Article 1er.*

Le premier paragraphe de cet article n'accorde aux hypothèques maritimes qu'une reconnaissance internationale de leur force exécutoire. On pourrait pourtant espérer le maintien du régime de l'article 1 de la Convention de 1926 qui considérait ces hypothèques comme valables et respectées, attributions qui dépassent bien la force exécutoire. Et cela, sans méconnaître que la force exécutoire d'une hypothèque est d'une importance primordiale.

L'article 1 pourrait donc être libellé de la manière suivante :

« Les hypothèques sur un navire, constituées et inscrites, conformément aux dispositions de la loi dont le navire bat pavillon, sont reconnues dans tous les Etats Contractants ».

3. Mais la reconnaissance internationale des hypothèques n'est point suffisante. Après l'article 1er, qui précise les conditions de reconnaissance internationale des hypothèques, doivent être insérés des articles contenant des dispositions visant les points suivants :

a) D'abord, sur l'étendue des droits des créanciers hypothécaires et les relations entre eux. A ce propos, la solution consiste dans le renvoi explicite de la Convention à la loi du pavillon. Mais le droit du créancier hypothécaire, sur l'indemnité d'assurance du corps du navire, doit être internationalement reconnu.

b) Ensuite, étant donné que le caractère mobile du navire rend la publicité de l'hypothèque par l'inscription au registre du port d'attache insuffisante, il faut prévoir que, parmi les documents de bord, le capitaine devra conserver un document attestant le nombre des hypothèques inscrites sur le navire, ainsi que le montant pour lequel chacune d'elles avait été inscrite (voir article 42 du Code Hellénique de Droit Maritime Privé et les articles 15 et 17 de la loi hellénique sur les Hypothèques de Préférence).

c) La force exécutoire est un troisième point que la Convention Internationale doit traiter. Il pourrait être admis que ces titres exécutoires émis en conformité avec les dispositions de la loi du pavillon par rapport à une hypothèque légalement constituée et inscrite, soient reconnus exécutoires dans tous les Etats Contractants, sans la procédure d'execatur ou sans une intervention préalable des autorités judiciaires de l'Etat du lieu de l'exécution.

4. *Article 2.*

La disposition du premier paragraphe de l'article 2 visant le cas de changement de pavillon d'un navire grevé d'hypothèques doit être complétée de manière à prévoir que le consentement des créanciers hypothécaires sera fait par écrit.

Les dispositions des paragraphes 2 et 3 de ce même article sont satisfaisantes.

5. *Article 3.*

Ainsi qu'il a été antérieurement exposé, une nouvelle disposition doit être insérée, après l'article 1er, stipulant que l'étendue des droits des créanciers hypothécaires ainsi que les relations entre eux seront régis par la loi du pavillon. Si cette suggestion est retenue l'article 3 ne sera plus nécessaire.

6. Les dispositions relatives aux hypothèques maritimes doivent être complétées par un dernier article disposant qu'en cas de saisie d'un navire, à partir de la notification de cette saisie au Conservateur des Hypothèques (voir infra sous article 10), toute inscription d'hypothèque est nulle.

7. *Aticle 4.*

a) La critique de cet article a été virtuellement faite dans les observations générales, mais on doit répéter ici qu'il ne répond pas aux besoins contemporains. Cet article est louable en ce qui concerne l'élimination de certains privilèges reconnus par la Convention de 1926, il ne l'est pas, au contraire, en ce qui concerne l'adoption de nouveaux privilèges.

b) Surtout l'élargissement des privilèges du 4e rang de la Convention de 1926 ne répond à aucun besoin. Tous ces cas sont actuellement assurés et l'adoption d'un tel privilège ne serait, en application de l'article 9 du projet, qu'un privilège au profit des assureurs, ce qui n'est conforme ni au but, ni à la mission sociale des assureurs, dont les droits par la voie de la substitution, vont prévaloir sur ceux des autres créanciers et surtout sur des créanciers hypothécaires.

c) D'ailleurs, l'adoption des nouveaux privilèges aura comme résultat de gêner les entreprises maritimes, dont les besoins accrus de crédits ne pourraient être satisfaits à cause de l'incertitude de la valeur réelle de l'hypothèque.

d) Par contre, le fait que d'après le projet, les privilèges ne s'exercent plus sur le fret, constitue un progrès considérable. Il serait bien souhaitable que ce progrès soit complété par une disposition établissant que les privilèges ne s'exercent pas sur l'indemnité d'assurance.

e) Relativement à l'élimination des privilèges relatifs aux taxes et aux charges sociales, cette élimination, d'ailleurs très juste, risquerait de compromettre l'adoption du Projet de Convention, presque par tous les gouvernements.

f) Enfin, du point de vue de la rédaction de cet article, il est à noter que le renvoi du privilège, relatif aux frais judiciaires, à un article, n'est pas à retenir, tout simplement parce que cette solution ne donne pas à première vue le nombre exacte des privilèges.

8. *Article 5.*

Dans le 4e paragraphe de cet article pourrait être retenue la disposition du paragraphe 3 de l'article 3 de la Convention de 1926, à savoir : « Les créances se rattachant à un même événement sont réputées nées en même temps ».

9. *Article 6.*

L'article 6 vise un problème très difficile. On doute que la solution donnée soit la meilleure possible. Ce sujet doit donc être reconsidéré.

10. *Article 7.*

a) Le 1er paragraphe de cet article élargit d'une manière inadmissible l'étendue des privilèges. Il n'y a aucune raison valable pour que les navires soient grevés des privilèges pour des obligation des locataires ou des affréteurs du navire. D'autre part les termes utilisés, tels que l'armateur gérant, exploitant, ne sont pas précis et doivent être éliminés.

b) Le 2nd paragraphe régissant le cas de changement de propriétaire ou d'immatriculation doit être complété par une disposition statuant que dans un tel cas le créancier privilégié doit dans un délai extinctif très court, par exemple trois mois, intenter une action pour reconnaissance de son privilège.

11. *Article 8.*

a) Cet article aussi, élargit par comparaison à la Convention de 1926, la portée des privilèges dans le temps, sans raison valable. Le délai d'un an prévu par la Convention de 1926 est amplement suffisant pour la sauvegarde des droits des créanciers privilégiés.

b) D'ailleurs, les cas de faillite ou de liquidation forcée ne doivent pas constituer par eux-mêmes des cas d'interruption du délai. L'interruption doit se faire par l'intervention de l'intéressé à la procédure de la faillite ou de la liquidation forcée.

12. *Article 9.*

Cet article aussi est libellé de manière à élargir la portée réelle des privilèges. L'Association Hellénique s'oppose à cette disposition. Le privilège visant à la protection de quelques intérêts d'importance sociale ne peut pas faire l'objet d'une transaction quelconque.

13. *Article 10.*

a) Cet article traite tout de suite de la vente forcée d'un navire. Mais, dans presque toutes les procédures du monde entier, la vente forcée est précédée de la saisie du navire à vendre, fait auquel presque toutes les procédures attachent une série de conséquences, telles que privation du droit d'aliénation du navire et autres. Il est donc nécessaire que la saisie soit notifié dans un certain délai, au Conservateur du Registre auquel le navire saisi ou arrêté est immatriculé. D'autre part, le mépris de ce délai pourrait être sanctionné par la nullité de la saisie.

b) Ensuite vient la question de la notification de vente forcée. La notification prévue par l'article 10 du projet « *à tous* les titulaires

de privilèges maritimes » favorise de nouveau les titulaires déjà assez favorisés, mais risque de créer des nullités de la procédure de vente, étant donné le caractère occulte des privilèges. Les titulaires des divers privilèges ne sont et ne peuvent pas être connus par la personne qui a l'initiative de la vente forcée.

c) D'ailleurs l'obligation de notifier la vente forcée aux créanciers hypothécaires, ne peut être retenue que pour ceux des créanciers dont les titres ont été enregistrés avant l'enregistrement de la saisie. (Voir supra sub-par. 5).

14. *Article 11.*

a) Relativement à l'alinéa 1, il est à noter que la phrase « autres charges » peut donner lieu à des interprétations erronées. Dans le cas où, par cette phrase vague, on vise les privilèges éventuellement reconnus par une législation intérieure, en application de la disposition de l'article 6 du projet, elle pourrait être remplacée par la phrase « privilèges de n'importe quelle nature ». Si par contre elle vise à d'autres saisies éventuelles, il faudra les nommer.

b) Par ailleurs, la phrase frais taxés par le Tribunal risque de provoquer des difficultés dans les pays dont la procédure a confié la taxation des frais à une autre autorité non judiciaire, telle que la personne par devant laquelle s'effectue la vente. Cet inconvénient pourrait être évité si ce paragraphe était rédigé de la manière suivante :

« Les frais taxés par le tribunal et les frais provoqués par la saisie ».

15. *Article 14.*

Le contenu de cet article doit être réexaminé de manière à éviter les problèmes qui peuvent surgir de l'application parallèle des deux conventions.

Le Secrétaire
T.B. Karatzas
Avocat

COMITÉ MARITIME INTERNATIONAL

RIV[illegible]ES ET HYPOTHÈQUES MARITIME

15

(T. 65)

MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

COMITE MARITIME INTERNATIONAL

PRIVILÈGES ET HYPOTHÈQUES MARITIMES

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MARITIME LIENS AND MORTGAGES

INTERNATIONAL MARITIME COMMITTEE

QUATRIEME RAPPORT

1. Au nom de la Commission Internationale, le soussigné a l'honneur de soumettre à la Conférence de New York le projet de Convention Internationale concernant les Privilèges et Hypothèques Maritimes annexés (désignés ci-dessous comme « Projet d'Anvers »).

Le projet d'Anvers est le résultat des travaux de deux réunions de la Commission Internationale; il a été précédé de deux autres projets, le « Projet d'Oxford » et le « Projet de Portofino ». Le premier de ces projets (le Projet d'Oxford) a été préparé par un groupe de travail qui s'est réuni à Amsterdam au mois de décembre 1963 et à Oxford au mois d'avril 1964. Ensuite, la Commission Internationale a pris connaissance de ce projet et en a discuté le contenu à sa première réunion tenue à Amsterdam les 19 et 20 juin 1964; elle a désigné un comité de rédaction qui a modifié le texte du Projet d'Oxford conformément aux décisions de la Commission Internationale. Ce projet amendé (Projet de Portofino) a été examiné d'une manière détaillée lors de la deuxième réunion de la Commission Internationale tenue à Anvers le 4 juin 1965 et a été soumis à nouveau au Comité de Rédaction. Le lendemain, le 5 juin 1965, le Comité de Rédaction s'est réuni et a amendé le texte du projet de Portofino conformément aux décisions prises à la réunion du jour précédent, établissant de cette manière le Projet d'Anvers.

2. Au stade actuel il paraît utile de rappeler en quelques mots les raisons principales qui, à la réunion à Stockholm en juin 1963, ont amené le Bureau Permanent à prendre la décision de mettre ce sujet à l'ordre du jour du Comité Maritime International. Il y avait deux sortes de raisons, à savoir :

1° le fait que jusqu'à cette époque seul un nombre relativement restreint de pays avaient ratifié la Convention de 1926 concernant les Privilèges et Hypothèques Maritimes ou y avaient adhéré;

2° le besoin accru de financer l'exploitation de navires et spécialement la construction de nouvelles unités, besoin qui nécesssite un renforcement de la position du titulaire d'une hypothèque maritime et en outre un traitement uniforme de ces hypothèques si possible sur un plan mondial.

Depuis lors un certain nombre de Nations maritimes, parmi les plus importantes et parmi lesquelles certaines jouent un rôle prépondé-

FOURTH REPORT

1. On behalf of the International Subcommittee the undersigned begs to submit to the New York Conference the attached draft of an International Convention relating to Maritime Liens and Mortgages (hereinafter to be referred to as « the Antwerp draft »).

The Antwerp draft is the result of the proceedings of two meetings of the International Subcommittee; it was preceded by two drafts, the « Oxford » draft and the « Portofino » draft. The first of these two drafts (the Oxford draft) was prepared by a Working Group which met in Amsterdam in December 1963 and at Oxford in April 1964. This draft was subsequently submitted to the International Subcommittee which discussed its contents at its first meeting at Amsterdam on the 19th and 20th June, 1964, and appointed a Drafting Committee which subsequently revised the text of the Oxford draft in accordance with the decisions of the International Subcommittee. This revised draft (the Portofino draft) was in its turn considered in great detail by the second meeting of the International Subcommittee held at Antwerp on the 4th June, 1965 and once more referred to the Drafting Committee. On the next day, June 5th, 1965, the Drafting Committee met and amended the wording of the Portofino draft in accordance with the decisions of the meeting held on the previous day, thus producing the Antwerp draft.

2. At this point, it would seem useful to recall in a few words the main reasons which induced the Bureau Permanent to decide, at its meeting held in Stockholm in June 1963, to put this topic on the Agenda of the Comité Maritime International. Those reasons were twofold, namely, *firstly* the fact that so far only a relatively small number of countries had ratified or had adhered to the 1926 Convention relating to Maritime Liens and Mortgages, and *secondly*, the increased need for the financing of ships and especially of new buildings which need requires a strengthening of the position of holders of maritime mortgages and moreover a uniform treatment of such mortgages, if possible on a world wide scale. Since a number of the most important maritime nations, some of which moreover play an important part in the financing of ships, had refused to become a party to the 1926 Convention and a change of attitude on their part was not to be expected, it was felt that either a revision of the 1926 Convention or the drafting of an

rant dans le financement des navires, ont refusé de souscrire à la Convention de 1926; et il ne faut pas s'attendre à un changement d'attitude de leur part. Il est apparu que soit une revision de la Convention de 1926, soit l'élaboration d'un tout nouveau texte remplaçant celui de cette convention serait souhaitable dans l'intérêt tant des propriétaires de navires que des institutions de financement intéressées. En outre, le projet de convention relatif à l'enregistrement des droits concernant les navires en construction adopté en 1963 par la Conférence de Stockholm du C.M.I. (dénommé ci-après « Projet de Stockholm »), n'a pas répondu d'une manière suffisante aux besoins d'une nouvelle législation internationale dans ce domaine puisque ses dispositions se limitent à des hypothèques et autres droits enregistrés portant sur des navires en construction et ne portent pas sur des privilèges frappant le navire pendant la période de la construction, de sorte que cette convention n'établit ni une mise en vigueur internationale de tels privilèges ni un rang, que ce soit entre les privilèges ou entre les privilèges et les hypothèques ou par rapport à des hypothèques maritimes ou à des privilèges établis ultérieurement à la mise en exploitation du navire.

3. Il devint manifeste dès le début que la plupart des Associations Nationales qui soumirent des rapports, préféraient une nouvelle Convention à une tentative de révision de la Convention de 1926, ceci en raison des critiques sérieuses formulées non seulement dans les Etats non-contractants mais également dans les pays qui avaient adhéré à la Convention (voir rapport préliminaire Doc. Hypo-1 et Hypo-2). Ces critiques portaient tant sur certains principes qui sont à la base de la Convention que sur plusieurs de ses articles. La rédaction d'une Convention entièrement nouvelle paraissait donc la tâche la plus facile et cette solution, nous l'espérons, pourra s'avérer acceptable pour un grand nombre d'Etats y compris ceux qui sont restés en dehors de la Convention de 1926.

Jusqu'alors, seule l'Association danoise et dans une moindre mesure l'Association française avaient exprimé le point de vue suivant lequel il n'y aurait pas de besoin réel d'une nouvelle Convention (Doc. Hypo-31 et Hypo-41).

4. A ce stade, il paraît souhaitable de faire quelques remarques d'une nature plus générale avant d'entamer la discussion des différents articles du Projet d'Anvers.

a) L'Association norvégienne dans son rapport du 29 mars 1965 attire l'attention sur le Projet de Stockholm et propose que le nouveau projet de Convention soit rattaché au Projet de Stockholm avant d'être présenté à la Conférence de New York. Lors de la réunion de la Commission Internationale du mois de juin 1965 le délégué norvégien a déclaré toutefois que, puisque de l'avis de son association, le Projet

entirely new instrument in substitution for that Convention would be desirable in the interest both of shipowners and of the financial institutions concerned. Moreover the need for new international legislation in this field was not sufficiently met by the draft Convention relating to Registration of Rights in respect of Ships under Construction adopted in 1963 by the Stockholm Conference of the C.M.I. (hereinafter referred to as « the Stockholm draft »), in as much as its provisions are limited to registered mortgages on and other registered rights in respect of ships under construction and do not apply to maritime liens attaching to ships during the construction period, and therefore do not provide either for the international enforcement of such liens or for their ranking either « inter se » or with respect to such mortgages, or subsequent maritime mortgages effected on and subsequent maritime liens attaching to the vessel when in operation.

3. Already at an early stage it became manifest that most of the national associations which submitted reports, were in favour of preparing a new Convention rather than attempting a revision of the 1926 Convention, which came in for serious criticism not only in non-Contracting States, but also in those countries which had acceded to it (vide the Preliminary Report, doc. Hypo-1 and Hypo-2). Those criticisms were levied both at certain principles underlying that Convention and at many of its articles. The drafting of an entirely new Convention therefore seemed an easier task and, as is hoped, might prove acceptable to a large number of States, including those which had stayed outside the 1926 Convention.

So far, only the Danish Association and in a lesser degree the French Association have expressed the view that there exists no real need for a new convention (doc. Hypo-31 and Hypo-41).

4. At this stage, it may be desirable to make a few remarks of a more general nature, before discussing the several articles of the Antwerp draft.

a) In its report dated March 29, 1965, the Norwegian Association draws attention to the Stockholm draft and proposes that the new draft Convention be geared to the Stockholm draft prior to its presentation to the New York Conference. At the June 1965 meeting of the International Subcommittee the Norwegian delegate stated however that, as in the view of his Association the Portofino draft conflicted

de Portofino entre en conflit avec le Projet de Stockholm, la dite proposition doit être comprise comme une proposition tendant à supprimer complètement l'article 12 du Projet de Portofino. Après un long échange de vues, la Commission Internationale a rejeté la proposition norvégienne et c'est la raison pour laquelle il a été décidé de maintenir l'article 12. D'autre part, une étude portant sur la question de savoir si, et dans quelle mesure, les deux projets contenaient des dispositions contradictoires ainsi que sur la recherche éventuellement d'une solution demanderait un temps dépassant largement celui qui était disponible. C'est la raison pour laquelle la Commission Internationale a décidé de créer une petite commission composée de membres appartenant à la Commission Internationale; cette petite commission a été chargée d'examiner ce problème particulier et de faire rapport au Bureau Permanent qui, suivant les renseignements disponibles, se réunira à New York immédiatement avant le commencement des travaux de la Conférence de New York.

b) L'article 3, paragraphe 2, de la Convention Internationale relative à la limitation de la responsabilité des propriétaires de navires de mer, signée à Bruxelles le 10 octobre 1957, dispose que dans chaque partie du fonds de limitation visé par le paragraphe 1 dudit article, la répartition se fera entre les créanciers proportionnellement aux montants de leurs créances reconnues.

Par conséquent, lorsqu'un fonds de limitation constitué conformément à la Convention de 1957, est distribué, toutes les créances portant sur une partie quelconque du fonds de limitation prendront rang *pari passu* (au marc le franc) qu'elles soient ou non garanties par un privilège maritime.

Peu de temps après l'adoption de la Convention de 1957 la question s'est posée de savoir si le paragraphe 2 de l'article 3 de cette Convention n'était pas en contradiction avec l'article 5 de la Convention de 1926 relative aux Privilèges et Hypothèques Maritimes; en effet, on pourrait éventuellement déduire de ce dernier article que dans le cas où un fonds de limitation a été constitué, la distribution de ce fonds devrait être réalisée en tenant compte des privilèges existants. A ce propos, l'attention a été attirée également sur la Convention de 1924 relative à la limitation de la responsabilité qui dans les articles 6 et 7, se réfère à l'ordre des privilèges qui doit être respecté dans la masse des créances issues de la responsabilité du propriétaire. Conformément aux instructions données par le Bureau Permanent, le soussigné a rédigé au mois de mars 1963 un rapport ainsi qu'un questionnaire qui, toutefois, n'a provoqué que peu de réaction, seules les Associations française, allemande et suisse ayant soumis un rapport.

Lors de l'établissement du Projet d'Oxford par le groupe de travail mentionné plus haut, le même problème a été soulevé quoique, contrairement à la Convention de 1926, le Projet d'Oxford ne contienne

with the Stockholm draft. the said proposal was to be understood as a proposal to entirely delete Article 12 of the Portofino draft. After a lengthy discussion, the International Subcommittee rejected the Norwegian proposal and therefore decided to maintain Article 12. On the other hand, a study of the question whether and if so, to what extent the two drafts contain conflicting provisions, and how, in that case, such conflicts could be remedied, would have far exceeded the time available. For that reason, the International Subcommittee decided to set up a small Committee from among its members which was entrusted with the task to investigate this particular problem and report to the Bureau Permanent which, it is understood, will be meeting in New York immediately before the beginning of the New York Conference.

b) Article 3, par. 2 of the International Convention relating to the limitation of the liability of owners of sea-going vessels signed at Brussels on October 10th, 1957, provides that in each portion of the limitation fund referred to in par. 1 of the said Article, the « distribution among the claimants shall be made in proportion to the amounts of their established claims ».

Consequently, when a limitation fund set up in accordance with the 1957 Convention is distributed, all claims against each portion of the fund rank *pari passu* irrespective whether or not they are secured by a maritime lien.

Shortly after the 1957 Convention had been adopted, the question arose whether the said par. 2 of Article 3 is not inconsistent with Article 5 of the 1926 Convention on maritime liens and mortgages, from which latter article it might perhaps be inferred that, in the event that a limitation fund should have been set up, the distribution of such fund will have to be effected with due regard to existing liens. In this connection attention was also drawn to the 1924 Brussels Convention on limitation of liability, which in its articles 6 and 7 refers to the order of liens to be observed in connection with the amount(s) representing the extent of the owner's liability. Pursuant to instructions from the Bureau Permanent the undersigned prepared in March 1963 a preliminary Report with accompanying Questionnaire which however met with little response, only the French, German and Swiss Associations having submitted reports.

When the Working Group referred to above prepared the Oxford draft, the same problem came up for discussion, although otherwise than in the 1926 Convention, the Oxford draft did not contain any reference

aucune référence à un fonds de limitation. Néanmoins, afin d'éviter que des tiers ne puissent se prévaloir d'un manque d'harmonie entre la Convention de 1957 et la nouvelle Convention, le groupe de travail a décidé d'insérer dans le Projet d'Oxford, une disposition particulière (article 11 de ce projet) stipulant que les titulaires d'une créance sur un propriétaire de navires qui peut soumettre cette créance à une limitation, ne peut avoir recours à la sûreté fournie par un privilège maritime, après la constitution d'un fonds de limitation.

Toutefois, il a été décidé à la réunion d'Amsterdam de la Commission Internationale de biffer complètement l'article 11 du Projet d'Oxford et une proposition yougoslave tendant à réintégrer dans la nouvelle Convention une disposition similaire à celle de l'article 11 du Projet d'Oxford, a été rejetée à l'unanimité à la réunion d'Anvers de la dite Commission Internationale.

Le sousssigné a cru qu'il convenait d'attirer l'attention de la Conférence de New York sur ce point particulier quoique pour les raisons qui viennent d'être exposées, le problème examiné ici aura perdu son importance dès que la nouvelle convention relative aux Privilèges et Hypothèques Maritimes entrera en vigueur, ceci de toute manière pour les Etats qui seront Partie à cette Convention.

Evidemment, la question restera ouverte au cas où une nouvelle Convention rédigée dans le sens du projet d'Anvers ne serait pas adoptée; au cas où pareille Convention serait adoptée, elle le restera bien plus encore mais alors dans la mesure où certains Etats ayant souscrit tant à la Convention de 1926 qu'à celle de 1957, ne deviendront pas Parties Contractantes à la nouvelle Convention. Toutefois, dans les deux cas le problème dépasse le cadre du sujet actuellement à l'étude et c'est la raison pour laquelle il ne doit pas être examiné maintenant.

c) A l'exception de l'Association française, toutes les Associations Nationales qui ont envoyé un rapport et qui étaient représentées aux réunions de la Commissions Internationale ont fait part de leur approbation à l'égard du système général qui est à la base tant du Projet d'Oxford que du Projet de Portofino (1). Toutefois, l'Association française adopte un point de vue différent qui est opposé à celui exprimé par sa délégation à la réunion d'Amsterdam de la Commission Internationale lors de la discussion du Projet d'Oxford. Dans son deuxième rapport (doc. Hypo-41) cette association semble vouloir accepter le principe de l'établissement d'un nouveau projet de Convention pourvu qu'un tel projet soit, tout au moins provisoirement, limité à l'établissement d'un régime international d'hypothèques maritimes. Le dit deuxième rapport fait valoir que le problème de la reconnaissance des hypothèques maritimes est différent de celui de la reconnaissance des privi-

(1) Sous réserve de l'opinion émise par l'Association danoise précisée au paragraphe 3 ci-dessus.

to a limitation fund. Nevertheless, in order to prevent from the outside that any incongruity could be considered as existing between the 1957 Convention and the new Convention, the Working Group decided to insert in the Oxford draft a specific provision (article 11 of the said draft), providing that a creditor in respect of whose claims the shipowner is entitled to limit his liability may not rely on a maritime lien securing such clam once a limitation fund has been constituted.

However, the Amsterdam meeting of the International Subcommittee decided to entirely delete article 11 of the Oxford draft, while a Yougoslavian proposal to reinstate in the new Convention a provision similar to the said Article 11 of the Oxford draft, was defeated by a unanimous vote of the Antwerp meeting of the said Subcommittee.

The undersigned thought it proper to draw the attention of the New York Conference to this particular problem, although for the reasons set out above, the problem discussed here will have lost its importance, once the new Convention on Maritime Liens and Mortgages will have come into force, anyway for those States who will have become parties to that Convention.

Of course, the problem would remain open, in the event that a new Convention along the lines of the Antwerp draft should not be adopted, and moreover in the event that such Convention should be adopted, in so far as States having acceded both to the 1926 Convention and to the 1957 Convention, would not become partie to the new Convention. However, in both cases the problem would be *outside* the topic now under review and therefore need not be discussed in connection therewith.

c) With the exception of the French Association, all national associations which submitted reports and which were represented at the meetings of the International Subcommittee, expressed their approval with the general system both of the Oxford draft and of the Portofino draft (1). The French Association, however, takes a different view which is the opposite of the one expressed by its delegate to the Amsterdam meeting of the International Subcommittee when the Oxford draft came up for discussion. In its second Report (doc. Hypo-41) this Association seems to agree tentatively with the principle of a new draft convention being prepared, provided that such draft be, anyway provisionally, confined to setting up an international regime of maritime mortgages. The said second report argues that the problem of the recognition of maritime mortgages is distinct from that of the recognition of maritime liens and from that relating to the respective ranking as

(1) Subject to the view taken by the Danish Association mentioned in par. 8 above.

lèges maritimes et de celui des rangs respectifs entre les hypothèques et les privilèges, que pour le moment les efforts du C.M.I. devraient être limités à l'obtention d'un accord international sur la reconnaissance internationale des hypothèques maritimes uniquement, que l'Association française s'oppose fondamentalement aux dispositions de l'article 4 du Projet de Portofino mais qu'à son avis il n'est pas exclu qu'à une date plus éloignée, il pourrait s'avérer possible d'arriver à un accord international également en ce qui concerne les privilèges maritimes.

Afin de faciliter un accord, l'Association française a joint à son deuxième rapport un projet de Convention portant uniquement sur les hypothèques.

Immédiatement après l'ouverture de la réunion d'Anvers de la Commission Internationale, il a été décidé de ne pas baser les discussions sur le projet français pour les raisons que voici :

i) déjà à la réunion d'Amsterdam la Commission Internationale avait décidé de préparer un projet de Convention portant tant sur les hypothèques que sur les privilèges et par conséquent la proposition française était en contradiction avec l'ordre du jour, de toute manière à ce stade de la procédure;

ii) le système de la proposition française différait considérablement de celui du Projet de Portofino (dans la mesure où ce dernier portait sur des hypothèques maritimes) et le projet français introduisait certaines nouvelles conceptions étrangères à celles du Projet de Portofino;

iii) il était à craindre qu'une discussion du projet français ne conduise à une confusion et n'occupe en outre le temps indispensable à une discussion approfondie du Projet de Portofino;

iv) la dite décision ne pouvait d'aucune façon porter préjudice aux droits de l'Association française de soumettre sa proposition à la Conférence plénière de New York.

d) Une remarque finale concerne l'importante question relative au nombre de privilèges maritimes qui devraient être reconnus sur le plan international dans le cadre de la nouvelle Convention.

A ce stade il pourrait être utile de rappeler un des buts principaux qui ont déterminé la décision de préparer un nouveau projet de Convention, à savoir le besoin de renforcer la situation légale des titulaires d'hypothèques maritimes. On peut faire valoir que cela impose et justifie une restriction du nombre de privilèges maritimes mais si l'on compare les privilèges maritimes mentionnés à l'article 4 et les frais dits de justice mentionnés au paragraphe 2 de l'article 11 du Projet d'Anvers avec l'article 2 du Protocole de Signature joint à la Convention de 1926, on pourrait se demander si ce but a été atteint.

Cette comparaison fait ressortir que, alors que dans l'article 4 du Projet d'Anvers la catégorie de créances mentionnée à l'article 2, paragraphe 5 de la Convention de 1926 a été écartée, le dit article 4 men-

between such mortgages and liens; that for the time being the efforts of the C.M.I. should be limited to reaching international agreement on the international recognition of maritime mortgages only; that the French Association fundamentally objects to the provisions of Article 4 of the Portofino draft, but that in its opinion it is not excluded that at some future date it may prove possible to reach international agreement also with respect to maritime liens.

In order to facilitate agreement, the French Association attached to its second Report a draft-convention relating only to maritime mortgages.

At the outset of the Antwerp meeting of the International Subcommittee it was decided not to discuss the French draft; the reasons for that decision being :

i) that already at its Amsterdam meeting the International Subcommittee had decided to prepare a draft-Convention covering both mortgages and liens and that, in consequence, the French proposal was out of order, anyway at this stage of the proceedings;

ii) that the system of the French draft varied considerably from that of the Portofino draft (in so far as the provisions of the latter related to maritime mortgages) and that the French draft introduced certain new concepts which were foreign to those of the Portofino draft;

iii) that it was feared that a discussion of the French draft would lead to confusion and moreover would take up the time required for a full discussion of the Portofino draft;

iv) that the said decision could not in any way prejudice the right of the French Association to submit its proposal to the Plenary Conference at New York.

d) A final remark relates to the important question concerning the number of maritime liens which ougth to be given international recognition under the new Convention.

At this point it may be useful to recall one of the main purposes that actuated the decision to prepare a new draft convention, namely the need of strengthening the legal position of holders of maritime mortgages. It may be argued that this would entail and justify a restriction of the number of maritime liens, but when comparing the maritime liens listed in Article 4 and the socalled « law costs » mentioned in Article 11, par. 2, of the Antwerp draft with Article 2 and of the Protocol of signature attached to the 1926 Convention, it may be asked whether this purpose is being attained.

This comparison shows that, while in Article 4 of the Antwerp draft, the category of claims mentioned in Article 2, par. 5 of the 1926 Convention, has been omitted, on the other hand the said Article 4

tionne des créances auxquelles la Convention de 1926 n'accorde pas de privilèges maritimes à savoir :

i) créances du chef de mort ou lésions corporelles de toute personne se trouvant à bord du navire ou non alors que suivant l'article 2 (4°) de la Convention de 1926 un privilège correspondant est limité aux créances relatives à des lésions corporelles des passagers et de l'équipage;

ii) les créances quasi-délictuelles du chef de pertes ou dommages matériels à tous biens se trouvant à bord ou non alors que la disposition correspondante de la Convention de 1926 limite les créances dites de dommages matériels à celles trouvant leur origine dans une abordage ou un autre accident de navigation, à celles portant sur des dommages causés à des installations faisant partie de ports, bassins et voies navigables et finalement à ceux concernant des pertes ou dommages à la cargaison ou aux bagages.

Les différents rapports présentés par les Associations Nationales et les travaux des réunions de la Commission Internationale démontrent que même un plus grand nombre de privilèges que ceux actuellement repris à l'article 4, ont été proposés mais ont été rejetés finalement par ces réunions. Il n'est pas exclu que des amendements de cette nature soient soumis à la Conférence de New York et l'on peut se demander si, au cas où pareille tentative serait couronnée de succès, cela ne constituerait pas une défaite pour l'objet principal de la nouvelle Convention.

5. *Le Projet d'Anvers.*

La juxtaposition du Projet de Portofino et de celui d'Anvers fait ressortir qu'un grand nombre de modifications concerne uniquement la rédaction et n'appelle pas, de ce fait, des commentaires spéciaux. La même remarque s'applique à l'inversion de l'ordre des articles 2 et 3 tel qu'il figure au Projet de Portofino. En outre le présent rapport n'a pas pour but de traiter le grand nombre d'amendements (au Projet de Portofino) proposés à la réunion d'Anvers de la Commission Internationale qui furent rejetés à cette réunion car la discussion de ces amendements dépasserait le cadre du présent rapport.

Article 1

La seule modification de substance concerne la référence à des hypothèques au porteur qui a été insérée au sous-paragraphe c). Par conséquent les pays dont la loi nationale permet l'enregistrement des hypothèques au porteur, ne seront pas contraints de modifier leur législation lors de la ratification de la nouvelle Convention.

Un amendement ayant pour objet de ne reconnaître, dans le cadre de la Convention, que les hypothèques « contractuelles » a été rejeté.

lists the following claims to which the 1926 Convention does not grant a maritime lien, namely :

i) claims in respect of loss of life of or personal injury to *all* persons whether on board or not on board the vessel, while in Article 2 par. 4 of the 1926 Convention the corresponding lien is limited to claims in respect of personal injury to passengers and crew;

ii) tort claims in respect of loss of or damage to *all* property whether on board or not on board the vessel, while the corresponding provision of the 1926 Convention limits the socalled property claims to those caused by a collision or other accident of navigation, to those with respect to damages caused to works forming part of harbours, docks and navigable ways and finally to claims with respect to loss of or damage to cargo or baggage.

The several reports presented by national Associations and the proceedings of the meetings of the International Subcommittee show that even more maritime liens than those actually listed in Article 4 have been proposed, but were ultimately rejected by those meetings. It is not excluded that amendments of that nature will be submitted once more to the New York Conference. It may be asked if such attempts, if successful, would not defeat the main object of the new Convention.

5. *The Antwerp draft.*

A comparison between the Portofino draft and the Antwerp draft shows that many of the changes effected concern matters of drafting and as such do not call for special comments. The same applies to the reversal of the order of articles 2 and 3 as appearing in the Portofino draft. Further it is not intended to deal in this Report with the large number of amendments to the Portofino draft which were proposed at the Antwerp meeting of the International Subcommittee, but were rejected by that meeting, as a discussion of those amendments would exceed the scope of this Report.

Article 1

The only change of substance consists of the reference to mortgages to bearer which has been inserted in sub-par. c). In consequence, those countries, the national law of which allows a mortgage to bearer to be registered, will not be forced to change their legislation when ratifying the new Convention.

An amendment to the effect that only « contractual » mortgages should be recognised under the Convention, was defeated. As the

Tel que l'article 1 est libellé il couvre également les hypothèques dites « légales » et « judiciaires » dans la mesure où elles sont prévues par les lois existentes de certains pays et à condition évidemment que ces hypothèques répondent aux critères prévus par l'article 1.

Article 2

(Article 3 du Projet de Portofino)

Pas de changement.

Article 3

(Article 2 du Projet de Portofino)

Il n'y a que des modifications de rédaction.

Articles 4, 5 et 7, par. 1

Les modifications de fond suivantes ont été adoptées :

a) Au paragraphe 1 iii) correspondant au paragraphe 1 iv) du Projet de Portofino et au paragraphe 1 iv) correspondant au paragraphe 1 vi) du Projet de Portofino, les mots « en relation directe avec l'exploitation du navire » ont été ajoutés; en outre, il est précisé dans ces deux sous-paragraphes que les créances visées sont garanties par un privilège maritime uniquement « contre le propriétaire » défini à la dernière phrase du paragraphe 1 à savoir le propriétaire, le locataire de coque nue, l'affréteur, l'armateur gérant ou l'exploitant du navire.

La première ajoute a paru nécessaire étant donné que sans cette précision les créances pour mort et lésions corporelles d'une part et les créances extra-contractuelles concernant les biens d'autre part auraient été garanties par un privilège maritime même si la perte par mort ou lésions corporelles ou les pertes ou dommages étaient survenus sans aucun rapport avec le navire ou son exploitation.

A la suite de l'ajoute des mots « en relation directe avec l'exploitation du navire » les autres précisions figurant au Projet de Portofino, notamment que la mort, les lésions corporelles et la perte ou les dommages concernant des biens doivent avoir été causés par le propriétaire du navire ou par une personne au service du navire et dont le propriétaire est responsable, deviennent superflues et ont donc été biffées.

L'ajoute des mots « contre le propriétaire (voir définition) » a été jugée nécessaire afin d'éviter une construction suivant laquelle toutes les réclamations mentionnées aux sous-paragraphes iii) et iv) seraient garanties par un privilège maritime, même celles pour lesquelles le propriétaire (tel qu'il a été défini) ne serait pas responsable. Cette dernière précision n'est pas nécessaire pour les autres réclamations mentionnées au paragraphe 1 puisque ces réclamations sont par définition contre le propriétaire ou éventuellement contre les autres personnes mentionnées au paragraphe 1 de l'article 7.

wording of Article 1 reads, it covers also the socalled « hypothèque légale » and the « hypothèque judiciaire » in so far as existing in the legislation of certains countries, provided of course that such mortgages comply with the requirements of Article 1.

Article 2

(Article 3 of the Portofino draft)

No change.

Article 3

(Article 2 of the Portofino draft)

The only changes effected are changes in drafting.

Articles 4, 5 and 7, par. 1

The following changes of substance were decided upon :

a) In par. 1 iii) corresponding to par. 1 iv) of the Portofino draft, and in par. 1 iv) corresponding to par. 1 vi) of the Portofino draft, the words « in connection with the operation of the vessel » have been inserted, while moreover those two sub-paragraphs specify that the claims referred to therein are secured by a maritime lien only if they are « against the owner » as defined in the last sentence of par. 1, namely the shipowner or the demise of other charterer, manager or operator of the vessel.

The insertion first mentioned was deemed necessary as without this qualification loss of life and personal injury claims and tort claims in respect of property would have been secured by a maritime lien, even although the loss of life, personal injury or loss of or damage to property should have occurred without any connection with the ship or its operation.

As a result of the insertion of the words « in direct connection with the operation of the vessel » the further qualification appearing in the Portofino draft, namely that the loss of life, personal injury and loss of or damage to property must have been caused by the owner or by a person in the service of the vessel for whom the owner is responsible, became superfluous and was therefore deleted.

The insertion of the words « against the owner » (as defined) was deemed to be necessary, in order to prevent a construction according to which all the claims listed in the said sub-pars. iii) and iv) should be secured by a maritime lien, even those in respect of which no liability would attach to the owner (as defined). This latter qualification is not needed with respect to the other claims listed in par. 1) as such claims are « per definitionem » against the shipowner or possibly against the other persons mentioned in Article 7, par. 1).

b) La Commission Internationale a décidé de modifier le rang des privilèges entre eux, tel qu'établi par l'article 5 du Projet de Portofino; cette décision a rendu nécessaire une modification dans la liste figurant à l'article 4 du dit projet. Ainsi les créances concernant les gages etc. du capitaine, officiers et équipage obtiennent le rang le plus élevé étant donné que ces créances ne font pas et ne peuvent pas faire l'objet d'une assurance alors que les créances pour enlèvement d'épaves (désigné comme « relèvement d'épaves » par le Projet d'Anvers) et des créances pour assistance constituent la 5me catégorie après les créances pour dommages matériels. Finalement, les créances du chef de contribution en avaries commune ont été reléguées au 6me et dernier rang.

Conformément à l'article 5 du Projet d'Anvers tous les privilèges prennent un rang dans l'ordre établi par l'article 4. Toutefois, il y a une exception lorsque les privilèges garantissant des créances du chef de sauvetage et de relèvement d'épave viennent en compétition avec d'autres privilèges; les privilèges mentionnés en premier lieu prendront rang avant tous autres privilèges chaque fois que les opérations de sauvetage ou de relèvement d'épave visées ont été effectuées après la constitution à charge du navire des autres privilèges, étant donné que dans pareil cas les titulaires des autres privilèges maritimes profitent du sauvetage ou du relèvement d'épave, leur sûreté ayant été (partiellement) sauvegardée.

Article 6, par. 2

Il n'y a pas de modification de fond sauf que, pour les besoins de la clarté, les mots qui suivent ont été ajoutés à la fin du paragraphe : « ... ni à la délivrance du navire à l'acquéreur de celui-ci en vente forcée ».

Toutefois, quatre Associations Nationales à savoir celles du Danemark, de la Grande-Bretagne, du Japon et des Pays-Bas se sont énergiquement opposées à l'exclusion de tout droit ou privilège de rétention garantissant les créances d'un chantier naval. Elles ont fait valoir que de toute manière, pour autant qu'il s'agisse de réparation, une protection quelconque devrait être garantie au chantier, par exemple en accordant un privilège maritime à cette créance particulière étant donné que dans la plupart des cas le chantier est amené à effectuer des réparations immédiates et par conséquent sans avoir, en fait, l'occasion de demander et d'obtenir une garantie de la part du propriétaire.

Article 7

Pas de modification.

Article 8

La règle fondamentale qu'on a voulu exprimer par l'article 8 du Projet de Portofino a été maintenue mais la rédaction de cette article n'était ni claire ni exacte et a donc dû être modifiée.

b) The International Subcommittee decided to change the respective priorities of the maritime liens « inter se » as set out in Article 5 of the Portofino draft, which decision necessitated changes in the order of listing as appearing in Article 4 of the said draft. According to this decision claims for wages etc. of Master, Officers and crew are given the highest priority, the reason being that those claims are neither insured nor insurable, while claims for wreck removal (referred to as « wreck raising » in the Antwerp draft) together with claims for salvage have been listed in the fith category after the property claims. Finally, claims for contribution in general average have been removed to the sixth and last category.

According to Article 5 of the Antwerp draft, all liens rank in the order listed in Article 4. However, with the one exception that when liens securing claims for salvage and wreck-raising concur with other maritime liens, the liens first mentioned shall take priority over all such other liens, whenever the salvage or wreck-raising operations concerned will have been performed *after* such other maritime liens have attached to the ship, the reason being that in that case the holders of those other maritime liens will have benefited by the salvage or wreckraising whereby their security will have been (partly) preserved.

Article 6, par. 2

No change of substance except that for purposes of clarification the words « and neither the delivery of the vessel to the purchaser in a forced sale » were inserted at the end of this paragraph.

However, four national associations, namely those of Denmark, Great-Britain, Japan and the Netherlands, strongly objected against the prohibition of all rights of retention or possessory liens securing the claims of a shipyard. They contended that, anyway in so far as claims for repairs are concerned, some protection should be granted to the yard, for instance by granting à maritime lien with respect to that particular claim, as in most cases the yard is required to carry out the repairs at once and therefore without in fact having had an opportunity of asking for and obtaining security from the shipowner.

Article 7

No change.

Article 8

The substantive rule as intended to be expressed by Article 8 of the Portofino draft has been maintained but the wording of that article was neither clear nor correct and needed to be changed.

Tel que l'article est libellé maintenant, il établit une prescription de tous les privilèges maritimes après un délai de deux ans à moins qu'avant l'expiration de ce délai le navire n'ait été saisi, cette saisie aboutissant à une vente forcée; alors que, sauf dans le cas d'une saisie et d'une vente comme précisé ci-dessus, le délai de deux ans n'est pas susceptible d'interruption.

De même, aucune suspension du délai de deux ans ne sera permise sauf si pendant la période de deux ans le créancier privilégié a été légalement empêché de saisir le navire pour le motif qu'il a été réquisitionné ou que son propriétaire a été déclaré en faillite ou mis en liquidation forcée.

Ces trois événements, à savoir la réquisition, la faillite et la liquidation forcée mettront le créancier privilégié dans l'impossibilité de saisir le navire dans le territoire de l'Etat où le navire a été réquisitionné (de toute manière dans le cas d'une réquisition en propriété) ou dans le territoire de l'Etat où le propriétaire a été déclaré en faillite ou a été contraint à une liquidation forcée. Ne pas permettre dans ces cas une suspension du délai de deux ans aboutirait à imposer une privation non justifiée au créancier privilégié. D'autre part, l'exception ne serait pas d'application si, pendant la période de deux ans, le créancier privilégié avait eu l'occasion de saisir le navire dans le territoire d'un autre Etat.

Article 9

Pas de modification.

Article 10

Pas de modification sauf que le préavis visé devra être donné par écrit.

Article 11

Il n'y a pas de modification de fond. Les mots ajoutés à la fin du paragraphe 2 rendent plus clair que les montants distribués entre les titulaires des privilèges maritimes et des hypothèques, au moyen du produit de la vente du navire, ne dépasseront jamais le montant de leurs créances respectives.

Les mots « dans un Etat contractant » ont été ajoutés au paragraphe 3 après les mots « vente forcée ». Ces mots avaient été omis par inadvertance dans le texte anglais du Projet de Portofino.

Article 12

Pas de modification.

As the article now reads, it provides for an extinction of all maritime liens after a two years' péríod unless prior to the expiry of that period the ship should have been arrested, such arrest leading to a forced sale, while, except for the case of the arrest and sale of the ship mentioned above, the two years' period is not subject to interruption.

Similarly, no suspension of the two years' period of extinction will be allowed, except if during the two years' period the lienor should have been *legally* prevented from arresting the vessel, owing to the vessel having been requisitioned or the shipowner being bankrupt or in compulsory liquidation.

Those three events, namely requisitioning, bankruptcy and compulsory liquidation will make it impossible for the lienor to arrest the vessel within the territory of the State in which it has been requisitioned (anyway in case of a requisitioning for title) or in which the shipowner has been declared bankrupt or has been put into compulsory liquidation. Not to allow in that case a suspension of the two years' period would amount to an unjustified hardship on the lienor. On the other hand the exception would not apply, if during the two years' period the lienor could have arrested the vessel in the territory of another country.

Article 9

No change.

Article 10

No change, except the requirement that the notice referred to therein shall be in writing.

Article 11

No change of substance. The words inserted at the end of par 2) make it clear that the amounts to be collected by lienors and mortgagees out of the proceeds of the sale of the vessel shall never exceed the amounts of their respective claims.

In par. 3) the words « in a Contracting State » have been inserted after « forced sale ». Those words had been inadvertently omitted from the printed English text of the Portofino draft (vide : the French text of that draft).

Article 12

No change.

Article 13

Pas de modification de fond.

Article 14

L'article 14 du Projet de Portofino aurait pu conduire à des complications dans les relations entre deux Etats qui ont tous les deux ratifié la Convention de 1926 mais dont un seulement a ratifié la nouvelle Convention. C'est la raison pour laquelle la Commission Internationale a décidé de remplacer l'article 14 du Projet de Portofino par un nouveau texte stipulant que chaque Etat qui ratifie la nouvelle Convention, ou y adhère, devra immédiatement dénoncer la Convention de 1926.

Le résultat sera le même que celui visé par l'ancien article 14 mais les dangers des complications précités seront évités.

Amsterdam, juin 1965.

J.T. Asser.

Article 13

No change of substance.

Article 14

Article 14 of the Portofino draft might have led to complications in the relationship as between two States, both of which have ratified the 1926 Convention, while only one has ratified the new Convention. The International Subcommittee therefore decided to substitute for Article 14 of the Portofino draft a new text providing that each State which ratifies the new Convention or accedes to it, shall forthwith denounce the 1926 Convention. The result will be the same as that which the old article 14 tried to achieve, but the danger that the aforementioned complications would arise will be avoided.

Amsterdam, June 1965.

J.T. Asser.

PROJET DE CONVENTION

(PROJET D'ANVERS)

Article 1

Les hypothèques et « mortgages » sur les navires de mer seront reconnus dans tous les Pays Contractants à condition que :

a) Ces hypothèques ou « mortgages » aient été régulièrement constitués et inscrits dans un registre en conformité avec les lois de l'Etat, où le navire est immatriculé.

b) Le registre et tout acte auquel il se réfère soient accessibles au public et que des extraits du registre et des copies des actes auxquels il se réfère puissent être obtenus du Conservateur et que

c) le registre mentionne le nom et l'adresse de la personne en faveur de laquelle l'hypothèque ou le « mortgage » ont été constitués, ou qu'il a été établi au porteur, le montant garanti, ainsi que la date et les autres particularités qui, suivant la loi de l'Etat de l'inscription, déterminent son rang au regard des autres hypothèques ou « mortgages ».

Article 2

Les hypothèques ou « mortgages » inscrits occuperont entre eux le rang qui leur est reconnu par la loi de l'Etat où ils sont inscrits.

Article 3

1. Sauf dans le cas prévu à l'article 11, aucun Etat contractant ne permettra la radiation de l'immatriculation d'un navire, sans le consentement écrit de tous les titulaires des hypothèques ou « mortgages » inscrits.

2. Un navire qui est ou a été immatriculé dans un Etat Contractant ne sera susceptible d'être immatriculé dans un autre Etat Contractant, que

a) si un certificat a été émis par le premier Etat, attestant que le navire a été radié, ou

b) si un certificat a été émis par le premier Etat, attestant que le navire sera radié le jour où cette nouvelle immatriculation aura eu lieu, et pour autant que celle-ci ait été effectuée dans les 30 jours.

DRAFT CONVENTION

(ANTWERP DRAFT)

Article 1

Mortages and « hypothèques » on sea-going vessels shall be enforceable in Contracting States provided that :

a) such mortgages and « hypothèques » have been effected and registered in accordance with the Law of the State where the vessel is registered;

b) the register and any instrument referred to therein are open to public inspection, and that extracts of the register and copies of the instruments referred to therein are obtainable from the registrar; and

c) the register specifies the name and address of the person in whose favour the mortgage or « hypothèque » has been effected or that is has been issued to bearer, the amount secured and the date and other particulars which, according to the law of the State of registration, determines the rank as respects other registered mortgages and « hypothèques ».

Article 2

Registered mortgages and « hypothèques » shall rank as between themselves in accordance with the law of the State where they are registered.

Article 3

1. Subject to the provisions of Article 11, no Contracting State shall permit the deregistration of a vessel without the written consent of all holders of registered mortgages and « hypothèques ».

2. A vessel which is or has been registered in a Contracting State shall not be eligible for registration in an other Contracting State, unless :

a) a certificate has been issued by the former State that the vessel has been deregistered; or

b) a certificate has been issued by the former State that the vessel will be deregistered on the day when such new registration is effected, provided that the registration is effected within 30 days.

Lorsque le certificat visé sous b) aura été émis, aucune inscription de droits relatifs au navire, ne sera plus autorisée au cours de cette période de 30 jours.

Les certificats visés sous a) et b) ci-dessus indiqueront tous les hypothèques et « mortgages » inscrits sur le navire avec leur rang respectif.

3. Pareil navire ne sera admis à l'immatriculation dans un autre Etat Contractant que si les hypothèques et « mortgages » inscrits mentionnés dans les certificats prévus au paragraphe 2, sont acceptés pour inscription dans cet Etat, et conservent leur rang respectif.

Article 4

1. Les créances suivantes seront garanties par un privilège maritime sur le navire :

i) Les gages et autres sommes dues au capitaine, aux officiers et aux autres membres de l'équipage, en vertu de leur contrat d'engagement à bord du navire.

ii) Les frais de port, de canal et autres droits de navigation ainsi que les frais de pilotage.

iii) Les créances contre le propriétaire du chef de mort ou lésions corporelles survenant en relation directe avec l'exploitation du navire.

iv) Les créances de nature non contractuelle contre le propriétaire du chef de pertes ou dommages aux biens ou en rapport avec des biens, survenant en relation directe avec l'exploitation du navire.

v) Les créances du chef d'assistance et de sauvetage et du chef de relèvement d'épave.

vi) Les créances du chef de contribution en avarie commune.

Le mot « propriétaire » figurant au présent article est censé comprendre le locataire coque nue, l'affréteur, l'armateur gérant ou l'exploitant du navire.

2. Aucun privilège maritime ne grèvera le navire pour sûreté des créances visées au 1° iii) et iv) du présent article, résultant ou provenant de propriétés radioactives ou d'une combinaison de propriétés radioactives avec des propriétés toxiques, explosives ou autres propriétés dangereuses de combustible nucléaire ou de produits ou déchets radioactifs.

Article 5

1. Les privilèges énumérés à l'article 4 auront la priorité sur les hypothèques ou « mortgages » inscrits.

2. Les privilèges énumérés à l'article 4 prendront rang dans l'ordre suivi à cet article; avec cette réserve cependant que les privilèges mari-

When the certificate mentioned under b) above has been issued, no registration of rights in respect of the vessel shall be allowed during the 30 days' period.

The certificates mentioned under a) and b) above shall set out in order of priority all registered mortgages and « hypothèques » on the vessel.

3. Such vessel shall be accepted for registration in another Contracting State only if the registered mortgages and « hypothèques » set out in the certificates mentioned in paragraph 2 are accepted for registration by such State and retain their respective priorities.

Article 4

1. The following claims shall be secured by maritime liens on the vessel :

i) wages and other sums due to the Master, Officers and other membres of the vessel's complement in respect of their employment on the vessel.

ii) Port, canal and other waterway dues and pilotage dues.

iii) Claims against the owner which arise in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel.

iv) Claims not based on contract against the owner which arise in respect of loss of or damage to property or in connection with property occurring in direct connection with the operation of the vessel.

v) Claims for salvage and wreck raising.

vi) Claims for contribution in general average.

The word « owner » mentioned in this paragraph shall be deemed to include the demise or other charterer, manager or operator of the vessel.

2. No maritime lien shall attach to the vessel securing claims as set out in par. 1 iii) and iv) of this Article which arise out of or result from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Article 5

1. The maritime liens set out in Article 4 shall take priority over registered mortgages and « hypothèques ».

2. The maritime liens set out in Article 4 shall rank in the order listed, provided however that maritime liens securing claims for salvage

times garantissant des créances du chef d'assistance et de sauvetage et du chef de relèvement d'épave prendront rang avant tous autres privilèges maritimes qui grevaient le navire au moment où les opérations d'assistance et de sauvetage ou de relèvement d'épave ont été effectués.

3. Les privilèges maritimes énumérés dans chacun des paragraphes 1 i), ii), iii) et iv) de l'article 4 viennent en concours entre eux au marc le franc.

4. Les privilèges maritimes énumérés dans chacun des paragraphes 1 v) et vi) de l'article 4 prendront rang entre eux dans l'ordre inverse du moment où les créances garanties par ces privilèges sont nées. Les créances du chef de contribution en avarie commune seront censées être nées à la date à laquelle l'événement donnant ouverture à l'avarie commune s'est produit.

Article 6

1. Chaque Etat Contractant peut reconnaître des privilèges pour garantir des créances autres que celles énumérées à l'article 4, à condition toutefois que ces privilèges ne prennent rang qu'après les hypothèques ou « mortgages » inscrits répondant aux exigences de l'article 1.

2. Chaque Etat Contractant peut également reconnaître des droits de rétention sur le navire à condition toutefois que l'exercice de ces droits ne puisse porter préjudice ni à l'exercice des privilèges maritimes énumérés à l'article 4 et des hypothèques ou « mortgages » inscrits répondant aux exigences de l'article 1, ni à la délivrance du navire à l'acquéreur de celui-ci en vente forcée.

Article 7

1. Les privilèges maritimes énumérés à l'article 4 naissent, que les créances garanties par ces privilèges soient à charge du propriétaire ou à charge du locataire coque-nue, d'un affréteur, d'un armateur gérant ou d'un exploitant du navire.

2. Sous réserve des dispositions de l'article 11, les privilèges maritimes énumérés à l'article 4 suivront le navire nonobstant tout changement de propriétaire ou d'immatriculation.

Article 8

1. Les privilèges maritimes énumérés à l'article 4 s'éteindront à l'expiration d'un délai de deux années à compter de la date de la naissance de la créance garantie, sauf si avant l'expiration de ce délai, le navire a été saisi, cette saisie conduisant à une vente forcée.

2. La période de deux années dont question à l'alinéa précédent ne sera susceptible d'aucune suspension ou interruption, sauf cependant que le délai sera suspendu pendant la période durant laquelle le créan-

and wreck raising shall have priority over all other maritime liens which have attached to the vessel prior to the time when the salvage or wreck raising operations were performed.

3. The maritime liens set out in each of the sub-paragraphs i), ii), iii) and iv) of Article 4 shall rank pari passu as between themselves.

4. The maritime liens set out in each of the subparagraphs v) and vi) of Article 4 shall rank in the inverse order of the time when the claims secured accrued. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was performed.

Article 6

1. Each Contracting State may grant liens to secure claims other then those referred to in Article 4, provided however that such liens shall rank after all registered mortgages and « hypothèques » which comply with the requirements of Article 1.

2. Each Contracting State may also grant rights of retention in respect of the vessel provided however that such rights shall not prejudice the enforcement of the maritime liens set out in Article 4 or of registered mortgages or « hypothèques » which comply with the requirements of Article 1, and neither the delivery of the vessel to the purchaser in a forced sale.

Article 7

1. The maritime liens set out in Article 4 arise whether the claims secured by such liens are against the owner or against the demise or other charterer, manager or operator of the vessel.

2. Subject to the provisions of Article 11, the maritime liens securing the claims set out in Article 4 follow the vessel notwithstanding any change of ownership or of registration.

Article 8

1. The maritime liens set out in Article 4 shall be extinguished after a period of two years from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested, such arrest leading to a forced sale.

2. The two years' period referred to in the preceding paragraph shall not be subject to suspension or interruption, provided however that time shall not run during the period that the lienor is legally pre-

cier privilégié est légalement empêché de saisir le navire, pour le motif qu'il a été réquisitionné ou que son propriétaire a été déclaré en faillite ou mis en liquidation forcée.

Article 9

La cession d'une créance ou la subrogation dans les droits d'une créance garantie par un privilège maritime énuméré à l'article 4, comporte la cession ou la subrogation simultanée de ce privilège.

Article 10

Avant la vente forcée du navire dans un Etat Contractant l'autorité compétente de cet Etat fera connaître avec un préavis par écrit d'au moins un mois, la date et l'endroit de cette vente à tous les titulaires connus d'hypothèques et de « mortgages » inscrits et de privilèges maritimes énumérés à l'article 4 et au conservateur du registre où le navire est immatriculé. A cet effet l'autorité compétente s'efforcera d'obtenir les noms et adresses de ces titulaires de ce conservateur et du propriétaire du navire.

Article 11

1. En cas de vente forcée du navire dans un Etat Contractant tous les hypothèques, « mortgages », privilèges et autres charges de quelque nature que ce soit, cesseront de grever le navire à condition toutefois :

a) qu'au moment de la vente, le navire se trouve dans la juridiction de cet Etat Contractant, et

b) que la vente ait été poursuivie en conformité avec la loi de cet Etat et les dispositions de la présente Convention.

2. Les frais taxés par le Tribunal et provoqués par la saisie, la vente qui l'a suivie et la distribution du prix, seront payés en premier lieu, par prélèvement sur le produit de cette vente. Le solde de ce produit sera distribué entre les titulaires des privilèges maritimes et des hyopthèques et « mortgages » inscrits en conformité avec les dispositions de la présente Convention et à concurrence des montants qui leur sont dûs.

3. Lorsqu'un navire immatriculé dans un Etat Contractant a été l'objet d'une vente forcée dans un Etat Contractant, le Conservateur délivrera à la requête de l'acheteur, un certificat de radiation de son immatriculation, à condition toujours que les exigences mentionnées aux paragraphes 1 a) et b) et 2 de cet article aient été observées.

Article 12

Les dispositions de la présente Convention s'appliqueront également aux navires en construction à condition toutefois que

vented from arresting the vessel, owing to it having been requisitioned or to the owner being bankrupt or being in compulsory liquidation.

Article 9

The assignment of or subrogation to a claim secured by a maritime lien set out in Article 4 entails the simultaneous assignment of or subrogation to such maritime lien.

Article 10

Prior to the forced sale of a vessel in a Contracting State, the competent authority of such State shall give at least 30 days written notice of the time and place of such sale to all known holders of registered mortgages, registered « hypothèques » and maritime liens set out in Article 4 and to the registrar of the register in which the vessel is registered. For this purpose the said authority shall endeavour to obtain the names and addresses of such holders from the said registrar and from the owner of the vessel.

Article 11

1. In the event of the forced sale of the vessel in a Contracting State all mortgages, « hypothèques », liens and other encumbrances of whatsoever nature shall cease to attach to the vessel, provided however that :

a) at the time of the sale the vessel is in the jurisdiction of such Contracting State; and

b) the sale has been effected in accordance with the law of the said State and with the provisions of this Convention.

2. The costs awarded by the Court and arising out of the arrest and subsequent sale of the vessel and the distribution of the proceeds shall first be paid out of the proceeds of such sale. The balance shall be distributed among the holders of maritime liens, registered mortgages and « hypothèques » in accordance with the provisions of this Convention to the extent necessary to satisfy their claims.

3. When a vessel registered in a Contracting State has been the object of a forced sale in a Contracting State, the registrar shall issue, at the request of the purchaser, a certificate of deregistration, provided always that the requirements set out in paragraph 1, subparagraphs a) and b) and paragraph 2 of this Article have been complied with.

Article 12

The provisions of this Convention shall also apply to vessels which are under construction, provided however that :

a) seuls les hypothèques et « mortgages » qui ont été inscrits dans l'Etat où le navire est en construction soient reconnus;

b) les privilèges maritimes énumérés à l'article 4 ne grèvent le navire que si les créances garanties par ces privilèges sont nées après que le navire sera devenu flottant.

Article 13

Sauf stipulations dérogatoires dans la présente convention, les Etats Contractants appliqueront les dispositions de cette Convention, à tous les navires de mer, peu importe qu'ils soient immatriculés dans un Etat Contractant ou dans un Etat non-Contractant.

Article 14

Chaque Etat qui ratifie la présente Convention ou y adhère, dénoncera immédiatement la Convention Internationale pour l'Unification de certaines règles relatives aux privilèges et hypothèques maritimes et protocole de signature, signés à Bruxelles le 10 avril 1926.

a) only such mortgages and « hypothèques » as have been registered in the State in which the vessel is under construction shall be enforceable;

b) the maritime liens referred to in Article 4 shall attach to the vessel only if the claims secured thereby accrue after the vessel has become waterborne.

Article 13

Unless otherwise provided in this Convention the Contracting States shall apply the provisions of this Convention to all sea-going vessels, no matter whether they are registered in a Contracting State or in a non-Contracting State.

Article 14

Each State which ratifies this Convention or accedes to it, shall forthwith denounce the International Convention for the Unification of certain rules relating to Maritime Liens and Mortgages and the Protocol of Signature signed at Brussels on April 10th, 1926.