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ESSAYS ON MARITIME LIENS AND MORTGAGES AND ON ARREST OF SHIPS

Prepared from Lectures given to an International Workshop at Dalian, People's Republic of China: October and November, 1984, under the auspices of the Economic and Social Commission for Asia and the Pacific (ESCAP).

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PREFACE

At the request of the Economic and Social Commission for Asia and the Pacific (ESCAP), a group of experts prepared Guidelines on shipping legislation which were subsequently approved by the Intergovernmental Meeting on Maritime Legislation which was held in Bangkok in January 1983.

Following this Meeting, ESCAP was requested by the Ministry of Communications of the People's Republic of China to organise a number of seminars on various subjects of Maritime Law, to assist the Government of China in the preparation of the Maritime Laws of China.

The subjects chosen by the Chinese Authorities for the first seminar were Maritime Liens and Mortgages and Arrest of Ships. With the agreement of the Ministry of Communications and the China Council for the Promotion of International Trade, ESCAP asked me, in my capacity as President of the C.M.I., to organise the Seminar. Accordingly, I prepared a plan for the Seminar which was submitted to ESCAP and the Chinese Authorities for approval. The lectures were prepared by Professor Allan Philip, Mr. Emery Harper, Professor Jan Slot and myself.

The Seminar was held in Dalian from 29th October to 2nd November and the essays which follow are based upon the Seminar Lectures.

Francesco Berlingieri

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PART I

Maritime liens and mortgages

A INTRODUCTION

FOREWORD

If all debtors would always settle their obligations, or at least if creditors' claims could always be satisfied out of the proceeds of sale of the debtor's assets the problem of securities and priorities would not arise.

But this is not so, and various methods have been thought out to protect creditors.

(a) One method is to grant priority to certain claims so that if the assets of the debtor are insufficient to meet all his obligations, such claims are satisfied before others. Priority may be granted generally on all assets of the debtor or specifically on some assets to which the claim is related e.g. on the cargo in respect of the freight. The right of priority is against other creditors and does not affect the debtor. Generally it arises only by operation of law.

It is called lien and, in French, privilège.

(b) Another method is to prevent the assets of the debtor being transferred to third parties. Such a transfer may be made ineffective against the creditors in general or one creditor in particular.

The technique differs according to whether the asset is a chattel or real property.

(i) For chattels it is based on the control or possession of the chattel in question by the claimant or a third party.

When the chattel is already in the possession of the creditor the law may authorise him to retain it until he is paid. This statutory right of retention is normally accompanied by a right of priority on the chattel in question, which is conditional on the claimant's continued possession.

This right is called possessory lien and again privilège in French.

Another method of preventing the diminution of the debtor's assets and of simultaneously acquiring a right of priority, is by transferring the possession of the chattel to the creditor or to a third party until the debt is paid.

This type of security is called pledge, pignus, gage, pfand.

(ii) For real property the same result is achieved, without the debtor having to give up possession, by creating a charge on the property and registering it in the land register. Any transfer of the title to that property is not effective against

the creditor in question although it might be effective against others. Also in this case, in order to grant the creditor complete protection, his priority is recognised.

Originally this type of security was substantially different in England and in Continental Europe.

In England the security, called a mortgage, is effected by a transfer of title in the property to the creditor, called the mortgagee, by the debtor who owns the property, called the mortgagor, accompanied by an agreement that the mortgagor may recover his title on payment of the debt. This right is called the right of redemption. In order to acquire full title to the mortgaged property the mortgagee has to prevent the mortgagor from exercising the right of redemption. The action he can use for this purpose is called "foreclosure". This "mortgage" is patterned on a Roman contract, called fiduciary sale.

Oddly enough, the countries in continental Europe which inherited the Roman legal system (civil law countries) adopted a different type of security which does not imply a transfer of title, but simply the creation of a charge. The property in question remains in the ownership of the debtor who can also sell it, but the right of the creditor to have his claim satisfied by the sale of the property is not affected by the sale and can be enforced against the purchaser.

This security is called hypothec.

(c) A more basic protection which is still accepted in a great many countries is a creditor's right to retain the movable property of the debtor entrusted to him for performance of works or services such as repairs or carriage until payment of what is owed. The right of retention does not mean that the creditor has a right to sell the property and to satisfy himself out of the proceeds of sale.

Nor does it create a priority. However, it may be more effective than a priority if the creditor is entitled to refuse redelivery, both in the case of the debtor's bankruptcy or liquidation and of the forced sale of the property in question.

(d) In continental Europe the movable nature of ships prevented the creation of security such as the hypothec, which traditionally applied only to immovable property. This brought about the creation of a different type of security. It arises by operation of law in circumstances where the owner of the ship needs credit, thereby encouraging suppliers to provide services and materials on credit terms. This type of security is called privilège but it differs from the ordinary civil law privilège and comes closer to the hypothec. In reality, the security probably arises irrespective of the vessel being owned by the debtor and it travels with the ship; it follows the ship on her sale until a voyage has been completed under the management of the purchaser.

In common law countries a similar security was created, albeit for

different reasons and in respect of different claims, the maritime lien. The maritime lien also arises by operation of law in respect of certain claims and is a privileged claim which travels with the property without any specified time limit. It is a secret charge as is its continental equivalent, which, however, secures a much greater number of claims since there is no other type of voluntary security.

When the hypothec on ships was created, most of the continental liens should have been abolished, but instead they continued to exist, thus rendering the hypothec less attractive as security, for liens come ahead of the hypothec.

On Civil Law and Common Law

The distinction between Civil Law and Common Law has already been referred to in chapter 1. It may be useful to consider the different starting points of the two systems and the different influences on their development. Bearing in mind the many variations of each system which have grown up and the recent trend towards narrowing the gap, what follows is a description of the general characteristics of the two systems as at the beginning of the century.

Civil Law originated with the Code Napoleon or Code Civil in France. It is used on the continent of Europe, in South America and in other countries which took French Law as the basis of their Legal Systems. Common Law originated in England and from there it spread to the United States, Canada, Australia and other countries which adopted English Law as their model.

Civil Law is founded in comprehensive codes which enunciate abstract principles from which solutions may be deduced in individual cases. Theoretically the codes contain the solutions to all legal problems. There are no "holes" in the law and therefore the judge never makes law himself but applies the law which he finds in the codes.

Common Law, on the other hand, is uncodified judge-made law, created from case to case. Under the doctrine of precedent, where a judge searches previous cases for similarities, he is bound to decide similar cases in the same way unless he can "distinguish" the case by finding differences of fact. Not all Common Law countries have the doctrine of precedent, and in those that have it, it is not uniform.

In practice, the difference between the two systems is less noticeable. In Common Law countries, law is made by legislation in the form of Statutes or Acts of Parliament. For example, the Uniform Commercial Code in the United States, which has been adopted by almost all the States, is very close to a continental code. In England, however, Statutes are interpreted restrictively and Common Law is still applied to all situations not covered by the Statute, which cannot therefore be considered to be as comprehensive as a code.

Equally, judgements play an important role in Civil Law countries, not only as interpretations, but also to develop the law as the codes become older and out of date, though lip service is paid to the principle that the decisions are still interpretations. The judges may be restrained from becoming too creative as has happened in some Common Law countries, but there remains the danger of encouraging Begriffs Jurisprudenz, conceptual jurisprudence, where reality plays a less important part than logical argument.

As an exception to the general rule, the Swiss code acknowledges that it it not complete and imposes upon the judge an obligation when deciding

cases not covered by legislation to state a rule which will serve in similar cases in the future.

Although the methodological approach of the two systems is less divergent today than it used to be the differences in substance remain. Civil law is based upon Roman law while the common law is mainly home-grown, although Roman law played a part in its origin. The principles and rules of common law legislation are developments of the common law and are based upon its concepts and ideas.

Scandinavian law stands somewhere in the middle between the two big systems. Since the 17th and 18th century no new codes have been introduced and today all legislation is in the form of statutes. Until recently large parts of the law consisted of judge-made law but much of that law has been codified and replaced by statutes in recent years.

Scandinavian law is not based upon Roman law but it has taken much of its vocabulary and its systematic approach to the description of the law from continental legal systems. Legal writers attempt to import a systematic order resembling the codes in order to guide the courts which, however, are not bound by any abstract general legal principles. The approach is rationalistic, the courts trying to interpret statutes and create new rules in such a way as to fill the needs of present day society. This is the foundation of the realist school of jurisprudence.

Various Types of Securities on Ships

The many types of security may be distinguished in as many ways. The most significant are as follows:-

(i) Source of the security

A security may arise by operation of law or by the will of the parties. Liens, be they maritime liens, possessory or general liens, arise usually by operation of law whilst mortgages and hypothecs arise by contract. However this is not always so, for in some jurisdictions there are liens which are created by the parties, such as the lien on freights and cargoes in English Law, and conversely there are hypothecs which are created by operation of law, such as the hypothec of the seller for the unpaid portion of the sale price (Art. 2817 Italian Civil Code) and of the husband on the assets of the wife and vice versa (Art. 2121 French Civil Code; Art. 168 of the Spanish Ley hypothecaria) or judicial hypothecs, which can be registered by the successful claimant following the judgment he has obtained against the defendant (Art. 2818 Italian Civil Code; Art. 2123 French Civil Code). In maritime law however, the source of securities on ships is generally clear-cut, for maritime (and also possessory) liens on ships arise only by operation of law whilst mortgages and hypothecs are created only by contract or by the unilateral declaration of the mortgagor. One exception arises in Spain where hypothecs on ships are created by operation of law in respect of claims for payment of the purchase price (Art. 25 of Leg He de Hipoteca Naval) and claims for payment for repairs (Art. 26 and 27).

(ii) Subject matter of the security

Traditionally only real property could be the subject of a hypothec or of a mortgage, mainly because only real property was registered. In civil law countries this tradition continued even after some chattels, first of all ships, began to be registered in a public register. The charge on ships, although having the character of a hypothec, was called a pledge. In Italy the "naval pledge" continued to exist until 1928, when after the promulgation of the law authorising the ratification of the 1926 Brussels Convention on maritime liens and mortgages, the ship's hypothec was created. In France the ship's hypothec had been created much earlier, in 1874, and in Spain in 1893.

Nowadays in maritime countries chattels may be the subject of a hypothec when they are registered in a public register, for example ships, aircraft and vehicles.

Only chattels, and mainly unregisterable chattels, may be the subject of a pledge, for the characteristic of the pledge is the

transfer of possession to the creditor or a third party. Some laws, e.g. in Italy and France, expressly exclude pledge on ships.

Any type of property may be the subject of a lien. Although ships are the principal subject of maritime liens, under the 1926 Brussels Convention on Maritime Liens and Mortgages the freight and other assets (called "accessories") of the vessel, such as compensation due to the owner for material damage suffered by the ship, or general average contributions or salvage remuneration may also be the subject of a maritime lien. These sums are either a replacement of the value of the vessel or (the salvage reward) have the same nature as freight. There is no reference to freight and "accessories" in the 1967 Brussels Convention on Maritime Liens and Mortgages.

(iii) Registration of the security

The existence of some securities is made known to the public at large through registration, and registration is sometimes a condition of the very existence of the security. It is always a condition for the validity of the security against third parties in good faith. Mortgages and hypothecs belong to this category. Registerable charges with characteristics similar to those of mortgages and hypothecs are called "pand" in Scandinavia and "prenda" in Peruvian and some other South American laws.

In some jurisdictions liens also are registerable, although registration is not common. This is so in Italy for the (non maritime) lien granted in favour of the seller of machinery for the unpaid purchase price (Art. 2762 Civil Code provides that the claim should be endorsed in a register kept by the court), and in France for several liens on immovable property (Art. 2106 - 2111 Civil Code).

Third parties are made aware of other securities through the physical location of the subject matter of the security, which must remain in the control of the creditor, within his premises, factory or yard. Possessory liens belong to this category.

In maritime law possessory liens on ships are granted in many jurisdictions to ship builders, ship repairers, wreck removers, as well as to the ship owner or carrier on the cargo as security for their claims for freight and demurrage, general average contributions etc.

On the other hand, other liens, and maritime liens in particular, are usually secret charges. There are exceptions to this rule; for example, in Spain the maritime lien of the cargo owner for the value of the goods sold by the master in order to repair the ship is conditional on its endorsement on the ship's papers (Art. 580, No. 7 Code of Commerce) and that securing claims for bottomry bonds is conditional on their endorsement in the ship's register (Art. 580, No. 9 Code of Commerce).

(iv) Ownership of the subject matter of the security

Where a security is created by contract, it is essential that the person who creates it owns the property so charged though of course the owner may grant a charge on his property as security for a debt of another.

Ownership of the property by the debtor is not a requirement for the creation of a maritime or a possessory lien. Art. 7 of the 1967 Convention provides that the maritime liens listed in the Convention arise whether the claims secured by such liens are against the owner of the ship or against the demise or other charterer, manager or operator.

This may be explained in various ways; in the first place by the fact that the claim lies against the vessel, irrespective of ownership; secondly the owner, by allowing other persons to use his vessel, impliedly consents to such persons using the vessel as security for claims which may arise during her employment and as a consequence thereof. The principle whereby maritime and possessory liens arise irrespective of whether the debtor is also the owner is well entrenched in maritime law and is confirmed in Art. 7 (1) of the 1967 Brussels Convention.

(v) Enforcement of the security

Enforcement of the security differs according to the type of security. A mortgage, as will be seen later, entitles the mortgageee to enforce the security through the forced sale of the vessel.

The position is different for maritime and other liens. The security may entitle the claimant to arrest or retain the vessel, but normally the claim must be proved in Court or arbitration before it can be collected against the security.

The difference lies in the fact that a mortgage or a hypothec itself acknowledges the debt of the owner towards the holder of the security, whilst this is not the case with maritime and possessory liens, which arise by operation of law.

(vi) Ranking of secured claims

The various types of security may also be distinguished by the priority with which the secured claims are satisfied out of the proceeds of sale of the property which is the subject of the security.

Securities belonging to a certain type all rank before or after those of another type; thereafter ranking as between securities of the same type is decided according to different criteria.

The general rule is that maritime liens rank ahead of mortgages and hypothecs whilst liens, other than maritime, come after. The rule is not universal in respect of possessory liens and rights of retention. In some jurisdictions they rank ahead of all other securities, including maritime liens, whilst in others they rank

after maritime liens and even after mortgages or hypothecs.

The conflict has been resolved in the 1967 Convention (Art. 6) by providing that all liens other than those granted in the Convention, and all rights of retention, rank after those mortgages and hypothecs which comply with the provisions of the Convention, with the exception of liens or rights of retention over ships in the possession of ship-builders or ship repairers. These possessory liens or rights of retention rank after the Convention maritime liens and before mortgages and hypothecs.

Ranking between maritime liens and mortgages is more complicated in the United States. All maritime liens which accrue before the registration of a preferred ship mortgage take priority over it: a limited number of maritime liens which accrue after the registration of a preferred ship mortgage rank ahead of it, that is, liens securing claims for damages in tort, for wages of a stevedore when employed directly by the owner (operator, master, ship's husband or agent), for wages of the crew, for general average and for salvage.

(vii) Extinction of the security

Mortgages, hypothecs and maritime liens all follow the vessel on voluntary sale. However, such a sale may cause the extinction of a maritime lien after a period of time. In addition Art. 9 of the 1926 Convention enables contracting States to enact domestic legislation by which liens may be extinguished on sale if accompanied by advance notice to third parties and to the registrar.

Maritime liens may also be extinguished by lapse of time, in this case from the date of accrual of the lien. The 1926 Convention provides that maritime liens cease to exist at the expiration of one year from the date of their accrual, except (i) any cases provided for by national law and (ii) maritime liens securing claims in respect of contracts entered into or acts done by the master for the preservation of the vessel or the continuation of the voyage, which cease to exist after six months. The Convention further provides that the contracting parties may extend the time limits in those cases where it has proved impossible to arrest the vessel to which the lien attaches in the territorial waters of the State in which the claimant has his domicile.

The 1967 Convention in its turn provides (Art. 8) that Convention maritime liens are extinguished after the lapse of one year from the time when the claims secured thereby arose, unless the vessel is arrested within the year and thereafter sold by forced sale.

Mortgages and hypothecs may also be extinguished by lapse of time from the date of registration, and provisions to this effect exist in some jurisdictions.

The need for securities on ships and for the order of priority

(a) Civil Law Approach

More types of security on ships used to exist than have been mentioned, but most disappeared during this century. It is worth considering why countries allow any kind of system whereby one creditor can be paid out of the value of a specific asset with priority over all other creditors. It is arguable that those who loan the ship or shipowner money or give him credit should all be treated on an equal footing. However, most countries make the distinction between simple and preferred creditors and those who have acquired security in the ship.

The variety of liens is a remnant of the way in which shipping was organised in the western world back to Roman times, modified over the centuries to reflect contemporary requirements.

Typically, mortgages and hypothecs fulfill the need for long term financing, the need for large amounts of money to acquire capital goods such as ships, which can only be paid back over the lifetime of those goods, while liens and rights of retention are connected with the day to day operation of the ship, and relate to smaller amounts which, in principle it should be possible to repay within a short period of time.

The mortgaging of ships is a comparatively recent development. The construction and purchase of ships used to be financed mainly by capital put up by the owners, often through the participation of sleeping partners. The scarcity of private capital and the great cost of modern shipbuilding has changed the situation and to-day ships are built only on the basis of some form of credit. In fact, credit has become one of the main parameters in competition between shipyards. Credit of this size is only obtainable against security. The big banks and other institutions which organise credit to shipping would be much too vulnerable if they relied solely on the creditworthiness of the shipowners. In fact, even with security, some of the big lenders to shipping had serious problems during the slump in world trade in the seventies, because the value of the security, the ships, became so deflated that it did not cover the loans which had been granted.

The mortgage of ships has been greatly influenced by the corresponding system of credit in real estate. The mortgage of ships forms the basis of issuance of bonds held either by one or more banks or circulated through the stock exchange.

Although, as said above, mortgaging is typically used for long term financing, there is nothing to prevent mortgages from being used for short or medium term financing. The abolition (in the 1967

Convention) of maritime liens for most claims based upon contract and especially the maritime lien for necessaries (as exemplified by the 1926 Convention Art. 2 No 5) leads in this direction. There was good reason for the latter in the days when communications and transferring money were difficult. A master necessarily had to have wide powers to assure the safe journey of the ship, including the power to raise money and to offer the ship as security. Today that need has mostly disappeared. The shipowner can follow the ship closely wherever it is and arrange to provide any necessary money. Financing has become a centralised matter and the most called for security is not the lien but the mortgage. At the same time, to admit of too many liens may endanger the financing of shipbuilding by mortgages since liens are usually given priority over mortgages.

The shipowners' need of financing beyond what can be provided by owner's capital and unsecured loans is really to-day best fulfilled through the use of the mortgage. The maritime lien is no longer a method of financing but an assurance to claimants of the shipowner's ability to pay especially to those claimants who are forced into a legal relationship with the shipowner. This has become especially clear with the abolition, by the 1967 Convention, of maritime liens for most contractual claims.

Liens are granted as a type of "social security" for wages, for the claims of public authorities, for claims in tort and for claims in connection with the distress of the vessel, on the whole for claims which cannot be secured in other ways in advance. In the 1926 Convention and in many national laws maritime liens are also given for several claims in contract. This is not so easy to explain under modern conditions except as protectionism. It is no longer important for the shipowner nor for his creditors who like suppliers in other trades, can easily obtain information on the creditworthiness of his customer and, if it is unsatisfactory, demand cash payment or security in the form of a bank guaranty, or mortgage or else avoid entering into any contract.

What has been said about maritime liens for contractual claims also applies to the right of retention.

Traditionally, maritime liens take priority over mortgages while the ranking of retention rights differs from country to country. Maritime liens are given priority as between themselves on the basis of an evaluation of the relative importance of the claims secured by the liens, while mortgages usually take priority as between themselves according to the time of registration, prior tempore, potior jure.

This order of priority between maritime liens and mortgages is, again, of historical origin and is open to discussion today.

When maritime liens were granted to ensure the preservation of the ship and the continuation of its journey, it was natural for the liens to be given priority over mortgages. It was through the credit based on maritime liens that shipping was made possible, and at the same time the ship was preserved for the mortgagee. Many of the historical reasons for the existence of maritime liens have

disappeared and they ought not to endanger the system of mortgages which today ensures the financing of the shipping industry in general and without which it would not exist.

The priority of at least some maritime liens over mortgages, should be balanced against the short period of limitation or prescription that applies to them. The preferred status of wage claims and claims of public authorities corresponds to the similar status of such claims in general bankruptcy law, (although the latter does not imply security in any particular assets of the debtor).

(b) The American Approach

In describing the American approach it is relevant first to consider the Uniform Commercial Code (the "U.C.C."), a statute adopted and now in force in 49 of the 50 states and, as its name indicates, a virtually uniform codification of laws governing many types of commercial relationships. In the United States, many, if not most, commercial relationships are governed by the laws of the individual states. This, of course, creates great confusion for parties from other countries because there may be no apparent reason for the laws of, say, New York or California rather than national law to govern a commercial contract or relationship. This division of authority impinges on the maritime field and very directly on maritime liens and mortgages. While there is a federal, or national, Ship Mortgage Act, there is no national law of "mortgages". The Ship Mortgage Act, in granting special priority status to "preferred mortgages", assumes and builds on the creation of a "valid mortgage". Since there is no national law on the component parts of a valid mortgage, courts must look to state law for guidance.

The interplay between federal and state law has also had its impact in the law of maritime liens, particularly liens for supplies and necessaries. Although the "general maritime law" gives guidance with respect to certain kinds of maritime liens, supply liens since 1910 have been governed by the Federal Maritime Lien Act which grants maritime lien status to claims by persons furnishing repairs, supplies, services and other "necessaries" to vessels in the United States. Its passage was necessary to supersede the chaos resulting from a myriad of inconsistent and competing state laws on the subject. In contrast to ship mortgages, the liens created by these state statutes were recognised as maritime in character. Many of these state laws are still on the books although no longer viable because pre-empted by federal legislation.

In the United States there is historically a limit on the subjects over which a court in Admiralty may exercise jurisdiction. The principal reason for the Ship Mortgage Act was to turn a non-maritime chattel mortgage recognised under state law but "beneath the dignity of the Admiralty" into a maritime instrument recognised and enforceable in the Admiralty Courts.

Before the adoption of the Uniform Commercial Code in the early sixties, security interests in personal property were created by instruments labelled, variously, chattel mortgages, pledges, assignments, trust agreements, and other types of title retention devices. These forms, with their own special rules and intricacies provided a creditor with special rights of recourse to items of a debtor's personal property prior to other creditors. At the time the federal Ship Mortgage Act was passed in 1920 the prevailing method of securing a lender with regard to tangible personal property was the chattel mortgage, and the Ship Mortgage Act adapted the forms and procedures then in practice in the several states, added a few requirements and opened the courts of Admiralty to these "preferred mortgages". With the adoption of the U.C.C., the chattel mortgage as

a security device with rules peculiar to its form largely passed into history: thereafter there was no continuing and developing body of state chattel mortgage law, to fill in those gaps in the ship mortgage statute where such reliance had been presumed.

With very limited and specified exceptions, Art. 9 of the U.C.C. applies to "any transaction (regardless of its form) which is intended to create a security interest in personal property". Although rights governed by the Federal Ship Mortgage Act are among the exceptions, most vessel financings today include security interests in personal property other than vessels (such as hire due under charter of the vessel, or shares of capital stock in the vessel owning company). Art. 9 of the U.C.C. is very relevant to the consideration of the broader subject of vessel financing as well as useful background for the subject of mortgages, as it can be seen as a comprehensive scheme designed to govern the entire range of activities and issues involved in tha granting, perfecting and enforcing of security interests in personal property (1).

Where competing security interests are involved, the first to perfect (usually by filing a financing statement or taking of possession) is the first in priority. Detailed and complex rules also govern rights to proceeds.

In the context of maritime liens and mortgages, it is important to observe the role assigned to the courts by the provisions of Article 9. The key to the secured party's enforcement lies in his taking possession of the collateral and here he is accorded the right to assistance from the courts. The key to the protection of the debtor's interest is the commercial reasonableness of the secured parties' disposition of the collateral. Here, the debtor may obtain oversight by the court. In neither case, however, is recourse to the courts presented as a first option.

The purchaser of the collateral on resale by the secured party is also protected. Generally, he takes away goods unencumbered by the results of the previous owner's commercial activities.

It is strange that such a scheme does not apply to liens on vessels. The reason seems to lie in the secret nature of maritime liens and the need for the intervention of a court in admiralty to wipe the vessel clean. This conclusion is buttressed by the fact that mortgagees under preferred mortgages on commercial vessels almost never, in the United States, exercise the right to possession or the right to private sale, whereas mortgagees of preferred mortgages on a pleasure vessel seek to avoid a court ordered sale at almost any cost. In the case of a pleasure vessel there are, in practice, usually few maritime liens which attach through the vessel's operation and the time and expense of a judicial sale are not justified for the protection afforded.

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(1) for detailed discussion, see Appendix I.

(c) The 1926 and 1967 Brussels Conventions

The first attempt to unify the law on maritime liens was made by the CMI at its Conference held in Liverpool in 1905 when the first draft of an international convention on maritime liens and mortgages was prepared. It was already recognised at that time that an attempt to unify the law on mortgages and hypothecs would be impossible, in view of the substantial divergencies existing among the various national systems. Thus in the Liverpool draft the only provision on mortgages and hypothecs was that mortgages, hypothecs and pledges on ships, properly established and registered in the country of origin, should be recognised as valid in all other countries and should have effect as in the country where they are registered.

The maritime liens recognised were numerous, and included liens for:-

(i) judicial costs, taxes, costs of watching and preservation (of the ship);

(ii) sums due for salvage, pilotage, towage and general average during the last voyage;

(iii) wages of master and crew since their last engagement but not in excess of twelve months;

(iv) claims in respect of collision damages;

(v) master's disbursements, sums advanced by the master for the needs of the vessel during the last voyage, bottomry bonds, claims for loss or damage to cargo, claims for repairs, supplies, provisions, equipment, and labour (provided such claims arose in the port where the ship lay or in another port of the same country where she called during that voyage).

Apart from minor changes, the claims for which maritime liens were contemplated, corresponded to those existing in French law (2).

In the draft approved by the CMI Conference at Venice in 1907, the number of liens was substantially reduced by cutting out all the claims listed in (v) above.

The report accompanying the new draft stated that the fundamental principle followed in redrafting the rule on maritime liens had been to reduce such liens to the minimum, so as to enhance the value of the mortgage (or hypothec). It was also pointed out that there was no longer any reason to have a maritime lien for claims in respect of contracts made by the master, since the security and rapidity of modern communications made money available anywhere, without the need for the master to seek supplies and other services on credit. (CMI Bulletin No. 19, page 43).

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(2) See page 27 for more discussion.

The limitation of maritime liens to claims arising during the last voyage, which implied their extinction after the completion of each voyage, was replaced by a provision that all maritime liens were extinguished after one year from the time when the claimant could enforce his claim.

Thus, no maritime liens were contemplated in the 1907 draft to secure supplies or services obtained on credit. Other liens were granted for specific reasons; either because the expenses were incurred for the commmon benefit of all claimants, or the claimants were particularly in need of protection (because they were the servants of the owner or, because they could not choose their counterpart, their claims having arisen in tort).

This approach however failed to obtain sufficient support at the diplomatic conference in October 1909. The master's need to obtain services and supplies on credit terms was once again recognised, with the proviso that the services and supplies were required for the preservation of the vessel or the continuation of the voyage, and that the master was acting within the scope of his authority. Moreover, a maritime lien was introduced for claims for death of or personal injuries to passengers or crew and for loss of or damage to cargo.

As will be mentioned later, this was not a rational system, but the result of a compromise among three factions:- those who supported the theory that maritime liens, having priority over mortgages or hypothecs, should be reduced to a minimum; those who wanted to maintain the civil law system; and those who thought that maritime liens should be granted to all claims subject only to limitation of liability. Thus, although as early as 1907 it had been recognised that there was no need for the master to obtain supplies and repairs on credit a maritime lien was nevertheless granted to secure those claims as well as claims for loss of or damage to cargo.

The system of priorities brought about by the 1926 Convention was not complete. Art. 1, paragraph 2 of the Protocol of Signature permitted contracting States to grant port authorities the right to detain the vessel or wreck, to sell it and to satisfy themselves out of the proceeds of sale, with priority over all other claimants, for the cost of removing the wreck, harbour dues, and damage caused by the vessel to harbours and (navigable) waterways. This freedom was granted in order to induce those States in whose legal system such rights of detention and sale already existed to ratify the Convention. This result was only partly achieved for in many maritime countries a right of detention existed in favour of other types of claim as well, such as those shipbuilders and shiprepairers, and the importance of those industries in the economy of many maritime nations was such that ratification was not possible without their approval.

The sub-comittee appointed by the CMI in 1963 to consider the need to revise the 1926 Convention, had to find out why that Convention had not been ratified by many important maritime nations and to establish

whether mortgages and hypothecs required better protection. The first report of the Chairman of the International Sub-Committee, accompanied by a questionnaire, stressed that after the world war the need for financing for shipping, and particularly shipbuilding, had enormously increased; since the loans were repaid during the operation of the vessels, the security granted to the lending institutions had to be such as to assure recovery in case of the forced sale of the vessel. This was acknowledged by the great majority of the national associations in their replies to the questionnaire, although there was no similar consensus as to which maritime liens should be abolished other than that securing claims for contracts made by the master.

In order to remove one stumbling block to the approval of the 1926 Convention the shipbuilders' and repairers' right of retention was recognised, with priority over mortgages.

The reasons underlying convention maritime liens

The reasons why each of the maritime liens was allowed by the 1926 and by the 1967 Conventions and their consequent ranking ahead of mortgages and hypothecs, should be examined in detail. The liens listed in both the Conventions are jointly analysed below. Those in the 1926 Convention which were abolished by the 1967 Convention are noted. The wording used is that of the 1926 Convention followed by a comparison with the 1967 Convention. Ranking of the liens inter se, is discussed later.

(i) Law (judicial) costs due to the State and expenses incurred in the common interest of the creditors in order to procure the sale of the vessel and the distribution of the proceeds of sale (Art.2. No.1)

These costs are unavoidably incurred to enable the claimants to satisfy their claims out of the proceeds of sale. It has been rightly pointed out that, as in the case of bankruptcy or liquidation, these costs are deducted before the proceeds of sale are distributed so that there is no need to secure them by a maritime lien. Therefore Art. 11, paragraph 2 of the 1967 Convention provides that the costs awarded by the Court and incurred in arresting and selling of the vessel and distributing the proceeds shall be the first charge on the proceeds, the balance being then distributed among holders of maritime liens and of mortgages and hypothecs in accordance with their priorities.

(ii) Tonnage dues, light or harbour dues, and other public taxes and charges of the same character (Art. 2, No. 1).

This lien has no connection with the previous one. It can be traced back to the French Ordinance of 1681 and from there it passed into the Code of Commerce. Its only basis is the protection of the interests of the State or other public authorities. The lien is preserved in the 1967 Convention, albeit with a slightly different wording, "Port canal and other

waterway dues" (Art. 4,1(ii)).

(iii) Pilotage dues. (Art. 2, No. 1)

This lien was included in the draft Convention during the Venice Conference in 1907, at the request of the French Association, because a pilot's claim is similar to that of the crew, although it was put together with tonnage and similar dues. The lien persists under the 1967 Convention, where it is still bracketed with port, canal and other waterway dues. It is worth noting that the sums payable to the pilot have been described in the (unofficial) English translation of the 1926 Convention as "dues", whilst in the original French text they are described as costs (frais) (Art. 4,1(ii)).

(iv) Cost of watching and preservation from the time of entry of the vessel into the last port (Art.2, No.1).

The reason these costs are granted priority is the same as that for claims under (i) above, and they should have been listed immediately after judicial costs: "last port" is the port where the vessel is arrested and then sold. Under the 1967 Convention these costs are part of the "cost awarded by the Court and arising out of the arrest and subsequent sale of the vessel" and thus are paid first out of the proceeds of sale (Art. 11, para. 2).

(v) Claims arising out of the contract of engagement of the master, crew and other persons on board (Art.2, No. 2).

The reason for this lien is the need to protect the crew. Furthermore the operation of the vessel, which could benefit the claimants, by enabling the owner or operator to earn sufficient money to settle his debts, would not be possible without the services of the crew. This lien has been preserved in the 1967 Convention (Art. 4,1(i)).

(vi) Remuneration for salvage (Art. 2, No. 3).

The priority of the claim of the salvor was recognised in Roman law on the grounds that the services rendered by him benefited all claimants. This lien has been preserved in the 1967 Convention (Art. 4,1(v)).

(vii) Contribution of the vessel in general average (Art.2, No. 3).

The reason for this lien is the same as that for salvage remuneration. If in fact the sacrifice of the cargo which gives rise to the ship's general average contribution avoids a danger to vessel and cargo, all claimants benefit (Art. 4,1(v) of 1967 Convention).

(viii) Indemnities for collisions and other accidents of navigation.

This lien, which did not exist in the civil law systems, was

recognised in England by the Privy Council in the leading case The "Bold Buccleugh" (7 Moo. P.C.C. 267). Subsequently the House of Lords in Currie v. McKnight (8 Asp. M.L.C. 193) described the vessel as the "instrument of mischief". In the United States the Supreme Court in The "John G. Stevens" (170 U.S. 113) gave a similar justification to this lien:

> "The foundation of the rule that collision gives to the party injured a jus in re in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages".

This is an explanation of why there is an action in rem, but not of why this claim ranks before others, and before mortgages and hypothecs.

This lien is preserved in the 1967 Convention (Art. 4,1(iv)).

(ix) Indemnities for damage caused to works, forming part of harbours, docks and navigable ways (Art.2, No. 4).

The reason for this lien is the same as that for collision damages, i.e. that the vessel is the "instrument of mischief" and an action against her is therefore justified. The lien existed in English law as was held in The "Veritas" (1901), P.304. It continues to exist under the 1967 Convention (Art. 4,1(iv)).

(x) Indemnities for personal injury to passengers and crew (Art.2, No.4).

In the Venice draft claims for death and personal injury were secured by a maritime lien only if they arose out of a collision. In the 1926 Convention the phrase "indemnities for collisions and other accidents of navigation" covers both death and personal injuries as well as loss of or damage to ship and cargo.

The additional words "indemnities for personal injury to passengers and crew" cover the claims of passengers and crew against the owner of the vessel on which they are embarked, that is claims normally based on contract. The general justification for this lien, which was not known either in common or in civil law, is the protection of human life. As regards the crew, it would have been absurd to secure claims for wages and not claims for death and injuries. This lien is preserved in the 1967 Convention (Art.4. 1 (iii)).

(xi) Indemnities for loss of or damage to cargo or luggage.

This lien was not included in the original draft of the Convention but was inserted at the request of the Maritime Associations of civil law countries in whose legal systems,

following the French Code of Commerce, most liens were contract liens. Owners of cargo or luggage should not need protection for they can freely choose the carrier and moreover, they can insure. Thus they are in a position to recover their claims from a carrier who is financially responsible or from insurers. Particularly there is no reason why these claims should be preferred to mortgages and hypothecs. This lien was not retained in the 1967 Convention.

(xii) Claims resulting from 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 the owner of the vessel, and whether the claim is his own or that of shipchandlers, repairers, lenders, or other contractual creditors (Art. 2, No. 5).

The reason for this lien, as already indicated, is to enable the master, away from the vessel's home port, to obtain supplies and repairs on credit or to borrow money to pay for such supplies and repairs. In 1926 the need for such a lien was long past and with the increased use of mortgages and hypothecs a shipowner should not be encouraged to borrow further money for the day to day operation of his ship in such a way as to affect the security of the holder of the mortgage or hypothec. Suppliers and repairers (save those who acquire the detention of the ship) who do not trust an owner should request payment in advance or some other security. This lien has no other effect than to allow a shipowner in poor financial circumstances to continue to operate his ship by superimposing new charges on the ship thereby obtaining new loans when he is no longer in a position to pay, merely because the last creditor knows that his claim will be preferred to those of previous lenders even if they are secured by mortgages or hypothecs. This lien has quite rightly been abolished by the 1967 Convention.

The order of priority

The first question to be considered is why maritime liens are preferred to mortgages and hypothecs. One general answer, not entirely satisfactory, is that statutory securities ought to be preferred to contractual securities. This is the general rule in civil law countries as regards liens and hypothecs on immovable property: the former take precedence over the latter. As regards ships, the problem arose in civil law countries when the ship hypothec was created: in France in 1885, in Spain in 1893 and in Italy (under the name of naval pledge) in 1865.

In France Art. 191 of the Code of Commerce, as amended by law of 10th July 1885, provided that hypothecs ranked after all maritime liens.

In England maritime liens rank before mortgages whether they accrue before or after the date of the mortgage. The rule was thus stated by

Dr. Lushington in The "Royal Arch" (1857) Swab 269, at p. 282;

> Where money is advanced on mortgage of the ship, the mortgagee must always be aware that he takes his security subject to all legal liens, and if he suffers therefrom, his only remedy must be against the owners.

In the United States after the passing of the Ship Mortgage Act, 1920 (whereby the preferred mortgage was created), maritime liens were divided into two categories; that of preferred maritime liens ranking prior to preferred mortgages, and that of the ordinary maritime liens ranking after them. The criteria whereby maritime liens qualified as "preferred" were twofold; on the one hand the type of claim, irrespective of the date of accrual (damages arising out of tort, wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, wages of the crew of the vessel, general average, salvage, including contract salvage) and on the other hand the date of accrual, all maritime liens accrued before the registration and endorsement of the mortgage ranking before it.

When the first draft of the 1926 Convention was prepared by the CMI in Liverpool in 1905 no one doubted that liens on ships (the French text did not qualify liens on ships as "maritime" nor does the 1926 Convention) should take precedence over mortgages and hypothecs. Art. 2 of the Liverpool draft provided:

> "Maritime hypothecs and other similar rights are preceded by liens".

This rule was maintained throughout the various drafts until the 1926 Convention when the rule was formulated in a slightly different manner (Art. 3):-

> "The mortgages, hypothecs and other charges on vessels referred to in Art. 1, rank immediately after the secured claims referred to in the preceding article."

This change was made with a view to allowing contracting States to create liens other than those mentioned in the Convention, provided they ranked after mortgages or hypothecs. There were however other exceptions, for the Protocol of Signature allowed contracting States to grant to the authorities administering harbours, docks, lighthouses, and navigable waterways power to detain a ship or a wreck, to sell her and to satisfy themselves out of the proceeds of sale in priority to all other claimants (and thus of holders of maritime liens of mortgages and of hypothecs) in respect of:

(i) claims for harbour dues;

(ii) claims for damage done by the ship;

(iii) claims for the cost of removal of the wreck.

Such rights of detention already existed in several maritime

countries and it was felt that they should be allowed, for otherwise the countries in question would not have ratified the Convention.

In the 1967 Convention all these claims are secured by a convention maritime lien and thus uniformity is achieved, albeit to the detriment of the holders of mortgages and hypothecs.

Moreover, it was felt advisable to regulate internationally other rights of detention which, although not mentioned in the 1926 Convention, existed in several maritime countries and were treated on the same footing as the right of detention referred to in the Protocol of Signature of the 1926 Convention. The most important categories of claims in respect of which such a right of detention (or retention) was granted were those of shipbuilders and of shiprepairers. It was thus deemed advisable to regulate internationally the ranking of these rights, whether they qualified as (possessory) liens or as rights of retention. A compromise was reached at the CMI Conference in New York in 1965, and was adopted by the Diplomatic Conference in 1967, so that

(a) liens or rights of retention were to take precedence over mortgages or hypothecs but not over convention maritime liens;

(b) such liens or rights of retention were extinguished when the vessel ceased to be in the possession of the shipbuilder or shiprepairer, as the case may be.

Thus during the operation of a vessel many secured claims may arise, including convention maritime liens and claims which are to be satisfied with priority over mortgages or hypothecs, such as claims of shiprepairers. Only one such claim may arise at a time, since either it is enforced before the vessel sails or it is lost. It is worth noting that a shiprepairer's claim may also be secured by a maritime lien under the 1926 Convention (Art. 2, No. 5), if the repairs were ordered by the master acting within the scope of his authority for the preservation of the ship or the continuation of the voyage. The situations in which the security can arise are thus more restricted than under the 1967 Convention, but on the other hand the security is a maritime lien, which follows the ship also after her departure from the place of repairs, whilst under the 1967 Convention the lien (if any) while less circumscribed, is conditional on possession and is lost when possession is lost.

It follows that whenever repairs are made without the repairer having possession of the ship e.g. when the ship is moored at an ordinary berth during repairs and not at the yard of the repairer the 1967 lien or right of retention does not even arise.

The priority of maritime liens inter se is governed by different principles under the 1926 and under the 1967 Conventions.

Under the 1926 Convention the German system of ranking per voyage was adopted and thus all liens which accrue in the last voyage rank before all liens which accrued in the previous voyage and so on. As regards maritime liens accrued during the same voyage, the claims

secured thereby rank in the order in which they are listed in Art. 2. Within each group all claims rank pari passu, save the claims listed in No. 3 (salvage and general average) and No. 5 (claims resulting from contracts made by the master for the preservation of the vessel or the continuation of her voyage), when the most recent claim takes precedence over the one before and so on.

The ranking of maritime liens according to voyage was avoided in the 1967 Convention. In fact, the reason for which such a system had been created in German law, so that all claims subject to limitation of liability should be secured by a maritime lien, was no longer a good one, since the limitation fund is to be distributed amongst all claimants in proportion to their established claims, and thus priorities are of no avail. Moreover, the concept of voyage had proved difficult in practice.

The basic principle is that maritime liens rank in the order in which they are listed in the convention, irrespective of the time of accrual. However, an exception is made to this rule in respect of claims for salvage, wreck removal and general average, which take priority over all other maritime liens even those which attached to the vessel before the operations giving rise to such liens. The reason for this exception to the general rule, which existed within too narrow limits in the 1926 Convention, is that salvage, general average sacrifice or expense and wreck removal have the effect of preserving the vessel and thus the security of the holders of pre-existing liens. The expense or sacrifice is beneficial to all previous claimants and must be recompensed with a priority dating back to Roman Law, and analogous to the rule governing the priority of judicial costs.

B MARITIME LIENS

Characteristic Features of Maritime Liens

The basic difference between a mortgage or hypothec in a ship and a maritime lien is that the former can be created only by the declared will of the owner of the vessel while a maritime lien attaches to the vessel by law when a claim arises which according to law is secured by a maritime lien.

Whereas the owner of the vessel, and in many countries only the registered owner, has power to mortgage the vessel the maritime lien comes into existence regardless of whether the claim is against the owner himself or against others who are responsible for the operation and management of the ship. The owner need have no personal liability; the claimant need have no right to claim against any assets other than the ship, for example where there is a bareboat or other demise charterer.

The effect of both mortgage and lien is to limit the owner's interest in the ship by creating a burden which the ship owner ultimately must bear. In any event the lien attaches to the ship so that if the (personally liable) operator does not pay, the holder of the maritime lien may enforce his claim against the ship and the owner will have to pay or put up security if he wants to avoid the arrest or forced sale of his ship.

Any loss resulting from a lien attaching through the actions of a non-owning operator may be recoverable by the owner from the person who is personally liable for the claim, provided that person is able to pay, or is covered by a bank guarantee or in some cases by insurance.

Whether the owner of the vessel is personally liable for a claim secured by a maritime lien depends upon whether he is the operator or manager of the vessel. In the case of a bareboat charter the charterer is the person liable, not the owner. In the case of a time charter, normally the owner is liable and the possibility of claims has to be taken into consideration when the charter hire is fixed. In the relationship between owner and charterer the charterparty determines who is going to pay in the last resort and in most cases it also determines the personal liability of the owner in relation to third party claimants. Only if the owner has been deprived of possession of the ship by an unlawful act will under the law of most countries no maritime lien attach to the vessel for claims normally secured by a maritime lien.

In some cases a charterparty includes a non-lien clause to the effect that the charterer's operation of the ship shall not result in any maritime liens. Such a clause takes effect only between the parties. It cannot deprive third parties of the protection they get by having their claims secured by a maritime lien in the ship. This security is given them by the law itself.

What has now been said is not expressly spelled out in the 1926 convention. The 1967 convention, as will be further explained below sets it out both in Art. 4 and Art. 7.

While security created by contract for other persons' debts is a regular feature in the law, it seems to be an extraordinary thing, peculiar (at least in most countries) to maritime law, that the property of one person can by law become security for a claim against another person.

Maritime liens are valid against everybody without registration while most other rights in a ship must be registered in order to be protected, i.e. to obtain priority in relation to other holders of rights in the ship or other creditors.

Maritime liens take priority over other of the shipowner's creditors whether those creditors are simple or preferred and whether their claim is secured by registered mortgage or otherwise. One exception is that, under the choice of law rules, certain foreign maritime liens may be recognised although with priority after registered mortgages. But, in principle, maritime liens take priority over all other rights in the vessel without registration.

The rule that maritime liens are good against everybody is true also of purchasers or others who acquire ownership or other rights in the vessel. The maritime lien will survive even without registration and this applies, at least in most countries, even if a person takes the ship in good faith and knows nothing of the existence of a maritime lien, the so-called indelibility of the maritime lien.

This is expressed both in the 1926 and 1967 convention, Art. 8 and 7 respectively. Under the 1967 convention countries undertake to apply this rule even in the case of a change of registration i.e. change of nationality of the vessel. The Scandinavian countries have gone so far as to impose personal liability for the underlying claim upon the seller of a vessel which by the sale passes into a registry where maritime liens created prior to registration there do not survive, even if the seller prior to the sale were not personally liable for the claims secured by the maritime lien. Liability is limited to the amount which the claimant would have got by enforcing his lien. This seems equitable since a seller normally has to guarantee the purchaser against the existence of maritime liens or to reduce the sale price correspondingly.

A special characteristic of maritime liens perculiar to English and American law is the in rem procedure, a procedure against the vessel rather than against the owner or debtor, with effect against the whole world. Proceedings normally are valid, have res judicata effect, only in respect of the parties to them. This will be further discussed in the chapter on maritime liens and English and American law.

Counter-balancing these peculiar characteristics, maritime liens are, in most countries outside the common law area, limited in time. The limitation period varies from country to country and often depends upon the type of maritime lien. In the common law countries the doctrine of laches applies according to which reasonable diligence must be used in the

enforcement of the security. In the two conventions the limitation period is one year with the exception of the maritime lien for necessaries in the 1926 convention where the prescription time is 6 months.

Within the prescription period the maritime lien must be enforced by arrest or seizure and subsequent forced sale. It starts running from the time when the claim which is secured arose. The fact that the maritime lien is extinguished after the lapse of a specified period of time does not affect the underlying claim, which continues to exist but after the lapse of time it is no longer secured by a maritime lien.

The Maritime Liens in the Civil Law Systems

In the French Code of Commerce of 1808 the claims secured by a lien on the ship were all of a contractual nature, as follows:-

(i) Judicial costs incurred in connection with the sale and distribution of the proceeds of the sale;

(ii) Pilot dues, tonnage, dock and similar dues;

(iii) Fees and disbursements of the custodian from the vessel's entry into her last port until her sale;

(iv) Rent of warehouses where the vessel's apparels and appurtenances are stored;

(v) Cost of maintenance of the vessel, her apparels and appurtenances since her last voyage and her entry into the port;

(vi) Wages of the master and crew employed in the last voyage;

(vii) Sums lent to the master for the needs of the vessel during her last voyage and reimbursement of the price of the goods sold by him for such purpose;

(viii) Sums due to the seller, to the suppliers and workmen employed in the construction, if the vessel has not yet made any voyage; sums due to creditors for supplies, works, labour, drydocking, provisions, equipment before the departure of the vessel;

(ix) Bottomry bonds on the hull, apparels and appurtenances for drydocking, provisioning, equipment before the departure of the vessel (this lien was abrogated when the ship hypothec was created);

(x) Insurance premiums due for the last voyage;

(xi) Damages due to charterers for loss or damage to cargo.

The owner of the vessel and the master were thus able to obtain services and supplies for the operation of the vessel. At that time the ship hypothec did not exist, the hypothec being allowed only on immovable property. There was no other way of obtaining financing, nor had the great number of liens the negative effect it had subsequently.

The attributes of these liens, which arose by operation of law, were not the same as those which now are thought proper to maritime liens. Firstly it was not clear whether the liens arose when the claims so secured were against persons other than the owner. Secondly, the liens were granted normally in respect of claims which had arisen during the last voyage of

the ship, and therefore the commencement of a new voyage extinguished all liens which had arisen during the previous voyage. Thirdly, the holders of the liens could not enforce them after the voluntary sale of the ship and the performance of a voyage under the name of the purchaser.

The claims secured by maritime liens had to be evidenced in the manner required by the law. For example, in France judicial costs had to be approved by the Court, tonnage dues to be evidenced by official receipts, crew wages by the crew rolls, bottomry bonds by statements signed by the master, claims for loss of or damage to cargo by judgements or arbitration awards.

The French system with some changes was accepted in many other civil law countries such as, in Europe, Belgium, Italy, Netherlands, Portugal and Spain and, in South America, Argentina, Brazil, Chile, Panama, Peru and Venezuela. It was also accepted in Egypt and Japan.

When the ship's hypothec was created, the number and character of liens on the ship did not change. The hypothec was ranked sometimes after all liens, or, after some of them and before others. In France the hypothec, when it was created by the law of 10th December 1874, ranked after all liens, and thus was granted a priority lower than that of the bottomry bond it replaced. In Italy the pledge (as it was originally called) ranked together with bottomry bonds after all liens.

In Panama the hypothec ranked after the claims for judicial costs, salvage remuneration, crew wages, stevedoring services, tort claims, general average contribution but before the claims in respect of contracts for supplies to the ships, bottomry bonds, expenses incurred in order to preserve the ship after the last voyage, loss of or damage to cargo, the sale price of the ship.

In Spain, before the ratification of the 1926 Brussels Convention, the law of 21st August 1893 on ship's hypothecs provided (Art.31) that some claims ranked before the hypothec whether evidenced in writing or not, whilst others (Art.32) were granted priority over the hypothec only if evidenced in the manner prescribed and some (bottomry bonds) provided they were registered in the ship's register.

Thus while it was felt necessary to create a new contractual type of security (the hypothec), the previous system, which was designed to cover all requirements through statutory securities, remained practically unaltered, thereby affecting to a substantial degree the usefulness of the ship's hypothec.

When the first attempt was made to unify the law on maritime liens and mortgages and hypothecs, there appeared to be a clash between the civil and the common law systems as well as a clash of the common law systems inter se and the German system. The clash was due not only to the number of liens taking priority over the contractual charges (mortgages and hypothecs) and to the different features of the (maritime) liens, but also to the different types of claims which were secured by (maritime) liens: in the civil law countries only contractual claims were secured by liens whilst in the common law countries maritime liens secured both claims in respect of service done to a ship and injury or damage caused by it. In

Germany the liens, as numerous as in the civil law systems, were granted to all claimants who could enforce their claims only against the ship (Schiffsglaubigers) and were therefore subject to the limitation of liability system in force; and since limitation applied per voyage, the claims secured by a lien on the ship also ranked per voyage, those arising in the last voyage having preference over those which had arisen in the previous voyage.

Thus the voyage was relevant both in the civil law systems and in the German system, the difference being that in the former the completion of the voyage caused the extinction of the liens, whilst in the latter it was one criterion for ranking.

As is not unusual in international conventions, particularly when unification is attempted for the first time, the clash between these various systems resulted in a compromise, not entirely satisfactory, along the following lines:

(a) The number of liens on the ship taking priority over mortgages or hypothecs was reduced, but of the claims secured by a lien on the ship some originated from English law (general average, salvage and collision) and some from civil law (expenses incurred for the preservation of the ship after her entry into the last port; claims for loss of or damage to cargo and claims resulting from contracts entered into by the master for the preservation of the vessel or the continuation of the voyage).

(b) The German system of priority was accepted, in that claims ranked per voyage, although of course there was no connection between these claims and the limitation of liability system in force.

(c) As respects claims arising out of the same voyage, the ranking was based on a compromise between the various legal systems and between political and social requirements: law costs due to the State and expenses incurred after the entry of the vessel into the last port came first, then salvage and general average, then contract and tort claims and finally claims in respect of supplies and repairs to the ship.

The 1926 Convention exerted a substantial influence on the civil law systems, and on those of countries within the ambit of civil law even where the Convention had not been ratified (the 1926 Convention is in force in the following civil law countries: Belgium, Brazil, France, Hungary, Italy, Poland, Rumania and Spain).

For example, in the new Code of Commerce of Mexico the claims secured by maritime liens ranking before the ship's hypothec, are (Art. 116) crews wages, sums due to the Fisc, salvage, general average contribution, collision, obligations arising out of contracts entered into by the master for the preservation of the vessel or the continuation of the voyage; the claims rank per voyage.

Similarly, in the USSR's Merchant Shipping Code (Art. 280) the claims

secured by a lien on the ship (it is not clear if the lien has the characteristics of a maritime lien, i.e. if it travels with the ship and arises irrespective of the debtor being the owner) are: 1) claims arising out of labour relations, social insurance contributions, death or injury to seamen; 2) port dues; 3) salvage and general average contribution; 4) collision and damage to port structures and other property including navigational devices; 5) acts done by the master by virtue of the powers conferred on him for the preservation of the ship or the continuation of the voyage; 6) damage or loss of cargo; claims rank per voyage and, as in the 1926 Convention, are extinguished after one year except those under 5) above which are extinguished after six months (Art. 285).

Two more recent statutes on maritime liens and mortgages in civil law countries, both enacted after the 1967 Brussels Convention, are those of Argentina (Articles 471 - 489 of Ley de Navegacion) and Venezuela (Ley de Privilegios e Hipotecas Navales of 24th August 1983).

In Argentina the maritime liens have been divided in two groups; the first one includes the maritime liens ranking before hypothecs and the second one includes liens ranking after hypothecs. The maritime liens of the first group reproduce those of the 1967 Brussels Convention, save that judicial costs, (which pursuant to the Convention are paid out of the proceeds of sale prior to their distribution) are secured instead by a maritime lien with priority over all other liens. Claims of the shipbuilder and shiprepairer are also secured by a maritime lien, but such liens are included in the second group and therefore rank behind hypothecs, even though the 1967 Convention (Art. 6) allowed builders' and repairers' claims to be given priority over hypothecs. The new Argentine law differs from the Convention in respect of the ranking of maritime liens. Ranking per voyage has in fact been preserved and thus whilst the ranking of the claims which have arisen during the same voyage conforms with the provisions of the Convention, claims arising in a previous voyage rank behind those of the subsequent voyage. Another aspect on which Argentine law differs from uniform maritime law as brought about by the 1976 Limitation Convention is that also in case of limitation of the shipowner's liability claims are satisfied in accordance with their priority.

In Venezuela too there are two groups of maritime liens, one ranking ahead and one behind hypothecs. The claims included in the first group correspond to those in respect of which maritime liens are recognised by the 1967 Convention, save that claims of the Fisc are added to the list. A maritime lien of the second group exists in respect of claims of the shipbuilder or shiprepairer. Therefore also Venezuela did not deem it convenient to give the priority over hypothecs as allowed under Art.6 of the 1967 Convention.

The view that the number of maritime liens ranking ahead of hypothecs must be reduced as much as possible seems by now generally accepted in civil law countries. It is equally generally accepted that maritime liens arise irrespective of the claims secured thereby being against the owner, operator or charterer of the ship and that maritime liens follow the ship on transfer of title to a bona fide purchaser. Finally it is generally accepted that maritime liens must cease after not too long a period (generally one year) from their accrual, in order to protect purchasers and lenders.

The Maritime Liens in American and English Law

Definition

A maritime lien has been characterised as a property right in a vessel which attaches to the vessel wherever she travels. Certain types of debts give rise to maritime liens, giving the lienor the right to have the ship sold to obtain satisfaction of the debt. The lien against the vessel is created at the time a service is rendered, an injury is caused, or a wage is due. It is important to understand that the liability attaches to the vessel and not necessarily to the owner, the master, or the charterer of the vessel (1). To be sure, the person who has a maritime lien against a vessel may also have a claim directly against the shipowner, the charterer, or the master, but, in some mystical fashion, the maritime lien is more than mere security for the payment of any personal obligation.

From the moment a maritime lien is created it adheres to the vessel and remains attached even though the ownership or possession of the vessel is transferred to a party lacking knowledge of the lien. Indeed, these liens are secret and seldom recorded, and are good "against the world" (2). It is a constant worry to purchasers of vessels. The owner of the vessel, including an innocent purchaser, may extinguish a maritime lien through payment; otherwise, he may suffer the ship's loss through a sale by an admiralty court.

Maritime liens in English and American law are similar. There are, however, a few important differences which can lead to diverse results. These differences will be noted in the discussion following.

Purpose

Several unique characteristics of the shipping industry were responsible for the development of this device. A vessel travelled from port to port, continent to continent. She was often found in places where her owner was unknown or inaccessible, and the master, although historically the authorised agent of the owner, was not usually sufficiently well funded to

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(1) For an extensive discussion of this topic, see N. Pieper, "Maritime Liens", Maritime Law and Practice, Florida Bar Continuing Education (1980), 353.

(2) For an extensive discussion of this topic, see G. Gilmore & C. Black, The Law of Admiralty, 588 (2nd ed. 1975).

respond to the unforseen financial demands of the voyage [3]. Through the device of a maritime lien, ship suppliers, seamen, or others concerned about being paid could look to the vessel itself for security, and did not have to ascertain the fiscal stability and reliability of a distant owner or charterer. Thus, did a ship come to be considered a real party of interest, putting its value on the line to assure fulfilment of the contract commitments entered into, for the supplies and repairs and services it required, and as a pledge for compensation to an injured party.

Indeed, two attributes of a maritime lien, both in English and American law, are "indelibility" and automatic creation. These attributes are not found in other types of liens. Indelibility means that the lien stays with the ship wherever she travels, regardless of whether she is sold [4], and irrespective of bankruptcy and reorganisation [5]. This quality of a maritime lien is, however, balanced by the equitable doctrine of laches which results in extinguishment of the maritime lien if a claimant delays too long before asserting it against the vessel.

Automatic creation means that the lien arises automatically upon the occurrence of an event - "it springs into existence the moment the circumstances give birth to it" [6]. Because there is no requirement that the claimant file a record for purposes of giving notice, the lien is often secret. An important exception to this general rule is the statutory lien, a hybrid lien peculiar to the English system. Ship Mortgage liens are a separate matter. In neither of these cases does the lien arise without the lienor taking certain steps designed to give constructive notice.

Proceedings in rem and in personam

In the United States the maritime lien gives rise to proceedings against the vessel, or proceedings in rem; accordingly the jurisdiction is limited to the value of the vessel or the res. It is unlike other areas of American jurisprudence where the attachment of the property is a means of bringing the owner under the jurisdiction of the court. In an admiralty in rem proceeding, an appearance by the owner, unless he is joined as a party, does not give the court jurisdiction over the owner, or jurisdiction in personam.

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(3) For an extensive discussion on this topic, see Benedict on Admiralty, Vol. 2, § 21.

(4) This is true even if the ship is sold to a purchaser in good faith, i.e. one who purchases without knowledge of the lien's existence. In practice, such a purchaser would generally obtain an indemnification from the seller for all such unknown claims against the vessel.

(5) For an extensive discussion on British maritime liens, see D.R. Thomas, Maritime Liens, British Shipping Laws Series, vol. 14 (1980), 3 & 72.

(6) Dr. Lushington, The Mary Ann, (1865) L.R. 1 A. & E. 8.

Characterising the vessel as the obligor benefits the claimant who, therefore, does not have to locate and sue the owner, the charterer, or the master. Of course, if the claimant seeks to recover a greater amount than his share of the proceeds from a judicial sale, he must obtain in personam jurisdiction over the owner.

This important rule does not hold good in English law and reflects the American theory of personification. In England, the in rem action is used to obtain jurisdiction over the owner, to compel him to appear in court. Once he appears, he is liable in personam as well as in rem.

Commentators have suggested that the legal fiction of the personification of the ship is no longer necessary to explain current judicial results in the Admiralty Court of the United States. It has become fairly well established that an innocent shipowner may be subject to limited liability (to the extent of the value of his ship), in rem, for certain acts of third parties. As Gilmore and Black have observed:

> Since World War II the courts and commentators have been in comfortable agreement that the personification of the ship is and always has been merely a legal fiction, is not and never has been a principle of decision. Abandonment of the fiction would seem to have been a clear gain for legal thought (7).

It is, however, difficult to persuade maritime lawyers in the United States that personification is a thing of the past. Furthermore, it seems clear that a shipowner may, under certain circumstances, have recourse against the third party whose action resulted in the maritime lien if the third party was, through the terms of a charter, contract or otherwise, required to bear the cost of the service or supplies which give rise to the lien.

In England, the personification theory was never allowed to evolve. Whether the creation of maritime liens depends on the personal liability of the owner is problematic and appears to depend on the type of lien. For instance, damage and disbursement maritime liens depend on the personal liability of the owner. Wage and salvage liens are not dependent on the owner's personal liability. As a practical matter, the personal liability on the part of the owner for such claims will almost always exist anyway:

> (The) relationship between a maritime lien and the personal liability of a res owner is therefore one which may fall to be answered differently as between individual maritime liens. It is clear that the various maritime liens do not in this regard, display common characteristics (8).

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(7) Gilmore and Black, supra, at 616 (footnotes omitted).

(8) Thomas, supra, at 15.

In this way, the American and English systems seem to have reached similar results although having taken different paths. In neither is there a unified theory which explains which maritime liens depend on the personal liability of the owner and which do not. The best that can be said is that the importance of this question is only in relation to whether a maritime lien is created. Once created, and the vessel is sold to an innocent buyer, the lien will still stand although there is clearly no personal liability of the new owner.

As mentioned above, a significant difference between the English and American systems is the effect of an appearance by an owner in a proceeding in which a maritime lien is asserted. In the United States, an owner of a vessel encumbered by a maritime lien may appear to defend a suit against the ship without being subject to in personam jurisdiction. Hence, his liability is limited to the value of the res, i.e. the vessel. In the English system, when an owner enters an appearance he is subject to in personam jurisdiction, and if he is found personally liable his liability will extend beyond the value of the res. If, however, the shipowner does not appear in the English courts, his liability is limited to the value of the vessel but of course he cannot defend the action and will certainly lose his ship (9).

Property subject to maritime liens

Properties subject to maritime liens in England and the United States are, as a general proposition, similar. A maritime lien may be enforced against the vessel itself, its appurtenances and its freight; against the vessel's bunkers, the cargo, the wreck of these, the proceeds of their forced sale and charterer's subfreights. Needless to say, the party in whose favour the lien arises will not be the same in each case, the lien against the cargo and the subfreight belonging to the shipowner to secure the obligations of the shipper or charterer to pay the agreed cost of carriage.

A vessel is defined as any type of water-craft used or capable of being used as a means of transportation on water. In the United States, the terms had been held to include a barge without motive power, a houseboat, and the luxury liner "Queen Eliizabeth" while moored as a tourist attraction, and has generally been interpreted broadly.

Maritime liens on a vessel include her appurtenances where the equipment is essential to or an integral part of the vessel but cannot usually be asserted against leased equipment on board the vessel. Maritime liens may not be asserted against the insurance proceeds of a lost or damaged vessel or against her general average contributions, or salvage remuneration (10).

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(9) For an extensive discussion of British maritime liens, see S. Harley, How to Secure a Maritime Lien (1981).

(10) J.B. Smith, Maritime Liens and Rights of Arrest and Attachment, Lloyd's of London Press and American Shipper Seminar, October 16-17, 1980.

The owner of a ship may assert a maritime lien against the cargo when the freight is unpaid. Unlike maritime liens against the ship, however, the lien against the cargo is possessory and is lost upon unconditional delivery to the consignee. The lien on subfreight is subject to similar rules.

Claims which give rise to maritime liens

Except for the growing importance of the ship mortgage in the United States and the statutory rights of action in rem in England, the types of activities which give rise to maritime liens have changed very little since the 19th century. In the United States, maritime liens against a vessel and her freights which are recognised today have their source in the general maritime law and the Federal Maritime Lien Act (11).

In contrast to the American system, maritime liens in English law are confined to a relatively small number of claims. These claims fall into the categories of damage done by a ship, salvage, seamen's and masters' wages, masters' disbursements and bottomry, which are known as the "principal" or "genuine" maritime liens.

Perhaps the major distinction between the English and American system of maritime liens is the treatment of "necessaries", the goods or services furnished by materialmen to vessels. These liens account for the greatest number of maritime liens in the United States, yet they are not given that status in England. In England, the mechanism for enforcing such claims is the statutory right of action in rem, which lacks many of the advantages of maritime liens.

Claims giving rise to maritime liens in the United States

1. Preferred ship mortgage (12)

The Ship Mortgage Act, passed by the United States Congress in 1920, conferred the status of maritime lien on mortgages on U.S. flag vessels which met the requirements under the Act. These mortgages are referred to as "preferred mortgages".

The Act is limited to mortgages held by citizens of the United States on vessels of 25 tons or more, documented under United States law. In the 1950's "preferred" status was extended to mortgages on foreign flag vessels of 200 tons or greater, validly executed under, and duly registered in accordance with, the laws of the country under which the vessel is documented. However, unlike the U.S. preferred mortgage, the

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(11) The former place held by the maritime lien statutes of the various states has been superseded by the Federal Maritime Lien Act.

(12) This topic will be dealt with in greater depth at a subsequent lecture.

foreign preferred mortgage is expressly subordinated in priority to maritime liens arising from services performed or necessaries supplied to the vessel in the United States. A mortgage which is not a "preferred mortgage" under the Act is treated as a common-law nonmaritime contract completely subordinated to all maritime liens and other mortgages with "preferred" status.

2. Maritime contract liens in the United States

Generally, those contracts which are necessary for a vessel to continue operating give rise to maritime liens.

They cover a broad range of contracts and constitute the largest group of maritime claims. Claims for furnishing repairs, supplies and other necessaries are the most numerous. They are governed by federal statute. Other maritime contract claims, which arise under the general maritime law, relate to seaman's wages, salvage, contracts of affreightment, stevedore services, towage, pilotage, wharfage, and general average.

a) Federal Maritime Lien Act

Before the Federal Maritime Lien Act of 1910 (13), a confusing patchwork of state statutes and general maritime law controlled the area of maritime contract liens. The confusion grew out of the development of the so-called home port doctrine which denied a maritime lien to suppliers or services furnished in a ship's home port unless the state conferred this right by statute (14). The states rushed to pass such statutes; the statutes inevitably varied in scope, and the confusion developed.

Within a relatively short time of its enactment, the Federal Maritime Lien Act became all but the sole source of law on maritime contract liens based on supplies and necessaries. The Act has five short sections:

(1) Section 971 creates a maritime lien for "any person furnishing repairs, supplies, towage or other necessaries, including the use of dry dock or maritime railway, to a vessel, whether foreign or domestic upon the order of the owner or by a person authorised by the owner."

(2) Section 972 lists the people presumed to have the authority of the owner and includes "(t)he managing owner, ship's husband, master, or any other person to whom the management of the vessel at the port of supply (lawfully) is intrusted".

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(13) 46 U.S.C.A. §§ 971-975.

(14) The theory behind this doctrine was that since the owner was available for in personam jurisdiction, there was no need to rely on the vessel's credit.

(3) Section 973 deals with chartered vessels and specifies that persons listed above have the same authority to bind the vessel even if appointed by a charterer, or by an owner pro hac vice.

(4) Section 974 specifies that the rules of law in effect at the time of passage shall continue to govern with respect to the right to proceed against the vessel for advances, the effect of laches on enforcement of liens, the right to proceed in personam, and the rank and priorities of maritime liens among themselves and between such liens and mortgages.

(5) Section 975 expressly states that the statute supersedes all State laws granting maritime liens for necessaries.

Certain problems have arisen in the construction of the Lien Act. While the term "other necessaries" usually gets a broad reading, the type of vessel involved and the service in which she was engaged are important factors in determining whether an item is or is not necessary. For example, furnishing liquor and wine for a fishing crew may not constitute other necessaries, while stocking the bar of a tourist ship would fall in this category. Other examples which have been found to constitute "other necessaries" include pilotage services, dockage and wharfage, pumping services to control leakage of water, fumigation of a vessel, advertising for a cruise ship, and taxi fare for bringing provisions to a crew. A recent issue before the courts in the United States was whether containers constitute necessaries for a container vessel.

Interpretation of the term "furnished" has also generated litigation. Supplies delivered to a fleet of vessels will not be considered to be furnished by the supplier if they are comingled with the owner's general stock of supplies, and the supplier would not have a lien. However, it appears that if the supplies are promptly delivered to the individual vessels, then the supplier obtains a maritime lien.

Work performed on a vessel, if reasonably necessary to facilitate her use as a ship, is considered a repair and qualifies for a lien. This can include drafting plans, was well as wharfage while the vessel is being repaired. However, reconstruction, such as converting a destroyer to a fishing boat, does not constitute a repair and hence does not give rise to a maritime lien.

The Act provides that it is not necessary for a material-man to allege or prove that credit was given to the vessel. It also provides that a material-man can waive his lien by agreement or involuntarily. The courts have interpreted this latter phrase to mean that if a materialman takes additional security directly from the owner, he may waive his right to a lien against the vessel. Consequently, the practice grew up in which notes, agreements, and invoices expressly "stipulate for the retention of the lien" and services were billed to the ship or to the vessel and the owner, but not to the owner alone. Recently, this reliance on formalistic expressions of intent has relaxed, and it may no longer be fatal to the creation of a maritime lien to bill the owner directly without the accompanying safeguarding phraseology.

Since many vessels operate under charter, the question of when a charterer has the authority to create a lien against the chartered vessel has been the source of major conflict between owners and those who supply the vessels. The problem arises of course, because, when operating on charter, a vessel is not under the direct control of the owner or the owner's agent, and yet the suppliers and materialmen still look to the vessel as security for the goods and services they supply to her.

It is unclear to whom the draftsmen of the Maritime Lien Act intended to give the upper hand when the Act became law in 1910. Originally, the Act required that a "furnisher" exercise "reasonable diligence" in determining whether the terms of a charter party restricted a charterer's power to bind the vessel (15). It became customary to insert a clause in the charter party restricting the charterer's authority to bind the vessel. The extent of the inquiries necessary to meet the reasonable diligence standard was never clearly outlined, but suffice it to say that this requirement gave the vessel owners the upper hand. The presumption of authority provisions were in effect swallowed up by the duty to inquire.

All this was changed in 1971 when the duty of inquiry was deleted from the statute. In a recent case it was held that a supplier of necessaries to a vessel is under no duty to inquire as to the existence of a prohibition of lien clause in a charter party despite the fact that the supplier knew that the vessel was running under a time charter party (16). Thus, the burden of proof is upon the vessel owner to show that a supplier has actual knowledge of the master's or charterer's lack of authority to bind the vessel. This probably means that vessel owners can protect themselves only by undertaking to inform suppliers and materialmen in the various ports, an impractical suggestion, at best. The practice of including a "prohibition of lien" clause in charter parties and, indeed in vessel mortgages, remains intact whatever its value now is.

b) Seaman's wages

The seaman's claim for wages, arising out of the contract of employment, has historically been the most sacred of all maritime liens since the services involved are considered so vital to the vessel's operation. Indeed, it has often been observed that the seaman's claim for wages is nailed to the last plank of the vessel. The term "seaman" has been interpreted broadly and embraces generally all persons employed on board a vessel during a voyage, including bartenders and musicians as well as the more traditional categories of those who aid in the navigation or preservation of a vessel.

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(15) 46 U.S.C. § 973.

(16) Ramsay Scarlett & Co. Inc. v. s.s. "Koheun" 462 F,Supp.277 (1978).

Under general maritime law, the master of the vessel was not entitled to a lien for unpaid wages. However, in 1968, Congress gave masters what the maritime law had grudgingly withheld for so long by enacting legislation providing that a master of a vessel has the same priority for wages as any other seaman serving on the same vesssel [17].

c) Contract of affreightment

Claims for damages to cargo in loading, towing, or custody, as well as breach of contract terms, are based on the affreightment contract as evidenced by a bill of lading or charter party. Under the Harter Act [18] and the Carriage of Goods by Sea Act [19] the vessel owner is immune from most cargo damage claims. However, where liability exists, the claim has the status of a contract maritime lien. In the United States there are increasing efforts to convert this contract claim into a tort, largely because tort claims are entitled to priority over preferred mortgages. There have been a number of successes.

A breach of the affreightment contract by the cargo owner such as the failure to pay the freight or charter hire gives rise to a lien against the cargo in favour of the vessel owner for the unpaid freight. This lien is unlike other maritime liens in that it is dependent on possession - that is, when the cargo is delivered without restrictions, the lien expires. It is thus perhaps, best categorized as a possessory lien.

d) Advances (subrogation of a maritime lien)

American courts recognise the "advance rule" which holds that anyone (except an owner, general agent and the like) who advances money for the purpose of paying claims which would have maritime lien status (even if the claims are not in existence at the time of the advance) are entitled to a maritime lien of the same rank as the lien "discharged". In some cases, the party advancing funds is described as being subrogated to the lien of the party whose claim was paid. In other cases, the courts find that a new lien of equal rank to that of the supplier who has been paid has arisen in favour of the party advancing funds. Generally, the funds must be advanced and used specifically for the purpose of paying off such claims but it does not appear to matter whether the payments are made to the owner or owner's agent or directly to the claimants.

3. Claims arising from accidents and disasters

a) Torts

Today most torts giving rise to maritime claims are covered by insurance, and, therefore, such liens tend to be cleared quickly by posting a bond or furnishing a P & I Club letter. As a practical matter, then, maritime liens based on torts are seen less frequently and seldom compete directly with claims of preferred mortgagees and contract maritime liens for the

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(17) 46 U.S.C.A. § 606.
(18) 46 U.S.C. § 190-196.
(19) 46 U.S.C. § 1330 et seq.

value of the vessel. Nevertheless, occasions do arise - as in cancellations for nonpayment of insurance premiums, breach of warranties which void the policy, policies applied on a strict indemnity basis or in the case of a very high deductible - where a valid maritime tort lien will rank before contract liens for necessaries and preferred mortgages (20).

In deciding what constitutes a maritime tort, the threshold question is whether an action is maritime. Generally, this question is easily answered by determining whether the tort occurred on navigable waters. Under this so-called "locality" test, waterskiers, motorboats, and bathers have been allowed to proceed in admiralty and assert maritime liens. This test has been criticized as being overly broad, and it has been proposed that the test be narrowed to include only those torts connected with maritime commerce.

On the other hand, fearing that the locality test may be too narrowly construed, Congress passed the Admiralty Extension Act of 1948 which allows for maritime liens where the injury occurred on land as long as a vessel on navigable waters was the cause. Such injuries might include damage to persons ashore or on bridges and docks or collision between vessels and bridges or dikes. The Extension Act permitted maritime tort claims against a vessel where damage to shoreline property was caused by an oil spill from the vessel.

It is well established that maritime liens in favour of seamen arise for injury or death caused by the unseaworthiness of the vessel. While passengers are not owed a warranty of seaworthiness, they may recover for injuries based on the negligence of the crew and have a corresponding lien.

Since the 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act (21), maritime workers (e.g. longshoremen and vessel repairers) are no longer entitled to actions based on the seaworthiness of vessels, although they can still assert a maritime tort claim and lien against the owner for negligence.

One area where vessel owners have thus far been protected from in rem liens is seamen's injuries caused by the negligence of officers or crew of a vessel. Congress apparently tried to change this general maritime principle with the passage of the Jones Act in 1920 which gave seamen the right to sue for injuries caused in the course of employment even when caused by the negligence of officers or crew.

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(20) For an extensive discussion of maritime liens arising out of accidents or disasters, see N.B. Richards, Maritime Liens in Tort, General Average and Salvage, 47 Tulane Law Review 569, 586 (1973).

(21) 33 U.S.C.A. §§ 901-950, as amended (1972).

However, although the remedy now exists, seamen may still not assert a maritime lien against the vessel and must proceed in personam. Nevertheless, since many such Jones Act claims are coupled with actions based on alleged unseaworthiness of a vessel, it appears reasonable to conclude that seamen are generally entitled to a maritime lien when they have been injured.

In collisions between vessels, a private vessel owner, but not the United States (23), will be held liable in rem if his vessel is at fault. In collision cases, maritime liens against the vessel can extend to situations where the owner or the owner's agent is not at fault and the owner is not personally liable. This may occur where the vessel is under the control of a compulsory pilot.

As previously mentioned, tort liens are accorded a higher priority than preferred mortgages and maritime liens for necessaries and breach of contract of carriage. Actions involving loss or damage to cargo may include claims based on fraud or misrepresentation or unseaworthiness in addition to the breach of contract claim.

b) Salvage and general average

For the salvage of a vessel, whether under a contract or not, a maritime lien against the vessel in favour of the salvor is created. The lien may be maintained against any property including cargo which is saved, but no lien against the vessel arises for saving lives.

On the grounds that salvage preserves the res i.e. the vessel, for the benefit of all claimants, it is accorded a high priority against other maritime claims, generally next in line behind wage liens.

General average may also give rise to maritime liens and can be asserted against the vessel, the cargo, or the freight. However, this lien is not frequently invoked; rather, bonds, cash, or underwriter's letters are substituted for the vessel and cargo.

4. Claims which do not qualify as maritime liens in the United States

A claim's maritime flavour does not imbue it with the benefits accorded a maritime lien. Indeed, many types of claim related to maritime commerce do not achieve the status of a maritime lien. Such claims are subordinate to and rank lower than the lowest maritime lien.

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(22) 41 Stat. 1007 (1920).

(23) The Public Vessels Act, 46 U.S.C. §§ 781, 788 (1970), exempts the United States from in rem actions although it is still liable in personam.

a) Executory contracts

Breaches of maritime contracts which are wholly executory do not give rise to a maritime lien. Executory contracts are contracts which have not yet been performed. In maritime law this issue is often found in disputes relating to contracts of affreightment. A contract of affreightment is generally held to be executory up to the point when the goods are delivered to the vessel, and placed in the control of the vessel. It is not necessary that the vessel set sail.

Where contracts for repairs or supplies are involved, the Federal Maritime Lien Act governs and under that statute, the contract is no longer executory when the repairs and supplies are "furnished" to the vessel. Similarly, other services like wharfage and towage must be "furnished". Where a cruiseship is involved, a passenger would not be entitled to a maritime lien if the cruise were cancelled before he boarded even if he had paid his fare. And in a charter-party, the contract remains executory until the vessel is delivered.

b) Vessel owners

It is well established that owners, part owners, and general agents, are not entitled to a maritime lien against the vessel. Moreover, the owner cannot subrogate to the lien, since he is considered liable for the underlying debt.

> When the seas get rough one who looks, thinks, acts, and profits like an owner cannot retreat to the relatively safe harbor of a maritime lienor, who of course has a claim against the vessel itself (24).

c) Ship construction, maritime insurance, and tax liens

On the principle that contracts for the construction of vessels are not related closely enough to commerce and navigation, builders of vessels are not entitled to maritime liens for breach of these contracts. Similarly, contracts for supplies and services for the installation of the main engine and rigging even while the vessel is in the water will not give rise to a maritime lien. Recourse is governed by state law.

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(24) Sasportes v. m/v "Sol de Copacabana", 581 F. 2d 1204, 1209 (5th Cir. 1978).

Other claims which do not attain the status of maritime liens include claims for unpaid marine insurance premiums, a non-preferred mortgage on a vessel and tax liens. Nevertheless, it should be noted that if a dispute arises under a state statute granting lien status for claims not covered in the Federal Maritime Lien Act, then state law is still controlling; since certain states authorise liens against vessels for some contracts not entitled to maritime lien status under the Federal Maritime Lien Act, a breach of such a contract may arguably still give rise to a maritime lien against the vessel. But at least one commentator has asserted that such state statutes, while in theory still in force, are in fact "either moribund or dead" (25). Finally breach of a contract for the sale of a vessel does not give rise to a maritime lien, the seller being, however, personally liable for the breach of his contractual undertakings.

Claims giving rise to maritime liens in England

1. Genuine maritime liens

As in United States, the rules of law applicable to maritime liens are not altogether clear. This is probably due to the fact that, in the development of the law on maritime liens through decisions, no clear guiding theoretical basis for these charges against maritime property emerged.

English commentators identify bottomry, salvage, wages, master's wages, disbursements and liabilities, and damages as "genuine" maritime liens but quickly add that the scope of these categories has been expanded by statutory enactment.

Towage and pilotage present no clear picture, some courts having treated them, in ranking claims against proceeds of forced sales, as maritime liens. Other courts classify these claims as statutory rights in rem. Commentators, as a matter of policy disfavouring secret liens, are more comfortable with the latter category.

Unlike the situation in the United States, the furnishing of necessaries does not give rise to a maritime lien, nor does a claim arising out of cargo damage.

D.R. Thomas describes a maritime lien under English law as having the following characteristics:

(i) a privileged claim or charge,
(ii) upon maritime property,
(iii) for service rendered to it or damage done by it,
(iv) accruing from the moment of the events out of which the cause of action arises,
(v) travelling with the property secretively and unconditionally, and
(vi) enforced by an action in rem.

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(25) Gilmore & Black, supra, at 659.

With respect to the first characteristic, a maritime lien is privileged because it enjoys a security in ranking over mortgages, possessory liens and statutory rights in rem.

With respect to the property covered, the following classifications have been offerred:

Maritime Lien	Property Covered
Bottomry	Ship, freight and cargo
Damage	Ship and freight
Salvage	Ship, freight, cargo, flotsam, jetsam, lagan, derelict and wreck
Wages and disbursements	Ship and freight

It is worth noting that the lien on freight depends on the continued existence of the lien on the ship earning the freight. Thus if the ship is lost no lien may be asserted against the unpaid freight.

2. Mortgages (26)

Mortgages under the English system do not have the status of "genuine" maritime liens.

Under the Administration of Justice Act 1956, a mortgage gives rise to a right in rem against the mortgaged ship. Unlike a maritime lien which is created automatically, the mortgagee's rights arises by virtue of the mortgage agreement. Furthermore, the mortgagee's right to pursue his security in the hands of a third party is founded on notice, which arises from the registration of the mortgage.

3. Statutory liens (statutory rights in rem)

Statutory liens are not considered maritime liens, and, as their name implies, they are creatures of statute. They rank lower than maritime liens and mortgages in priority and are generally inferior to all secured claims arising prior to their creation. Notwithstanding the use of the term "statutory lien" the right granted by statute is in essence procedural rather than substantive and it is probably more accurate to say that certain maritime claims defined by statute, give rise to a statutory right in rem against the vessel. The great value of a statutory lien is that, by its entitlement to enforcement through an action in rem it provides a claimant with pre-judgment security, while avoiding the necessity of bringing an action in personam.

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(26) This topic is dealt with in greater depth in chapter D.2(c).

Unlike a maritime lien, which arises automatically upon the occurrence of the event giving rise to it the claimant must take steps to "create" the statutory lien. This is accomplished by issuing a Writ (equivalent to the Complaint in the U.S.) and causing it to be served on either the res if it is within the jurisdiction or on the defendent or his representative if either of them is in the jurisdiction. It is apparently unclear which of these two acts - the issuance of the writ or the service of the writ - triggers the creation of the statutory lien.

Under the Administration of Justice Act 1956, there are 18 types of maritime claims which can become statutory liens through the process just described. These are claims:-

(i) On the possession or ownership of a ship or a share of a ship.

(ii) By one owner vis-a-vis another owner over the possession, employment, or earnings of that ship.

(iii) In respect of a mortgage on a ship.

(iv) For damage done by a ship, including damage to shore property and pollution damage.

(v) For damage received by a ship including breaches of duty by persons on shore or persons on another ship.

(vi) For injury or loss of life caused by a defect in the ship or by the negligence of the owners, charterers, or persons in control.

(vii) For loss or damage to goods carried by a ship.

(viii) Arising under any agreement relating to the carriage of goods by a ship.

(ix) In the nature of salvage.

(x) In the nature of towage of a ship.

(xi) In the nature of pilotage.

(xii) In the nature of goods or materials supplied to a ship for her operation or maintenance.

(xiii) For the construction or repair of a ship and a claim for dock dues.

(xiv) By a master or member of a crew for wages.

(xv) By a master, shipper, or agent for disbursements on account of a ship.

(xvi) Based on general average.

(xvii) Arising out of bottomry (which is now obsolete).

(xviii) For the forfeiture or condemnation of a ship or goods carried on a ship.

One necessary feature of the statutory right in rem is the personal liability of the owner of the res for the claim upon which the action is based. From this it follows that the res must be owned by that party at the time the Writ is issued. Unlike maritime liens, then, a bona fide purchaser of a vessel is protected against such a claim.

One other feature of the statutory lien, except for claims described in categories 1 through 3 above, is that it is not peculiar to the vessel to which services or supplies are rendered. Since its essential feature is the personal liability of the owner, claimants may bring a claim against a sister ship, that is a ship beneficially owned by the owner of the offending ship. Thus, where a claimant whose claim is both a maritime lien and a statutory lien, e.g. a claim for wages, the claimant may make a claim against a sister ship although by doing so he is not entitled to the priority agianst the sister ship that his maritime lien would have against the offending ship.

General rankings in the United States

In the United States maritime liens are ranked in the following order:

1. Expenses during judicial custody

Costs, formally known as Custodia Legis, incurred by the marshal or other governmental agency following the seizure of a vessel under an in rem action, while not strictly a maritime lien, have long been accorded top priority by U.S. Courts. They include the cost of obtaining custodial services with the approval of the court as well as costs of discharge of cargo under appropriate circumstances.

2. Seaman's lien for wages; for maintenance and cure

This lien is for wages and for "maintenance and cure". The latter is a common law remedy, requiring that an injured crew member receive not only full medical treatment ("cure"), but compensation to support himself and his family as well. This lien extends to all crew members, including a vessel's master and any longshoreman working directly for the vessel. It takes first priority regardless of when it arises in relation to other types of liens.

3. Salvage and general average liens

The basis for the high priority of the lien for salvage, whether voluntary or by contract, is the salvor's close connection with the preservation of the res. This represents the familiar theory of "beneficial service" - i.e., the priority of liens should be determined, at least in part, by the value of the lienor's service to the continuance of the vessel's voyage, or, indeed, to its continued existence. For this reason the lien for general average also receives this high priority, since, theoretically, the cargo owner receives a lien for cargo sacrificed to save an imperilled vessel.

4. Maritime torts

Tort claims for property damage and personal injury are next in the ranking of priority. If a choice had to be made between the two, a judge would most likely choose the personal injury claims but discretion is vested with the court to treat the two equally.

5. Preferred ship mortgage

The insertion of the preferred vessel mortgage at this level is a statutory one. It should be noted, however, that under the Ship Mortgage Act any maritime lien arising prior in time to the recording and endorsement of the mortgage ranks before the mortgage. (See below).

6. Maritime contract liens

Contract liens include practically any work performed upon or services and supplies furnished to a vessel: these services and supplies are defined in the Maritime Lien Act of 1920, 46 U.S.C. § 971 (1976). All contract liens are ranked equally within the class, so that the rules governing priority as a matter of time become particularly important under this category.

Generally, liens in this category are ranked in the inverse order of accrual. However, there is a series of special rules which modify this principle.

The first of these special rules is the voyage rule, so called because it retains equal priority for all liens incurred during each voyage of a vessel. It has customarily been applied to vessels engaged in ocean voyages.

Because of the shorter length of coastwise and inland voyages, courts developed rules based not on a voyage's length, but rather on a stated period of time. The first of these rules is known as the Season Rule. The rule created equal priority within a class of liens for the eight-month season on the Great Lakes during which maritime trade was possible. The rule has survived on the Great Lakes and has been extended to almost all coastwise and inland maritime commerce. Beyond the Great Lakes the rule has generally been adapted into a Calendar Rule, granting lienors within a class equal priority for one year, after which their claims fall into a second rank with all other liens in their class. A 40 Day Rule governs liens for services to tug and harbor craft that operate solely within New York Harbor. A similar 90 Day Rule applies to craft operating within the Puget Sound.

7. Other liens and claims

State created liens, along with a variety of other possible non-maritime liens or claims, take the lowest priority in an action in rem against a vessel in admiralty. Note, this include a ship mortgage that is not entitled to preferred status under the Ship Mortgage Act.

Priority as affected by Ship Mortgage Act

The Ship Mortgage Act of 1920, accords preferred maritime lien status (i.e. prior to a preferred mortgage lien) to "(1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this chapter"; and (2) a lien for damage arising out of tort, for wages of the crew and stevedores employed by the vessel, for general average and for salvage.

One peculiar result of the Preferred Ship Mortgage lien is the creation in some cases of a seeming illogical preference. While under normal doctrine, "last in time equals first in right", the Ship Mortgage Act grants preference to liens created before a mortgage is perfected. The result has been that the courts have been forced to deviate from the inverse time rule: when the problem of circular priorities arose, the courts adjusted sensibly by relegating the post-mortgage lien to third place, after the pre-mortgage lien and the mortgage.

As noted earlier, the Ship Mortgage Act subordinates foreign preferred mortgages to maritime liens for repairs, supplies and other necessaries furnished in the United States.

The system of priorities in England

Initially it should be noted that although there exists a fairly well established system for ranking the various maritime liens, mortgages and statutory liens, additional claims such as possessory liens, corporate liquidators, trustees in bankruptcy or judgment creditors can all affect the final disposition of the proceeds from a sale. Given this limitation, the English priority system of maritime claims can be summarized as follows:

1. Expenses during judicial custody

As under the United States scheme, the Admiralty Marshal's expenses arising from the arrest, detention, appraisal, and sale of the res take top priority although these expenses are technically not maritime liens. The Marshal has discretion to take steps for the preservation and management of the res.

2. Plaintiff's costs

The plaintiff is entitled to recover for his costs up to the moment of the arrest as well as later costs he may incur up to the date of sale. This feature is not found in the United States scheme of priorities and reflects the fact that under the English system the prevailing party in litigation may recover its costs associated with the litigation.

3. Salvage

Salvage liens take priority over all other liens that have attached before salvage services are rendered. It generally takes preference over a wage lien unless wages were for services rendered by the master and crew in preserving the res. An inverse order of salvage claims prevails when services have been rendered on different occasions, except that life salvage is awarded a priority over all other salvage claims.

4. Collision damage

Where there is more than one collision damage lien, the several liens rank equally, regardless of when the collisions occurred, the writs issued, or judgments published.

5. Seaman's wages, master's wages and disbursements

Seaman's wages generally rank ahead of Master's wages and disbursements, while these latter two do not have priority over each other. This scheme may be affected if the continuity of wages is interrupted by a collision or a salvage action in which case the seaman's and master's wages before and after the event may be accorded different priorities.

6. Mortgages

Although mortgages are really a form of statutory lien they nevertheless are accorded a special priority over other statutory liens, ranking ahead of any statutory liens occurring after the date of registration of the mortgage. Regardless of dates, however, mortgages always rank below genuine maritime liens. As a general proposition, then, mortgages have similar positions in both the English and United States priority system. As between mortgages, a registered mortgage has priority over unregistered mortgages, and as between registered mortgages, the rank is according to the date of registration, not creation.

7. Statutory liens

Statutory liens line up last after the maritime liens and previously registered mortgages. As betweeen themselves, there is no order of priorities based on either class or date of accrual.

Extinction of maritime liens through passage of time; Laches

While maritime liens are generally accorded the exalted status of "indelibility", this feature is in reality tempered by the doctrine of laches. It should never be assumed - particularly by a maritime lien creditor - that his lien is indestructible, for just as it can be created without notice, so can it be lost without notice. Under this doctrine, found within English and American law, "stale claims" - those claims which go unprosecuted to the prejudice of the defendant or third parties - may have lost their validity when the desultory claimant gets around to exercising his rights. Generally, in both the United States and England, a defendant will be immune from suit under this doctrine where there has been (1) inexcusable delay in seeking a remedy and (2) prejudice ensuing from the passage of time. In the case of a vessel purchased in good faith by an unrelated buyer, courts have long applied the principle that the defence of laches will be upheld after a shorter period of time and a more rigid scrutiny of the circumstances or delay will be made.

Procedurally, the defence underwent something of a liberalizing change in the United States during the 1960's. Plaintiffs until then were commonly required to defeat both prongs of the laches defence; that is, plaintiffs were required to give a resonable excuse of delay and to show lack of prejudice to the defendant asserting the defence. In Larios v. Victory Carmers Inc., 316 F.2d 63 (2d Cir. 1963), the court altered the burden of proof under the latter prong, requiring the defendant to show prejudice from the delay of enough significance to warrant dismissal of the suit. 316 F.2d at 66-67. The result is that fewer claims will be dismissed based on the mere passage of time. It should be noted however, that, regardless of a narrowing of the defence of laches a claimant who allows his lien to grow stale has little practical chance of recovering from the vessel.

Statutory Time Limits

In the United States it should be noted that several causes of action, giving rise to maritime liens created or codified by statute, are governed by federal statutes of limitation. A suit initiated beyond the time limits specified in these statutes, regardless of the reasons for delay, will be barred. Examples of such regulated liens are: a one-year limit on damage claims by cargo owners, governed by the Carriage of Goods by Sea Act (46 U.S.C. § 1303(g)); two-years limitation on claims for salvage (46 U.S.C. § 730); one year for claims for wrongful death under the Death on the High Seas Act (46 U.S.C. § 763).

Similarly in England, periods of limitation are specified in statutes which act as a bar to the institution of a plaintiff's suit. For instance, the damage and salvage lien must be enforced within two years (Maritime Conventions Act 1911, § 8) although if there was no reasonable opportunity for arresting the defendant vessel, this period may be extended. Other examples include a one-year period for cargo damage (Carriage for Goods by Sea Act 1971, art. III, n.6) and a six-year period for seaman's wages (Limitation Act 1939, § 2(1)). With respect to liens for which there is no specific statutory time limitation, the doctrine of laches continues to apply.

Unification of Substantive Law on Maritime Liens:
the 1926 and 1967 Brussels Conventions

Claims secured by Maritime Liens

The 1926 Convention

1.(a) Judicial costs due to the State and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure her sale and the distribution of the proceeds of sale.

The judicial costs due to the State are the costs born by the State in connection with the arrest and forced sale of the vessel. As with all other claims included in Art. 2 No. 1, the maritime lien accrues only if the vessel is ultimately sold, for the sale and distribution of the proceeds amongst the claimants is what justified the maritime lien. The expenses mentioned are of two different kinds:

(i) they may be incurred in order to preserve the vessel from the time of her arrest until the time of her sale, and thus include harbour dues, supplies, crew wages, maintenance costs, repairs, etc. or

(ii) they may be incurred to procure the sale of the vessel and the distribution of the proceeds of the sale, and thus include the legal costs of the arrest and subsequent judicial proceedings until the distribution of the proceeds of sale, provided these costs are incurred in the common interest of the creditors, and not in the individual interest of one of them; for example, costs incurred to assert a claim or its priority are not included. The priority of these costs is also recognised under the 1967 Convention, although their description differs.

(b) Tonnage dues, light and harbour dues, and other public taxes and charges of the same character.

Whilst the claims under (a) above, as well as those under (c) below, are secured by a maritime lien only if they arise respectively after the arrest of the vessel and after her arrival in the port where she is arrested, the claims in respect of tonnage dues etc. are not expressly limited to the period after arrival or arrest.

The fact however that all other high priority claims are related to the arrest and forced sale justifies a corresponding restriction.

(c) Pilotage dues, cost of watching and preservation from the time of the entry of the vessel into the last port.

The costs of watching and preserving the vessel are already included under (a) above, but this time the maritime lien is not conditional on these costs having been incurred in the common interest of the creditors.

Furthermore, reference to the entry of the vessel into her last port extends the period during which the liens may arise, for all costs are secured, even if incurred before the arrest of the vessel. Pilotage dues seem to have no relevance to the preservation of the ship or to forced sale and it is hard to justify their high priority.

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

Claims arising out of the contract of engagement may include, in addition to wages, other indemnities and bonuses. The wording seems to include claims for wages earned when the members of the crew are not on board. Seamen often have a labour contract with the owner which continues irrespective of their being on board ship or not, (save that the salary when ashore is lower than that when on board). However, this construction of the rule is probably prevented by the last part of the sentence "hired on board", which qualifies master and crew as well as other persons. Therefore only wages and other rights during the period when the claimants are actually part of the vessel's complement (even if ashore on leave) are secured by a maritime lien.

The words "other persons hired on board" are probably meant to cover persons who work on board a vessel, without being part of the vessel's complement, such as, in a passenger vessel, employees who work in shops, hairdressers and the like. They do not, on the contrary, include persons temporarily working on board, such as stevedores or engineers who carry out repairs whilst the vessel is in a port.

3.(a) Renumeration for assistance and salvage.

The translation into English of the words "assistance et sauvetage" by "assistance and salvage" has given rise to some uncertainties as to the nature of the claims which are secured by a maritime lien. It has been pointed out that "assistance" must be something different from salvage and thus extends the maritime lien to services other than salvage services. However all is clear in the 1910 Salvage Convention where it is expressly stated that no distinction must be made between the two types of services (Art. 1) and that only services which have a useful result give rise to the right to an equitable remuneration. The French words "assistance et sauvetage" thus correspond to "salvage" and do not extend the type of claims secured by a maritime lien to services other than salvage services.

(b) Contribution of the vessel in general average.

The claims secured by a maritime lien are the claims of interests other than the vessel for contribution from the owner of the vessel. Contribution of the vessel means contribution due by the owner of the vessel and therefore includes any contribution due in respect of freight, when at risk.

4.(a) Indemnities for collisions and other accidents of navigation.

This maritime lien is of common law origin and was unknown in civil law. The words "other accident (of navigation)" were added in the draft

submitted to the CMI Conference held in Venice in 1907 with a view to giving the lien the same scope as that existing in England. There it was recognised in respect of all claims caused by the negligent navigation of the vessel, even when no material contact had occurred between the two vessels, such as when damage is caused by the wake of a vessel or when a vessel's negligent navigation caused a collision between two other vessels.

Indemnities cover any kind of damage caused by the colliding vessel to another vessel, her crew, passengers and cargo, albeit the express reference to them, in the draft approved by the Venice Conference in 1907, was subsequently deleted in conjunction with the introduction of the lien for the claims of passengers and crew of the colliding vessel.

(b) Damage caused to works forming part of habours, docks, and navigable ways.

Since collision is an occurrence which only involves vessels, damage caused by a vessel to fixed objects had to be mentioned specifically. The words originally used were "works forming part of harbours" but in the draft approved by the diplomatic conference in 1909 the words "docks and navigable ways" were added in order to better clarify which types of fixed objects were intended.

(c) Indemnities for personal injury to passengers and crew.

This maritime lien is wholly independent of a collision, and secures any claim in respect of the death of and personal injury to passengers carried on board and the crew. The claims secured are therefore normally of a contractual nature. The provision was added during the Diplomatic Conference in 1910.

(d) Indemnities for loss of or damage to cargo and baggage.

Each time the draft convention was reviewed, further liens were added: this one was added in 1922 with a wider formula (claims arising out of bills of lading) at the request of the United States delegation, because such claims had been allowed in the U.S. Ship Mortgage Act of 1920.

5. Claims resulting from 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 her 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, or other contractual creditors.

In more or less wide terms, this lien existed in all maritime countries. In France and in all other civil law countries whose codes were based on the French Commercial Code the lien was for sums lent to the master for the needs of the vessel during her last voyage and for the value of goods sold by him for the same reason. In England the lien was in respect of bottomry and master's disbursements. In Germany a lien was granted in respect of the same claims. In the United States the scope of the lien was even wider; repairs or supplies ordered by the owner, not only by the

master, were secured by liens.

When the lien for claims arising out of bills of lading was added during the diplomatic conference held in 1922, a compromise was arrived at. The American system whereby maritime liens ranked before and after mortgages was adopted, and liens securing claims arising out of bills of lading and contracts entered into by the master were ranked after mortgages or hypothecs. Moreoever, the liens listed under Nos. 4 and 5 of Art. 2 were made conditional on registration.

Strong objections were raised against these proposals at the CMI Conference held in Genoa in 1925 and thus, notwithstanding that the Convention on maritime liens and mortgages had been open to the signature of the States parties to the Conference of 1922, a new Conference was convened by the Belgian Government in 1926, when the dual ranking system was abolished together with the registration requirements.

The lien is conditional on criteria which relate (i) to the person ordering the supplies or repairs, (ii) his powers, (iii) the place where they are ordered, and (iv) the purpose for which supplies and repairs are ordered.

(i) Who may order supplies and repairs. Claims in respect of supplies and repairs are secured by a maritime lien only if such supplies and repairs are ordered by the master. If therefore they are ordered by the owner the claims are not secured by a maritime lien.

(ii) Powers of the master. The master must act within the scope of his authority. In many legislations the master may not enter into contracts concerning his ship unless certain formalities are complied with, such as a previous request to the owners for instructions, the approval of the port authority if the vessel is in the country of registration or of the Consul if elsewhere. Thus when these requirements are not complied with, the master is not acting within the scope of his authority. The difficulty with this system is that no uniformity is achieved, for the requirements in question are different in each country.

(iii) Place where supplies and repairs are ordered. The vessel must be away from her home port, the reason being that when she is there the owner is deemed to take care of all the vessel's needs.

(iv) Purpose of the supplies and repairs. The purpose must be either the preservation of the vessel or the continuation of the voyage. This requirement is taken from German law, (§ 528 HGB and, in respect of bottomry, § 754, No. 6 HGB). The question whether the repairs are required for the preservation of the vessel must be solved with reference to what is needed to enable the vessel to reach her home port. If for instance temporary repairs are sufficient, permanent (and more expensive) repairs would not give rise to a maritime lien.

The 1967 Convention

Some of the claims listed in Art. 2 No. 1 of the 1926 Convention, those in respect of judicial costs and of expenses incurred in the common interest

of the creditors, are no longer secured by a maritime lien, but are paid out of the proceeds of sale before their distribution. It is convenient, before examining the 1967 liens, to compare the wording used in Art. 2, No. 1 of the 1926 Convention with that used in Art. 11, paragraph 2 of the 1967 Convention. Whilst the former separated costs due to the State and expenses incurred by one or more creditors for the benefit of all, the latter does not draw any such distinction but provides that the costs must be awarded by the Court, irrespective of to whom they are awarded. As regards expenses incurred by creditors, the former defines their purpose, the latter generally identifies their origin: the cost must arise out of the arrest and subsequent sale of the vessel and the distribution of the proceeds. Arrest, sale and distribution are not three distinct points in time, but phases of the procedure. That means that all costs incurred from the time of the arrest until the time of the forced sale, and which have been incurred because of the arrest, such as all costs incurred by the custodian, are secured by a maritime lien. The fact that the costs are awarded by the Court is thus a condition for the claims being secured by a maritime lien, but it is also necessary that such costs are of the type described in the Convention.

(i) 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.

This text makes it clear that sums other than wages are secured by a maritime lien. It also clarifies that only sums due in respect of employment on board are secured. If seamen are permanently employed and receive a salary during the period they are ashore and not members of the complement of any particular vessel, their salary is not secured by maritime lien. This is a logical consequence of the fact that maritime liens attach because the claim relates to a given vessel, and this is not the case when a salary is paid to the seamen ashore.

(ii) Port, canal and other waterway dues and pilotage dues.

The words "tonnage dues, light and harbour dues" have been replaced by "port (dues)" because they all come within the description of port dues, which is wider and includes other dues which may come under a different name. The words "and other public taxes and charges of the same character" have been left out, because other dues of the same nature have been specifically mentioned with the words "canal and other waterway (dues)".

(iii) Claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel.

In the 1967 Convention an approach different from that of the 1926 Convention has been followed. Instead of distinguishing tort and contract claims, a distinction has been made between claims in respect of death and personal injury and claims in respect of loss of or damage to property. The former, which were partly dealt with in the first sentence of Art. 2, No. 4 of the 1926 Convention (indemnities for collision etc.) and partly in the second sentence (indemnities for personal injury to passengers or crew) are now all included in this sub-paragraph. All claims are in fact covered, whether in contract or tort, whether the loss of life or injury

occurs on land or on water. Reference to accidents occurring on shore widens the scope of the lien, for the words "other accident of navigation" used in the 1926 Convention were construed to include accidents of the same type but not, for example, loss of life or personal injury caused ashore by explosion and fire on board a ship. Reference to loss of life and personal injury "on water" includes occurrences on board the carrying vessel, another vessel (in case of collision) and actually in the water (for example a swimmer). These occurrences were tied to the vessel as the "instrument of mischief" by stating that the death or personal injury should occur "in direct connection with the operation of the vessel". This form has subsequently been followed in the 1976 Convention on Limitation of Liability for Maritime Claims (Article 2, paragraph 1 (a) and (c)).

(iv) Claims against the owner, based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the vessel.

Whilst claims in respect of death and personal injury are secured by a maritime lien whether they arise in contract or tort, claims in respect of loss of or damage to property are secured by a maritime lien only if they arise in tort. Claims which may be brought in either tort or contract, are excluded by the words "not capable of being based on contract". For death or personal injury claims, the place where the accident occurs is irrelevant, provided it occurs in direct connection with the operation of the vessel. Loss of or damage to goods occurring on board may be secured by a maritime lien on the carrying vessel, provided the claim cannot be based on contract. A maritime lien could also secure loss of or damage to goods being carried under a contract of carriage but on board a vessel other than that of the contracting carrier. The Hamburg Rules in fact provide in Art. 10 that the actual carrier, who has no contractual relationship with the shipper, is subject to the rules of the Convention in respect of his liability for loss, damage or delay. Thus the shipper may claim against him invoking rules designed to regulate a contractual relationship but his claim is in tort and may be described as "not capable of being based on contract". The CMI International Sub-Committee which is studying the revision of the 1967 Convention will offer a suggestion to avoid this undesirable result.

(v) (a) Claims for salvage.

It is worth noting that the words "assistance et sauvetage" in the French text correspond to "salvage" in the English text of the Convention.

(v) (b) Claims for wreck removal.

No maritime lien was granted in the 1926 Convention in respect of claims for wreck removal. However, the Protocol of Signature allowed contracting States to grant a right of detention in respect of such claims and power to the authority effecting the removal to sell the wreck and to satisfy itself out of the proceeds of sale with priority over all other claimants. It was thus considered appropriate to make specific mention of claims for wreck removal in the convention and to grant a maritime lien, for by doing so the order of priority fixed by the Convention would be complied with.

(v) (c) Claims for contribution in general average.

No additional comment is required. See above.

Peculiar features of maritime liens

Maritime liens, like mortgages and hypothecs, are charges on a vessel which entitle the holder to satisfy his claim through the forced sale of the vessel even if she has been sold to a third party in good faith. Maritime liens, contrary to mortgages and hypothecs, arise only by operation of law, but it is not necessary for the claim secured by the lien to be against the owner of the vessel; it is in fact sufficient that the claim arises in connection with the operation of the vessel, even if it is against a person other than the owner, provided he has acquired the use of the vessel in a legitimate manner. An explanation of this apparently abnormal situation is that the owner, by letting other people use his vessel, impliedly permits his vessel to be charged as a consequence of liabilities which such people have incurred in connection with the use of the vessel. The situation is similar to that of the owner of a vessel who mortgages her as a security for a debt of another person, and thus allows his vessel to be arrested and sold for the satisfaction of a debt which is not his own.

Moreover, the maritime lien confers on the holder the right to satisfy his claim out of the proceeds of sale of the vessel with priority over other claimants.

The 1926 Convention expressly regulated only two of the peculiar features of maritime liens, viz. the fact that they travel with the ship and the priority of the claims secured thereby. Art. 8 provides as follows:

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

This rule, however, was limited by the permission given in Art. 9 to contracting States to provide that maritime liens are extinguished on the voluntary sale of the vessel, provided the sale is accompanied by formalities of publicity including an advance notice of the sale.

The 1967 Convention deals with all the unique features of maritime liens, which have been previously discussed.

(i) The fact that they may arise irrespective of whether or not the claim is against the owner is dealt with in Art. 7 paragraph 1 as follows:

> 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.

(ii) The right to follow the ship after sale is more clearly stated in Art. 7 paragraph 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.

This rule makes it clear that maritime liens continue to exist even if, as a consequence of the sale, the nationality of the vessel changes. Moreover, under the 1967 Convention contracting States are no longer allowed to provide in their national laws that maritime liens are extinguished as a consequence of the voluntary sale of the vessel.

(iii) The priority of maritime liens over other claims is established by Art. 5 paragraph 1 as follows:

> The maritime liens set out in Article 4 shall take priority over registered mortgages and "hypothèques" and no other claim shall take priority over such maritime liens or over mortgages and "hypothèques" which comply with the requirements of Article 1, except as provided in Article 6 (2).

Ranking of liens as between themselves

For the ranking of maritime liens inter se see above pp 29-30, 46-49.

Extinction of maritime liens

Under both the 1926 and the 1967 Convention, maritime liens are extinguished by lapse of time. The period is one year from the date of accrual. The six months period under the 1926 Convention applied only to claims resulting from contracts entered into by the master, which are no longer secured by a maritime lien under the 1967 Convention. But whilst the 1926 Convention left to national law all questions relating to the suspension or interruption of the time limit, the 1967 Convention regulates this matter with a view to reaching greater uniformity and at the same time enhancing the security of mortgages and hypothecs. In fact the more numerous are the causes of interruption and suspension of the period of extinction of maritime liens, the longer such liens may remain alive. This has various negative effects for the holders of mortgages and hypothecs, as well as for prospective buyers of the vessel.

(i) If a loan is sought on a vessel already in operation, the prospective lender's difficulties in establishing the existence of maritime liens grow with the length of the period which must be examined: to trace the history of a ship for a long period is a hard thing to do.

(ii) The prospective lender's difficulties in establishing the existence of maritime liens grow with the length of time which must be examined. In fact holders of maritime liens may refrain from enforcing their claim on the vessel if they know that their security is not affected by the lapse of time.

(iii) Prospective buyers are faced with the same problems described under (i) above, and this may create obstacles in the purchase and sale of second-hand vessels.

The most difficult question is whether the commencement of ordinary proceedings against the debtor is sufficient to interrupt time running. If it is, then a maritime lien could last as long as the proceedings, and that could mean in many countries nearly the life of the ship. Another question is whether time would start running again after the claimant obtained an enforceable judgment. Holders of mortgages and hypothecs as well as prospective purchasers would face the impossible task of checking worldwide what proceedings were pending, some, no doubt against parties other than the ship's owner.

The problem was solved by Art. 8 para 1 of the 1967 Convention:-

> The maritime liens set out in Article 4 shall be extinguished after a period of one year 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 forced sale.

Only the major and very public step of arresting the ship and continuing to the forced sale of the ship was considered sufficient to prevent the extinction of the lien after one year. The continuation of proceedings to forced sale is a noteworthy safeguard. Without it, an arrest would be little better protection than the issue of proceedings.

The claimant may elect at any time to release the ship from lien, for example if he concludes that his claim is not a good one or if he obtains other perhaps more convenient security in the form of a bank guarantee or a letter of undertaking.

E) Registration of maritime liens

Historically, the only maritime liens which were registered were for claims for a known amount acknowledged by the debtor, such as bottomry bonds, the construction price, etc.

Registration before a claim was established would create confusion and give the claimant the means of exercising undue pressure on the debtor. Moreover, the machinery of such registration would necessarily be cumbersome and impractical even for claims lodged in the courts of the country of registration. It would be very difficult if not impossible to make it work with claims lodged in the courts of other countries: besides having to obtain certified copies and translations it would be difficult for the registrar to decide whether an action commenced in any given country fulfilled the requirements of the international convention.

A reasonable period of time from the date when the claim arose would have to be allowed to the claimant, for the amount of the claim may not be known immediately. For example, the collision damage suffered by a vessel requires a survey of the ship and drydocking; sometimes, in order to minimize damages, the survey is postponed and temporary repairs are done. Even more difficult is the assessment of damages for loss of earnings.

In these cases the claimant would be confronted with the alternative of registering a claim for a very large amount, which may then prove to be greatly excessive and give rise to a counterclaim for damages, or for an amount which then may prove to be insufficient, and thus lose his lien for

the balance. In practice a reasonable time would not be substantially shorter than the period of extinction (one year) and thus registration would serve very little purpose, if any.

Nor would registration justify the increase in the number of maritime liens taking precedence over mortgages and hypothecs, for such an increase would in any event affect the security of the holder of the mortgage or hypothec.

Conflict of Laws

Taken in the broad sense Conflict of Laws covers problems of choice of the applicable law, the jurisdiction of the courts, and the recognition of foreign judgements, together with other acts of foreign public authorities and of private individuals. The border line between choice of law and recognition is not always very sharp. Mortgages and liens in ships may be mentioned as an example. The status of a mortgage or lien in a ship created under a foreign law may be viewed as a problem of what law should be applied to that mortgage or lien or as a question of the recognition of a mortgage or lien created under a foreign system of law. There seems to be a tendency to talk about recognition of mortgages but about the law applicable to maritime liens, perhaps because the creation of mortgages is often connected with a public act of registration, while there is no such act where maritime liens are concerned.

Problems of conflict of law, of course, apply to all parts of the law. In practice they arise much more frequently in maritime law than in most other fields of law because of the inherently international character of shipping. Compared with international trade, shipping has special characteristics. In trade contracts only two or three countries are usually involved. In shipping the international contacts may be numerous. On one trip the ship may visit several ports to load and unload cargo, where its master or owners will make contracts for the purpose of acquiring supplies, or hire sailors, conclude charter parties or issue bills of lading, or the ship may be involved in salvage operations, collisions with other ships of a different nationality or may destroy harbour installations. A decision has to be made as to which law to apply to each of these legal relationships. And although that decision may not always be difficult, there is also the problem of enforcement since the ship will quickly be gone again, not in order to evade its obligations but because of the nature of its trade.

The ideal solution to all these problems, of course, would be for the law to be the same everywhere and for courts everywhere to enforce each other's decisions. Where international conventions exist containing uniform rules of substantive maritime law no conflicts can arise provided these conventions are interpreted in a uniform way, and choice of law rules, thus, become superfluous. Although great effort has been made all through this century to achieve this goal it is only in limited fields or in limited regions of the world that there has been success. The conventions on mortgages and maritime liens are cases in point. The growing tendency to revise existing conventions has not made things better, because several international instruments exist side by side in the long period it takes before a new international convention is ratified or enacted in domestic law. Thus, the diversity of laws remains a practical fact, and choice of law, therefore, remains a necessary part of the law.

The diversity of laws and procedures results in a reluctance on the part

of countries to enforce each other's judgements and other acts. There is thus a need to ensure the enforcement of judgements in their country of origin.

This explains the practical importance of arrest and the need for international regulation of arrest so that it shall not hamper international trade more than necessary.

The fact that laws are different from country to country does not in itself make choice of law rules necessary. Theoretically, the courts of each country could apply their own rules, lex fori, when seized of a case involving contacts with foreign countries, exactly as if the case were of a completely domestic character. In practice this would lead to many unsatisfactory solutions. Financing the construction of ships would not be possible without some certainty that mortgages created in one country would be recognised in others. Financing of trading with ships would be hampered if contracts concluded and credit granted in one country were not respected or honoured in other countries or perhaps only on conditions differing from those foreseen at the time of making. The reasons for applying foreign law in accordance with choice of law rules are one aspect of the need for uniformity of decision regardless of forum, which again is based upon the need for predictablity of decision.

For these principles to work in practice uniform rules for choice of law are necessary. Unfortunately, there are none, but the differences are often slight and the number of possible choice of law rules is few. Predictablity, therefore, is much greater than if each country were to apply its own law.

The choice of law rules operate by indicating, in each type of situation, a connecting factor which will indicate the law of which country to apply to the case in hand. Beside lex fori, the law of the court seized with the case, the connecting factors of special importance in shipping law, are the law of the flag or the law of the country of registration (laws which in practice are identical), the proper law of the contract e.g. the contract of affreightment or salvage, or the law of the place where a tort has been committed, lex loci delicti commissi. Other connecting factors may be mentioned, such as the law of the place where the ship is situated, lex rei sitae, which will be identical to lex fori in most ordinary situations.

It may be useful to consider the kind of situation where the problems of choice of law arise and see what kind of problems have to be solved.

Clearly, where a contractual situation is involved, i.e. when a mortgage is created or where a claim safeguarded by a maritime lien comes into existence by contract, the parties may have already considered the choice of law implications. They know that ships travel across borders and that even ships in local trade may meet ships of other nationalities giving rise to international complications.

Although the parties may influence the choice of law by inserting a choice of law clause into their contract it is only at the time of the forced sale of a ship that the problems of choice of law really become acute. It is this worst possible situation which the parties have to bear in mind

when they create a mortgage or enter into a contract which may give rise to the creation of a maritime lien.

The principal problems are:-

Should a mortgage created abroad be recognised?

Should a maritime lien which exists under a foreign law be given effect?

According to which law should it be determined how several mortgages or several liens rank between themselves and what rank to give to liens and mortgages respectively?

What effect should be given to a forced sale which took place in another country?

The creation of maritime liens.

Several choice of law rules could be used in theory and examples of most of them may be found in the judgements and legislation of different countries. The strongest connecting factors are the law of the flag, the law of the forum (lex fori) and the law applicable to the legal relationship to which the maritime lien attaches (lex causae).

The application of the law of the flag results in the application of one law to all security rights in the same ship. The general rule is that the law of the flag applies to mortgages. Conceptually, this is a solution which can be justified in the same way as the application of lex situs to real property. It has advantages also with the question of ranking since only rights which are recognised in one legal system have to be ranked. However, when the ship is sold in a country other than that of its flag other considerations intervene which also have to be taken into account.

The application of the law of the forum, i.e. the law where it is sought to enforce the lien, may be seen as the result of the general lex fori tendency but can also be supported conceptually. Thus, in English law, where lex fori seems to be applied to the existence of maritime liens, the original explanation was that the lien was characterised as a procedural remedy rather than as a rule of substance. The law of the forum is normally always applied in procedural matters.

Where the maritime lien is not regarded as a procedural remedy, it seems natural to look upon the rules regulating it as simply part of the rules applicable to a specific legal situation and, therefore, to apply the law governing the underlying legal relationship (lex causae) to the question whether the claim is secured by a maritime lien. Where the claim is contractual the law applicable would under this theory be the lex contractus; where it is a tort claim, the law applicable to the tort would also determine whether the claim is secured by a maritime lien.

The criticism which may be directed against this approach in respect of contract claims is that the parties may have agreed on the applicable law (party autonomy). They may thus provide for a maritime lien which is not provided for in the proper law of the contract, i.e. the law which would be applicable failing any agreement between the parties and thereby by

their own will create a security which otherwise only arises by operation of law.

It seems that a somewhat similar approach is used in American Law which, however, avoids this problem. The proper law of the legal relationship is applied to the creation of a maritime lien but any agreement between the parties is disregarded. Thus, the law of the flag seems mostly to be applied in respect of wage claims and injury to sailors while the law of the place of supply is applied to materialmen's supplies to ships, (perhaps with a modification if American suppliers supply ships abroad and the question later arises in a U.S. court, where American law is applied and a maritime lien is granted even if the foreign law in question does not give rise to a maritime lien).

When evaluating which of these various choice of law rules is best, it seems necessary to ask what purpose is being pursued. Is the purpose to encourage shipbuilding by protecting those who provide credit for ship building, or is it rather to protect those who provide credit for the operation of the ships? Or should there be a more atomistic approach, each situation being looked at separately in order to determine whether in that case a maritime lien should be granted regardless of the general consequences? These considerations certainly ought to influence the decision as to choice of law. The law of the flag and, perhaps, the law of the forum favour the general tendency towards standardisation while the application of lex causae or modified versions thereof is more appropriate to a policy of diversity.

The changes from the 1926 Convention to the 1967 Convention seem to be explained by a general tendency to limit the number of maritime liens. This in turn may be explained by the wish to protect those who finance ship building and get security in the ship. The greater the number of maritime liens, the greater the risk of the mortgagees' not receiving satisfaction of their claims out of the ship's proceeds. Thus, the development seems to have been to transfer protection from those with claims arising out of the operation of the ship to those who finance the construction of the ship.

This general trend of course, is not approved by everybody and this explains why it has not been possible to obtain a sufficient number of ratifications for the 1967 Convention. But it also explains the diversity in choice of law rules. The countries wanting a small number of maritime liens favour the application of lex fori, or perhaps the law of the flag, while those wanting maritime liens to protect those financing the operation of the ship and other individual claimants will tend to apply the local law where the claim arose.

By Art. 12 of the 1967 Convention, the Convention must always be applied, while the 1926 Convention applies only where the ship belongs to a convention state. It is traditional to limit the application of a convention to contracting states, thus making its application dependent upon reciprocity, whereas the 1967 rule is natural in a modern convention intended to create uniform law of general application and it is meant as a choice of law rule. It ensures that maritime liens in the contracting states are created within the limits laid down by the convention. Thus, the general trend is re-inforced by means of the choice of law rules.

Ranking of maritime liens between themselves and also in relation to mortgages.

The possibilities are in practice limited to the law of the flag and the law of the forum. Either could be applied, regardless of which law is applied to the creation of the maritime lien. On the other hand if the law applicable to the creation of a maritime lien depends upon the character of the lien it is not possible to apply that law to the question of ranking as well, at least not in the case of different liens, created under different laws which have different rules of ranking.

The law of the flag is adopted in some countries with respect to ranking, but most countries seem to adhere to the law of the forum. This is, of course, unfortunate since it means that the result will be different according to the forum of enforcement. It encourages forum shopping where each party will attempt to obtain the result most in his favour by trying to get enforcement in the country where the law is most favourable to him. From this point of view, the law of the flag would be preferable. In view of the differing policies towards maritime liens the result is, however, understandable.

Under the 1967 Convention the solution is, in principle, to apply the Convention, which again means lex fori. This, however, is logical since the purpose is to create uniform law in the convention countries. However, the Convention does make it possible to accept maritime liens, other than those recognised by the Convention, provided they are ranked after those recognised by the Convention and after the mortgages. The Scandinavian countries have, thus, adopted a rule according to which maritime liens in existence under the law of flag but not recognised by the Convention, will have priority in a forced sale after mortgages but before simple claims. The 1926 Convention contains no express solution to the problem except in respect of ships from contracting states.

Termination of liens.

In most countries liens terminate if not enforced within a fairly short period of time. In the Conventions it is one year and in the 1926 Convention in certain cases even six months. It seems that, except in countries where such prescription periods are characterised as procedural and lex fori is then applied, the law applicable to the creation of the lien applies also to its extinction by prescription.

Liens as well as mortgages are usually terminated under the various national laws by the forced sale of the vessel. The question which arises in the conflict of laws is whether this important effect of the forced sale is recognised in other countries and particularly whether it is recognised in the country of registration when the sale has taken place in another country.

The 1967 Convention provides in Art. 11 that liens and mortgages shall cease to attach to the vessel after a forced sale, if the vessel is in the contracting state where the sale took place, and the sale has taken place in accordance with the law of that state and the convention. The recognition is, thus, limited to sales in contracting states. However, in

practice the rule of the Convention seems to have general application in most countries. In that connection it is worth remembering that the Convention requires notice to known mortgagees and to the registrar in the country where the ship is registered. Similar requirements are laid down in the 1926 Convention and they ought also to have general application outside of the Conventions.

C OTHER LIENS AND RIGHTS OF RETENTION

Possessory Liens

A possessory lien is analagous to the right of retention. In general, it is the right of a person lawfully in possession of goods to retain possession until his claim against the owner of the goods is satisfied. In the United States this possessory lien is typically granted to a repairman or mechanic who performs work on goods, a warehouseman who stores goods or a carrier who transports them. In each case the claim against the owner arises out of or in connection with the period of the lienor's possession. The lien, arising originally from common law concepts, is now generally granted and covered by statute. In the maritime context, it is most frequently asserted by ship repair yards against vessel owners for unpaid repair bills and by the owners of a vessel against shippers for unpaid freight.

In the United States, a ship repairer is also entitled under the Federal Maritime Lien Act to a maritime lien against the ship for repairs. This maritime lien is not dependent upon possesion nor is it lost upon redelivery by the ship repairer to the owner. In terms of ranking, the maritime lien is superior to the possessory lien and any claim by a ship repairer in a foreclosure action would normally be based on the maritime lien. The possessory lien can however operate as an effective supplement to the maritime lien, because it affords the ship repairer the right to withhold the vessel, thereby putting commercial pressure on the owner for payment without having to incur the expense of commencing an admiralty proceeding and arresting the vessel.

The possessory aspect of the lien on cargo in the United States represents in some respects a fusion of concepts. A vessel owner is entitled to a maritime lien on cargo to secure unpaid freight. In the case of a chartered vessel, the owner also has a maritime lien on sub-freights payable to the charterer to secure payment by the charterer of charterhire due to the owner. Although maritime liens do not generally depend on possession, the maritime lien on cargo is lost on unconditional delivery of the cargo. On the other hand and notwithstanding unconditional delivery of the cargo, the maritime lien on subfreights may still be asserted provided notice is given to the subcharterer or shipper before he pays the subfreights to the charterer.

It is generally recognised that when a vessel is voyage chartered the maritime lien on subfreights arises without an express provision in the voyage charter whereas when a vessel is timechartered no lien on subfreight arises unless expressly so provided in the timecharter.

The common law possessory lien of a ship repairer is recognised in England and is generally accorded ranking after all maritime liens which have attached to the vessel at the time when possession of the vessel is taken, and as having priority over all later maritime liens. Statutory liens which have arisen earlier than the taking of possession also apparently have priority over the possessory lien.

It is worth noting that in the United States Ship Mortgage Act the right of the United States Marshal to take possession of a mortgaged vessel in connection with an admiralty foreclosure action is expressly provided even if the vessel is in the possession or under the control of a person claiming a common law possessory lien. In describing the effect of an admiralty foreclosure sale, the statute also provides that any common law possessory lien against the vessel is thereby terminated. (46 U.S.C. § 952-953).

Rights of Retention

A right of retention is the right of a person who has a claim against another to retain possession of goods which have come into his possession in connection with the facts that gave rise to the claim until his claim is satisfied. Various conditions must be fulfilled in order validly to exercise a right of retention.

In the shipping field the right of retention is typically exercised by shiprepairers to secure claims for repair of a vessel.

The right of retention should be distinguished from the right which a seller has not to deliver goods sold on a cash basis until payment is received and from the right of stoppage in transitu. These rights, of course, have the purpose of assuring the seller of payment of the purchase price, but the conditions and effects are very different from the right of retention. It, therefore, seems to be a mistake when Art. 6 of the 1967 Convention includes the shipbuilder's right to retain the vessel among the rights of retention.

The cases where a right of retention is recognised, and the detailed regulation of it, varies of course, from legal system to legal system. The main characteristics, however, are similar.

(i) The person exercising a right of retention must have possession of the goods, e.g. of the vessel. This means that as a minimum he must be able to prevent the owner from taking possession.

The possession must have arisen in connection with the coming into existence of the claim, e.g. in connection with the repair or, when the claim is in tort, in connection with the tortious act. The mere fortuitous possession or possession based upon a contract for a different purpose such as a charter, does not confer a right of retention upon the shiprepairer for his claim under the repair bill.

The shiprepairer has a right to retention for the repair bill as long as he has the ship in his possession in connection with the repair of the ship. If he gives up possession without obtaining payment or security for payment he loses his right of retention. And it is not revived even if he later regains possession of the ship, e.g. in connection with another repair.

(ii) The claim must have fallen due. If credit has been agreed so that payment is to be made subsequent to the delivery date of the ship after repair the shiprepairer cannot retain the ship because he fears for his money.

(iii) The right of retention in most legislations gives no right to enforce the claim, e.g. by a forced sale of the ship. It is a right only to deprive the owner of the possession he otherwise has a right

to, in order to put pressure upon him to fulfill his obligation to pay for the repair.

There may be a right for the retaining person to sell, e.g. if the goods retained are perishable, but it does not flow from the right of retention: it is rather a reflection of his duty to take care of the goods he retains.

Ranking

The solution to the question of ranking of rights of retention as against other rights in the property varies greatly, especially with respect to mortgages. The problem is partly solved in Art. 6 of the 1967 Convention for countries adhering to that Convention. Another problem is the position of the right of retention in bankruptcy.

The principal rule of the Convention is that the maritime liens enumerated in Art. 4 and registered mortgages recognised under Art. 1 must have first priority. The contracting states may grant other liens or rights of retention but they must rank after Art. 4 liens and Art. 1 mortgages.

However Art. 6 permits two types of rights of retention to be given priority before Art. 1 mortgages, although always after Art. 4 liens. First is the shipbuilder's right of retention to secure claims for the building of the vessel. In that case there will rarely be any Art. 4 or other liens and as mentioned above this does not seem to be a true right of retention. The fact that the rule is included in the Convention may well give rise to difficult problems in respect of the relationship between that rule and the rules of the law of sale. Second is the right of the shiprepairer to secure claims for repair of the vessel.

To be sure, the Convention itself does not instigate a right of retention in these two cases, nor does it give it priority as mentioned over registered mortgages when such a right exists under national law. All it does is to permit countries whose laws provide a right of retention to give it priority between Art. 4 liens and Art. 1 mortgages. They may choose not to create these rights of retention, or only one, and they may also choose to rank them after registered mortgages rather than before. The Scandinavian maritime acts which are based upon the 1967 Convention have provided for both types of right of retention and given them priority before registered mortgages.

The Convention also makes it clear that it is a condition for giving the right of retention the priority mentioned that the shipbuilder or shiprepairer has possession of the ship and that he retains possession of it.

Also it is clear from the text, at least with respect to the shiprepairer, that the right of priority may only be given with respect to claims for repairs which have been effected during the same period of possession, not for older claims. The same, although it is not so clear from the text, must be presumed to apply to the shipbuilder's right of retention.

D MORTGAGES AND HYPOTHECS

Mortgages and Hypothecs Distinguished

Legal nature of the hypothec and of the mortgage.

The hypothec is a right of security attached to a credit. The hypothec involves neither a transfer of the title to the ship nor a transfer of her possession, but creates a direct relationship between the creditor and the ship. The right of the holder of the hypothec is inherent in the subject matter of the security and the holder can realise his security without the co-operation of the owner of the vessel. The difference between an ordinary creditor and the creditor whose credit is secured by a hypothec is that whilst the former can satisfy his credit through the forced sale of the assets of the debtor at the time when proceedings for the realisation of the credit are commenced, the holder of a hypothec can enforce his claim against the subject matter of the hypothec even if the same has been transferred to a third party. This special character of the hypothec entitles the creditor to expropriate, even against the purchaser, the subject matter of the security.

The holder of the hypothec therefore is and remains a creditor and the ownership of the subject matter of the hypothec remains fully vested in the debtor. The holder of the hypothec can in no circumstances acquire title to the subject matter of the hypothec, except in the case when title is transferred to him after a forced sale in which he becomes the purchaser. Any agreement whereby title to the subject matter of the hypothec passes to its holder if the debtor defaults is in fact null and void.

In English Law the mortgage of personal chattels other than ships, creates a legal interest in the chattel which is subject to the provisions of the Bills of Sale Acts 1878 and 1882 if in writing.

The right to redemption is however granted to the mortgagor, being incident to the contract of mortgage.

In the United States the nature of a mortgage seems to be controversial. Whilst on the one hand a mortgage, particularly a mortgage of real property, is frequently defined as a conveyance of property to secure the performance of some obligation, on the other hand its function as security for a debt is regarded sometimes as the dominant feature; the mortgage is then regarded as a lien or encumbrance and is defined as a security or lien for the performance of an obligation. This latter view is enchanced by the fact that a mortgage is deemed to be an accessory of the debt secured thereby, so that the existence of an obligation to be secured is an essential element of the mortgage and the mortgage has no efficacy if unaccompanied by a debt or obligation, either pre-existing, created at the time, or contracted to be created.

The inherent characteristics of hypothecs and mortgages seem therefore to differ more in words than in substance. Even in England, where the

difference seems to be greater, the right of redemption and the possibility for the Court, in a foreclosure action, to direct a sale, in practice has the effect of giving the mortgage the character of a security and bringing it closer to the hypothec.

Mortgages of ships are even closer to hypothecs, for s. 34 Merchant Shipping Act 1894 expressly provides that "Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgaged debt, the mortgagor shall not by reason of the mortgage be deemed to have ceased to be owner thereof". Therefore, until the mortgagee takes possession (and this is one of the remaining differences between mortgages and hypothecs) the mortgagor retains all rights and powers of ownership. The exception which is provided for in s. 34 has the purpose of enabling the mortgagee to exercise the common law right to take possession of the mortgaged property, apart from any express agreement, whenever the mortgagor is in default in the payment of interest or principal, or where the mortgagor allows the ship to remain burdened with maritime liens which impair the security. But by taking possession the mortgagee acquires only the use of the ship and not title to her, and although he may then exercise the right to foreclose, in practice this right is very seldom used.

Although the modifications made to the mortgage by the intervention of equity led Maitland to state that the mortgage "is one long suppressio veri and suggestio falsi", the original character of the mortgage is still visible resulting in possibly better protection of the security than that available to the holder of a hypothec.

That may not be the case in the United States, for in those jurisdictions in which a mortgage is regarded both in law and equity as a mere lien, and not a conveyance of title, the mortgagee has no right either before or after default, to the possession of the property mortgaged; the right of possession remains in the mortgagor until foreclosure and sale. The security aspect of the mortgage is strengthened by the fact that although the realisation of the security is still defined as "foreclosure of a mortgage", this phrase has in general acquired a different meaning from that which it originally bore. "Foreclosure" in fact denotes equitable proceedings for the enforcement of a lien against property in satisfaction of a debt: the essential purpose of a foreclosure suit is to have the mortgaged property applied to the debt secured by means of its judicial sale.

Enforcement of the security.

The holder of a hypothec has no special statutory remedies in order to realise the security. If the hypothec is made in the form of a public instrument and it embodies an acknowledgement of debt, it entitles the holder, as would any other acknowledgement of debt in the same form, to enforce his claim by the attachment and forced sale of the ship. This right does not arise out of the hypothec, but out of the acknowledgement of debt in the form of a public instrument. The creditor can enforce his right against any asset of the debtor, including of course the hypothecated vessel. As previously pointed out, the only difference is (besides the priority in the distribution of the proceeds of sale) that the holder of the hypothec can enforce his claim on the vessel even if

title to the vessel has passed to a third party. The forced sale of a vessel may equally take place on the basis of a promissory note when the governing law thereof entitles the holder, on default of the promisor, to enforce his claim by the forced sale of the promisor's assets.

Although the security can be realised against a bona fide purchaser of a ship, it is doubtful whether the same rule applies against a bareboat charterer. The holder of the hypothec could still realise his security through the forced sale of the vessel, but the vessel could not be sold free from the interest of the bareboat charterer; the purchaser would thus be bound to perform the charterparty and this fact may affect the price. For example in Italy, Art. 1599 Civil Code provides that the purchaser of either real property or a chattel is bound by any contract of lease made by the seller prior in time to the sale and which is certain, that is, certified by a notary public or other public official.

The purchaser of real property (and also of registered chattels) is so bound for a maximum limit of 9 years when the contract of lease is not registered. Although this provision refers specifically to sale, the general view is that it applies also to the hypothec.

In England a power of sale is conferred on every registered mortgagee by s. 35 Merchant Shipping Act 1894, but when there are more than one registered mortgagees of the same ship or share, a subsequent mortgagee cannot, except under the order of a Court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee. A sale out of Court may enable the mortgagee to obtain the satisfaction of his credit in less time than through a forced sale. However, besides the fact that this remedy is immediately available only to the first mortgagee, a mortgagee exercising this power of sale may only convey the ship subject to all interests and rights which have priority over the mortgage i.e. subject to all maritime liens. It follows that a sale out of Court may not be the most satisfactory manner to realise the security when there are or there may be maritime liens on the vessel, unless the mortgagee guarantees the purchaser against any claim by the holders of maritime liens.

In the United States there does not seem to be any statutory power of sale. Such a power may be included in the mortgage or may be created by separate instrument and is thus a matter of contract. As regards real property it has been stated that although the sale is not in such a case a judicial sale, it is as valid and binding and has the same force and effect as the sale under decree (American Freehold Land Mortgage Co. v. Sewell, 92 Al. 163). However it seems doubtful that the purchaser in such a case acquires the property free from all encumbrances and liens as he would under a judicial sale.

As already mentioned above, the primary manner of realising the security of a mortgage is by foreclosure by sale, which is available only where there has been a default on the part of the mortgagor. To this effect a suit must be brought by the mortgagee against the mortgagor and any other person who is beneficially interested in the estate mortgaged. The purpose, or at least one of the main purposes, of the suit to foreclose a mortgage is to ensure the judicial sale of the mortgaged property.

The power of sale is usually given in the mortgage or in the deed of

covenant and may also be given in the hypothec to the holder, the latter becoming in effect the proxy of the owner, who irrevocably authorises him to sell the vessel in case of default on the terms of the hypothec. Thus under English law there is a statutory power of sale, which does not exist in respect of the hypothec under most civil law systems or the laws of the United States, but because such a power is usually given in the deed creating the hypothec or mortgage, the protection afforded to the holders of the hypothec and to the mortgagee is in this respect alike.

A Comparative Analysis of the Law on Mortgages and Hypothecs
Hypothecs in Civil Law Countries

Source of the security

Hypothecs on real property may normally be based on a) a unilateral declaration of the owner of the property or on contract, b) a judgment whereby the owner is found liable to pay a sum of money to the creditor and, c) a statutory provision. However these principles generally do not apply in respect of hypothecs on ships which, in the majority of civil law countries, are based on a unilateral declaration of the owner of the ship or on a contract betwen him and the creditor (Art. 499 of the Argentinian Ley de Navegacion; Art. 565 of the Italian Codice della Navigazione; Art. 43 of the French law No. 67-5 of 3.1.1967). In some countries, however, hypothecs may have their legal source in statutes. This is the case in Spain, where in accordance with Art. 19 of Ley de Hipoteca Naval of 21.8.1893 the seller may register a hypothec on the vessel sold by him as security for payment of the unpaid balance of the purchase price and pursuant to Arts. 20 and 26 the shiprepairers can similarly register a hypothec as security for payment of the cost of repairs.

The hypothec must be constituted by a written instrument and the signature of the shipowner (and of the creditor in case of a contract) must be certified by a notary public. Alternatively hypothecs may be executed in the form of a notarial deed (Art. 501 of the Argentinian Ley de Navegacion; Art. 43 of the French law No. 67-5; Art. 565 of the Italian Codice della Navigazione; Art. 3 of the Spanish law of 21.8.1893).

All laws specify the information which must be contained in the instrument. This information includes the names of the owner of the ship and of the creditor, their domicile and nationality, the name, tonnage and port of registration of the ship, and the amount secured (Art. 503 of the Argentinian Ley de Navegacion; Art. 17 of the French Decree No. 67-967 of 27.10.1967; Art. 569 of the Italian Codice della Navigazione; Art. 6 of the Spanish law 21.8.1893).

Subject Matter of the Security

In several civil law countries hypothecs may be executed on ships under construction. In Argentina Art. 502 of Ley de Navegacion provides that a hypothec may be executed on a ship under construction as from the date of the signature of the building contract, and then makes reference to Art. 501 in respect of registration: this does not seem to be altogether clear, for Art. 510 regulates the registration of hypothecs on completed ships on the ships' register. In France Art. 45 of law No. 67-5 provides that hypothecs may be executed on seagoing ships under construction, and Art. 13 of Decree No. 67-967 provides in its turn that a hypothec on a ship under construction must be preceded by a declaration of the builder to the competent administrative authority, i.e. to the custom authority. Whether or not two distinct registers are kept by the customs authority, one for

ships under construction and one for completed ships, is not clear. However this is clearly set out in Italy by Art. 566 Codice della Navigazione, whereby hypothecs on ships under construction may validly be registered in the register of ships under construction from the time of the registration of the declaration of construction; Art. 233 then provides that the builder must file a declaration containing the main data of the ship' before commencing its construction, with the port authority of the place where the hull is to be built and that declaration will be registered in the register of ships under construction.

In Spain hypothecs on ships under construction may be created or realised pursuant to Art. 16 of law 21.8.1893, only where the amount secured is equal to at least one third of the total value of the future ship; registration of ships under construction - and hypothecs thereon - is done in a special section of the ships' register.

What may be the object of a hypothec on a ship under construction is specified only by the Argentinian Ley de Navegacion whose Art. 502 provides that all materials, equipment and elements of whatsoever nature assembled or stored within the yard and destined for the construction of the vessel are hypothecated, provided they are identified in the manner specified by the National Ships Register.

The object of the hypothec on a completed ship is not specified by the Argentinian Ley de Navegacion, nor by the Italian Codice della Navigazione. But it is specified by French and Spanish law. Art. 46 of the French law No. 67-5 states that, unless otherwise provided, objects of the hypothec are the hull of the vessel and all its accessories, engines, apparels and appurtenances, but not the freight. Art. 7 of Spanish law 21.8.1893 similarly states that unless otherwise provided, the hypothec relates to the hull, apparels, spare parts, appurtenances, engines as well as the freight earned but not paid. In Italy Art. 573 Codice della Navigazione only provides that freight is not included in the subject matter of the hypothec on the ship.

By comparison with the provisions relating to the subject matter of maritime liens and of hypothecs on aircraft, it is generally accepted that the subject matter of a hypothec on a ship comprises the hull and machinery, all accessories and appurtenances. Appurtenances are described by Art. 246 Codice della Navigazione as the boats, apparels, instruments, outfittings and generally all durable goods destined for permanent use in the ship.

Stores, therefore, such as bunkers, lubricating oil and paints, are generally not included amongst the things which are hypothecated.

Registration

Registration in some countries (e.g. Italy) is required for the very existence of the hypothec, whilst in others it is required only for the validity of the hypothec vis-a-vis third parties (e.g. Argentina, France and Spain).

The register in which registration is effected may be the ships' register (as is the case in Argentina, Italy and Spain) or a special register (as

is the case in France where hypothecs are registered in a register kept by the custom administration of the district in which the vessel is registered: Arts. 14 and 15 of Decree No. 67-967). In the first case the register is that kept in the home port of the vessel; in the second case it may be either a register kept in the home port of the vessel, as is the case in France, or a central register, as is the case in Sweden.

Registration is normally effected through an application to the registrar by either the owner of the ship or the creditor. The application must contain the information which is needed for the ships' register or the register of hypothecs. In many civil law countries there are specific provisions in this respect, and the basic information is indicated in the law (Art. 17 of the French Decree No. 67-967; Art. 569 of the Italian Codice della Navigazione; Art. 6 of the Spanish law of 21.8.1893), so that when it is not provided the registrar may refuse to effect the registration.

The application must be accompanied by a certified copy of the hypothec instrument. The procedure followed by the registrar for the registration may vary from country to country. In France the application, in triplicate, is submitted to the customs official who registers the informatin on the register of hypothecs, and then returns one copy to the applicant with a statement that registration has been effected (Art. 18 of Decree No. 67-967). In Italy the registrar takes a note of the application in a book called repertory with the exact time of its delivery, returns to the applicant a copy of the application after endorsing on it the time of receipt and the number under which the application has been noted on the repertory; he then registers the information contained in the application on the ships' register, where there is a section specially designed to receive the registration of the hypothec. In Spain Art. 37 of law 21.8.1893 provides on the contrary that the date of registration is that of filing the request with the Registrar.

In addition to registration on the ships' register or on the special register of hypothecs as the case may be, in many countries the hypothec must be endorsed on the ship's papers: this is the case in Argentina (Arts. 501, 505 and 506 Ley de Navegacion), France (Art. 18 Decree No. 67-967), Italy (Art. 567 Codice della Navigazione) and Spain (Art. 14 of the law 21.8.1893). Such endorsement however is not required for the purpose of the existence of the hypothec or its validity vis-a-vis third parties, not is it sufficient. If the endorsement is effected prior to the registration of the hypothec on the register, the hypothec does not come into existence or become valid vis-a-vis third parties as the case may be until its registration on the register. Likewise, the priority of the hypothecs inter se is based on the date of their registration on the register. This results impliedly from the provisions of Arts. 501 and 504 of the Argentinian Ley de Navegacion and from those of Art. 51 of the French law No. 67-5 whereby the order of priority is based on the time of registration of the hypothec on the ships' register or on the register of hypothecs, with no reference to its endorsement on the vessel's papers. The result is the same under Art. 38 of the Spanish law of 21.8.1893 containing a similar provision. Italian law is more specific: Art. 571 of the Codice della Navigazione in fact makes reference to Art. 257 which, dealing generally with registration of rights in ships, provides that priority is determined on the basis of the date of registration in the

ships' register, and that in case of difformity between the dates registered in the register and those endorsed on the vessel's papers, the former shall prevail.

Subrogation

It is a general rule in all civil law countries that if the property hypothecated is damaged or destroyed certain indemnities due to the owner by third parties are payable to the holder of the hypothec. This general rule also applies to ships and the indemnities or sums are normally specifically described. These are:

a) Indemnities for damage done to the vessel and not repaired (Art. 507 (a) of the Argentinian Ley de Navegacion; Art. 47 (a) of the French law No. 67-5; Art. 572 (a) of Italian Codice della Navigazione; Art. 7 of Spanish law 21.8.1893).

b) Sums due to the owner out of a general average fund on account of damage suffered by the ship (Art. 507 (b) of the Argentinian Ley de Navegacion; Art. 47 (b) of French law No. 67-5; Art. 572 (b) of Italian Codice della Navigazione.

c) Indemnities for damage suffered by the ship during salvage operations (Art. 507 (c) of the Argentinian Ley de Navegacion; Art. 47 (c) of French law No. 67-5; Art. 572 (c) of Italian Codice della Navigazione).

d) Insurance indemnities for unrepaired damage to the ship (Art. 507 (d) of the Argentinian Ley de Navegacion; Art. 47 (d) of French law No. 67-5; Art. 572 (d) of Italian Codice della Navigazione; Arts. 7, 8 and 9 of Spanish law 21.8.1893).

Rights of the Holder of the Hypothec to Safeguard his Security

Although no specific provisions in this respect are to be found in the maritime laws of any civil law country, there are such provisions in the general law of hypothecs which is also applicable to ships' hypothecs. Art. 2813 of the Italian Civil Code provides that whenever the debtor or a third party does anything which might cause loss of or damage to the hypothecated property, the creditor may ask the judicial authority to order the cessation of such activity and to take the necessary measures to avoid the security being affected.

Enforcement of Security

The provisions on hypothecs do not generally regulate the enforcement of the security otherwise than by stating that the security may be enforced against the purchaser of the property hypothecated. But this does not entitle the holder of the hypothec to enforce his claim on better conditions than those specified in respect of ordinary, unsecured claimants. For example, Art. 2808 of the Italian Civil Code provides that the hypothec confers on the creditor the right to expropriate the property vis-a-vis a third party who has purchased it. However the right of

expropriation is generally granted to all creditors, subject of course to the existence of the conditions required by the law: the difference therefore is that the creditor whose claim is secured by a hypothec may follow the property in the hands of third parties (Art. 509 Argentinian Ley de Navegacion; Art. 55 French law No. 67-5; Art. 2808 Italian Civil Code; Art. 28 Spanish law 21.8.1893).

The conditions for the exercise of the right of expropriation are normally set out in procedural laws. These conditions consist in the claim being evidenced by a judgment, a promissory note or bill of exchange, a notarial deed where it embodies an obligation to pay a sum of money (French Decree of 12.6.1947; Art 474 of Italian Code of Civil Procedure). Thus the instrument whereby the hypothec is constituted may enable the creditor to enforce his claim without need to waste time getting a judgment, provided the instrument is executed in the form of a notarial deed and embodies the promise to pay a specified sum at a specified time.

More specific rules may be found in the Spanish law 21.8.1893. Art. 39 sets out the events in which the holder of the hypothec may enforce his right (i.e. maturity of the instalments, bankruptcy, damage to the vessel preventing her employment, sale of the vessel to a foreigner); Art. 42 provides that if the debtor does not settle his indebtedness after notice is given to him, the holder of the hypothec may apply to the competent court for the arrest and forced sale of the vessel. It must however be taken into consideration that under Spanish law a hypothec must be executed before a notary public and thus the conditions for enforcement are the same as those previously mentioned.

In the countries where the aforesaid rules are in force not only are hypothecs constituted under the national laws of such countries unenforceable unless the aforesaid conditions are complied with, but also hypothecs and mortgages executed elsewhere, and governed by other laws, are likewise subject to the same conditions.

Therefore the fact that under the law governing the hypothec or mortgage the security is immediately enforceable through the arrest and forced sale of the ship is not sufficient to enable the creditor to enforce his security everywhere. To have this effect it would be necessary for the same rules on enforcement of mortgages or hypothecs to exist in the country where the enforcement takes place. Nor is it even sufficient that the security is executed in the form of a notarial deed in order to effect its enforcement in a civil law country where the notarial deed permits the expropriation of the assets of the debtor. If in fact such a notarial deed has been executed in a country other than that where enforcement is sought, it is necessary to obtain an exequatur of the deed in the same way as it would be necessary in the case of a foreign judgment, and this would again require a considerable time.

The conclusion is that the holder of a hypothec or mortgagee may not be able to enforce his security in a significant number of countries and may not be able to enforce his security for a long time if the mortgaged vessel trades between countries where enforcement requires conditions difficult to realise, such as those previously mentioned.

With a view to encouraging ships' financing it is therefore advisable to

provide for the right of the holder of a hypothec or the mortgagee to enforce his security otherwise than by forced sale, i.e. by private sale, and also to take possession of the mortgaged ship. The right to take possession would at least enable the holder of a hypothec or mortgagee to move the vessel into a country where her forced sale could take place in a shorter period of time.

Priority of Hypothecs as between themselves

The basic rule is that priority is based on registration. However the rule is not the same in the various countries as regards hypothecs which are registered on the same day. In some countries, i.e. France (Art. 51 law No. 67-5 of 3.1.1967) these hypothecs rank pari passu between themselves. In other countries, i.e. Argentina (Art. 504 Ley de Navegacion), Italy (Art. 574 Codice della Navigazione), Spain (Art. 38 of Law 21.8.1893) they rank on the basis of the time of registration, i.e. that registered at an earlier hour takes precedence over that registered subsequently.

Extinction of Hypothecs

Extinction of the credit

The hypothec, being a right of security, cannot exist without the credit secured thereby, whatever the reason for the extinction of the credit, i.e. satisfaction, prescription, etc.

Waiver of the security

The creditor may wave his security right without waiving his credit. This is expressly provided in Italian law by Art. 2879 Civil Code.

Deletion of the registration

In those countries in which registration is a condition of the creation of the hypothec, deletion of registration causes the extinction of the hypothec. Such deletion may take place only on the basis of the written consent of the creditor, (Art. 54 of the French law No. 67-5 of 3.1.1967; Art. 2878 Italian Civil Code; Art. 50 of Spanish law of 21.8.1893), a final judgment (Art. 54 of French law No. 67-5; Art. 2884 Italian Civil Code; Art. 50 of Spanish Law of 21.8.1893) or the order of the court whereby the title to the vessel is transferred to the purchaser of the vessel after a forced sale (Art. 2878 No. 7 of Italian Civil Code).

Expiry of the term of validity of the registration

In several civil law countries the effect of the registration terminates with the lapse of time and if the registration is not renewed prior to the expiry date, the hypothec is extinguished. Such a provision exists in Argentina, where the period is three years (Art. 509 Ley de Navegacion), in France, where the period is ten years (Art. 52 law No. 67-5), in Italy where the period is twenty years (Art. 2878 No. 2 Civil Code).

Prescription

In some civil law countries there is a specific prescription (extinction

by lapse of time) period for the security right. The period is two years in Italy (Art. 577 Codice della Navigazione), ten years in Spain (Art. 49 law of 21.8.1893).

Release of the vessel from the hypothec by her purchaser

If there is a voluntary sale of a vessel which is hypothecated, the purchaser is entitled to release the vessel from all hypothecs registered prior to the registration of the purchase by offering the holders of such hypothecs a sum equal to the purchase price. Any holder of a hypothec may then cause the vessel to be sold judicially provided he puts in the first bid which must be 10% higher than the price declared by the purchaser and provided he pays into court a bond as security for the payment of the purchase price if his bid is successful (Art. 23 French Decree No. 67-967; Art. 676 Italian Codice della Navigazione). The request for judicial sale must be made within a specified time limit from the date of notification by the purchaser to the holders of hypothecs of his offer to place at their disposal the purchase price: ten days according to Art. 23 of the French Decree No. 67-967; fifteen days according to Art. 676 of the Italian Codice della Navigazione. After the bid has been put in, the sale follows according to the ordinary rules applicable to judicial sales, i.e other bids may be put in and the title to the vessel, free from all hypothecs, is transferred to the highest bidder. In Italian law the holders of maritime liens may also participate in the distribution of the proceeds of sale and all liens are extinguished.

Forced sale

A forced sale, which may take place on the initiative of any claimant, causes the extinction of all hypothecs, maritime and other liens and other encumbrances. There are express provisions to this effect in all civil codes as well as in the 1967 Brussels Convention (Art. 11). The creditors are then satisfied out of the proceeds of sale according to their respective priorities.

Destruction of the vessel

The destruction of the vessel causes the extinction of the hypothecs. The concept is thus different from that of total loss in insurance, actual or constructive. A vessel which is stranded or sunken may be a total loss for insurance purposes, but is not physically destroyed. A vessel which is broken in two pieces, one of which only is salved, is not destroyed. In all these cases the holder of the hypothec can still exert his rights on what is left. Only when the vessel is deleted from the register is the hypothec extinguished. The extinction however does not take place when the holder of the hypothec acquires by subrogation rights which arise out of the loss of or damage to the vessel as previously mentioned.

A Comparative Analysis of the Law on Mortgages and Hypothecs
Mortgages in Danish and other Scandinavian laws

The term "mortgage" is used because that is the usual translation into English of the corresponding Scandinavian legal term. However, this does not imply taking a position as to whether the Scandinavian legal institution of "pant" (German "Pfand") is a mortgage rather than a hypothec in the sense in which these terms are used in common law and civil law respectively and in the international conventions. Rather, the difference betwen these two institutions and between them and the corresponding Scandinavian law seeems to be nuance only, conceptually based.

What follows concern only mortgages created by the unilateral declaration of the owner or by contract.

As a starting point, ships, in principle, are movable property. They may be subject to mortgages according to the rules of movable property, either with or without possession. In practice, however, ships are regarded more as real property and this is further borne out by the system of registration. Usually with a mortgage, the owner remains in possession of the ship until some form of enforcement takes place.

Danish and Norwegian law contain only a few statutory rules of law on mortgage in ships or indeed generally. Their regulation rests on case law and tradition and is heavily influenced by the corresponding regulation of mortgages in real property. Swedish law contains some more express statutory provisions. The greater part of Scandinavian legislation relating to mortgages, however, is related to registration and its effects.

Mortgaging of ships in Scandinavia is not subject to any formal requirements in order to be valid as between mortgagor and mortgagee. The contract of lending, like other contracts, requires no special form and that is true even if it provides for security such as a mortgage on a ship.

Priority and registration

It is clear, however, that the important point for the mortgagee is his protection against third parties, against the mortgagor's other creditors and those who acquire rights in the vessel from the mortgagor. In order to obtain priority in relation to them the mortgagee must have his right registered.

The rules of registration in Scandinavia are not specific to mortgages but apply generally to most rights in vessels. It seems natural, therefore, first to consider ship's registration in general and then return to mortgages in order to point to some specific rules on mortgages. Danish law is the standard basis of discussion but in spite of some differences,

especially in Swedish law, the systems are very similar.

Denmark and Sweden each have a central register of ships while in Norway the ship's registration is decentralized. It is possible to register ships under construction, although the Scandinavian countries have not ratified the Convention on ships under construction.

The ship's register has two functions, under public and private law. The public law function is to be a complete registry of all ships which have Danish nationality. The private law function is to be a register of ownership and other rights in ships. The double function causes certain problems which are not known in the registration of real property. It is always clear what real property is Danish and that it will remain Danish. It is otherwise with respect to ships. Ships may be bought from, or even built, abroad. Any they may be sold out of the country or built there for foreign owners.

Therefore, a ship under construction may have to be registered in Denmark for the purpose of the private law function although it does not fulfil the conditions for registration from the point of view of the public law function because it is built for foreign account. And a ship may have to remain in the Danish registry because of private law rights registered in it although it no longer fulfils the conditions for remaining in it for public law purposes. This dilemma has been solved by special rules which mean that the public and private law function of the registry do not always converge.

The following pages concern the private law function of the registry only. As already mentioned, rights in a ship are validly created without any formal requirements. However, in certain relationships a right must be registered in order to be protected, in order to retain its priority over other rights or even in order to avoid being extinguished.

The rights which may be registered are rights of ownership, or mortgage, a right to use the ship or a right which limits the owner's freedom to dispose of the ship. This includes leases, charterparties, arrest, seizure preparatory to enforcement etc. (but not maritime liens and rights of retention which cannot be registered and which are valid without registration.)

All these rights must be registered in order not to lose priority nor to be extinguished by the registration of rights in the ship created 1) by agreement between the owner and a third party who in good faith is ignorant of the unregistered right, or 2) by the enforcement of creditors' rights in the ship.

Thus, if the owner and a lender have agreed that the lender shall have a mortgage in the ship as security and the owner then sells the ship, although the claim of the lender/mortgagee against the owner will survive, the right of the mortgagee in the ship will be extinguished if the purchaser registers his right in the ship before the mortgage is registered and the purchaser is in good faith. Similarly, if the owner gives a second mortgage to someone else who has it registered in good faith before the first mortgage is registered, the first mortgage will get priority only after the second mortgage.

Again, if before the mortgage is registered a creditor has obtained an enforceable judgment against the owner and seizes the ship and has the seizure registered he will have priority over the mortgagee even though he knew of the mortgage. And if the mortgage is not registered it will be extinguished at the subsequent forced sale of the ship following the attachment, although the personal claim against the owner survives.

The registration of a right has further importance. Only the person registered as its owner can allow anything to be registered which touches his right as owner. The consent of the holder of a registered right is necessary to the registration of anything which could result in the termination of or change in that right or its priority.

And if someone in good faith acquires a registered instrument, e.g. the right to a registered mortgage, and the instrument is negotiable or he registers his right to it, then nobody can object to the validity of that instrument unless it was false or issued under threat of violence or issued by a person under age.

Priority in the registry is obtained from the day of filing. If several rights are filed on the same day they get the same priority if possible. Otherwise, a delay is granted to clarify the relationship between the rights.

All documents which are filed are entered in a special book in chrongological order. That book, as well as the registry, is open to the public and must be searched by any one who wants to assure himself of the priority he will obtain. After being filed the documents will be examined by the registrar as to whether they fulfil the conditions for registration, and if they do they will be entered into the registry with priority from the day of filing.

One difference between the Swedish system and the Danish and Norwegian systems should be mentioned. In Denmark and Norway a mortgage document is agreed between the parties and then registered. In Sweden the owner registers a mortgage and transfers it to the mortgagee. In practice, however, there is little difference. Also in Denmark and Norway an owner may register a mortgage issued to himself in order to reserve the priority and then use it later on as security for a loan. This means that the amount of the loan and of the mortgage deed may not correspond. This does not mean, however, that the holder gets security for more than the actual amount of the loan. Any "free space" will be reserved to the owner or his creditors. It is similar to the situation where amortization payments have been made on a mortgage without deregistration of the corresponding amount. Special rules in the statute govern the disposal of the "free space". In principle this is normally reserved for the owner. In practice it is often agreed in the mortgage deeds that those with later priority move up as those with better priority are amortized.

Subject matter of a mortgage

As mentioned above, ships under construction and rights in registered ships under construction may be registered. Usually, ships under construction are registered only because there is a wish to register a

right, e.g. a mortgage in the ship. Registration may only take place if what is being built can be identified as a ship under construction. Construction must have to progress to a certain degree before registration can take place. Any rights in the ship under construction will include materials for the construction which are present at the yard and marked as intended for use in the construction of that ship. Although the Scandinavian countries have not ratified the Convention on registration of ships under construction, the law is in almost complete conformity with that Convention.

With respect to ships which have been built, rights, e.g. mortgages in them, include engines and other machinery, radio equipment, fishing gear etc. which has been bought at the owner's expense and is intended for installation or is installed in the ship even if temporarily separated from it. A reservation of property clause is not valid with respect to such items. Stores are not covered by the registered rights in the ship.

The registered rights including the mortgage also cover any compensation given for loss or damage to the ship including insurance claims. Incidentally maritime liens are not covered by the insurance of the ship unless specifically provided in the policy.

Enforcement

The question of enforcement of mortgages is a procedural matter and its regulations varies much from country to country. In Denmark and Norway a mortgage may be used as basis of direct enforcement and no judgment is needed. In bankruptcy in Denmark, however, the sale of the vessel is part of the general bankruptcy proceedings and the mortgagees have to await that and cannot proceed on their own to obtain satisfaction of their claim. In both respects the situation is the opposite in Sweden.

The mortgage right terminates on termination of the underlying claim e.g. by payment, or when the vessel is sold by a forced sale. It also terminates when the ship perishes unless it can continue in rights which replace the ship. The mortgage right cannot be prescribed by lapse of time and its registration is, with unimportant exceptions, not limited in time.

A Comparative Analysis of the Law on Mortgages and Hypothecs Mortgages in Common Law Countries

Introduction

The ship mortgage in the United States and England is significantly different from the civil law hypotheque. The hypotheque, is a much broader concept and probably sweeps in a variety of liens and other forms of analogous security devices known to the American and British system. The right to possession of the collateral on default of the debtor/mortgagor appears to distinguish the mortgage from the hypotheque as a security instrument. Yet the right to possession is rarely exercised; recourse to court proceedings, through arrest and forced sale, is the preferred method of enforcement. The reason for this, is largely financial, since there are likely to be existing commitments, such as a charter or cargo on board; there is a crew to be paid, and arrangements to be made for insurance, port facilities and discharging cargo. In the United States, the obligations of a mortgagee assuming possession of an operating vessel are not defined by statute or otherwise clearly developed through court precedent. Ship mortgagees are accordingly reluctant to jump into these uncharted waters. Also, the Ship Mortgage Act, as has already been seen, is not a comprehensive statute. It was designed to give a common ship mortgage a maritime lien priority and to make the admiralty foreclosure action available for realising the security.

Because of these factors, there is probably very little difference in practical effect between a mortgage and a hypotheque. Ship mortgage law in the United States and England is examined in the following pages.

Source of the security

The original method of raising funds on the credit of the vessel in both Engish and American law was the Bottomry Bond. Although this device created a security interest in the vessel enforceable in admiralty in rem, it was not a satisfactory device, since not only the maritime lien, but the debt itself, was lost if the vessel sank. Thus, the Bottomry Bond, along with the "Respondentia Loan", a similar device pledging the cargo of the vessel, became historical relics during the nineteenth century.

Ordinary ship mortgages, before the passage of the Ship Mortgage Act in the United States in 1920 and the Admiralty Court Acts in England in 1840 and in 1861, were considered by United States and English courts to be personal contracts, unenforceable in the courts of admiralty. These early mortgages were left to rely on the common law and equity courts for their foreclosure rights and in terms of priority ranked behind all maritime lien claimants in the distribution of proceeds from the sale of the vessel. The ship mortgage was a singularly unattractive form of security.

The ship mortgage in the United States

In the United States, the Ship Mortgage Act of 1920, codified as amended at 46 U.S.C. §§ 911-84 (1975), created a new security device, the preferred ship mortgage ("preferred mortgage") and, in so doing, transformed the ship mortgage into a viable form of security. The most significant feature of the preferred mortgage is that it is of a maritime character, enforceable by an action in rem in the Admiralty courts, with a considerably improved level of priority. The preferred mortgage is not absolutely preferred, however; it ranks behind a group of "preferred maritime liens" consisting of any maritime liens arising prior in time to its recording and endorsement on the vessel's document and to a group of maritime liens that receive priority regardless of time of accrual. This latter group, consisting of damages arising out of torts, wages of stevedores and crew members, general average, and salvage (including contract salvage) (46 U.S.C. § 953(a) (1975)), are easily correlated with the group of genuine maritime liens under English law. As already mentioned the Ship Mortgage Act is limited in scope.

> "The (Ship) Mortgage Act is not a comprehensive statute. It contains the detailed provisions previously discussed on the formal requisites of a preferred mortgage and on the giving of public notice through recordation and indorsement. It has also a highly important provision regulating priorities between preferred mortgages and other maritime liens ... It contains sketchy provisions on foreclosure: the lien of the mortgage may be enforced by suit in rem in admiralty and the mortgage may also proceed in personam for the recovery of any deficiency. That is, however, about as far as the Act goes". (Footnotes deleted) (1).

The ship mortgage in England

As early as 1840, the English Admiralty Courts began to exercise limited jurisdiction over ship mortgages under the Admiralty Court Act 1840. Today, the Admiralty Courts' jurisdiction is complete, deriving its authority under the Supreme Court Act 1981, section 20(a)(c) which provides jurisdiction over "any claim in respect of a mortgage of or a charge on a ship or any share therein" and extends to unregistered mortgages as well as foreign mortgages. This is in contrast to the United States Ship Mortgage Act which is far narrower in application and which makes admiralty jurisdiction dependent on adherence to formal requisites of recordation.

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(1) G. Gilmore & C. Black, The Law of Admiralty 718 (2d ed. 1975)

Formalities of recordation

The United States

Access to the Admiralty Courts for enforcement of a preferred mortgage depends upon the proper recordation of the mortgage in the office of the U.S. Coast Guard Documentation Office (formerly office of the Collector of Customs) at the vessel's port of documentation (46 U.S.C §§ 921-22 (1976)) and endorsement by the Documentation Officer of certain information respecting the mortgage on the vessel's document, Section 926 of the Ship Mortgage Act requires several preconditions to the recording of the mortgage. It must state the interest of the grantor or mortgagor in the vessel and the interest mortgaged, and the signature of the mortgagor must be acknowledged before a notary public in the jurisdiction where executed. There also must be filed with the mortgage an affidavit of good faith, to the effect that the mortgage is made without any intent to hinder, delay or defraud any existing or future creditor or lienor of the vessel (46 U.S.C. § 922(a)(3)). The act requires but not as a condition to "preferred" statue that a certified copy of the mortgage be placed on board the vessel by the mortgagor and be exhibited by the Master to any person also having business with the vessel (46 U.S.C. § 923).

England

The legal mortgage in England is created by complying with the statutory requirements of the Merchant Shipping Act 1984, notably section 31(1). This section provides that only registered ships can be subject to legal mortgages. Mortgage registration must take place at the ship's port of registry. Often, the mortgage instrument refers to a collateral agreement in which the parties have set forth their agreement on such terms as time for repayment, interest, insurance, and conditions constituting default.

Mortgages on ships which are not registered under the Merchant Shipping Act, or which are not capable of being registered because they are granted on ships under construction or foreign-owned ships, are not legal mortgages but are described as equitable mortgages and have low priority ranking.

Like the United States system, the formal requirements of registration and recordation must be closely followed to create a legal mortgage. However, even if the formal requirements are not met, an equitable mortgage is created.

Under the Companies Act 1948, certain mortgages must be registered with the Companies Register, and failing proper registration, will fall into the equitable mortgage status. These include mortgages on ships owned by companies registered in England and which have stablished places of business there. Unless the mortgages on such ships are registered within 21 days of their creation, they will not prevail over liquidators or creditors of such companies.

Registered mortgages may be transferred to third parties, but the instrument of transfer must be in the proper form and it must be properly registered to take priority over third parties.

Subject of the security

The United States

To constitute a preferred mortgage, the subject must cover the "whole" of a United States vessel, other than a towboat, barge, scow, freighter, car float, canal boat, or tank vessel, of less than twenty-five gross tons (46 U.S.A. § 992(a)). Vessels which are not documented cannot be subject to a preferred ship mortgage.

Mortgages on foreign flag ships may also attain "preferred" status (i.e. they may be enforced in the Admiralty Courts) provided that the mortgage was validly executed and duly registered in accordance with the laws of that ship's flag. It must be remembered, however, that the value of such mortgages when enforced in the United States Admiralty courts is diminished by the fact that they rank after maritime liens for necessaries supplied in the United States.

Where a mortgage includes property other than a vessel - a so called mixed mortgage - preferred status will be denied "unless the mortgage provides for separate discharge of the other property by a payment of a specified portion of the mortgage indebtedness" (46 U.S.C. § 922(e)). Such a rule is designed to ensure the jurisdictional and constitutional integrity of the admiralty proceedings by avoiding the "entangling alliance" with non-maritime property: The Emma Giles, 15 F.Supp. 502, 506 (D.Md. 1936).

Preferred mortgages may include more than one vessel. The provision of the act governing these "fleet mortgages" grants to the maker the option of providing "for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness". If so provided, this amount must be endorsed on each vessel's documents. If not so provided, a court may release a vessel from the mortgage upon payment of part of the mortgage debt proportional to the values of the vessels covered by the mortgage, plus 20%.

The mortgage must cover the whole of the vessel; one that covers only the ship's equipment cannot attain preferred status. It is generally understood that the mortgage covers the freight earned by the ship, and the mortgagee can require in the mortgage instrument the freight to be paid directly to him.

Property that has been acquired for the vessel's use after the creation of the preferred ship mortgage may be included in the security interest of the mortgage. Most mortgages contain what is commonly known as an "After-Acquired-Property" clause. In the absence of such a clause, courts usually ask whether the property or equipment is necessary to the accomplishment of the particular voyage, or has become an essential part of the res. If so, it will further inquire into the property's ownership. Where title is held by the owner-mortgagor, or where a supplier holds title as a security device only, courts extend the lien to that property.

Only a United States citizen may hold a mortgage on a United States ship. Corporations are considered citizens of the United States when the controlling interest is owned by United States citizens, its president, chief executive officer, and chairman of the board of directors are United States citizens, no more than a minority of the number of directors constituting a quorum are aliens, and the corporation is organised under the law of the United States or one of the states.

England

A legal mortgage can be granted on any ship not exempted from registry under the Merchant Shipping Act, 1894. Exempted are ships not exceeding 15 tons and which sail only in the rivers and coasts of the United Kingdom or some British possession. Under the Act, ships are defined to include vessels which are not self-propelled, such as various types of barges and floating oil tanks, as well as submersibles and jack-up rigs (2).

Only British subjects or companies established under and subject to the laws of Her Majesty's Dominions and which have a principal place of business in those Dominions may own a British vessel. The nationality of the shareholders of the company is immaterial.

A mortgage covers the vessel and the appurtenances thereto. This includes all articles necessary to the navigation of the vessel which were on hand at the time of the mortgage or which were brought on board to substitute for such articles.

The mortgage does not include a charge on the insurance or earnings of the vessel, although it is not unusual for an assignment of the earnings and insurance to be contained in a separate collateral agreement.

The mortgagee is bound by contracts entered into by the mortgagor when the mortgagor had control of the ship as long as the mortgagee had notice of such contracts. The mortgagee is not bound by other contracts unless those contracts gave rise to maritime liens. If the mortgagee takes possession by invoking the assistance of the Admiralty Court, his rights and obligations remain the same as if he obtained possession on his own.

The mortgagee has the option of selling the ship after taking possession. This power is given under the Merchant Shipping Act 1894, S.35 which allows the mortgagee to sell by private treaty or public auction. However, since the private sale does not extinguish maritime liens, mortgagees generally prefer arrest and forced sale by the Admiralty court.

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(2) Hamilton, Douglas "England and Wales", Handbook on Maritime Law, Vol. III, 137-138 (1983).

Priority of mortgages as between themselves

United States

The traditional rule of thumb governing the priority of maritime liens, "last in time, first in right", is reversed in the case of mortgages.

A question has arisen in regard to mortgages that are renewed or in some manner modified. Where amendments or modifications do not substantially change the nature of the obligation, courts will leave intact the priority of the mortgage as of the date of initial perfection. Coastal Dry Dock & Repairs Co. v. S.S. "Beybelle", 1975 A.N.C. 1736 (S.D.N.Y. 1975). This rule also applies where the mortgage is assumed by a new party if the assumption does not substantially alter the nature of the obligations. Barnouw v. S.S. "Ozark", 304 F. 2d 717 (5th Cir.), Cert. denied sub nom., Socony Mobil Oil Co. v. Wall Street Traders Inc., 371 U.S. 923 (1962).

England

When more than one registered mortgage is involved, priority between mortgages is determined according to the date of registration, not the date of the creation of the mortgage. However, if the first mortgage covers future advances, it will not rank ahead of a second mortgage which is registered prior to any advancements under the first mortgage. Equitable mortgages, including unregistered mortgages, rank behind registered mortgages regardless of whether a subsequent registered mortgagee was aware of the prior equitable mortgage, Equitable mortgages will rank ahead of claims for necessaries where the supplier commences the in rem action subsequent to the date the mortgage is granted.

Registration of Vessels in Relation to Registration of Rights on Vessels

Any proper system of legislation on mortgages and liens presupposes adequate registration of vessels. The very fact that some countries have one register for the registration of ships and for rights thereon may conceal essential features.

The general principle should be that registration of the ship should clearly and unequivocally identify the object. Only thus can the interests of the mortgagee be sufficiently protected.

Registration of ships

From an international point of view registration of ships is necessary to allocate jurisdiction over vessels engaged in international seaborn transport. Traditionally, jurisdiction over a ship has been connected with its nationality. Under international law, the concept of nationality comprises the rights and duties of a state vis-a-vis its ships. The nationality of a ship refers to the state which has authority over and responsibility in respect of the ship. Registration is the act by which this nationality and the collateral rights and duties are conferred on the ship.

A ship may be registered if it meets the relevant national requirements and registration is effected by entering the ship in the national ships' register.

The ships' register of each State lists the ships which are registered in that state and which therefore, come within the national jurisdiction of that state. By placing a ship on its shipping register a state assumes the authority to exercise over the ship the power inherent in the "jurisdiction of the flag state"; and undertakes the national and international responsibilities of a flag state in relation to that ship.

From a national point of view registration of ships forms the basis for national shipping policy, economic policy and defence policy. In addition, it serves to establish ownership and allocates responsibiity for safety, pollution control and social regulations.

Licensing of ships

Some countries maintain a licensing system as part of their economic c.q. shipping policy. Such a system is most commonly operated for domestic sea transport but occasionally also for international voyages.

Confusion arises in those legislative systems where registering a ship involves obtaining a licence. Registration and licensing have different purposes: Registration attributes nationality and identifies ownership; licensing, whenever practised, gives access to the sea transport market.

Access to the market may be denied to national vessels e.g. because the ship is not adequately built and equipped for the particular trade or because she is earmarked for another trade. On the other hand market access may be granted to chartered-in vessels operated by nationals, or to foreign ships operated by foreigners.

Licensing systems are largely absent in the traditional maritime countries with the notable exception of restrictions on cabotage (USA, France). It may be noted that licensing of fishing vessels is currently practised in many countries where everybody is free to buy and register vessels but where shipping policy dictates licensing in restricted trades.

Centrally planned economies seem, by their very nature, not to call for licensing systems for national ships. They may, however, feel the need to regulate foreign vessels calling at national ports, which could lead to licensing.

Registration of rights on vessels

Registration of rights first and foremost serves the interest of creditors. It may also be useful for those who contemplate doing business with the company owning the vessel.

Interrelations

The assessment and fixing of priorities among the various interested groups and forces mentioned above is the province of national shipping policy.

Registration, at least for ocean going ships, will always be necessary once the decision to acquire a vessel has been taken. On the other hand an entrepreneur who seeks finance and faces licensing is first and foremost concerned with the commercial prospects. And whether there is licensing or not, the market-prospects are decisive for obtaining finance.

If the prospects are good, getting finance may ultimately depend on the registration of rights and on the registration of the ship itself, which thus assumes decisive importance.

Important aspects of registration of ships

Article 5 of the 1958 High Seas Convention and the corresponding article 91 of the United Nations Convention on the Law of the Sea concern registration.

Article 5 of the 1958 Convention provides:

> "Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.
> There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships

flying its flag."

Article 91, paragraph 1 of the United Nations Convention on the Law of the Sea provides:

> "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship."

The 1958 High Seas Convention and the United Nations Convention on the Law of the Sea do not elaborate on registration. It follows from Art. 6 of the High Seas Convention and Art. 92 of the Law of the Sea Convention that double nationality and thus double registration must be avoided, in order to ensure that the ship is not under the jurisdiction of more than one state.

The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages agreed at Brussels, 27th May 1967 but not in force, contains (Article 3, paragraph 2) provisions aiming at avoiding double registration of vessels by making registration conditional on the delivery by the State of the former register of a certificate to the effect that the vessel has, or will be, deregistered.

Conditions for registration

The conditions for registration referred to in Article 5 of the 1958 High Seas Convention and Article 91 of the Convention on the Law of the Sea were discussed in UNCTAD, at conferences convened to draft an International Agreement on Conditions for Registration of Ships held in Geneva in July 1984 and January 1985. A third and final session is scheduled for July 1985.

UNCTAD produced several studies on the subject e.g. "Conditions for registration of ships" TD/B/AC.34.2, 22nd January 1982, and "Practices in relation to recording of operators, the use of bearer shares and bareboat charters" TD/B/AC.34.6, 20th August 1982. Whatever the outcome of the UNCTAD conferences and whatever national positions emerge in that debate, it is clear that conditions for registration on a national level must be such as to identify clearly the owner, the operator (in case the owner is not the operator) and the ship. Without such clarity creditors' rights may be in danger.

An important requirement, stemming from the need to protect creditors' rights and also to prevent the dual nationality of a ship, is the prohibition of simultaneous registration abroad.

The register

The first question to be resolved is whether to organise registration centrally or in different ports.

If registration is centrally organised there may be only one central register which may not be inconvenient in a small state; there may be

branch offices of the central register, where registration may also be effected, and which will forward data to the central register to keep it up to date. Central registration is practised in Mexico, Liberia, Panama, Argentina, Venezuela and the Netherlands.

In a system of decentralized registration, each port has its own register and only through special procedures can transfer to another register take place. The register of origin has to ask the mortgagees for permission. This system is prevalent in the United Kingdom, United States of America, Italy, Cyprus and Greece. Creditors generally prefer central registration for convenience and because it gives better protection against fraud.

The information to be kept in the register may include:-

Identity of the ship, e.g. name, year and place where the ship was built, tonnage, length, etc.;

Name(s), nationality, address(es) of the owner(s), operators and manager;

In the case of more than one owner, their respective shares in the ship;

In the case of an owning corporation, the names, nationality and addresses of the major shareholders, the directors and supervisory directors as well as the place of the head office of the corporation;

The seat of the company managing the ship;

The Composition of the crew.

It is useful to include a provision for compulsory notification to the registrar of any change in the above information.

The duties of the registrar may include:-

The entry and cancellation of an entry;

Verification of the documents;

The issue of a certificate of registration.

The legal status of entries in the register can be either that the data recorded constitute legal evidence (the positive system) or a presumption of the correctness of the data recorded (the negative system). In the latter system the data is not sufficient evidence and for example, it is necessary to establish title and ownership by other means.

The positive system prevails in the United Kingdom, United States of America and Liberia. The negative system is found in the Netherlands. Whichever system is chosen, it can affect liability. From the creditor's point of view, of course, the positive system is preferable.

In both systems the role of the registrar is restricted to prima facie verification of the documents presented. No further investigation is made

into the authenticity of the documents. This may be regrettable for the creditor or future buyer, who will usually want maximum protection. On the other hand authentication of documents by the registrar would require substantial effort. Entrusting courts with the examination of the documents prior to registration as is the practice in the Netherlands, lessens the disadvantages.

Provisional registration

For financing purposes registration is sometimes needed before the safety or tonnage measurement certificates are ready. This is the reason why many states provide for provisional registration. Although useful and necessary, provisional registration should be limited in time. (The example of Panama where provisional registration may continue indefinitely is a particularly inappropriate one).

Provisional registration should not be allowed to expire nor cancelled when this would affect the rights of mortgagees. The mortgagee should be allowed to take possession of the vessel and meet the relevant safety requirements in order to obtain the necessary certificates.

Who may apply for registration

As a rule only the owner can apply for registration and the ship will be registered in his name.

Some countries allow registration by a bare-boat charterer, in which case the ship is registered in his name and the owner has to consent.

Documentation for application

The following documentation may be required:-

Proof of ownership (or the charter party in case registration by the bare-boat charter is contemplated);

Statement by the owner (or the bare-boat charterer) that the ship is not registered abroad;

Various other documents including Tonnage Measurement Certificate; Safety Certificate; Statement by owner, supported by some official evidence, that the ship meets the nationality requirements for ownership; in the case of registration in the charterer's name, a statement by the owner that he does not object to this registration, and a statement by the charterer, also supported by some official evidence, that he meets the nationality requirements.

A certificate of deregistration, issued by the authorities of the former state of registration if the ship is being transferred from a foreign registry.

Cancellation of registration

The registration of a ship ought to be cancelled once it no longer meets the requirements for registration.

Cancellation may be effected by the registrar ex officio or at the request of the owner. If the charterer requests cancellation of the registration in his name, the owner has to consent.

Cancellation ex officio takes place inter alia if:-

The ship no longer meets the ownership requirements;

The ship is registered abroad;

The ship is lost.

A mortgagee should have the right to oppose deregistration before the registrar or the court until appropriate guarantees have been established.

The owner needs a certificate of deregistration if he intends to register the ship elsewhere.

Change of registration

It is useful to have a provision in the national legislation to prohibit change of registration and nationality other than in ports where reregistration may be effected.

Conflict of Law Rules and the 1926 and 1967 Conventions

The subject of mortgages in private international law may be divided into two parts: the question of the law applicable to the creation of the mortgage, its effects, and its termination on the one hand; and the question of its recognition in other countries on the other. There is no doubt to-day that mortgages are subject to the law of the flag, in this context more pertinently called the law of registration, and that law governs the relationship between mortgagor and mortgagee as a whole, including creation, effects and termination. It might be thought that recognition in countries other than that where the vessel is registered of mortgages which have been created under the law of the flag is the basic problem, but in practice recognition gives rise to little difficulty.

The 1926 Convention provided in Art. 1 that mortgages, hypothecations and other similar charges should be regarded as valid and respected in other convention countries if they are correctly made in the country where the vessel belongs and registered in a public registry.

The rule of the 1967 Convention, although more elaborate, amounts to the same thing. Mortgages and hypothecs shall be enforceable if they are effected and registered in accordance with the law of the vessel's registration, if the register and documents deposited there are open to public inspection and extracts are obtainable and if the register or the documents specify the holder of the mortgage either by name and address or as bearer as well as the amount secured and the data which are necessary to determine the rank of the mortgage in relation to other mortgages.

Thus, under the conventions the rule is that foreign registered mortgages are recognised and enforced in convention countries, though under the 1926 Convention, only if the vessel is registered in a convention country.

The remarkable thing about the 1967 Convention seems to be its recognition of all foreign mortgages regardless whether the country of origin is a convention country or not, i.e. regardless of reciprocity. The explanation is, of course, that besides requiring valid creation of the mortgage under the law of registration, the convention requires certain substantive conditions be met with respect to the foreign register and its contents. Thus it combines a rule of private international law with one of substantive law.

Although remarkable as a convention rule it does not go much further than many, if not most, of the countries which have not adopted it. Registered mortgages which fulfil certain minimum conditions seem to be recognised almost everywhere. That also seems to be true under American and English law. Perhaps the convention is not so remarkable in that maritime liens are covered first, and there lex fori prevails; the only problem, therefore, is whether mortgage creditors, typically originating in building loans, should be preferred to simple creditors or not.

The 1967 Convention goes into more detail concerrning the effects of recognition. Art. 3 of the convention first prohibits deregistration of a vessel without the consent of holders of registered mortgages. At the same time it enjoins other states from registering the vessel before it has been deregistered in its former registry or a certificate has been received from that registry that deregistration will take place immediately following the new registration.

Furthermore the convention in Art. 2 contains a rule of choice of law. It provides for the application of the law of registration to the ranking of mortgages as between themselves and in respect of their effects on third parties. The latter provision, however, only applies without prejudice to the provisions of the convention, which as we have seen has its own rules of ranking as between mortgages and liens.

The choice of law rule also provides that procedural matters relating to the enforcement are governed by the law of the state where enforcement takes place. That is in accordance with general principles.

PART II

Enforcement of Securities

A ARREST OF SHIPS

(a) The Civil Law Approach

In civil law countries arrest is a word which means two different things:-

The French "saisie conservatoire" (in Italian "sequestro conservativo"; in Spanish "embargo preventivo") a conservative measure, aiming at preventing a reduction of the assets of the debtor before the claim can be enforced on such assets through their forced sale: and the French "saisie-execution" (in Italian "pignoramento"; in Spanish "embargo") the seizure of the assets of the debtor for the satisfaction of a claim through forced sale.

Arrest as a conservative measure

A decree may be obtained before proceedings on the merits of the claim are commenced and in any event before an enforceable judgment is delivered, its purpose being to prevent the sale, or the disposal in any other manner, by the debtor of his assets. The conditions required in order to obtain an order of arrest from the judicial authority vary slightly among the civil law countries; but generally they are prima facie evidence of the claim and evidence of the need for a conservative measure, of the danger of the assets of the debtor diminishing in such a manner as to prevent the future enforcement of the claim.

Any asset of the debtor, immovable or movable, as well as credits, may be the subject of arrest and any type of claim may entitle the claimant to seek such an arrest.

The arrest of immovable property does not normally imply the dispossession of its owner, since the owner is usually appointed as custodian. Nor is dispossession necessary, for the purpose of the arrest is achieved through endorsement of the order of arrest in the land register. The arrest of movable property on the contrary is effected through the physical apprehension of the thing by a court's marshal and thus the dispossession of the owner.

These general rules apply also to ships (except for the changes brought about by the 1952 Arrest Convention), and therefore a ship may be arrested as security for any kind of claim, be it a maritime claim or not.

Since the ship is movable property registered in a public register, dispossession would not actually be required. The protection of the claimant against subsequent transfers of, or charges on the ship is obtained by means of endorsing the arrest in the ships' register. However, during its operation a ship is subject to a number of perils; it may be apprehended and sold by other claimants whose claims, albeit later in time, have priority over the claim of the claimant who arrested the ship. For this reason the arrest of a ship usually involves prevention from sailing and the appointment of a custodian. Art. 30 of the French Decree No. 67-967 of 27th October 1967 provides that the "saisie conservatoire"

prevents the sailing of the ship and Art. 26 provides that the port authority, when advised that a ship has been arrested, shall refuse permission to sail. Art. 687 of the Italian Code of Navigation provides that the order of arrest shall include an intimation to the master not to sail.

However, both under French and Italian law, at the discretion of the court, a ship under arrest may be permitted to perform one or more voyages, provided the owner of the vessel makes satisfactory guarantees available, such as proof that adequate hull and P.&I. insurances are in existence, that the salary of the crew has been paid and that funds are available to cover the cost of the voyage, such as bunkers and port expenses.

In civil law countries arrest is not normally a means of obtaining jurisdiction. If the court by which the arrest is granted is not competent on the merits of the claim, proceedings are brought before it only for the purpose of validating the arrest. Proceedings on the merits must be brought before the court of competent jurisdiction whose judgment may then be enforced on the ship or on the security provided by the debtor in order to release the ship from arrest.

Since the arrest is a conservative measure, the ship may be released if the owner provides security for a sum equal to the claim or, if the claim is in excess of the value of the vessel, equal to the value of the vessel. The security may be a payment into court or a bank guarantee, or, provided the claimant agrees, a letter of undertaking from the ship's P.&I. Club.

Arrest as a means of satisfying a claim

When the claimant has obtained an enforceable judgment or when his claim is evidenced by a document which has the same effect, such as a promissory note or a notarial deed wherein the debt is acknowledged arrest is a method of getting a claim paid. The arrest is effected by the apprehension of the vessel by the court marshal whereupon the claimant must, within the prescribed period, give notice of the arrest to the debtor and to all registered claimants and then apply for the forced sale of the vessel. The Court then orders the valuation of the vessel and fixes a date for the auction, and also the conditions for participation in the auction, such as the payment of a deposit, the minimum price, and the amounts by which successive bids should increase.

Title to the vessel is transferred by the Court to the successful bidder, free of all encumbrances. All claimants in fact participate in the distribution of the proceeds of sale on the basis of their priorities.

(b) The Scandinavian Approach

Arrest in the Scandinavian countries (and in Germany) does not differ essentially from arrest in the civil law countries as described in Chapter 1(a).

Arrest in Scandinavia is a temporary, conservative measure, designed only to assure the existence of certain assets for the purpose of enforcing a claim when an enforceable judgment has been obtained. Arrest is not part of the seizure of assets used to enforce a claim. The latter seizure is regarded as a completely separate procedure subject to different rules. But of course, such a seizure is necessary prior to the forced sale of an asset of a debtor such as his ship.

The Scandinavian countries have not ratified the Arrest Convention, although it has been ratified by the Federal Republic of Germany. As a result vessels may be arrested in Scandinavia to create security for any claims against their owner regardless of whether the claims are maritime in character. The restriction of the Arrest Convention to maritime claims does not apply. It is to be expected, however, that Denmark will ratify the Arrest Convention along with the European Communities Convention on enforcement of judgements and jurisdiction of courts.

An arrest must be registered to be protected against the rights of third parties. This applies to vessels registered in the domestic registry. Foreign vessels are treated in accordance with the law of the flag. The arrest is made effective by notifying the harbour authorities that the ship is prevented from sailing and by the bailiff taking the vessel's certificates into his possession.

In all three Scandinavian countries jurisdiction is based upon the presence of the vessel in the jurisdiction. This rule will not apply to Denmark after ratification of the European judgments convention mentioned above as far as ships owned by persons or companies domiciled in the EEC countries are concerned.

Jurisdiction based upon the presence of the vessel in the territory ceases when the vessel is released against security. The security, if given by the owner of the ship and deposited in the country where the vessel was arrested, will itself be a basis of jurisdiction in that country. However, if the security is given by a third party, e.g. the P & I Club of the vessel, this ground of jurisdiction will cease to exist.

In Norway and Sweden, however, arrest is itself a head of jurisdiction and even if the arrest is avoided by putting up security in advance or if the ship is later released upon provision of security, the arrest jurisdiction continues. In Denmark, arrest does not give rise to jurisdiction but this will change when the Arrest Convention is ratified. The present situation makes problems because judgments of only a few foreign countries are recognised. If an arrest is made in Denmark but jurisdiction is elsewhere, the foreign judgment obtained where jurisdiction exists may not be capable of enforcement on the arrested ship.

An arrest is usually ordered if the claimant can show that there is a reasonable probability that a claim is valid. In Norway the law is a little more restrictive since, apart from cases where a lien has arisen, it is a condition for arrest that the conduct of the debtor gives the claimant reason to fear that enforcement without the arrest will be difficult or will have to be effected abroad. Security for wrongful arrest will normally be required from a claimant unless it is clear that the claim is valid.

(c) The Common Law Approach

Arrest of vessels in the United States

The United States is not a signatory to any international convention pertaining to the arrest of seagoing vessels, and, accordingly, virtually all law regarding the procedure and substance of ship arrest in the U.S. must be found in the U.S. case law and statutory law alone.

The grounds for, and procedures governing the arrest of vessels in the United States are set out in Supplemental Rules B and C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure (hereinafter "Admiralty Rules"). The Federal Rules of Civil Procedure are rules issued by the Supreme Court of the United States pursuant to authority given to it by Congress to promulgate rules governing procedure in all suits of a civil nature, that is cases at law, in equity or in admiralty. The Admiralty Rules supplement the more general Federal Rules of Civil Procedure with procedures applicable to the unique aspects of maritime cases. They specifically permit the seizure of a vessel by two related, but distinct means, the "warrant of arrest" and the "writ of attachment". The warrant of arrest is used where the claim is against the vessel (an in rem claim). The writ of attachment is available where the claim is solely in personam against the vessel's owner; there the attachment serves the purpose of subjecting an absent owner's assets to the jurisdiction of the court (only up to the value of the attached vessel, of course). This is known as quasi in rem jurisdiction. Unlike the case with a strict in rem claim, the claim in such a case is made against the vessel not because of its potential liability but because of its owner's potential liability.

Rule C provides that a warrant for the arrest of a vessel may be obtained in connection with either (a) the enforcement of a maritime lien, or (b) an action in rem permited under admiralty common law or any statute of the United States which permits a maritime action in rem or a proceeding analogous thereto (1). Rule B provides that a writ of attachment, which restrains the departure of a vessel as surely as the arrest of a vessel, may be issued with respect to any admiralty or maritime claim in personam, against its owner provided the owner can not be found within the district.

The general view is that a chartered vessel is not a chattel of the charterer and that neither the vessel nor the charterer's interest therein is subject to attachment in respect of a claim against the charterer.

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(1) 46 U.S.C. § 951, for example, provides the basis for an arrest by the holder of a preferred ship mortgage:

> "A preferred mortage (including foreign ship mortgage) shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty."

Furthermore, although there is little authority, most commentators would not permit attachment of a time-chartered vessel with respect to a claim against the owner where it would defeat the charterer's right to possession. This is to be distinguished from a Rule C arrest in rem where the claim is against the vessel and thus not affected by any contract between owner and charterer. Admiralty Rule E(8) provides that the owner may make a restricted appearance to defend against either a claim in rem (initiated by warrant of arrest) or quasi in rem (initiated by a writ of attachment) without subjecting himself to liability beyond the value of the vessel under restraint and without subjecting himself to jurisdiction for the purpose of any other claim as to which process has not been served.

Evidence necessary to obtain an arrest

An arrest may be obtained in the United States upon the simple allegation of any maritime lien or a cause of action under a statute which would permit an arrest in rem. No evidentiary hearing is required prior to issuing a warrant of arrest; however, a verified complaint, in effect an affidavit as to the truth of the matters contained therein, is necessary. The verified complaint must allege the existence and nature of the maritime lien or maritime cause of action, must describe with reasonable particularity the property that is the subject of the action, and must state that the res is within the district or will be during the pendency of the action. A warrant of arrest obtained pursuant to Rule C need not be issued by a judge and, in fact, is routinely issued by the Clerk of the Court simply upon the filing of the verified complaint and payment of the required fees (2).

An attachment of a vessel, which procedurally is tantamount to an arrest, may be obtained pursuant to Rule B(1), which provides that a vessel (or other goods and chattles or credits and effects in the hands of named garnishees) may be attached whenever a maritime cause of action exists against the owner personally, and upon a further averment under oath that the owner-defendant can not be located within the district where process is served despite a diligent search. A Writ of Attachment pursuant to Rule B(1) is obtainable by a procedure very similar to that governing a Rule C arrest and is routinely issued by the Clerk of the Court upon the filing of the necessary verified complaint and affidavit that the defendant can not be found in the district, and upon payment of the required fees. A Rule B attachment may be used as a basis for the quasi in rem jurisdiction referred to above and is permissible only where the court does not otherwise have personal jurisdiction over the defendant.

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(2) Upon filing of the complaint in required form, "the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action, and deliver it to the marshal for service". The actual practice is for the clerk to return the warrant to the attorney who then delivers it to the marshal.

Functionally, the Rule C arrest and Rule B attachment differ in that the Rule C arrest is the means by which to execute upon a traditional maritime lien on the vessel or bring a statutorily authorised maritime claim against a vessel while the Rule B attachment is a means for a plaintiff to acquire jurisdiction over, and security from, a defendant against whom he has only an in personam claim and no in rem claim over the particular vessel upon which the writ is served.

Notice requirements before arrest or attachment

U.S. Rules of Practice do not require that any notice be given to any party before the initial attachment or arrest of the vessel, for the obvious reason that the vessel might well escape the jurisdiction were its owner or other interested parties to know in advance of the impending arrest.

The United States rules, however, require notice quite soon after arrest or attachment, and certain statutes under which an arrest or attachment may be obtained have additional notice requirements. Rule C(4), requires that if the property is not released within 10 days after service of the warrant of arrest on the vessel by the Marshal, the plaintiff must cause public notice of the arrest to be given in a newspaper of general circulation in the district. Local rules of practice elaborate this requirement. In New York, for example, the Rules (Local Rule 3(a)) require publication of notice of the arrest in a newspaper of general circulation upon at least one occasion, and require the notice to state that any Claimant must file his claims within ten days after the arrest or within such other time as may be allowed by the Court, otherwise the vessel may be sold to satisfy the demand set forth in the Complaint. Furthermore, Local Rule 3(b) specifies that the case may not be heard and sale may not be ordered until after such publication. Additionally, both the Admiralty rules and local admiralty rules now require immediate notice to the owner of the vessel, provided his identity can be established upon diligent search, immediately upon service of the Warrant of Arrest; this requirement is in addition to the traditional requirement that notice is to be posted upon the vessel in certain conspicuous locations at the time the Marshal serves the Warrant (3).

Rule C specifically notes that the Ship Mortgage Act, 46 U.S.C. § 951, contains additional notice requirements with respect to vessel mortgages. That section requires that, in addition to any notice of publication, actual notice of the commencement of the suit shall be given by the libellant (claimant or plaintiff), in such manner as the court shall

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(3) Local Admiralty Rule 10(b) of the Southern District of New York, for example, requires prompt notice of an attachment in writing, by telex, telegram or cable, and further provides that failure to accomplish or to have diligently attempted such notice, shall be deemed evidence of "manifest want of equity" which would permit the Court to dismiss the arrest after an immediate hearing.

direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel as provided in 46 U.S.C. § 925, "unless after search by the libellant satisfactory to the court, (it appears that) such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States"(4).

Government owned vessels

In the United States, vessels owned, possessed, or operated by the United States government are immune from arrest. Nevertheless, Rule C provides that an action against the United States may otherwise proceed on in rem principles. Under the Foreign Sovereign Immunities Act, 28 U.S.D. § 1602 et seq., vessels owned by foreign governments or instrumentalities thereof are also immune from arrest, except in some cases where the arrest is to satisfy a previously obtained judgment. Nevertheless, process in the nature of an in rem suit may be served on a vessel against which a claimant asserts a maritime lien based on the commercial activity of the foreign state, and the owner government may thereafter be found liable in personam on an amount up to the value of the vessel upon which the maritime lien existed and process was served. Where such a vessel is knowingly arrested by a lienor, the notice shall be deemed void and no suit may thereafter be brought by that lienor against the vessel.

Mechanics of arrest

Since judicial taking and maintaining of physical custody of the property proceeded against is an absolute prerequisite to the continuation of the proceedings to judgment on the merits (5), facilitation of execution of the arrest by the United States Marshal is of prime importance. The pragmatic aspects of execution vary considerably from district to district, ranging from the rigidly formal to the possibility of effecting an arrest by telephone.

The mechanism of an arrest in the United States is governed by local practices, variable from district to district within the United States, by statutory requirements governing the duties and discretion of the Marshal, and by the United States Marshal's Manual, which is the guide published by the United States Department of Justice for use by individual United States Marshals in determining what actions within their discretion should

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(4) Failure to give such notice, while not a jurisdictional defect, subjects the libellant to liability to the other claimant in the amount of his interest in the vessel, terminated by the sale of the vessel.

(5) Neither stipulation to in rem jurisdiction, nor appearance by the Owner in personam, nor initial arrest in rem suffices to permit continued jurisdiction over the res where actual custody is not maintained.

be taken in the course of an arrest [6]. In accordance with the philosophy of the Justice Department and 28 U.S.C. § 1921, the Manual instructs United States Marshals to take no action in furtherance of an arrest without being funded for expenses in advance by the plaintiff and/or receiving an indemnification for any losses or damages which might arise out of the actions of the Marshal [7]. This requirement creates a practical difficulty in accomplishing many arrests, as for example those which must take place upon very short notice during the middle of the night, or on weekends. The United States Marshal's office for the District of New York requires payment of $4,500 in cash or certified check in advance of service of any Warrant of Arrest or Writ of Attachment upon a vessel as a deposit for initial watchmen's fees and insurance costs.

Inasmuch as certified checks in that amount are unobtainable on weekends (even cash will not always be acceptable), it is essential that an arrest is anticipated as far in advance as possible [8].

As noted, the United States Marshal's Manual admonishes marshals and their deputies to undertake little if any action without (1) a direct authorisation from the Court, (2) prior payment and arrangement of expenses by the plaintiff, and (3) adequate indemnification for the difficulty of arranging services for the vessel during the period of arrest, (due in part to the doctrine that when a vessel is in custodia legis, no further lien can attach, and payment for services is dependent upon a court order, which is granted "if equity and good conscience" so dictate). For this reason, suppliers of necessaries (food, fresh water, diesel fuel, etc.) usually demand payment upfront or a binding guaranty by the plaintiff.

There are many other strict requirements to be complied with.

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(6) See 1972 AMC 569.

(7) 28 U.S.C. § 1921 sets fees in connection with vessel arrests and requires the collection of an advance deposit to cover initial expenses. See also 28 U.S.C. §§ 561-7.5 (outlining duties of marshals and 31 U.S.C. § 665 (prohibiting the obligation of government funds to defray costs incurred in seizures on behalf of private litigants).

(8) In extreme circumstances, it is possible to obtain a Writ of Attachment from a judge at his or her home or chambers on a weekend. Even if that is accomplished however, and the requirements of cash or certified check is either dispensed with by Order of the Court or has been obtained in advance, unless a qualified United States Marshal or Deputy United States Marshal can be located, it is still well nigh impossible to arrange service of the warrant. In that event, the best planning in the world will not have sufficed to accomplish the physical service of the warrant, which is an absolute jurisdictional prerequisite to the Court's obtaining any control or right over the vessel.

While the Marshal's Manual advises the marshal to permit the continuation of loading and discharging and other activities which are part of the vessel's routine port operations, in many jurisdictions the marshal requires a court order before permitting any activity whatsoever (9). Part of the reason for this requirement is no doubt so that the marshal may obtain the necessary indemnification by the Court or from the parties, and part of it is due to the marshal's understandable reluctance to permit activities to continue if he is not aware of the outcome of the action. It is for this latter reason, no doubt, that many marshals' offices permit routine discharge and loading operations except where the arrest has been arranged at the behest of the mortgagee of the vessel, since in this situation the likelihood of the vessel being released, and continuing its operations is rather low.

As to the timing of the actual arrest, it should be noted that the in rem action may be filed but the issue of process held in abeyance until an opportune moment, as, for example, until the location of the vessel is known with precision (Admiralty Rule E(3)(b)). Needless to say, any aid that can be given to the United States Marshal in locating and reaching the vessel expedites the service of process on the vessel.

Execution of the warrant of arrest is effected by the Marshal upon delivery to him of: (1) the warrant issued by the clerk, (2) a certified check for the initial deposit, and (3) a U.S.M. Form 285, properly completed by the plaintiff's attorney (10).

No bond is required of the plantiff before the initial arrest (11). Process is executed by affixing a copy to the vessel in a conspicuous place and by leaving a copy of the complaint and process with the person having possession, or his agent (Admiralty Rule E(4)(b)).

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(9) In other districts, however, the marshal's requirements are quite lax and his willingness to accomodate plaintiffs, as well as the regular port routine for the vessel, is considerable.

(10) USM Form 285 (see 1972 AMC 572) requires names of parties, a reasonably detailed description of the property and its location, and special instructions (such as arrangements made to facilitate service by the marshal).

(11) Although a plaintiff is not absolutely bound to file a bond as a prerequisite to a Rule C arrest, pursuant to Admiralty Rule E(2)(b), "the court may, on the filing of the complaint or on the appearance of any defendant, claimant or any other party, or at any later time, require the plaintiff (or any other party) to give security in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him". Since the initial Rule C warrant of arrest is issued by the clerk of the court, a cost bond is not routinely required in the Southern District of New York, if at all, until the defendant owner appears in the action.

Once the warrant is served, the ordinary practice is for the ship's owner or representative to post a bond or P & I letter of undertaking. In many instances arrest of the vessel may thus be terminated within hours of the original service of the warrant. Local practice, in fact, may be for the attorney for the potential arresting party to telephone the attorney for the P & I Club which insures the vessel to inquire whether a letter of undertaking would be issued without the necessity of arresting the vessel and causing attendant delay and burden. Needless to say, such an action cannot be undertaken exept where the expectation is high that such a letter will be provided and where such a practice is common and accepted both among the attorneys and their clients.

Where a bond is posted pursuant to the Rules of the Court, it is posted under Rule E(5)(a,b), which requires that the amount of the bond, in the form of a Letter of Undertaking by a qualified surety company, shall be no more than double the amount of the claim or the value of the vessel, whichever is less (12). If there is a dispute as to the value of the vessel, of course, an immediate appraisal may have to be obtained.

The question of whether a vessel arrest, without notice, upon the bare allegations of a verified complaint, conforms with the fundamental requirements of the due process of United States law, has been addressed by several courts in recent years. The general consensus is that despite the lack of requirement of prior notice or that a judge has to make a finding of probable cause, in order to arrest the vessel, Rule C arrests are constitutional, both because of the long history of such admiralty arrests and because local notice and hearing provisions substantially meet any objections. Thus, both the 5th Circuit, in Merchants Nat'l Bank v. The Dredge General G.L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), certiorari denied 456 U.S. 966 (1982) and the 4th Circuit in Amstar Corp. v. s/s Alexandros T., 664 F.2d 904 (4th Cir. 1981) have upheld the constitutionality of Rule C arrests.

Arrest of vessels in England

Arrests of vessels are obtained in the United Kingdom in accordance with the Administration of Justice Act of 1956, and its successor, the Supreme Court Act of 1981, which give effect to the International Convention Relating to the Arrest of Sea-Going Ships, signed at Brussels on May 10, 1952 and to which Britain is a party.

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(12) 28 U.S.C. § 2464, by contrast, requires the bond to be twice the amount of plaintiff's claim, without any court discretion to reduce the amount; Rule E(5) has been followed and 28 U.S.C. § 2464 generally ignored.

Furthermore, under the principles enunciated in Mareva Compania Naviera S.A. v. International Bulk Carrier Ltd. (The "Mareva"), (1975) 2 Lloyds Reports 509, and its progeny, English Courts will, where it appears that the owner of property is about to remove it from the jurisdiction in order to frustrate a judgment which the plaintiff is likely to obtain, enjoin a vessel's owner or operator from removing it from the jurisdiction pending litigation. The "Mareva" injunction applied to vessels may have much the same effect as a Rule B attachment in the United States with the significant difference that it does not give rise to in rem or quasi in rem jurisdiction but constitutes only an order to the owner of the vessel that he may not remove it from the jurisdiction pending resolution of the litigation. No jurisdiction over the vessel itself is obtained. Accordingly, the court may not directly conduct a sale of the vessel under restraint. In further contrast to a Rule B attachment, the "Mareva" injunction will be granted only where there is a strong likelihood that the plaintiff will ultimately prevail in his action. In this regard the "Mareva" injunction is similar to rules for attachment in non-maritime causes of action in the United States.

Grounds for, and evidence necessary to obtain arrest

An arrest in rem may be obtained in the High Court of Justice, sitting in Admiralty, or in certain county courts permitted to exercise admiralty jurisdiction, on the allegation of a maritime tort (personal injury, collision damage, cargo damage, etc. arising out of the vessel's operation), breach of a maritime contract, salvage, supplies and repairs to a ship, wages, general average and mortgage or hypothecation of a vessel (all claims permissible under the 1952 Brussels Convention, which allows no other arrests) (13). Both maritime liens and statutory liens (liens given maritime status by statute) provide bases for arrest.

The mere allegation by affidavit of the existence of a claim giving rise to a right of arrest, and a statement of the nature, circumstances and damages outstanding in connection with the claim, together with evidence that the vessel is about to be removed from the jurisdiction, is sufficient to obtain an arrest. The plaintiff's attorney must issue a Writ of Summons directed "to the owners of and parties interested in" the offending ship. The Writ is usually followed by the issue of a Warrant of Arrest only if security is otherwise unobtainable by virtue of an outstanding Caveat against Arrest or by undertaking.

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(13) Yet the Convention states:

> "nothing in this Convention shall be deemed to extend or restrict any rights or Powers vested in any Governments ... under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction" (Convention, Article 2). Because of this language, the Mareva injunction may be applied to non-maritime claims not specified in the convention, without offending the terms of the Convention.

To obtain a "Mareva" injunction forbidding the removal of the res from the jurisdiction, the plaintiff must show a cause of action upon which he is likely to prevail and a reasonable likelihood that the owner of the property intends to remove it from the jurisdiction.

Mechanism of arrest

Upon issue of the Writ (the complaint setting forth the cause of action), the plaintiff must apply to the Admiralty Registry for a Warrant for Arrest of the vessel (sister ships may also be named in the writ but each writ may ordinarily be served only on one ship; additional writs and warrants must therefore be issued for each ship to be arrested). The application must be supported by an affidavit stating the identity of the applicant for the warrant, the nature of the claim, the nature of the property to be arrested, and the details of the beneficial ownership if it is a sister ship against which the claim is made (14). An arrest may be effected within several hours of the time the necessary information becomes available.

The warrant of arrest remains valid for 12 months and thus can be arranged well in advance (unless secrecy is a concern, as it usually is).

No security need be posted by the claimant upon the arrest. Only if the arrest is both wrongful and malicious would there be a claim for damages. The plaintiff's solicitor, however, must give his undertaking, as an officer of the court, not as agent for plaintiff, that he will indemnify the Marshal for all costs, expenses and liability.

The Admiralty Marshal must serve the Warrant of Arrest. While a Writ may be served by the Plaintiff's lawyer, where an arrest is involved the Marshal ordinarily serves the Writ as well. The Writ is served only upon the ship or upon lawyers instructed by the owner to accept service. The Warrant must be served on the ship (actually posted on the ship, not served on the Master) in order to effect proper process. As in the United States, the Marshal is responsible for the safekeeping and proper maintenance of the arrested vessel, and the costs will be a first charge on the proceeds of sale (and for which the plaintiff's solicitor initially indemnifies the Marshal). The Marshal will ordinarily insure the vessel only with respect to his own liability except where extensive vessel movements, are planned and the plaintiff should accordingly arrange for adequate insurance.

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(14) The Writ and Warrant of Arrest may be issued by the Clerk without court intervention. In the event the supporting affidavit lacks some of the required information, the court (not the clerk) may, in its discretion, issue a warrant notwithstanding plaintiff's failure to comply with all technical requirements.

If the owner has reason to believe that an arrest is likely in England he may arrange in advance for the issue of a caveat against arrest. The caveat is an order issued by, and maintained on file by the Clerk of the Court, which warns any potential arresting plaintiff that an arrest of the vessel will be at his peril. Where there is a caveat against arrest in force with respect to the vessel to be arrested the arrest in admiralty is wholly unnecessary provided the undertaking filed is sufficient to cover the claim. The caveat against arrest is issued upon an undertaking from the owner of the ship or his solicitor to enter an appearance in any action that may begin against the vessel and to give bail in such an action (or pay the amount into court) in an amount up to that specified in the "praecipe", the document filed by the owner or his solicitors which sets forth the undertaking in the event of an arrest. Any person arresting a vessel is obliged to ascertain whether a caveat against arrest is in effect, and if he arrests where one is in effect, he must justify his action or pay the damages sustained.

Nowadays the caveat against arrest is less common and solicitors are much more inclined, as in the United States, to offer letters of undertaking from the owner's P & I Club or a bond, in lieu of the more formal caveat as a means of forestalling an anticipated arrest.

Government owned vessels

England has not subscribed to any international conventions relating to the arrest of state-owned vessels. Vessels owned by the British Government and used for Governmental purposes may not be arrested in Britain (although alternative actions may be brought against the Crown). Vessels owned by foreign governments may be arrested if they are used in ordinary commercial activities.

The custodial period

In England, so that the Marshal need not continually approach the Court for orders permitting specific activities to preserve, maintain and provision the arrested vessel, an omnibus order is routinely issued which permits the Marshal at his discretion, to take appropriate measures to preserve, move and supply the arrested vessel.

When the expense incurred by the Marshal approaches one half the value of the vessel, the Marshal will usually notify the arresting parties. If they take no action he will himself apply for the immediate sale pendente lite of the vessel. The Marshal's expenses are satisfied out of the proceeds, or if the vessel is released, by the releasing party (who must post an undertaking sufficient to cover as yet uncomputed costs).

When the Marshal decides to lay up the vessel (if it appears it is to be sold or held in custody for an extended period), he will probably arrange the repatriation of the crew after obtaining an order permitting payment of wages, to be reimbursed out of the proceeds of sale, unless the consul for the country to which the seamen belong arranges for wage payment and repatriation, which would then be recovered outside the context of the action.

The 1952 Brussels Convention on Arrest of Ships

The initiative of preparing an International Convention on Arrest of Ships dates from long ago. An International Committee was, in fact, appointed following a resolution of the CMI Conference in Antwerp in 1930, with the task of preparing a draft Convention on Arrest of Ships. A first draft was submitted to the CMI Conference in Oslo in August 1933.

That draft, by which arrest could be used as security for all claims against the owner of a vessel, met with opposition from the United Kingdom and the United States Delegations, who pointed out that in common law a vessel could be arrested only with a view to enforcing claims against the ship (CMI Bulletin No. 102, page 83). The draft was referred back to the International Sub-Committee who, hoping to avoid dispute, restricted arrest to claims for which a maritime lien was provided by the 1926 Brussels Convention. Eventually the draft which was submitted to the CMI Conference in Paris in May 1937, dealt only with arrest for claims for collision or other damage caused by a vessel, and salvage remuneration, and provided that the claimant could arrest the vessel in respect of which the claim had arisen, or any other vessel belonging to the same owner, even if ready to sail.

This draft also met with opposition from some Associations. The French Association objected to the possibility of arresting a sister ship (CMI Bulletin No. 102, page 112); the Norwegian Association pointed out that the draft granted the power of arresting a vessel in too many situations (page 117); the Swedish Association stated that the draft covered too restricted an area, and did not make clear whether or not the arrest of a vessel, as security for claims other than those covered by the draft, was permissible if authorised by the lex fori (page 120); the Italian Association considered the coexistence of a uniform law with national rules for claims other than those covered by the draft, impractical and dangerous (page 136); the United Kingdom Association did not express any view, but submitted a questionnaire (page 200). Following a proposal from the German Association (page 317), the Paris Conference restricted the scope of the draft convention to arrests in connection with collision damages; the draft as approved by the Conference did not, however, clarify whether or not a vessel could be arrested as security for other claims, if allowed by the lex fori (page 325).

After the World War the problem of the unification of the law on arrest of ships was raised again by the United Kingdom Association. It is therefore not surprising that the basic concepts of the Convention are taken from the Judicature Act 1925, such as the list of maritime claims, the rule whereby a vessel cannot be arrested for claims other than maritime claims, and the rule whereby the Courts of the Country in which the arrest is made have, in certain cases, jurisdiction on the merits as well.

The concept of arrest

Article 1, paragraph 2 defines arrest as the detention of a ship by judicial process to secure a maritime claim. The continental concept of arrest as security [1], thus seems to have been introduced into the Convention, although the power to secure claims by way of arrest is limited to the claims listed in Article 1, paragraph 1. A distinction is drawn between arrest and attachment, i.e., the "seizure of a ship in execution or satisfaction of a judgement", which is not covered by the Convention.

Therefore the notion of arrest is more limited than in the 1967 Brussels Convention on Maritime Liens and Mortgages (Article 8, paragraph 1 and Article 11, paragraph 2). The words "such arrest leading to a forced sale" in Article 8, paragraph 1 would include arrest as a security measure, as defined in Article 1 paragraph 2 of the Arrest Convention, and as the "seizure in execution or satisfaction of a judgement" (saisie exécution). If this were not the case, the latter type of procedural remedy could not interrupt the one year extinction period. The words "cost awarded by the Court and arising out of the arrest and subsequent sale of the vessel" in Article 11, paragraph 2 certainly include the "seizure in execution or satisfaction of a judgment"; they very likely include arrest in the sense this word is used in the 1952 Arrest Convention, although this may be open to discussion.

Co-ordination between the two conventions seems therefore highly desirable.

The arrest, as conceived and regulated by the Convention, is a judicial remedy. Article 1, paragraph 2 refers, in fact, to the detention of a ship "by judicial process", and Article 4 provides that a ship "may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made". Thus no vessel flying the flag of a Contracting State may be arrested in another Contracting State, otherwise than on an order of the Court, or of an "appropriate judicial authority" of that State. In other conventions reference is made only to "a Court" (see, for example, the 1952 Convention on Civil Jurisdiction in Matters of Collision, Article 1; the 1962 Convention on the Liability of Operators of Nuclear Ships, Article X; the 1967 Convention on Maritime Liens and Mortgages, Article 11; the 1969 Civil Liability Convention, Articles 9 and 10; the 1974 Passengers Convention, Article 17; the Hamburg Rules, Article 21). The addition in this convention of the words "or of the appropriate judicial authority" may have been made with a view to including judicial authorities which may

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[1] Reference to arrest as a means of obtaining security in respect of a claim is made also in some English decisions: The Tervaete (1922) P.259; The Jupiter (1924) P.236; The Cap Bon (1967) 1 Lloyd's Rep. 543; Re Aro Co. Ltd. (1980) 1 All E.R. 1067 (C.A.).

not qualify as "Courts". However, the words used in the translation are not entirely correct, for the Court is itself a judicial authority, indeed the most typical judicial authority. The French text is more logical and uses the words "toute autre autorité judiciaire competente". It is to be noted that "appropriate" and "competent" do not mean the same thing.

The authority by which the arrest is to be granted is a "judicial authority", and therefore in a Contracting State vessels flying the flag of another Contracting State may not be arrested pursuant to the order of an administrative authority, except in the cases mentioned in Article 2. This Article states:-

> ".... but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction."

In view of the initial provision, it seems clear that the Authorities mentioned in the last part of this Article may arrest or otherwise detain vessels to secure their own claims, or for reasons of safety or other public reasons, but not to secure any private claim, whether maritime or not.

It is worth noting that if the word "judicial" had been omitted, as in the 1976 Limitation Convention (Article 11), arrest by an administrative authority (such as a Harbour Master) would have been permissible.

Claims in respect of which a vessel may be arrested

These claims are listed in Article 1, paragraph 1. There are several problems to be considered with respect to this article. One of them is whether the list of maritime claims is satisfactory. Each individual maritime claim ought also to be examined on its own merits, with a view to establishing the clarity and completeness of the provision.

a) Damage caused by any ship either in collision or otherwise

The British Association in its comments on the preliminary draft (CMI Bulletin No. 105, page 44) said that it thought the words "or otherwise" were meant to cover all those situations where damage is caused by one ship to another without physical contact, by wash or by a negligent or hazardous manoeuver. On this assumption it agreed with the wording, and no further comment seems to have been made.

It is worth noting that in the Administration of Justice Act, 1956, whereby the United Kingdom gave effect to the Convention, albeit in part only, the reference to collision is omitted and the wording used is "any claim for damage done by a ship" (the wording is identical in the Supreme Court Act, 1982 s. 20(2)(e)).

In relation to this provision the House of Lords held in The Eschersheim

(1976) 2 Lloyd's Report 1, that although the ship itself must be the actual instrument by which the damage was done, "physical contact between the ship and whatever object sustains the damage is not essential" (Lord Diplock at page 8). This statement is particularly significant because in the same judgment it was held that where any provision of the Act which appears to intend to give effect to the arrest convention, is capable of more than one meaning, the Court may look at the Convention in order to gain assistance in deciding which meaning is to be preferred.

b) Loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship

The words "caused by any ship" are not followed in this case by the additional words "either in collision or otherwise", but seem to cover the same type of occurrences. In addition they may cover events occurring on board when the ship is the actual instrument by which the damage was done: e.g. a block falling and killing a passenger. The second part of the sentence widens the scope of this particular maritime claim to situations where the ship is not the instrument of the occurrence, such as when a passenger is injured falling on a slippery deck, or when a passenger falls overboard due to the lack of an adequate rail.

c) Salvage

Claims arising out of salvage may include both claims of salvors for salvage reward, and claims of the owners of the salved vessel on account of damage or delay due to the negligence of the salvors.

d) Agreements relating to the use or hire of any ship whether by charter-party or otherwise

Although the word "hire" is also used in respect of time charter-parties, in this context it should cover only bareboat charters. This view is supported by the French text wherein the corresponding words are "contrats relatif à l'utilisation ou à la location d'un navire, par charte-partie où autrement". Moreover sub-paragraph (e) refers to agreements relating to the carriage of goods whether by charter-party or otherwise, and thus includes time charter-parties.

Agreements relating to the use of a ship seem to cover contracts which, even if they are not bare-boat charters, have the effect of placing the ship at the disposal of the customer. The House of Lords in The Eschersheim, classified as such, on the particular facts of the case, a salvage agreement on Lloyd's Form. Very likely an agreement for storage of oil on board tankers may come under the same category.

e) Agreements relating to the carriage of goods in any ship whether by charter-party or otherwise

The words "agreements relating to the carriage of goods" seem to cover all contracts of affreightment with the exclusion of the bare-boat charter, that is time charter-parties, trip charters, single and consecutive voyage charter-parties, freight contracts and contracts of carriage under bills of lading or non negotiable documents, usually in the liner trade. Claims arising out of any such agreement would seem to include those for any type

of breach, and thus also those for loss of or damage to goods. But since these latter claims are specifically covered by sub-paragraph (f), it would appear that sub-paragraph (e) covers all types of breach except those resulting in loss of or damage to goods.

f) Loss of or damage to goods including baggage carried in any ship

This sub-paragraph is wider than the previous one in that it covers also tort claims. The word "baggage", without any qualification, seems wide enough to cover both "luggage" and "cabin luggage" as defined in Art. 1 (5) and (6) of the Athens Convention.

g) General Average

Whilst it is certain that claims for general average contribution come under this sub-paragraph, there may be doubts as to whether other claims also arising out of a general average act are covered, particularly when the act is ultimately found not to be such. Probably the problem has no great practical importance, for these claims, at least in so far as damage to or loss of the cargo is concerned, would be covered by sub-paragraph (f).

h) Bottomry

It need only be noted that in all modern maritime laws bottomry has been eliminated since it is not used any more.

i) Towage

Any type of towage, whether deep sea or port towage, is covered, as well as any type of claim, such as damage done by the tug to the tow or vice-versa, breach of contract, etc. It must be noted that some paragraphs refer to the nature of the event or to the type of service, as in this instance, and others to the type of contract under which the claim may arise. Here reference is made to the type of service, and it is doubtful therefore whether claims on a contract of towage which has not been executed are covered by this sub-paragraph.

j) Pilotage

This sub-paragraph does not call for particular comment.

k) Goods or materials wherever supplied to a ship for her operation or maintenance

The word "wherever" seems to indicate that the goods can be supplied at the home port, so that there is no requirement here that the supplies should be made for the preservation of the vessel or the continuation of the voyage, as in Art. 2 (5) of the 1926 Convention on Maritime Liens and Mortgages. "Operation" is a much wider concept than "continuation of the voyage": thus bunker supplies under a contract made by the owner would be included. "Maintenance" is wider than "preservation", for maintenance includes work in excess of that strictly required for preservation, although it does not extend to conversion work.

l) Construction, repair or equipment of any ship or dock charges and dues

Why so many different claims have been put together is not easy to understand. The first group of claims relates to works, as opposed to supplies, and clearly aims at covering all kinds of work done on a ship, from her construction onwards. Here, there is no express limitation as to the purpose, although repairs are by definition done only when something is damaged or not operational, and thus the purpose is to ensure the maintenance of the vessel. The problem which arises is whether "repairs" must be restricted to the work done to make good the damage, in which event it would not cover work done to improve the condition of a vessel, or to effect her conversion into a vessel of a different type. Some works which do not come under the restricted meaning of "repairs" would however be covered by the term "equipment", such as the installation of an inert gas system or segregated ballast on board a tanker.

On the other hand, the three words used in a sequence in this paragraph denote an intention to cover all kinds of work, thus including, inter alia, conversion works.

Dock charges and dues do not call for any specific comment.

m) Wages of masters, officers or crew

The problem which may arise in this connection, is whether other emoluments and sums payable by the employer, such as taxes, social insurance and pension contributions, or indemnities due to seamen in case of total loss of the vessel, may be deemed to be included under this heading. The problem was examined in England in a number of cases, and it was held that the wages concept included emoluments such as victualling allowances and bonuses (The "Tergeste", (1903) P. 26; The "Elmville" No. 2, (1904) P. 422), both the employer's and the employee's national insurance contributions (The "Gee-Whiz", (1951) 1 Lloyd's Rep. 145) social benefit contributions (The "Arosa Star", (1959) 2 Lloyd's Rep. 396, The "Arosa Kulm", No. 2, (1960) 1 Lloyd's Rep. 97) insurance and pensions contributions (The "Fairport", (1965) 2 Lloyd's Rep. 183; The "Halcyon Skies" (1976) 1 Lloyd's Rep. 461).

n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner

The final words of this sub-paragraph, although specifically referring to disbursements made by shippers, charterers and agents, may also be used to qualify the type of master's disbursements to be covered herein. Disbursements made on behalf of a person other than the owner of the ship, such as the bare-boat charterer or the time or voyage charterer, do not qualify as maritime claims unless made on behalf of the ship. Nor is the ship subject to arrest pursuant to Art. 3 (4) whereby in the case of a charter by demise (as well as in the cases mentioned in the last sentence of that paragraph) the claimant may arrest a ship when the charterer is liable for a maritime claim. In fact, for this rule to apply, it is

necessary to have a maritime claim under Art. 1.

Disbursements made on behalf of the ship seem to be distinguished from those made on behalf of the owner, for otherwise there would be no reason to make reference to both (but see the Administration of Justice Act, 1956, Part 1, sec. 1 (1) (p) and now the Supreme Court Act, 1982, Sec. 20 (2) (p) wherein the reference is to disbursements made "on account of a ship"). If this is so, "disbursements" should cover a more limited area and relate to the ship herself, and to her operation, such as maintenance and repair costs.

Disbursements made on account of the operation of the ship, such as harbour dues, agency fees, pilot fees, tug charges, stevedoring costs and the like, would not consequently be maritime claims unless made on behalf of the owner of the ship.

Such a restricted interpretation seems to be supported by the fact that, if the notion of disbursements made on behalf of the ship were to include disbursements made for the running of the ship which are all chargeable to the charterer, it would make no sense to refer to "disbursements made by charterers on behalf of the ship", for these would be made by them on their own behalf.

Agency fees are not disbursements, and therefore are not maritime claims (but see contra "The Westport" (1966) 1 Lloyd's Rep. 342).

o) Disputes as to the title to or ownership of any ship

Any dispute as to the title to a ship, entails a dispute as to the property and vice versa. When the property in the ship passes from the seller to the buyer, the title to the ship is transferred to the buyer.

The identity of the two terms is supported by the fact that the French text refers only to "la propriété contestée d'un navire" and Part I, section 1 (1) (a) of the U.K. Administration of Justice Act, 1956, as well as Sec. 20 (2) (a) of the Supreme Court Act, 1982, to "possession or ownership". Moreover disputes as to title involving co-owners are covered herein since sub paragraph (p) below refers only to ownership.

Disputes as to the ownership of shares in a ship are obviously included in this sub-paragraph, save disputes between co-owners, which are covered by the following sub-section.

On the other hand, disputes about the possession of a ship do not seem to be covered by the language of this sub-paragraph, and the reference in the subsequent sub-paragraph to ownership and possession of the earnings of a ship, indirectly confirms this conclusion. If this is so, this is an omission which seems hardly justifiable.

p) Disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship

A preliminary remark which must be made in connection with this sub-paragraph, is that the French text differs from the English, for it is worded as follows:

La propriété contestée d'un navire ou sa possession ou son exploitation, ou les droits aux produits d'exploitation d'un navire en co-propriété.

The fact that in the first part the French text refers generally to disputes as to ownership or possession of a ship, and only in the second part to a "navire en co-propriété" may raise doubts as to whether the whole of this sub-paragraph refers to disputes between co-owners, as clearly appears from the English text. The English text seems the more reasonable solution of this language problem, for otherwise the first part of sub-paragraph (p) in the French text would cover the same ground as sub-paragraph (o).

The disputes covered by this sub-paragraph must be between co-owners, and not between partners or shareholders of a company. If, therefore, the operation of a ship is entrusted by the co-owners to a company formed for that purpose between them, the dispute is no longer between co-owners.

q) The mortgage or hypothecation of any ship

The word "hypothecation" is used here, as in the unofficial translation of the 1926 Brussels Convention on Maritime Liens and Mortgages, whilst the word "hypothèques" is used in the English text of the 1967 Convention. The reason why the French word was used is that the word "hypothecation" has a different meaning in English law, for it is used in respect of bottomry and respondentia. In this case also co-ordination between the two Conventions would seem desirable.

Another question to which this provision gives rise is whether the right of arrest is granted only in respect of mortgages and "hypothèques" or may also be exercised in respect of other charges, in addition to unregistered mortgages and "hypothèques".

Finally, the present wording seems to include claims arising out of the mortgage or hypothecation of any share in a ship.

Claims omitted from the List

Not all claims giving rise to maritime liens under the 1926 Brussels Convention are covered by the notion of "maritime claims". The following are not included in the list:

i) Law costs due to the State, (Article 2 (1) of the 1926 Convention);

ii) 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 (Article 2 (1));

iii) Costs of watching and preservation from the time of the entry of the vessel into the last port (Article 2 (1));

iv) Claims resulting from contracts entered into or acts done by the Master, acting within the scope of his authority, away from the home port, when such contracts or acts are necessary for the preservation

of the vessel or the continuation of the voyage (Article 2 (5)).

The omission of claims under (i) above is not significant, for according to Article 2 of the Arrest Convention, the right of Governments and Public Authorities to arrest or detain vessels is not affected.

The omission of claims under (ii) seems, on the contrary, to be important, and also of claims under (iii). The omission of claims under (iv) is only partial, and relates to those claims which are not covered by sub-paragraph (n) of Article 1 (1) (see below).

Amongst the claims which might have been described as "maritime claims", in view of their connection with the operation of a ship, the following may be mentioned:-

Insurance premiums: the inclusion of insurance premiums was suggested by the Netherlands Association (CMI Bulletin No. 105, page 79), but the suggestion was not accepted, although the reasons are not known.

Stevedoring charges.

Commissions of ship brokers and chartering brokers.

Pollution damage as defined in the 1969 Civil Liability Convention.

Prohibition against the arrest of vessels in respect of other claims

The restriction of the right of arrest to maritime claims applies only to ships having the nationality of a Contracting State. Article 8 (1) provides, in fact, that a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State, both in respect of any maritime claims and in respect of any other claim for which arrest is permitted by the lex fori.

From the provisions of Art. 2 and 8 the following propositions emerge:-

Ships having the nationality of a contracting state may not be arrested in any other contracting state except for maritime claims;

Ships of a contracting state may not be arrested in their own or in another contracting state by a claimant who is not a habitual resident nor has his principal place of business in a contracting state except for maritime claims;

Ships may be arrested in their home state by a claimant who is a habitual resident in the same state for any type of claim.

Ships having any other nationality may be arrested according to the domestic law of the forum;

The prohibition of arrest to secure claims, other than maritime claims, does not apply to claims of Governments, or Departments thereof, Public Authorities or Dock or Harbour Authorities within their jurisdiction. Their right to arrest, detain or otherwise prevent the sailing of vessels,

both to secure claims and for reasons of safety or other public reasons, is not affected by the Convention.

Vessels which may be arrested

The title of the Convention refers to the arrest of sea-going ships, but nowhere in the text is it suggested that the Convention applies only to sea-going ships. It may therefore be advisable to clarify this point, in view also of the fact that the 1967 Convention applies only to sea-going ships (Article 12, paragraph 1).

The ship or ships which may be arrested as security for a given claim, are identified in Article 3.

Three problems arise in connection with this Article. The first is the right to arrest the ship in respect of which the claim arose when it is not owned by the person liable for the maritime claim; the second is whether a change in ownership in relevant; the third relates to the right to arrest ships other than that in respect of which the claim arose.

(a) Whether the ship must be owned by the person liable when the maritime claim arose

Article 3, paragraph 1 states that, subject to the provisions of paragraph 4, a claimant may arrest either the particular ship in respect of which the claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the ship in respect of which the claim arose. It is not altogether clear from this provision whether the claimant may arrest the particular ship in respect of which the maritime claim arose even if the person liable is not owner. The reference to paragraph 4, which gives the right to arrest a ship when the liable person is a charterer by demise, seems to indicate that the right to arrest a ship not owned by the person liable is an exception to the general rule, and that the right does not exist in other cases.

However in its last sentence paragraph 4 provides as follows:

> The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

This sentence seems to extend the scope of the rule laid down in paragraph 4 to all types of contracts of carriage. A person other than the owner may in fact be liable for a maritime claim under a time or voyage charter. A review of the maritime claims which may arise under each type of contract is perhaps worthwhile (notation as for the list of maritime claims above).

b) loss of life or personal injury: a time charterer and also a voyage charterer may act as carriers in a contract of carriage of passengers and therefore may be liable on account of loss of life or personal injury to a passenger;

d) agreements relating to the carriage of goods: in this case also the obligation to carry goods which have been lost or damaged may have been assumed by a time or voyage charterer;

i) towage: port towage is usually charged to the time charterer;

j) pilotage: the same applies;

k) goods or materials supplied to a ship: bunkers are supplied to the time charterer;

l) dock charges and dues: they are usually payable by the time charterer.

The last sentence in paragraph 4 was added following the request of the Netherlands Association who thus explained its proposal (CMI Bulletin No. 105, p. 62):-

> Il est nécessaire de régler ce cas, étant donné que sous l'empire de la loi néerlandaise il arrive, notamment en cas d'abordage, de sauvetage ou d'assistance, que le responsable est "l'armateur" (celui qui engage le capitaine) et non le propriétaire régulièrement inscrit ou considéré comme tel par la loi; on peut imaginer d'ailleurs d'autres situations dans lesquelles le capitaine n'est pas le préposé du propriétaire légal ou inscrit.

The first part of the reasons given for the addition is an explanation not so much of the need for the addition but of the previous sentence of paragraph 4, relating to charters by demise. The second part on the other hand may relate to situations which are not covered by the provision relating to charters by demise, such as those arising by the "employment clause" commonly used in time charters, such as the "New York Produce Exchange" and the "Shelltime 3". The former provides in clause 8:

> The Captain shall prosecute his voyages with due despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency.

In any event, it would appear that the right to arrest a vessel for a maritime claim was not in doubt. At the Naples Conference of the CMI, when commenting the first part (then the only one) of paragraph 4, Giorgio Berlingieri so stated, (CMI Bulletin No. 105, p. 270):

> Il pourrait paraitre que le but principal de cette disposition est de permettre qu'un navire soit saisi, non seulement pour des dettes du propriétaire du navire, mais même pour celles de l'affréteur, lorsqu'il y a eu

"demise".
Mais je ne crois pas que ce soit le but principal de cette disposition, parce que c'est une conséquence directe de l'article 1. Lorsqu'il y a créance maritime, on peut toujours saisir le navire qui a donné lieu à cette créance.

This statement does not seem to have been challenged by anybody, and the addition suggested by the Netherlands Association may be seen in that light.

An alternative view has been expressed by Allan Philip in 'Maritime Jurisdiction in the EEC', Acta Scandinavica Juris Gentium, 1977, p. 118 to 119. He takes the view that it is the purpose of the arrest Convention in enumerating the claims for which arrest may be made to limit the number of cases where arrest may be made, not to provide that in these cases arrest must be made. In his opinion there is no obligation to arrest in the cases enumerated in the Convention in which arrest may be made, nor is there an obligation to enforce claims in these cases. In this connection reference is made to Art. 9 which provides that the Convention does not create rights of action or maritime liens where such rights do not exist under the applicable law apart from the Convention.

Arrest is a procedural remedy and substantive law is not changed by regulating procedure. If the Convention were to mean that under the Convention a claim could be made and enforced against a person who is not personally liable for it and who is not obliged to accept its enforcement on his property because of the rules on maritime liens the result would in fact be the creation by the Convention of a new group of maritime liens extending to all maritime claims.

It is asserted that this was not the intention of the Convention. A parallel may be drawn to the problem of whether in the individual case there is sufficient justification for making an arrest. Under Art. 6 para. 2 this seems to have been left to the law of the country where the arrest is applied for. Again, even if the situation is covered by the Convention there is no automatic right to have an arrest made. Arrest should only be made if (1) the claim is one of those enumerated in the Convention, (2) the arrest is justified in the circumstances according to the law of the forum arresti and (3) the judgment in the case following upon the arrest is enforceable on the arrested vessel or on the security given it its place.

There seems to be support for this view of the Convention in English case law, see e.g. The I Congreso (1977) 1 Lloyd's Rep. 536 where even in the case of a demise charter the owner could not be made to pay for a claim for which he was not personally liable.

However, the last sentence of Article 3, paragraph 4 remains to be explained, and moreover, Article 9 is not altogether clear, for in its first part it states that no rights of action are created "apart from the provisions of this Convention", and thus implies that rights of action may be created elsewhere in the Convention. As regards maritime liens, the French text refers to only "droit de suite" (see Article 7, paragraph 2 of

the 1967 Convention) but not to rights against the ship irrespective of ownership (see Article 7, paragraph 1 of the 1967 Convention).

The better solution is to exclude altogether any right to arrest a ship not owned by the person liable in respect of a maritime claim, save when such a right is granted under the applicable national law or International Convention, that is when the claim is secured by a maritime lien.

(b) Sale of the ship (Droit de Suite)

If the particular ship in respect of which the maritime claim arose can be arrested even if not owned by the person liable at the time when the claim arose, her subsequent sale, whether or not she was so owned when the claim arose, should not make any difference.

Paragraph 1 of Article 3 provides:

> Subject to the provisions of paragraph 4 of this Article, and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship .....

The fact that reference to ownership both at the time when the remedy is sought and also at the time when the claim arose is made only as respects sister ships, seems to confirm that a change in ownership is not relevant in the case of the particular ship in respect of which the maritime claim arose.

The interpretation of paragraph 1 of Article 3 which has been suggested above is, however, in conflict with Article 9, or at least with the French text of that Article, which provides as follows:

> Rien dans cette Convention ne doit être considéré comme créant un droit à une action que, en dehors des stipulations de cette Convention, n'existerait pas d'après la loi à appliquer par le Tribunal saisi du litige. La présente Convention ne confère aux Demandeurs aucun droit de suite, autre que celui accordé par la loi du lieu de la saisie ou par la Convention Internationale sur les privilèges et hypothèques maritime, si celle-ci est applicable.

If, in fact, the Convention must not be deemed to create any new "droit de suite", Article 3, paragraph 1 cannot be construed to mean that the vessel in respect of which the maritime claim arose may be arrested, even after a change in ownership.

This conclusion, however, is open to doubt. Firstly, because the provisions of Article 9 already existed in the preliminary draft Convention (Article 11 of the draft) in respect of which the amendment to Article 3, paragraph 1 was proposed by the British Association. Secondly, because the English text of Article 9 differs from the French in that in lieu of "droit de suite" it refers to "maritime liens". Although the "droit de suite" is an element of the maritime lien, there is a second, and perhaps more important element, that is priority. Therefore, at least with reference to the English text, Article 3, paragraph 1 as previously construed, and Article 9 may not be in conflict if Article 9 is deemed to refer to the priority aspect of maritime liens.

The United Kingdom Supreme Court Bill, one of whose purposes was to give effect more fully to the 1952 Arrest Convention, when submitted to the House of Lords in March 1981, generally provided in section 21 (3) that with regard to many of the maritime claims listed in the preceding section "an action in rem may .... be brought" against the ship in connection with which the claim arises. That would clearly have the effect of enabling the claimant to pursue his claim against the ship, even if title had passed to a bona fide purchaser. The problem was raised by Lord Diplock who, after having pointed out that it had always been one of the principles of Admiralty law in England that once the ship has been sold to a new owner, the vessel is no longer arrestable for claims against the previous owners, except for claims secured by maritime liens, stated (House of Lords Hansard for 26th March 1981, 1309 and 1310):

> These claims for cargo losses or damage - claims under charter parties - represent ordinary, simple contract debts. The effect of Clause 21(3), as it stands at present, is to convert these into secret charges, lasting six years and thus, possibly, through more than one change of ownership of the vessel, which may be very large indeed.
> .....
>
> I venture to suggest that a Bill of this kind, which is concerned with jurisdiction and with practice and procedure, is no place in which to make so fundamental an alteration in the substantive law and, without close discussion and consideration, to make a change in what, hitherto, has been the commercial policy of this country in this field. I would invite the noble and learned Lord the Lord Chancellor to add to his proviso, which is the amendment that we are debating at the moment, a provision that claims under paragraphs (g) and (h) of Clause 20(2), whether the claim arose before or after the passing of the Act, shall not be brought against the ship unless, at the time when the action is brought, the ship is beneficially owned as respects all the shares therein by the person who would be liable under the claim on the action in rem.

The amendment was agreed and Section 21(5) of the Supreme Court Act provides as follows:

> (5) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where -
>
> (a) the claim arises in connection with a ship;
>
> and
>
> (b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against -
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

For the reasons previously stated, it is , however, doubtful that Article 3 of the Arrest Convention is in line with the view so authoritatively expressed by Lord Diplock.

The remarks which have been made so far, and the problems which have been discussed, justify raising the general question, whether it would have been convenient to link to one another the Convention on maritime liens and mortgages and that on arrest of ships. This question is not novel. It was raised as early as 1925 in the Interim Report of the ILA Maritime Liens, Mortgages and Arrest Committee, from which the following statement may be quoted (page 24):

> The matter of arrest is so closely allied to the points covered by the Mortgages and Liens Convention, and so nearly affects the rights of the shipowner, lien holder, mortgagee, and other interests thereunder, that it would appear desirable to deal with the problem in the same Convention. At first sight no insuperable difficulties present themselves in

> the way of this course being adopted, and a precedent already exists in Article 8 of the Limitation of Shipowners' Liability Convention. It may well be, however, that a full discussion of the question at the present time might cause great delay. In these circumstances, the matter has been reserved for fuller consideration by the Committee at an early date.
>
> The fact remains, nevertheless, that international agreement as to the law and practice of arrest in general, and in particular for the purpose of obtaining security (saisie conservatoire) or to found jurisdiction is highly desirable, and a very necessary adjunct to the Convention under consideration; and it is further considered that problems so intimately connected should be settled simultaneously or as near thereto as may be found feasible in practice.

(c) Arrest of sister ships

The right to arrest so-called "sister ships" is provided for in paragraph 1 of Article 4, as regards the situation where the owner of the particular ship in respect of which the claim arose is the liable person; and in paragraph 4, as regards the situation where a person other than the owner is liable in respect of the maritime claim.

Paragraph 1 of Article 4 requires that the sister ship be owned, at the time of the arrest, by the person who owned the particular ship at the time when the maritime claim arose. Any change in ownership is therefore relevant in this case, at least as regards other ships owned by the person liable.

Paragraph 4 only states that when the person liable is not the owner, the claimant may arrest any ship in the ownership of the person liable, without any indication as to the time when the ownership must be ascertained. It seems, however, reasonable to assume that the same criterion applies in both cases, and therefore that the sister ships must be owned by the person liable at the time when the arrest is made.

Paragraph 2 of Article 3 provides that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons. Share in this context means a part of the property in a ship. The words "shares therein" in the English text, and "parts de propriété" in the French text, make this abundantly clear. Therefore, two ships owned by two different companies whose shares are owned by the same person or persons are not, for the purposes of this provision, in the same ownership. The reference to ships owned by the same persons applies to ships in co-ownership, and has the effect of excluding the right of arrest of another ship which is not fully owned by those same persons who owned the ship in respect of which the claim arose; it is however, sufficient that the arrested ship is fully owned by one or more, albeit not all, of

the persons who owned the ship in respect of which the claim arose. If the ownership in ship A, in respect of which the claim arose, is 20 shares to Mr. W, 20 shares to Mr. X and 20 shares to Mr. Y, and the ownership of ship B is 20 shares to Mr. W, 30 shares to Mr. X and 10 shares to Mr. Z, ship B may not be arrested. But ship B may be arrested if 50 shares therein are owned by Mr. W and 10 by Mr. X.

The right to arrest a sister ship appears to be granted as an alternative. Paragraph 1, in fact, states that the claimant may arrest either the particular ship in respect to which the maritime claim arose, or any other ship. These words have been counstrued disjunctively in England, with respect to s. 3(2)(a) and (b) of the Administration of Justice Act 1956, by the Court of Appeal in "The Banco" (1971) P.137. The opinion was also expressed in that case that the words "any other ship" were to be construed in the singular, so that if more than one ship is liable to arrest, the claimant could only select one of them; the same view was expressed in "The Elefterio" (1957) P.179; "The St. Merriel" (1963) P.247 and "The Berny" (1977) 2 Lloyd's Rep. 533. This view appears to hold good also for Article 3, paragraphs 3 and 4 of the Convention, to the extent, however, to which the prohibition to arrest a ship more than once is operative (see below p 131).

Requirements for the arrest

The basic requirement, which has already been discussed, is that as regards vessels flying the flag of a Contracting State the claim for which the arrest is sought must be a maritime claim.

The manner in which proof of the claim is to be given is not set out in the Convention, nor is it indicated if other conditions should be met, such as evidence of the financial condition of the debtor, as is the case in some civil law countries. The, albeit incomplete, acceptance of the Engish concept of arrest as a means of obtaining jurisdiction indicates that the mere existence of a maritime claim gives the right to arrest the vessel in respect of which the claim arose or a sister ship. The manner in which proof of the claim is to be presented is left to the lex fori: but as a general rule only prima facie evidence will suffice. It may seem surprising that no rules were made in this respect, whilst the release of the vessel is the subject of specific regulation in Article 5.

Limits to the right of arrest

The general limit is that vessels flying the flag of Contracting States may be arrested only in respect of maritime claims unless the vessel is in the country of registration and the claimant is a national of that country (Article 2 and Article 8, paragraph 4).

Vessels flying the flag of non-Contracting States on the contrary may be arrested both for maritime claims and for any other claim for which the law of the Contracting State (lex fori) permits arrest (Article 8, paragraph 1). Thus if, as is the case in most civil law countries, the arrest of a vessel is generally permissible to secure any claim, whether maritime or not, vessels flying the flag of non-Contracting States may be so arrested, provided, however, the requirements of the lex fori are met.

The restriction existing in civil law countries, that vessels ready to sail may not be arrested, does not apply as respects maritime claims. Article 3 paragraph 1 has, in fact, a provision to this effect, though perhaps that was not the right place for it.

A general restriction in Art. 3 § 3 of the Convention is that a ship may not be arrested more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant. Although this seems to be an unconditional prohibition, a subsequent arrest should perhaps be permissible when the actual claim proves to be larger than that originally claimed. For example, in a collision case the damage suffered by one of the colliding vessels may at a first sight appear not serious and the other vessel is thus arrested as security for the claim as assessed at the time; subsequently, after the damaged vessel is drydocked, the actual damage is found to be much more serious. There is no reason why, even if the other vessel has been released against bail covering the original amount of the claim, it could not be arrested again to secure the excess of the claim.

The provision in the second part of Article 3 paragraph 3, whereby a subsequent arrest shall be set aside "unless the claimant can satisfy the Court ..... that there is other good cause for maintaining the arrest", while apparently relating to the setting aside of an arrest already granted, is indicative that a "good cause" for maintaining a second arrest may be proved. And if there can be a good cause, the same "good cause" may be invoked to justify the granting of a second arrest.

It seems therefore that the Courts of the Contracting States are not absolutely inhibited from granting a further arrest by the language of Article 3 paragraph 3.

The reference to the same claim and the same claimant also covers the case where a claim has been assigned to another person. The identity of the positions of the assignee and the assignor is expressly dealt with in the Convention only as regards the habitual residence and the principal place of business for the purpose of determining the applicability of the exception provided for in Article 8 paragraph 5, but it seems to have general application.

Also in this case, as for the right to arrest a vessel ready to sail, the provision is misplaced, for it should have been included in Article 5.

Release of a vessel from arrest

Two different situations are expressly regulated in the Convention; that of the release against bail or other security and that of the release without any bail or other security when the vessel has been arrested previously and security has already been provided.

The first situation is dealt with in Article 5 which provides generally that the Court or other appropriate authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished.

The second paragraph of Article 5 provides then as follows:

> In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof.

There seem therefore to be two limits to the discretion of the Court: the first is that the parties may agree on the nature and amount of the security, whereupon the Court must release the vessel; the second is that a bail does not constitute the only form of security, for otherwise the reference to "other security" in Article 5 would be meaningless. Thus, although the Court may discretionally determine which security, other than a bail, is acceptable, some of the usual types, e.g. a bank guarantee, may not be refused.

The release from arrest when bail or other security had been previously provided in the jurisdiction of any of the Contracting States, whether following an arrest or not, is dealt with in Article 3 paragraph 3 reference to which has already been made above.

In such a case the Court of any other Contracting State must refuse to arrest the vessel again (subject to the remarks made under the previous heading) or, if the vessel has been arrested, the Court must set aside the subsequent arrest and release the vessel unless it is satisfied that the bail or other security has been "finally released before the subsequent arrest or that there is other good cause for maintaining the arrest".

Amongst the situations in which the Court may refuse to set aside the new arrest the following may be conceived:

a) the first security has been released after the subsequent arrest;

b) the security has proved to be insufficient for reasons unknown at the time when it was determined;

c) the type of security has proved to be inadequate for reasons unknown, at the time when it was determined or because of subsequent events, such as the bankruptcy of the guarantor;

d) when the Court in whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits, and the security is provided in that country, the judgment of the Court of competent jurisdiction may not be enforceable in the country where security was provided (compare with Article 21 paragraph 4 of the Hamburg Rules: the provision in Article 7, paragraph 2 may have not been complied with or may be ineffective) or the funds are not freely transferable (compare with Article 13, paragraph 3 of the 1976 Convention on Limitation of Liability for Maritime Claims).

Conversely the following reasons, inter alia, should not be relevant:

aa) the amount of the security has been fixed by the court by which the

first arrest was granted or agreed between the parties and no supervening reason justifies its increase;

bb) the nature of the security has been determined by the Court or agreed between the parties and no reason unknown at that time or supervening event justifies its replacement.

Again, there are other situations, in which a ship may be released by the Court without any security. First is where the claimant does not bring proceedings before a Court having jurisdiction to decide upon the merits within the time limit fixed by the former Court (Article 7, paragraph 2 and 3: see VIII below). The second, and more general one, is that the Court may always release a vessel from arrest whenever the arrest is wrongful or the claim is rejected.

Other rules of procedure relating to the arrest

In all other respects the Convention defers to the lex fori. It has already been seen that in default of agreement between the parties the nature and amount of the security must be determined by the Court within whose jurisdiction the ship has been arrested (Article 5).

A general reference to the lex fori as regards the arrest may be found in the second paragraph of Article 6 which provides as follows:

> The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and all other matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

There is however an exception to the generality of the reference, and that is the provision in Article 7, paragraphs 2 and 3 whereby the Court within whose jurisdiction the ship has been arrested, if not itself competent to decide upon the merits, or if the parties have agreed to submit the dispute to the jurisdiction of another Court or to arbitration, must fix the time within which the claimant shall bring an action before a Court having jursidiction. The time limit is left to the discretion of the arresting Court which has a duty to fix it. It also follows, though this is not expressly provided, that if proceedings are not brought within the time limit fixed by the Court the ship must be released from arrest, or the security, if already provided, must be released.

Liability for wrongful arrest

The first paragraph of Article 6 provides as follows:

> All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

It is worth noting that, like the rule in the second paragraph of Article 6, this is merely a rule of private international law. But whilst the rule in the second paragraph is obvious, for the court which will decide on the application to arrest a ship and on all matters following thereafter will apply its own law (as procedure is always governed by the lex fori), the position may be different as regards wrongful arrest. In fact the owner of the vessel, or any other person, may claim damages arising out of the arrest, in a jurisdiction other than that where the arrest was granted. The question may then be raised whether a claim for damages for wrongful arrest is a procedural or substitutive remedy. In the first case the application by a court of a law other than its own as indicated by Art. 6, may be contrary to public policy.

Jurisdiction on the merits

Two conceptions contradict one another; that of English law whereby Admiralty jurisdiction is recognised with respect to maritime claims and may be invoked by an action in rem against the ship in question, and that of civil law whereby the arrest is a conservative measure and neither a way of exercising jurisdiction nor of acquiring it. The English conception differs from the American which recognises that the arrest of a vessel in rem is based upon the liability of the vessel herself to respond to the claim and upon the principle that the in rem liability arises out of maritime torts or other claims giving rise to maritime liens. In theory the American conception is narrower than the English one, for the arrest of a vessel in rem is only permitted in respect of claims secured by maritime liens. In practice there is no great difference, for the number of maritime liens in United States law is far greater than in English law; practically all maritime claims are secured by a maritime lien. However in United States law in addition to the arrest of a vessel in rem there exists attachment of a vessel in a personal action against her absent owner. Rule 2 of the Supreme Court Admiralty Rules so provides:

> Rule 2-Suits in Personam-Process in-Arrest in Same
>
> In suits 'in personam' the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and

> chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the District.

The provision in the draft submitted to the Naples Conference of the CMI satisfied the common law requirements. It provided in fact as follows in Article 10 (II) (CMI Bullettin No. 195, p. 92);

> Un navire battant pavillon d'un Etat contractant peut etre saisi dans l'un des Etats contractants, en vertu d'une des créances énumerées à l'art. Ier, ou toute autre créance permettant la saisie d'aprés la loi de cet Etat.

The report of the French Maritime Law Association, prepared by M. Jean de Grandmaison, said the following (CMI Bulletin No. 105, page 31):

> Suivant certaines lois nationales, le Tribunal du lieu de la saisie est compétent pour juger du fond du droit. Dans d'autres, au contraire - et c'est le cas de la France - le Tribunal du lieu de la saisie n'a de ce chef aucune competence au fond.

He then stated that Dean Ripert had suggested a compromise: that reference should first be made to national law and thereafter jurisdiction on the merits should be expressly given to the arresting court where the claim arises in the country in which the arrest is made; where the claimant has his habitual residence or principal place of business in that country; where the claim concerns the voyage of the ship during which the arrest is made.

Dean Ripert's proposal was accepted, but under paragraph 1, sub-paragraphs (d), (e) and (f) were added, to cover some of the maritime claims.

There is thus a basic difference between the three original links suggested by Dean Ripert, and the additional cases inserted subsequently. The former are of a general nature and are independent of the type of claim. They are inspired by the criteria normally adopted in civil law countries, although they are acceptable to common law countries: arrest, and thence jurisdiction, is permitted only as regards maritime claims.

The three additional links, as already mentioned, are of a special nature, and consist of claims arising out of collision, salvage or based upon a mortgage or hypothecation, three of the maritime claims listed in Article 1.

Thus the compromise resulted in the common law countries giving nothing away, and in the civil law countries accepting the common law principle that jurisdiction is granted on the basis of the nature of the claim for only three of the maritime claims.

As with all compromises, the logic of it is not easy to understand.

Paragraph 2 of Article 7 makes two conditions for the situation where the Court in whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits. The first is that the bail or other security given in order to release the ship must specifically provide that it is given as security for the satisfaction of any judgment by a Court of competent jurisdiction. At first sight this provision seems superfluous, since Article 5 gives to the Court in whose jurisdiction the ship has been arrested the power to decide upon the nature and amount of the security. However it is important, since it has the effect of making it unnecessary for the claimant to seek the recognition or the enforcement of the foreign judgment in the country where the ship has been arrested.

Payment ought thus to be made against presentation of the judgment of a Court of competent jurisdiction. This construction meets however with two objections. The first is that there is no indication of the manner in which the jurisdiction of the Court delivering the judgment is to be established: if it is by the court itself, automatic enforcement may take place; if it is by another authority, i.e. by a Court of the country where the ship has been arrested, proceedings for the recognition and enforcement of the foreign judgment are required. The second objection is that the Convention does not specify the type of judgment which may entitle the claimant to obtain satisfaction, whether a final judgment, or one which is enforceable in the country where it has been delivered, albeit not final.

The problem is important, for if recognition or enforcement of the judgment delivered by the Court having jurisdiction to decide upon the merits is required, the time taken to obtain satisfaction may be substantially increased.

Scope of application

Article 8, paragraph 1 states that the provisions of the Convention apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State. This rule is restricted by paragraph 4, and extended by paragraph 2.

According to paragraph 4, the Convention does not affect the domestic rules of a Contracting State as regards arrest in the jurisdiction of that State of a vessel flying its flag by a person having his habitual residence or principal place of business in that State.

According to paragraph 2, a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1, or for any claim for which the law of the Contracting State permits arrest.

This provision may mean that vessels of non-Contracting States, besides being liable to arrest in all cases permitted by the domestic law of the Contracting State where they are found, may also be arrested in respect of any of the maritime claims listed in Article 1, even if this would not be permitted by the lex fori, but the Convention as a whole would not be applicable. Alternatively it may mean that the Convention applies to such

vessels, except that the restriction of the right of arrest to maritime claims provided in Article 2 does not apply.

The choice between these two alternatives is important, for if the former were adopted, the other provisions of the Convention would not be applicable, including Article 3, rules 2 and 4 regarding the arrest of sister ships and of ships not owned by the person liable in respect of a maritime claim; Article 5, wherein the rules regarding the release of the vessel are set out; and Article 7 regarding jurisdiction on the merits.

If a vessel flying the flag of a non-Contracting State may be arrested in respect of a maritime claim, even if this is not permitted by the lex fori, it follows that at least some provisions of the Convention apply to such vessels, such as Article 1. But the application of that provision alone would bring about a situation of uncertainty, for the lex fori may not provide for the claimant to properly avail himself of the right to arrest a vessel in respect of a maritime claim, or clarify problems such as the right to arrest a vessel which is not owned by the person liable in respect of the maritime claim, or the right to arrest a sister ship.

It is submitted therefore that the provisions of the Convention also apply to vessels flying the flag of non-Contracting States, except that these vessels may also be arrested in respect of claims other than maritime claims, wherever this is permitted by the lex fori.

B FORCED SALE

Character and Effects of The Forced Sale

Judicial sales in the United States

In the United States the judicial sale of a vessel may occur by order of an admiralty court (a) at a public auction conducted by the U.S. Marshal and subsequently ratified by the court or (b) by private sale, at a price at least two-thirds of its appraised value, which is advertised and subsequently ratified by the court provided no bona fide offer at least ten percent higher than the sale price is made. Judicial sale of a vessel may also be by order of a bankruptcy court by auction, negotiated sale or any other sale device calculated to obtain the highest price (1). Such sales in bankruptcy are usually conducted at the behest of the Trustee or the Debtor-in-possession and not, as in the case of the Admiralty, at the request of an attaching creditor. Foreclosure of private yachts and other non-commercial vessels in the U.S. is often accomplished by the mortgagee's private repossesion of the vessel and subsequent private sale.

Grounds for judicial sale

A sale of a vessel under arrest or attachment in admiralty may occur after final judgment or, as is far more common, after a interlocutory order is issued upon the application of any interested party or the marshal, pursuant to Admiralty Rule E(9)(b). Under Rule E(9)(b) an interlocutory order of sale may issue where the vessel is "perishable, or liable to deterioration, decay or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property" (2).

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(1) In a reorganisation under Chapter 11 of the Bankruptcy Code, negotiated sales are more common. In a liquidation under Chapter 7, auctions are more common. Although the receiver in the latter case certainly attempts to obtain the highest price, he is also concerned about liquidating assets as quickly as possible. One device sometimes used is that the negotiated price becomes the "upset price" or minimum acceptable bid. If no higher bid is received, the auction serves to validate the reasonableness of the negotiated price.

(2) Certain local rules provide, additionally, that no interlocutory sale may be ordered before the sum chargeable therein is fixed by the court, except upon consent or court order, no doubt to insure that the drastic remedy of sale is not used in a situation where the plaintiff's claim is unliquidated (as in a tort action for personal injury) and the extent of damages is conjectural. See Local Rule 3(d) in New York.

While explicit provision for the interlocutory sale of arrested vessels has long been a part of the admiralty rules in the United States and the practice itself dates back to the beginnings of the Republic, see e.g., Stoddard v. Read, Fed. Cas. No. 13 (Cir.Ct.Pennsylvania 1783) (interlocutory sale of schooner in "perishing condition" ordered for the ultimate use "of those to whom the same shall be finally decreed"), the interlocutory sale of attached vessels has only been permitted for the last couple of decades, since the unification of admiralty and other civil rules of practice. The interlocutory sale of vessels under arrest or attachment is strongly favoured in the United States, apparently in recognition that a vessel under restraint is an inherently wasting asset whose continued layup can benefit neither its owner nor the lienors who have arrested her or made claims against her. The rules recognise that the owner has the right to notice and an opportunity to bond the vessel prior to her sale; but if release is not promptly obtained, it is unlikely that the owner has the wherewithal to continue operations in any event. As protection against highly inflated or wholly unsubstantiated claims the owner and claimants are entitled to a hearing as to the amount of security required to release the vessel. The bias toward interlocutory sale in United States admiralty practice contrasts with the practice in most other jurisdictions, where a final judgment is often necessary before sale. This difference in practice is due partly to the length of time necessary to obtain a final judgment in the United States (exceedingly liberal discovery provisions in United States court actions, together with heavy court backlogs, usually make it impossible to obtain judgment for years) and partly to unwillingness in other jurisdictions to exercise such a drastic remedy until the owner has had a full hearing on the merits of the claims. The interlocutory sale procedure, however, makes considerable sense from the viewpoints of both owner and creditor. The owner has an opportunity to release the vessel or to prove that the claim lacks merit. If he is unable to do either, all interests are better off having the proceeds of the sale of the vessel earning money for ultimate disposition by court decree instead of paying the high expenses of maintaining a vessel which continues to deteriorate and depreciate.

Notice requirements for private and auction sales

Most districts have their own rules specifying the extent of notice before a sale. In New York for example, no public sale may be held except after at least six (6) days notice in a newspaper of general circulation in the district (Local Admiralty Rule 3(c)). In other jurisdictions, considerably less notice may be required by the rules. Needless to say full and adequate notice of an impending auction is wise, regardless of local rules, since it enhances the possibility of a sale at or near market rate, renders unlikely the possibility that the auction will be overturned on a claim of inequitable or improper conduct and minimize the likelihood that a court in another part of the world would permit a pre-existing maritime lien to survive against the vessel after sale. The goal should be "notice to the world" (3). It goes without saying that an acceptable sale price

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(3) Such notice should require that all liens must be asserted by a particular date, otherwise a separate notice would have to be published to make it clear.

can be obtained only where the buyer is relatively certain that the vessel is sold "free and clear of all liens". The best means of ensuring that courts in other jurisdictions recognise a judicial sale as an admiralty sale which has "washed" the vessel of all liens, is to demonstrate that best efforts were made to notify all maritime lienors in time to claim against the proceeds of sale.

For this reason, prudence often dictates that the sale should be advertised for longer than the minimum local requirements. While a sale by an admiralty court in the U.S. has traditionally been accepted around the world for this purposes, a sale by a bankruptcy court, as discussed below, is more problematical. If a bankruptcy sale is required, the cautious practitioner must be even more careful to ensure adequate notice to possible lienors world-wide.

Sale in admiralty in the United States may be either by open public auction or by private sale, but there is a strong bias toward sale by public auction: the private sale method is virtually never used in admiralty even though neither the Ship Mortgage Act nor any other maritime statute precludes its use. The United States Marshal's Manual, to which the Marshal turns for guidance on every aspect of the arrest, custody and sale process, does not even suggest the private sale as an available option. The bias is probably due in part to the possibilities of collusion inherent in the private sale method (if fraud is determined, the bill of sale may not effectively transfer the vessel free and clear of all liens) (4). Additionally, the court may sanction a private sale only if certain rigorous conditions are met. A private sale may be approved pursuant to 28 U.S.C. § 2001 and 2004 only if no bona fide offer at least ten percent higher is received after publication of the terms of the proposed private sale in a newspaper or newspapers of general circulation at least ten (10) days before confirmation by the Court. 28 U.S.C. § 2001. Needless to say, an intending purchaser might be unwilling to invest much energy toward such an uncertain end.

The preference for public auction in admiralty sales of commercial vessels is to be contrasted with the preference for sale by private treaty (by sealed bid) in such jurisdictions as England and Singapore and the preference for court approved negotiated sales in bankruptcy sales. For reasons which are apparent (confidentiality, opportunity to inspect the vessel fully, opportunity to arrange financing), negotiated sales probably maximize the sale price despite the risk of collusion. Interestingly, mortgagees foreclosing upon private yachts in the United States invariably take possession of the yacht and negotiate a private sale according to the

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(4) Curiously, the present English and Singapore preference is for sale by private treaty. According to several barristers, this preference arises out of several experiences in which the public auction was collusively manipulated.

very liberal provisions of the Uniform Commerical Code § 9-504, which simply seeks to ensure that the sale is commercially reasonable. In the case of commercial vessels, admiralty process is undoubtedly necessary due to the likely existence of numerous maritime liens which must be expunged upon sale. Maritime liens of suppliers, etc. on private pleasure craft is considerably less likely and the expense of judicial seizure, custody and sale in admiralty no doubt outweighs the benefit of the admiralty court's powers. The bias toward public auction does not appear to benefit either the owner or the lienor in most instances in that it clearly has a chilling effect on the sale price of the vessel. The Marshal supervises the public auctions, however, and obtains a worthwhile commission thereby. Moreover, since the sale is open and public, the Marshal is relatively assured of immunity from claims of wrongdoing.

Appraisal requirements

Before confirming the private sale of an arrested vessel pursuant to 28 U.S.C. § 2001, 2004, the court must appoint three disinterested persons to appraise the vessel. No private sale may be confirmed at a price less than two-thirds of the appraisal value.

If the sale is to be by public auction, the court is not required to order an appraisal, although in many local jurisdictions an appraisal must be ordered upon the application of any interested party (5). Often, one or more parties will propose that an "upset price", or minimum bidding level, be set by the Court. The Court will then receive testimony as to valuation and as to the benefits of having an upset price at all. While an upset price assures that the vessel will not be sold at an unconscionably low level, many brokers believe that the upset price simply deters prospective buyers from attending the auction.

Conduct of sales

The U.S. Marshal's Manual outlines the procedure to be followed at an auction. Its emphasis is upon giving all bidders ample opportunity to reflect upon their bid and does not promote the professional auctioner's more dramatic methods. A deposit of ten percent of the bid in cash or by certified check is required of the successful bidder at the time of the auction. The balance is payable when the sale is confirmed by the Court, when the Marshal's Bill of Sale is received. Following the public auction the court will usually conduct a confirmation hearing; in some jurisdictions (including New York), confirmation is automatic if no one objects to the conduct or results of the auction and if the Order of Sale makes no special requirement of a confirmation hearing. Where an auction

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(5) Local Admiralty Rule 11 in New York states that such an order may be entered "as of course, at the instance of any party interested, or upon the consent of the attorneys for the respective parties". The appraiser must give one day's notice of the time and place of the appraisal to the attorneys. The appraisal is to be filed when made.

is attacked, it will ordinarily be vacated only upon a finding that the sale price was grossly inadequate and that another buyer at a considerably higher price is available.

Effect of judicial sales

Sales in admiralty by the United States Marshal are deemed by other jurisdictions to transfer the vessel free and clear of all liens and encumbrances. The effect of a sale by a bankruptcy court in the United States is uncertain and there is controversy about whether bankruptcy courts are constitutionally empowered to exercise admiralty powers and wipe a vessel free of maritime liens. The controversy is likely to be resolved so that United States bankruptcy courts will be entitled to exercise full admiralty powers; this may be accomplished by a proforma approval of the court's action by a United States District Court judge, with clear constitutional authority to exercise admiralty jursidiction. A sale by a bankruptcy court ought to be recognised as a sale of a vessel free and clear of all liens inasmuch as the procedures which guarantee a valid Marshal's sale in admiralty are intact: the bankruptcy courts require full notice of sale and full notice to lienors, and they adjudicate maritime lien claims on the vessel in the same way as would an admiralty court. In many other jurisdictions in the world, however, bankruptcy or insolvency courts vary considerably in procedure and in their deference to maritime lien concepts. The ultimate test of the ability of a court to sanction a sale free and clear of all liens, should be based on whether that court requires full notice to possible lienors and a fair opportunity to present their claims against the proceeds of sale in accordance with established maritime lien priority concepts. At the moment, however, since there might well be problems with a bankruptcy sale in the United States, there is not much point in undertaking such a sale where an admiralty sale may be arranged.

It is also quite possible to sell a vessel pursuant to a court order from any of the fifty state court systems in the U.S. where the vessel has been attached pursuant to that state's procedures in order to secure an actual or potential judgment. Since no state court may exercise admiralty powers, however, such a sale would not wash the vessel of maritime liens and hence is rarely considered by creditors.

Judicial sales of vessels in England

Grounds for judicial sale

As in the United States, an Order of Sale will be issued by an admiralty court in the United Kingdom pendente lite if the vessel is deteriorating or where the cost of maintaining the vessel under arrest is disproportionate to its value. It would appear, however, that the preferred practice is to sell the vessel after judgment, even if that gives rise to additional expenditure by the litigants. The proceeds of sale are then paid into court to be applied to any judgment in the same action. Where sale does not occur until after final judgment, the order of sale may provide for the direct payment of the proceeds to the judgment creditors.

Notice requirement attendant to sale

Upon the entry of an Order of Sale for a vessel, the court will require the Admiralty Marshal to sell either by public auction or by private treaty (for which brokers are employed who are likely to advertise the vessel fully as in the case of any other sale). Other creditors are not always notified of the proposed sale, but following the sale the court will order publication of a notice in Lloyd's List and other newspapers requiring any claims against the proceeds to be lodged within a specified period.

Appraisal requirements

Whenever the value of the res is relevant and disputed, the defendant (owner or claimant) may file an affidavit of value and pay into court or give bail in that sum. If the affidavit does not satisfy the plaintiff or if negotiations entered into after submission of such an affidavit fail, any party may apply for an order of appraisement if the defendant is seeking the vessel's release, or for a simultaneous commission of appraisement and sale. A commission of appraisement and sale is issued by the Registry of the Court upon the final decree, or the interim order pendente lite, and is executed by the Marshal. The Marshal has no power to sell the vessel for less than the appraisal value unless the court, on the Marshal's application, approves a sale at a lower price.

Where crew or cargo remain aboard the vessel the court will direct that its order of sale remain in the Registry until the vessel is empty. Similarily, if it is ascertained that repairs will enhance the sale value, the order may be suspended pending such repairs.

Conduct of sales

The usual order for sale made by the court directs that the marshal sell either by public auction or by private treaty. The private treaty, in which sealed bids are solicited by newspaper advertisement without an asking price, is presently the preferred method of sale. The marshal's broker is the major determinant of the method of sale (6).

Attempts by owners, mortgagees or others to sell a vessel privately while it is subject to an order of sale is treated as a contempt (unless a separate order sanctioning it is obtained from the court).

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(6) The marshal's broker also determines whether sale with or without cargo aboard is preferable and undertakes on behalf of the marshal to make any necessary application for permission to discharge and recover the cost.

Upon completion of the sale, the proceeds are paid into court to abide the results of any determination as to priorities among competing claimants. The marshal initially settles his account, and his expenses are paid from the proceeds. Then, if there is only one plaintiff with an unassailable claim, the monies may be paid out.

Where a caveat against release and payment has been filed, no funds may be released until the claim of the party filing it is resolved. The caveat against release is a directive prohibiting the release of funds, issued by the Clerk of the Court upon the claimant's filing an undertaking that he will pay damages incurred by the original applicant as a result of the delay if he cannot prove he had good and sufficient reason to seek the caveat.

Effect of judicial sale

The sale in admiralty transfers the vessel free and clear of all liens and encumbrances. A sale in bankruptcy in England operates in a similar fashion to bankruptcy sales in other jurisdictions and does not accomplish a transfer free and clear of maritime liens. See, e.g., The Constellation(1963)2 Lloyd's Rep. 538.

The Need for Uniform Rules on the Effects of Forced Sale on Existing Securities

It is generally advantageous to commercial intercourse between nations that their laws are similar. The less similarity there is, the more risky it is for those engaged in international trade because they may not know, and therefore will not be prepared for, the legal institutions and rules of the foreign country they are going to trade with. That is why one of the aims of free traders and of both private and public organisations active in trade is to achieve a greater degree of international uniformity. In the field of maritime law it is IMO and UNCTAD which are especially active but there is also UNCITRAL and UNIDROIT as well as the private organisations of ICC and CMI.

Uniformity is particularly important in the effects of forced sale since that is the point in time when any securities in the vessel are going to prove their worth to the security holder. Up to that moment everything has, so to speak, been in preparation for a forced sale. Fortunately, the forced sale rarely materialises; but without the possibility of a forced sale securities are of little use. Of course, the holder of a security is able to put extra pressure on his debtor to pay the secured debt, but it is the risk of forced sale that makes the threat credible.

Where security is given in real estate, or in objects that rarely move, uniformity is less important. Vessels are different. They move around in the world; many vessels engage in cross trade between foreign nations, rarely touching their home port. If a security holder wishes to enforce his security he will often have to do it in a foreign port, in a country other than that where the ship is registered.

The effect of a forced sale is twofold. One is to distribute the value of the vessel among security holders, which raises the question of rank or priority of securities. The other is to give title to a purchaser free of encumbrances that are not voluntarily taken over by him and to make it possible for the purchaser to register title.

If the vessel is sold at a forced sale in its home port, registered mortgages and hypothecs and such maritime liens and rights of retention which are recognised there will, of course, participate in the distribution of the proceeds of sale and they will all be extinguished thereby. But very likely there will be foreign maritime liens that are not recognised or not given the priority which they would have had under the law of their origin. Thus, a problem may arise as to the effect of the forced sale on such a lien if a vessel, in the hands of its new owner, touches the country where the lien originated (or indeed another country which would treat that lien differently from the country of registration). Will that lien which was not recognised and which, therefore, did not participate in the proceeds of sale, be regarded as extinguished or will the ship be subject to an unexpected burden?

If the forced sale takes place elsewhere than in the country of registration it may be that registered mortgages or hypothecs are not treated as they would have been in the country of registration. Perhaps more or bigger maritime liens are given priority in the sale and as a result there is not sufficient money to give the registered mortgages the same satisfaction as they would have had in a forced sale in the country of registration. What is the legal situation if the ship later in its new ownership goes to a port in its former country of registration?

These examples show the need for uniformity first of all in the rules relating to securities but also, and regardless of the law on securities, in the effects of forced sale. It is very unfortunate if a purchaser who buys a ship at a forced sale cannot rely on that sale to have extinguished all existing encumbrances on the ship. It is unfortunate for the purchaser who runs the risk at having the ship arrested and of paying claims which he could not take into account when buying the ship. And it is unfortunate for the security holders because the price at the forced sale will undoubtedly be influenced by such a risk. Finally, it is unfortunate for the shipping industry generally, because such a situation will influence the opportunities of obtaining credit.

It follows that there is a great need for securities to be treated the same way regardless of where the forced sale takes place. Interest in challenging a forced sale in some other jurisdiction would be diminished, as would forum shopping in order to find a forum for the forced sale which gives the best possible treatment to the rights of the security holder in question. There is an even clearer need to have the effects of forced sales recognised everywhere so that they may not be challenged and that is made easier the more uniformity there is in the types and treatment of the various securities.

Surprisingly, in view of the lack of uniformity, there seems to be a general tendency in many countries even without the convention, to recognise that a forced sale in another country gives the purchaser a clean title, when certain minimum conditions are fulfilled (especially in respect of the notice to be given to known security holders in order that they may look after their interests).

The Rules of the 1967 Convention on Forced Sale

Introduction

The purpose of a forced sale is to satisfy the creditors of the owner of the ship, (and sometimes also the creditors of persons other than the owner) when their claims are secured by a charge (maritime lien, mortgage or hypothec, possessory lien or right of retention) on the ship, out of the proceeds of the sale. It is therefore in the general interest of the creditors, and particularly of those whose claims have less than top priority, that the ship is sold at the highest possible price, for otherwise they may not obtain even part satisfaction of their claims.

In order to find a buyer it is necessary for the title to the vessel to be transferred clean of any pre-existing charges. Nobody in fact would be prepared to pay the market price for a vessel when there remains the risk that pre-existing claims might still be enforceable against the ship, particularly because a recovery against the previous owner would not be successful.

On the other side the extinction of all charges on the ship cannot affect the claimants, for their claims are transferred, maintaining the same right of priority, to the proceeds of sale which ought, in normal conditions, to be equivalent to the value of the vessel.

In order to give prospective purchasers the assurance that their title is really good against the world, the extinction of all charges must be recognised in all jurisdictions, for otherwise, unsatisfied claimants may attempt to enforce their claims on the vessel after the passing of title in a country other than that where the forced sale has taken place.

Moreover, when a vessel is the object of a forced sale in a country other than that where she is registered, the buyer must be able to obtain endorsement of his title in the ships' register if the ship is to keep her nationality, or deregistration from the previous register if the buyer wants to register the ship in another country. It is in fact a customary rule of international law, now embodied in the 1967 Brussels Convention, that on changing nationality a vessel may not be registered in the new register unless she is de-registered from her previous register.

To be recognised in as many maritime countries as possible these effects of forced sale had to be set out in an international convention which might be widely ratified. Since the forced sale is the normal manner in which mortgages and hypothecs as well as maritime liens are enforced, provisions about the forced sale of ships could find a proper place in a convention on maritime liens and mortgages. Such provisions have been included in the 1967 Convention on Maritime Liens and Mortgages and will be analysed hereafter.

The approach adopted by the Convention is threefold:-

(i) reasonable protection for the creditors, to enable them to participate in the distribution of the proceeds of sale in accordance with their respective priorities;

(ii) transfer of a clean title in the vessel to the purchaser;

(iii) registration of the vessel in the name of the purchaser, or deregistration and issuance of a certificate of deregistration as the case may be.

Protecting creditors

The first aim is achieved by requiring (Art. 10) that before the forced sale the competent authority of the State where the sale is to take place should give at least thirty days written notice of the time and place of the sale to holders of registered mortgages and hypothecs which have not been issued to bearer, to holders of registered mortgages and hypothecs issued to bearer and of maritime liens set out in Art. 4 of the Convention whose claims have been notified to the selling authority, as well as to the registrar of the register in which the vessel is registered.

The creditors who benefit from the protection are thus identified according to two different methods: on the one hand they must be claimants whose claims are secured by a mortgage or a hypothec or a maritime lien; on the other hand they must be known to the judicial authority competent to conduct the sale. The manner in which the claimants become known to the said authority differs according to whether the claimants are registered in the ships register or not. In respect of the former, i.e. the holders of registered mortgages and hypothecs which are not issued to bearer, the said authority has an implied duty to find out who they are, since notice of the sale must be given to all of them: to this effect the judicial authority will require the claimant who has requested the forced sale of the vessel, as a condition for the sale taking place, to produce an extract of the ships register with a list of all mortgages or hypothecs registered therein. As regards holders of mortgages and hypothecs whose names do not appear in the register because those securities have been issued to bearer, the holders of unregistered (and normally unregisterable) claims, and more specifically the holders of maritime liens, the burden shifts to them: they have in fact to make themselves known to the competent authority; which only has the duty to notify those claimants whose claims have been brought to the authority's attention.

Mortgages and hypothecs are identified in Art. 10 generally as "registered" mortgages and hypothecs. A question however may arise as to whether the duty to give notice of the forced sale is prescribed in respect of all registered mortgages and hypothecs or only for mortgages and hypothecs which comply with the provisions of Art. 1 of the 1967 Convention. The latter alternative seems to be more likely for a number of reasons:-

a) the first requirement of Art. 1 is registration, and this is also a requirement under Art. 10;

b) the second requirement is that the register is open to public

inspection and that extracts therefrom are obtainable: if the register is not open to public inspection and extracts cannot be obtained, it is impossible for the Court conducting the forced sale to find out who the registered holders of mortgages or hypothecs are and to give them notice of the time and place of the forced sale;

c) the third requirement of Art. 1 is that either the register, or the instrument to be deposited, specifies the name and address of the person in whose favour the mortgage or hypothec has been effected, the amount secured, the date and other particulars which, according to the law of the State of registration, determine the rank as respects other registered mortgages or hypothecs: if the name and address of the mortgage or hypothecs are not indicated, it is impossible for the Court to give them notice of the time and place of the forced sale;

d) the provision in Art. 11 paragraph 2 whereby the balance of the proceeds of sale, after payment of the costs awarded by the Court, must be distributed among the holders of maritime liens and rights of retention mentioned in Art. 6 and registered mortgages and hypothecs in accordance with the provisions of the Convention, may be complied with only if mortgages and hypothecs are enforceable in the Contracting State where the sale is taking place and to this effect they must comply with the requirements set out in Art. 1.

The obligation to give written notice of the place and date of sale to claimants other than holders of registered mortgages and hypothecs not issued to bearer is limited to holders of mortgages and hypothecs issued to bearer and to holders of maritime liens set out in Art. 4. It should follow that the Court to which claims other than those specified above have been notified does not seem to be under any duty to give such claimants notice of the place and date of the forced sale. Whether this conclusion is right is however doubtful. In fact Art. 11 paragraph 2 provides, as already mentioned, that the balance of the proceeds of sale after payment of costs must be distributed not only among holders of convention maritime liens, but also among holders of liens and rights of retention mentioned in paragraph 2 of Art. 6 that is, those securing claims of shipbuilders and shiprepairers. If therefore notice of such claims is given to the Court notice of the sale must be also given to the claimants in question. This is confirmed by the fact that, according to paragraph 3 of Art. 11, the obligation to issue a certificate that the vessel is sold free of all mortgages, hypothecs, and of all liens and other encumbrances is conditional on the proceeds of the forced sale having been distributed in compliance with the aforementioned paragraph 2 of Art. 11 or having been deposited with the competent authority.

On the contrary there is no duty under the Convention to give notice of the time and place of the forced sale to holders of liens and rights of retention other than those mentioned in paragraph 2 of Art. 6, notwithstanding that such liens and rights of retention also cease to attach to the vessel as a consequence of the forced sale.

Transfer of a clean title

The second aim is achieved by means of a general provision whereby, subject to certain conditions, all mortgages and hypothecs, except those

assumed by the purchaser, and all liens and other encumbrances of whatsoever nature, cease to attach to the vessel in the event of her forced sale; and by imposing a specific duty on the Court or other authority which has control of the sale to issue a certificate to the effect that the vessel is sold free of all mortgages and hypothecs, and of all liens and other encumbrances.

They cease to attach to the vessel provided:

(i) that at the time of the sale the vessel is in the jurisdiction of the State where the forced sale takes place ensuring that the jurisdiction for the forced sale is linked to the physical location of the vessel; and,

(ii) that the sale is carried out in accordance with the law of that State and those provisions of the Convention which ensure the protection of all security holders, including holders of national liens or rights of retention for claims arising out of shipbuilding or repair contracts.

The provisions in question are those, previously mentioned, which require at least thirty days advance notice of the time and place of the sale to the persons mentioned in Art. 10 of the Convention. They do not include the rules on the distribution of the proceeds of the sale, for distribution occurs after the sale and therefore has no influence on the manner in which the sale is conducted.

Registration of the vessel in the name of the purchaser

The third aim is achieved by requiring (Art. 11 paragraph 3):

(a) the competent authority to issue a certificate to the effect that the vessel is sold free of all mortgages and hypothecs, except those assumed by the purchaser, and of all liens and other encumbrances;

(b) the registrar of the register wherein the vessel is registered to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of reregistration as the case may be.

The first requirement is conditional upon the sale being completed in compliance with paragraph 1 of Art. 11 (whereby the vessel must at the time of the sale be in the jurisdiction of the court competent for the sale and the sale must be effected in accordance with the provisions of the Convention, requiring advance notice of the time and place of the sale) and upon the proceeds of the sale having been either distributed in compliance with paragraph 2 of Art. 11 (among holders of registered mortgages and hypothecs and holders of maritime liens as well as of the liens and rights of retention securing under national law the claims of shipbuilders and shiprepairers), or deposited with the competent authority (paragraph 3 of Art. 11).

It must however be noted that only compliance with paragraph 1 of Article 11 is always required, whilst this is not so in respect of paragraph 2 (distribution of the proceeds), since a certificate must be issued even

when the proceeds have not been distributed provided they have been deposited with the competent authority for subsequent distribution. In fact distribution may take some time, when disputes arise in respect of the amounts of the claims and their respective priority, so the delivery of the certificate to the purchaser should not be postponed, for otherwise the purchaser could not register the vessel in his name or obtain a certificate of deregistration. Reference to the distribution of the proceeds of sale should perhaps have been omitted, for the purchaser cannot know at the time of bidding if the proceeds of the sale will be distributed in compliance with the provisions of the Convention and thus cannot have the certainty of obtaining a certificate and of obtaining the registration of the vessel in his name or deregistration. This could discourage prospective bidders and reduce the prospects of a satisfactory sale.

The requirement that the proceeds of the forced sale be deposited with the authority competent for such a sale is not always complied with. For example, in certain jurisdictions if the successful bidder is the holder of a registered mortgage or hypothec he may be authorised to set off his claim against the purchase price, provided the amount of any claims having priority over his mortgage or hypothec is paid or guaranteed.

In any event there is some doubt as to what manner of distribution will comply with paragraph 2 of Art. 11. As regards priority amongst the various categories of charges (maritime liens, mortgages and hypothecs, liens and rights of retention), it is clear that Convention maritime liens come ahead of mortgages and hypothecs, but it may (theoretically) be questioned by which law the existence of a lien or right of retention securing claims for the building of or for repairs to the vessel should be established. Such a lien or right of retention is extinguished, (paragraph 2 of Art. 6,) when the vessel ceases to be in the possession of the claimant. So, for the lien to exist at all, the vessel has to be still in the possession of the claimant at the time of the arrest or seizure leading to the forced sale. And since it is a requirement of Art. 11 paragraph 1 that at the time of the forced sale the vessel be in the jurisdiction of the Contracting State where the sale takes places, it is by the law of that State that the existence of a lien or right of retention in favour of the shipbuilder or shiprepairer and its possible priority over registered mortgages and hypothecs must be established.

Whilst the ranking of Convention maritime liens inter se must be established according to the specific rules of the Convention (Art. 5, paragraphs 2,3 and 4), the provisions of the Convention in respect of the ranking of mortgages and hypothecs inter se is not a substantive one, but a choice of law rule: Art. 2 provides in fact that such ranking is determined by the law of the State of registration.

No power or duty of control is attributed to the registrar. In fact paragraph 3 of Art. 11 provides that the registrar shall be bound to delete all registered mortgages and hypothecs and to register the vessel in the name of the purchaser or to issue a certificate of deregistration "upon production" of the certificate issued by the authority conducting the forced sale, that the vessel has been sold free of charges.

C IMMUNITY FROM ENFORCEMENT

Sovereign Immunity in the United States and England

Absolute vs. restrictive application of the doctrine

The concept of sovereign immunity, which grants immunity from prosecution to sovereign States or certain instrumentalities of such States, had its genesis in the laissez-faire era of government. The doctrine provided absolute immunity for a sovereign State from commencement of suit or execution of a judgement unless the State consented to such a suit. Consent could not be waived in advance but had to be given at the institution of the proceedings. Strict application of these principals was perceived to lead to serious injustice and as the State's role in international commerce expanded in the modern era this absolute rule began to be eroded. Today, both the United States and England subscribe to a modified form of sovereign immunity, generally referred to as the restrictive doctrine of sovereign immunity.

This approach attempts to limit sovereign immunity to those acts which are traditionally performed by governments and eliminates immunity for acts performed by a State which fall within the realm of activities traditionally performed by private parties. As Lord Denning observed in 1977:-

> "A century ago no sovereign engaged in commercial activities. It kept to the traditional functions of a sovereign; to maintain law and order; to conduct foreign affairs; and to see to the defence of the country... In the last 50 years there has been a complete transformation in the functions of a sovereign State. Nearly every country now engages in commercial activities. It has its departments of state - or creates it own legal entities - which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit."

Trendtex Trading Corp. Ltd. v Tepl Central Bank of Nigeria (1977) Q.B. 529 at p. 555, Lord Denning M.R.

Legislation embodying this approach to sovereign immunity has been enacted in both the United States and England. The acts are, respectively, the Foreign Sovereign Immunities Act of 1976 (the "US Act") and the State Immunity Act 1978 (the "English Act").

States and State entities which are granted immunity under the acts

Both acts continue to grant immunity although the treatment of government entities under each act is different. It might be said that the US Act bestows immunity on a broader range of government entitites than does the English Act. Under the US Act, all types of political subdivisions, including the territories of a sovereign State, benefit from the

privilege. Further, under the US Act, agencies or instrumentalities of a foreign State are also covered by the Act so long as they are either organs of the State or are entities in which a majority of shares or other ownership interest is held by the State (28 U.S.C. 1603).

The English Act includes the head of a State in his public capacity, the government of the State and any department of the government of a State. A different category is created for entities distinct from the executive organs of the government of the State. Immunity for these separate entities is only available where the entity is an organisation under the State's control and exercising governmental functions. If the entity retains an element of self-control in performing its functions, then it will generallly not be protected by the sovereign immunity doctrine. English courts tend to examine the substance of the activities rather than rely on factors like an entity's separate existence or an ambassador's certification of the entity's sovereign status.

Since shipping and other commercial activities of a maritime character are more frequently the province of specially created entities, the question of which entities qualify for sovereign immunity is of importance.

Waiver and enforcement of admiralty proceedings

Both the United States Act and the English Act are structured along similar lines. Each lays down the general principle of immunity for foreign States and certain entities, and then each outlines exceptions to the general rule. The exceptions which are relevant here are based on 1) waiver and 2) enforcement in admiralty proceedings.

The immunity granted under both Acts can be waived if the State submits to the jurisdiction of the courts of either country. In the United States, a foreign State may waive its immunity either explicity or by implication and such a waiver may be irrevocable by its own terms. Under the English Act a State may submit to the jurisdiction of an English court after the dispute has arisen or by prior written agreement, but a provision in the agreement that it is to be governed by English law, without more, is not regarded as submission.

For an example of a clause which has been regarded as a waiver of immunity in a loan agreement (and which is adaptable to other agreements), see appendix II.

Section 1610 of the US Act provides that the property of a foreign state shall also be liable to attachment in advance of judgement if immunity has been waived. Specific provisions in both the United States Act and the English Act deal with admiralty proceedings, and provide alternative means of jurisdiction where there is no effective waiver.

Under the English Act if a ship belonging to a State was in use or intended for use for commercial purposes, then the ship is not immune for an action in rem. The term commercial purposes means the following transactions:

(1) any contract for the supply of goods or services;

(2) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(3) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

The test of commercial use or intended commercial use is to be applied at the time when the cause of action arose and not when the ship is arrested or the Admiralty jurisdiction invoked.

In the United States, a suit in rem against the property of a State is not permitted; rather § 1609 (b) of the US Act provides that actions to enforce maritime liens shall be deemed to be "an in personam claim against the foreign state..."

Like the English Act, the U.S. Act requires suits in admiralty to enforce maritime liens to be based on the commercial activity of the Foreign State. The US Act then sets forth a procedure which must be followed to "enforce" a maritime lien. First, notice of the suit is to be given by delivering a copy of the summons and complaint to the person or agent having possession of the vessel. In this regard, notice is not deemed to be delivered if the vessel is arrested, nor may it be delivered after an arrest unless the lienor was unaware that the vessel of a foreign State was involved. The effect of arresting a vessel of a foreign State or entity may be to lose all the rights against the vessel and the owner Foreign State, as one recent case held. Jet Lines Services, Inc. v. M/V "Marsa El Hariga", 465 F. Supp. 1165 (D. Md. 1978). If the lienor is unaware that a foreign State is involved when he arrests the vessel, the notice provision is deemed satisfied by the service of process of arrest.

The second notice requirement provides for notice to the foreign State to be initiated within ten days after delivery of the first notice or within ten days of the time the lienor learned that the owner was a Foreign State, if the lienor arrested the vessel in ignorance. Notice under this requirement must be delivered either in accordance with a prior agreement between the lienor and the foreign State or as more particularly specified in 28 U.S.A. § 1608. If these procedures are followed, the claimant is entitled to prosecute his claim on an in personam basis against the State with the caveat that any judgment is limited to the value of the vessel or cargo that otherwise would have been the subject of the in rem arrest or attachment.

Immunity of State-Owned ships under the 1926 Brussels Convention

The extent to which immunity can be invoked by states with respect to their state-owned ships and cargoes is regulated by a Convention of 1926 supplemented by a protocol of 1934.

The Convention in its first two articles states as a general rule that the same rules of liability, the same obligations and the same rules of jurisdiction and procedure are to apply to states and to ships owned or operated by states, cargoes owned by states and cargoes and passengers carried on state-owned ships, as apply to private owners and their ships and cargoes.

The Convention then goes on in Art. 3 to state the exceptions. According to Art. 3 certain ships, and state-owned cargoes carried on board such ships, may not be seized, arrested or detained or be the subject of proceedings in rem. This applies to state-owned ships such as ships of war, hospital ships and other ships which are employed exclusively on Government and non-commercial service. It also applies to ships on charter, not only bare-boat but also time or voyage charter, to a state.

The immunity extends to state-owned cargo for government and non-commercial purposes carried on board merchant ships.

Notwithstanding the immunity granted by Art. 3, claims may be brought in courts having ordinary jurisdiction in respect of collision, salvage, general average, repairs of and supplies to ships and claims in respect of contracts relating to the cargo.

The character of the ship or cargo is conclusively proved by a certificate issued by the state of origin of the ship or cargo.

PART III

Legislation

PROPOSED REFORM

An outline of Law on Maritime Liens and Mortages, Arrest and Forced Sale

A. Terminology

The words "maritime liens" and "mortgages" are terms of art in common law. Their literal translation into other languages is not easy.

The security corresponding to the mortgage is called "hypothèque" in French law, "hipoteca" in Spanish law, "ipoteca" in Italian law, "prenda" in Peruvian and some other South American laws, "pand" in Danish law.

The security corresponding to the maritime lien is called "privilège" in French law, "privilegio" in Spanish and Italian law.

If the terms of art do not exist in a given legal system, the words used may either suggest the main features of a given type of security or translate the word or words used in other legal systems.

The first method may be adopted in respect of the security called mortgage in common law countries and hypothèque in civil law countries. In fact, the main characteristics of these securities are that they have the character of a charge and need registration in order to be valid against third parties. The words "registerable (or registered) charges", if they can be literally translated, seem to decribe those two characteristics.

The second method may be easier in respect of the various types of securities called "lien" with qualifications such as "maritime" and "possessory" and "statutory" in common law countries, and "privilège" with qualifications such as "maritime" or "possessory" or without qualifications in civil law countries.

The difference between the word "lien" and the word "privilège" is that "lien" conveys the charge-like character of some types of liens (i.e. the maritime and the possessory lien) while "privilège" describes the priority character of all types of privileged claims, including those which enjoy a preferred status only, without having the character of a charge, acting only on the chattels which are owned by the debtor at the time of the enforcement of the claim. If it is wished to emphasize the charge aspect, these securities may be called "statutory non-registerable charges"; if the enjoyment of priority is to be the main identifying characteristic, they may be called "privileged claims". In both cases a qualifying word must be used to distinguish the various types of "liens" or "privileged claims".

Since this outline is in English, it seems simpler to use English terms of art, i.e. the words "maritime liens" and "possessory liens". However, sometimes the words "privileged claims" will also be used to cover all types of unregisterable securities.

There is no problem regarding the words "right of retention", which may be literally translated into other languages.

B. Policy choices

One fundamental policy choice concerns what vessels may be subject to registerable charges, maritime and possessory liens and rights of retention. It is generally accepted that state-owned ships committed only to public non-commercial service may not be subject to any type of security.

The problem arises, particularly in a socialist country, in respect of state-owned vessels used in commercial service. If international financing were sought for the construction or purchase of vessels with the offer of security on such ships as opposed to a state guarantee or, if such security were requested by the lenders, registerable charges on state-owned ships in commercial services should be permitted and, along with them, maritime and other liens to the extent that it may be deemed proper.

A second policy choice is that relating to ranking between registered charges and maritime and other liens, as well as to the entitlement of the holder of a right of retention to refuse to surrender possession even if the ship is arrested or in case of bankruptcy. If ship financing is deemed to be the primary consideration, registerable charges, which constitute the security of the lenders, should be accorded the greatest possible protection both as regards enforceability and priority. In this latter respect, the fewer the liens having priority over the registered charges, the greater is the protection for the holder of the charge.

For the same reason, rights of retention should either be excluded or reduced to a minimum (if their holders are granted the power to refuse to surrender possession even in case of arrest and forced sale, until their claims are satisfied).

C. Maritime and other liens

If there are no general statutory provisions on liens such as may be found in the civil codes of civil law countries, the maritime law should include them. They should deal, inter alia, with the following matters:

1. The continued existence of the security when the subject matter of the security is damaged or physically altered. The limits within which such continued existence should be allowed ought to be established. For example, the breaking up of a ship or a ship which is sunk and only partly refloated.

2. Situations in which subrogation in the security occurs.

   These may include:-

   a) settlement by a claimant, whose privileged claim is lower in rank of another, of the privileged claim of higher rank;

   b) settlement by a joint obligor of a privileged claim;

   c) damage to or loss of the vessel giving rise to a claim against the tortfeasor.

3. Accessory character of the lien in respect of the claim secured thereby and consequent transfer of the lien if the claim is assigned.

D. Liens on a ship

D.1. Maritime liens

These are the liens which accord with the principles set out in Article 7 of the 1967 Brussels Convention.

1. Maritime liens must be specified and may encompass only those claims ranking ahead of registered charges (see Art. 4 of the 1967 Convention); or they may include other claims which rank behind registered charges. In the latter case which claims rank ahead and which behind must be made clear.

2. The ranking of maritime liens of different categories and of the same category inter se as well as ranking between maritime liens and registered charges must be set out (see Art. 5 of the 1967 Convention).

3. The characteristics of maritime liens must be specified (see Art. 7 of the 1967 Convention).

4. Provision for the extinction of maritime liens must be considered (see Art. 8 of the 1967 Convention).

D.2. Possessory liens

A possessory lien is conceivable only if the ship is in the possession of the claimant and if such possession is related to the claim. Examples are the salvage of a vessel abandoned by her crew, wreck removal, shipbuilding, ship repairs.

Whether claims should be secured by a maritime lien (as is usually the case in respect of salvage) or by a possessory lien (as is usually the case with ship repairs) must be decided on the basis of the advisability of limiting the priority of some claims in order to protect others, such as holders of registered charges if the possessory lien ranks ahead, holders of maritime liens in the same situation, or ordinary claimants.

The provisions for possessory liens, if any are admitted, should include the following:

1. A list of possessory liens;

2. Ranking of possessory liens with respect to maritime liens and registered charges;

3. Extinction of possessory liens when possession is lost.

D.3. Other liens

They should have, as previously indicated, only the effect of granting the holder a priority over ordinary claimants in the distribution of the

proceeds of sale without having any of the special features of the maritime lien. If therefore a ship is not owned by the person against whom the claim arose, the lien does not arise; if the ship is not longer owned by that person the lien is lost. This type of lien becomes relevant only at the time of the distribution of the proceeds of sale.

If it is decided that claimants other than those whose claims are secured by maritime and possessory liens deserve priority over ordinary claimants, this type of lien may be admitted. For example, in the civil law systems, there are liens for taxes, wages, professional fees, etc.

E. Liens on cargo

It may be reasonable to give protection to some claimants whose claims are for services done to, or expenses incurred in respect of, the cargo, i.e.:

1. Claims of the salvor for salvage services rendered to the cargo;

2. Claims of the shipowner for cargo's contribution in general average;

3. Claims of the shipowner for freight, demurrage and loading and unloading expenses;

4. Claims of the shipowner or master in respect of disbursements incurred for account of the cargo.

The ranking of the various liens on the cargo should be fixed. It is suggested that they should rank in the order in which they are listed above.

The liens mentioned under 2, 3 and 4 are possessory in a strict sense. That under 1 is not, since the cargo may never be in the possession of the salvor, but it should exist as long as the cargo remains on board or at least in the possessions of the shipowner and indentifiable as cargo of the particular ship. It should therefore be provided that all these liens should be extinguished upon discharge of the cargo from the ship except when the cargo remains, after discharge, in the possession of the owner, in which event they should be extinguished after the lapse of a certain period of time, e.g. fifteen days.

F. Registerable charges

F.1. Characteristic features

It would seem proper to start by specifying the characteristic features of a registered charge, that is the power of the holder thereof to enforce his claim on the ship even if title to that vessel has passed to a third person, and to satisfy his claim out of the proceeds of sale with priority over the other claimants indicated by the law.

F.2. Property subject to registerable charges

The property which may be the subject matter of a registerable charge must be specified; it would include the vessel, her machinery, appurtenances and spare parts existing on board or, if ashore, appropriated to the

vessel, such as a spare shaft or a spare propeller.

It should be provided that if appurtenances or spare parts are disembarked or cease to be appropriated to the ship, the registered charge ceases to attach to them. Conversely the registered charge shall automatically attach to new appurtenances and spare parts appropriated to the ship or to new additions generally.

The problem whether or not the charge should attach to appurtenances owned by a third party should be solved.

F.3. Registerable charges in ships under construction

If it is decided to allow registerable charges in ships under construction a special register for such ships should be established and the following provisions should be covered in the law:

a) From what time a charge may be registered, e.g. from the time of registration of the ship under construction in the register, irrespective of whether or not construction has commenced, or from the time when construction has reached a given stage.

b) Whether the subject of the charge is the ship under construction, or also the materials and machinery intended for the ship, provided they are in the precincts of the yard and are clearly identified.

F.4. Co-ownership

If a vessel is owned by various persons, and each one of them has a number of shares in the ship, it should be decided whether the shares owned by one of them may be the subject of a distinct charge.

F.5. Who can create a registerable charge

It should be provided that a charge on the ship (or on shares in the ship) may be created only by the owner of the ship (or of the shares). In case of co-ownership, it should perhaps be possible for the co-owners to agree a charge on the whole ship in lieu of one on their individual shares, provided this is agreed by the owners of a majority, such as seventy-five per cent, of the shares.

F.6. Form of the charge

Any charge should be in writing, executed by the owner of the ship or shares therein and properly certified.

F.7. Application for registration

An application to the registrar should be made either by the shipowner or by the holder of the charge. In order to avoid uncertainty and lack of uniformity, the minimum information which must appear in the report should be specified in the application. It may, for example, be the following:

a) Name of the vessel and other data required for its

identification, e.g. tonnage, port of register, registration number;

b) Name and address of the owner;

c) Name of the holder of the charge;

d) Date of execution of the charge;

e) Maximum amount secured.

F.8. Documents required for registration

In addition to the application, a certified copy of the instrument which constitutes the charge must be produced to the registrar.

F.9. Registration of the charge

The register in which the charge is to be registered should be specified, as well as the exact manner of the registration, e.g. first by noting the day and time of the application in a book and then by copying in the register the information contained in the application for registration.

F.10. Endorsement of the charge in the ship's papers

All ships should carry a document issued by the flag state certifying the nationality of the ship and providing information as to ownership. It is also customary for information to be provided (preferably in the same document), about charges registered on the ship. This enables third parties who deal with the ship in places other than the port of register to be informed as to whether the ship is free from charges. It should however be specified that, in case the information endorsed in the ship's papers is in conflict with that registered in the ship's register, the latter shall prevail.

F.11. Perfection of registration

The first decision which should be taken is whether endorsement in the ship's papers is a requirement for perfection or not. The negative seems preferable, for otherwise it would always take time to create a charge on a ship away from her home port, whilst transactions such as loans may have to be concluded quickly. It is appreciated that this may be detrimental to third parties who cannot then fully rely on the information in the ship's papers, but if third parties know that this is the case (a notice to this effect should be inserted in the ship's papers), they will inspect the ship's register before concluding a major transaction.

Perfection of registration in so far as the ships register is concerned may exist either upon the registrar noting the application in his book and returning a copy of the application with a certificate, or upon the registrar actually copying into the register the information contained in the application. In both cases the registrar would have to register the charges and other acts (such as a sale) in the order in which he has received them.

F.12. Effect of registration

Registration is relevant not only to the priority between holders of charges, but also to the relationship between holders of different rights, such as a charge on, or title in the ship. There should therefore be a general rule that, to the extent to which they are in conflict, a right registered prior in time prevails over a right registered subsequently.

F.13. Priority among registered charges

Priority may be based on the day and time of registration, the charge registered first taking precedence over that registered later, albeit on the same day, or alternatively on the day of registration, charges registered on the same day ranking equally.

F.14. Enforcement of the security

If it is desired to strengthen the security of the holder of a registered charge and to create incentives for ship financing, the enforcement of the security should be made as easy and as simple as possible. The following provisions should be considered:

a) Power of the holder of the charge to sell the ship and to satisfy his credit out of the proceeds of sale, placing the balance, if any, at the disposal of the owner;

b) Power of the holder of the charge to take possession of and operate the ship, whereupon the master shall comply with his orders;

c) Power of the holder of the charge to request the competent court to seize the ship and sell it in a forced sale.

F.15. Subrogation and assignment

Subrogation should occur in the same situations as for privileged claims as well as in cases of damage or loss of the ship giving rise to claims against insurers. Assignment of a secured credit ought to result in the automatic transfer of the charge securing such credit, in view of the accessory character of the charge.

F.16. Extinction

The cases of extinction of the security should be set out. They may include:

a) Satisfaction of the credit;

b) Extinction of the credit otherwise than by satisfaction;

c) Loss of the ship, save the subrogation in the claim against the insurer;

d) Deregistration of the charge or of the ship.

G. Rules of procedure

Special rules of procedure may be necessary to govern the arrest of a vessel as a conservative measure and the seizure and forced sale of a ship.

G.1. Arrest

The following matters should be regulated:-

1. The claims in respect of which the arrest of a ship is permissable (maritime claims: reference is made to Art. 2 of the 1952 Brussels Convention).

2. Ships which may be arrested: e.g. state-owned ships exclusively used in a public non-commercial service.

3. Whether arrest of the ship in respect of which the maritime claim arose is permissable even if she is not owned by the person liable for the claim (see Art. 3 of the 1953 Brussels Convention).

4. Proof of claim required to obtain the arrest; e.g. prima facie evidence of such claim.

5. Competent authority: e.g. the court of the place where the ship is at the time.

6. How an application must be made: e.g. the form of the document, by whom it should be signed, other documents required.

7. Whether the arrest may be granted ex parte, without the owner being summoned to attend a hearing before the order of arrest is issued: it is suggested that this should be so.

8. How the arrest is executed and by whom: e.g. by an officer of the court.

9. In whose custody the ship is to be placed after the arrest and by whom the costs of maintenance of the arrested ship must be borne:

   (a) It is suggested that the ship is placed in the custody of the court marshal if there is such an official, or of a person appointed by the court.

   (b) The owner of the ship should continue to pay for the crew, if the crew remains on board after the arrest, and for the ship's maintenance. However, if the crew is disembarked and a skeleton crew is placed on board, and if maintenance is not carried out, all sums which the custodian has to spend in order to preserve the ship should be advanced by the person who has applied for the arrest.

10. Whether counter security must be provided by the claimant: this should be left to the discretion of the court.

11. Whether, if no hearing takes place before the arrest, notice of the arrest must be given to the owner and a hearing fixed: it is suggested that it should be so.

12. Whether an order of arrest may be modified or cancelled by the court and, if so, in what circumstances: it is suggested that the court should be empowered to do so at its discretion.

13. Under what conditions the ship may be released from arrest: e.g. provision of adequate security.

14. The time limit within which proceedings on the merits of the claim must be brought.

15. Whether the court by which the arrest is granted has jurisdiction to determine the case on its merits (see Art. 9 of the 1952 Brussels Convention).

16. Under what conditions (e.g. risk of deterioration, excessive cost of maintenance, etc.) the arrested ship may be sold by the court.

17. Conversion of the arrest into a seizure when an enforceable judgement is obtained on the merits in order then to proceed to the forced sale of the ship and the distribution of the proceeds of sale.

G.2. Forced sale

The following matters should be regulated:-

1. The bases on which proceedings for the forced sale of a ship may be commenced, e.g. enforceable judgements, notarized acknowledgements of debt, etc.

2. Notice required before the seizure of the ship: usually a short notice is given to the owner intimating to him that he should settle his debt.

3. The competent court for the forced sale; this should be the court of the place where the ship is at the time of seizure.

4. By whom the seizure is made and how: by an officer of the court who should go on board and serve on the master the order of seizure.

5. To whom notice of the seizure must be given: the owner, the port authority, holders of registered charges, other claimants who have given notice of their claims to the court, the consul of the flag state of a foreign ship, the registrar of the register where the vessel is registered.

6. The time limit within which an application for forced sale must be made and the persons to whom notice must be given; it is suggested that a time limit from the seizure should be fixed, and that failing an application for sale in that time, the ship should be released. Notice of the application should be given to the same persons as for

the notice of seizure.

7. Valuation of the ship: the court should appoint an expert to value it.

8. Order of sale and date of auction: the order of sale should fix the conditions of the auction, the basic price, the amount of the increase for each subsequent bid, the sum which should be paid into court in order to permit participation in the auction, etc.

9. Service of the order within a prescribed time limit before the date of auction and publication of the order in specialized newspapers, in foreign countries as well, particularly in the case of the sale of a foreign ship.

10. Who can bid at the auction: payment into court of the sum fixed by the court (see No. 8 above) should be a condition for bidding.

11. Conduct of the auction.

12. Award of the ship to the successful bidder; this may take place immediately or after a fixed period of time within which a further increase of price may be allowed; any increase should be in excess of a stated percentage of the price (e.g. ten per cent) and a stated percentage of the new price paid into court, whereupon a new auction is fixed, the person making the offer being bound by it.

13. Provision for the situation where no bid is forthcoming for a sum equal to the basic price: a new auction at a reduced price should be fixed.

14. Transfer of title to the successful bidder, against payment of the purchase price, free of all encumbrances.

15 Provision whereby the holder of a registered charge, as the successful bidder, can set off his secured claim against the sale price of the ship, after the costs and the priority claimants have been paid or guaranteed.

16. Time limit within which claimants may file claims and the manner in which the claims must be proved.

17. Distribution of the proceeds of sale: a hearing should be fixed at which the plan for the distribution should be submitted to the claimants for approval.

18. Costs which may be paid out of the proceeds of sale before distribution to the claimants.

19. Manner in which objections to the distribution plan are to be settled by the court.

20. Provisions to empower the court to order the registrar to delete all encumbrances and to register the ship in the name of the successful bidder or to delete her from the register for the purposes of re-

registration in a foreign register, as the case may be.

21. Provisions to allow the purchase price to be paid by a foreign purchaser into a external account when the price is paid in a foreign currency and when the claimants are, in whole or in part, non-residents. This may avoid losses arising out of currency fluctuations and may expedite payment to non-resident claimants.

APPENDICES

APPENDIX I

United States Uniform Commercial Code Article 9

Definition of terms

One major effect of Art. 9 was the development of a series of "generic" definitions of broad application. Under Art. 9, a "debtor" is the person who owes payment of the obligation secured. Generally, the debtor owes payment of the obligation to a "secured party". U.C.C. §9-105(1)(d). A "secured party" is defined as a:

> lender, seller or other person in whose favour there is a security interest, including a person to whom accounts or chattel paper have been sold.
>
> (U.C.C. §9-105(1)(m))

The U.C.C. divides personal property into six categories:

1. "Goods" - generally tangible movable objects and fixtures. There are four sub-categories.

   (1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes; (2) "equipment" if they are used or bought for use primarily in business... (3) "farm products" if they are crops or livestock or supplies used or produced in farming operations... (4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service...

   (U.C.C. §9-109)

2. "Account", or account receivable, defined as any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance;

   (U.C.C. §9-106)

3. "Instrument", a writing evidencing the right to the payment of money, including a "negotiable instrument" and a "security" as defined in Arts. 3 and 8 of the U.C.C., respectively, typically a promissory note and a stock or bond certificate;

   (U.C.C. §9-105(i))

4. "Document of Title", a writing evidencing that the person in possesion of the document is entitled to receive, hold and dispose of the document and the goods it covers, typically, Bills and Lading;

(U.C.C. §9-105(1)(f); see U.C.C. §1-201)15).

5. "Chattel paper" - a writing which evidences both a monetary obligation, and a security interest in specific goods. Typically, a lease, although a purchase money chattel mortgage, when accompanied by a promissory note secured by that mortgage, used as collateral by the holder, would be considered in this category;

(U.C.C. §9-105(b))

6. Finally, the catchall category of "general intangible":

"any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money".

(U.C.C. §9-106)

Examples of collateral in the form of general intangibles include goodwill, copyrights, patent rights, royalty rights or rights to performance.

In addition to providing the secured party with rights in the original collateral, a security agreement under Art. 9 also provides the secured party with rights to "proceeds", or the property which results from the sale, exchange, collection or other disposition of the original collateral. U.C.C. §9-203. Art. 9 contains elaborate "tracing" rules affecting rights in proceeds.

Creation of a security interest: attachment and perfection

There are three events which must occur before a security interest attaches: (1) a security agreement, adequately describing the collateral, must be signed by the debtor, (2) value must be given by the secured party, and (3) the debtor must have, or acquire, rights in the collateral. As stated by the U.C.C., a security interest does not attach unless:

(1)(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral... and (b) value has been given (by the secured party); and (c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

U.C.C. §9-203

It is important to note that there is no set sequence for these events and, thus, the traditional sequence of events in common law countries applicable to say, a mortgage has been loosened.

Mere attachment of a security interest will not protect the secured party against the whole world. While attachment creates an enforceable relationship between the debtor and the secured party, it does not determine the relative rights or ranking of the secured party and interested third parties. To protect the secured party against the debtor's other creditors and transferees, the security interest must be "perfected". The concept of "perfection" is primarily Art. 9's adaptation of the principle of public or constructive notice, and generally requires some additional step beyond attachment which is deemed to constitute adequate notice of the security party's priority interest.

Under Art. 9, security interests may be perfected in two principal ways, depending upon the type of property involved.

First, security interests in all types of collateral, except "instruments", may be perfected by filing a "financing statement". There are few formalities and these are not rigorous. A financing statement is a simple form listing the names and addresses of the debtor and secured party and describing the collateral. It is signed by the debtor or, if previously authorised by the debtor, the secured party. The forms (in several copies) are filed in an appropriate state or county office and stamped by date and sequential numbering. The rules for determining the proper places for filing a financing statement may be complicated, depending on the type of property involved and the location of the debtors' business offices.

Most significantly:

A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

U.C.C. §9-402.

In other words, unlike a mortgage, a security interest can be recorded before the debtor owes the collateral and before the security agreement (the mortgage equivalent) is signed.

Secondly, security interests in goods, money, negotiable documents, instruments or chattel paper may be perfected by possession, thereby continuing the common law concept of a possessory pledge. The theory is that a secured party's unequivocal, absolute physical control over the pledged property should be sufficient to put third parties on notice of

the secured party's interest. However, it is important to note that a security interest in accounts and general intangibles cannot be perfected by transfer of possession to the secured party. Accounts and general intangibles represent kinds of property not ordinarily evidenced by a written document, which could operate to transfer the claim simply by its delivery into the possession of a secured party. In other words, a debtor's account receivable, in the hands of the secured party, does not generally transfer the right of payment to the secured party, and thus delivery of such an account to the secured party is not sufficient to put third parties on notice that the possessory party's interest is a secured interest.

The existence of a third set of security interests which are deemed perfected simply upon the attachment of the security interest must be mentioned for completeness. For example, a purchase money security interest in goods purchased primarily for personal, family or household purposes is perfected when the security interest attaches as between the debtor and the secured party. Therefore, when a consumer buys consumer goods from a merchant on credit, and the merchant reserves title to the goods until the consumer pays for the goods, the merchant's security interest is perfected upon attachment. It was felt that the merchant's financial and administrative burden in filing a financing statement is not justified by the protection thereby afforded to other possible creditors of the consumer-debtor. The likelihood of the consumer using the goods as collateral in another financing was considered unlikely.

Certain forms of security interests are governed by independent rules

Notwithstanding its comprehensiveness, Article 9, does not govern all security arrangements. As previously noted the provisions of the Ship Mortgage Act and other federal statutes are not meant to be disturbed. In addition, Article 9 by its terms does not govern liens or "security interests" in insurance policies or bank accounts except where insurance proceeds or a bank account represents proceeds of the original collateral in which the secured party had a security interest.

It would be simpler to be able to say that Article 9 rules have nothing to do with maritime liens, the latter being creatures of national law, i.e. the general maritime law which is considered a national law and the Federal Maritime Lien Act. It is true, as a general proposition, that state laws, such as the U.C.C., cannot abridge or regulate rights granted at the federal level. However, there are two areas where a perfected U.C.C. security interest and maritime lien compete for priority. Vessel suppliers have a maritime lien against a vessel and her freight then pending for payment of the cost of supplies. A vessel owner has a maritime lien on subfreights to secure payment by a charterer or charter hire under the prime charter. The subject of these liens (freights and subfreights) are within the definition of "account" under Article 9. The problem is whether the holder of the secret maritime lien prevails over the holder of an Article 9 security interest which has duly attached and perfected by the filing of a financing statement. The better view favours the maritime lien not because of any inherent equity but solely because one is maritime and the other not; or alternatively, solely because one is considered a creature of federal law and the other a creature of state law. But the argument has been raised that the U.C.C. rules governing perfection of a

security interest in accounts should apply equally to maritime liens on subfreights.

Enforcement

Article 9 does not outline those acts which constitute a default. Rather it leaves this important issue to the parties and to what little common law on default already exists. Generally, except for the vague restrictions of unconscionability and good faith, default is "whatever the security agreement says it is". While almost every default clause in a security agreement includes a provision that non-payment constitutes default, other common provisions may provide for the triggering of a default if the debtor suffers financial reverses, if the debtor damages, destroys or removes goods, or if the debtor fails to maintain insurance on goods.

Upon default the remedies available to a secured party are extremely broad. First the secured party is entitled to take possession of the collateral. U.C.C. § 9-503 provides in part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

This ancient remedy of "self-help" is sanctioned, provided no breach of the peace occurs, and, predictably, the courts have expended a substantial amount of time in defining the meaning of that phrase. Generally, if a secured party attempts to take possession of collateral despite the objection of the debtor, then the secured party's attempt will be a "breach of peace". See e.g. Morris v. First Nat'l Bank & Trust Co., 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970) and Stone Machinery Co. v. Kessler, 1 Wash.App. 750, 463 p.2d 651 (1970).

The remedy is most often used in consumer financing situations and there are many cases which now stand for the proposition that entry of the debtor's home or garage without the debtor's permission also constitutes a "breach of peace". See Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934). But see Cherno v. Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S.2d 114 (1967), aff'd 29 A.D.2d 767, 299 N.Y.S. 2d 862. Most successful cases of repossession occur where the collateral is not located at the debtor's premises and the debtor has neither approved nor dissapproved of the secured party's attempts to take the property. Many yachts subject either to a U.C.C. security interest or a "preferred mortgage" are repossessed at yacht basins, and airplanes have been flown away to undisclosed locations by creditors' agents, in the middle of the night. Complications can arise when the debtor tries to regain possession of the property in a similar manner. Of course, if the debtor consents to the taking, the taking is not a "breach of peace".

There are sanctions applicable to overzealous creditors since a secured party's commission of a "breach of peace" may expose him to tort liability and to liability under § 9-507 (discussed below) and may deprive him of his right to a deficiency judgment against the debtor.

If the debtor has defaulted and will not part with the goods, the secured party must reclaim the property through judicial action.

One important right which the secured party may exercise if the security agreement so provides, is the right to require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties (U.C.C. § 9-503). The secured party is also authorised to render equipment unusable without removing it, subject to the general requirement that he proceed in a reasonable manner.

Upon default and repossession, the secured creditor may accept the collateral in complete satisfaction of the debt. U.C.C. § 9-505(2). This procedure is called "strict foreclosure" and when accomplished, the creditor foregoes any right to recover any deficiency from the debtor.

"Strict foreclosure" procedures require the secured party to take possession of the collateral after default, then, to send written notice to the debtor stating his intention to retain the collateral in satisfaction of the debtor's obligation. In addition, if the collateral is not consumer goods, the secured party must send notice of his intent to any other creditor who has previously sent him written notice of a claim or of an interest in the collateral. Failure to give notice to the entitled parties can invalidate the strict foreclosure. If one of the notified parties enters a written objection during a specified period after the notice, the secured party must dispose of the collateral through the resale procedures described below.

Most secured parties have little use for repossessed collateral and attempt to dispose of the property under the provisions of U.C.C. § 9-504 which permit the secured party to "sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing". In addition, § 9-504(3) provides that "Disposition (of the collateral) may be as a unit or in parcels at any time and place and on any terms...".

Article 9 provides liberal guidelines, not strict rules, for the disposition of collateral by the secured party. There are two principal constraints:-

First, except in limited circumstances, notice must be sent to the debtor:

> (U)nless the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognised market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any prive sale or other intended disposition is to be made shall be sent by the secured party to the debtor.
>
> U.C.C. § 9-504(3)

Second, every aspect of the sale must be commercially reaonsable. § 9-507(2) states that:

> The fact that a better price could have been obtained by a sale at a

different time or in a different method than that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. (Emphasis supplied).

Despite the above language, courts have apparently invalidated sales because the resale price was simply too low. See Mercantile Financial Corp. v. Miller, 292 F.Supp. 797 (E.D. Pa. 1968).

Section 9-507(2) provides additional criteria of what is commercially reasonable: (1) a sale in the usual manner in any recognised market; (2) a sale at the price current in a recognised market at the time of sale; and (3) a sale in conformity with reasonable commercial practices among dealers in the type of property sold.

The order of distribution of the proceeds is specified in U.C.C. § 9-504(1). They are to be applied in the following order: (1) to the secured party's expenses of realisation; (2) to the satisfaction of the indebtedness secured by the security interest under which the disposition occurs and (3) to the satisfaction of indebtedness secured by any subordinate security interests. Under § 9-504(2), the debtor is generally entitled to the remaining proceeds.

Upon such a disposition, the interests of the debtor, of the secured party disposing of the collateral, and of secured parties junior thereto, are extinguished. However, a superior security interest would not be extinguished. Under § 9-306(2), a superior security interest would remain attached to the collateral notwithstanding the disposition of the collateral unless the disposition where also authorised by that secured party. That secured party also holds a perfected security interest in any identifiable proceeds received by the debtor, generally without having to take further steps to perfect the security interest.

An additional remedy is available where intangibles are concerned. The secured party is entitled, under U.C.C. § 9-502, whenever it is so agreed, to require the account debtor (i.e. the third party owing money to the debtor under a contract or other instrument which is the subject of the security interest) to make payment directly to the secured party. The secured party may proceed in a commercially reasonable manner to obtain such payment and may deduct from collections his reasonable expenses of realisation. This remedy is particularly important in marine financings where a long terms charter of the vessel is involved and the charter hire is expected to be applied to amortize the debt.

The debtor has the right to redeem his property until one of the following events occurs:

(1) the secured party disposes of the collateral or enters into a contract for disposition of the collateral (§ 9-506);

(2) the secured party accepts the collateral in satisfaction of the debt under § 9-505(2); or

(3) the debtor agrees in writing after default not to exercise his right to redeem the collateral (§ 9-506).

The U.C.C. imposes sanctions upon a creditor tempted to misbehave. Section 9-507 authorises the courts to exercise control over dispositions which would be commercially unreasonable and specifies that a secured party is liable for any loss caused by his non-compliance with the provisions of Article 9 dealing with the repossession and disposition of collateral.

When a secured party repossesses and then disposes of collateral, the purchaser takes the collateral free of all rights and interests of the secured party as well as any subordinate secured parties. This holds regardless of whether the secured party complies with the requirements of § 9-504 in the resale. However, if at a public sale, the purchaser has knowledge of defects in the sale or if he buys in collusion with the secured party, other bidders, or the person conducting the sale, then he would not take the collateral free of such interests. At a private sale, the purchaser must act in good faith which is defined to mean "honesty in fact in the transaction concerned". U.C.C.2-103(17(b)).

APPENDIX II

Model Waiver of Immunity Clause

The Borrower hereby irrevocably submits to the nonexclusive jurisdiction of the High Court of Justice in England, the Courts of the State of New York and the Courts of the United States of America for the Southern District of New York in relation to any claim, dispute or difference which may arise hereunder or any document entered into pursuant hereto or in connection herewith but without prejudice to the rights of the Agent of the Banks to commence any legal action or proceedings in the courts of any other competent jurisdiction and irrevocably appoints _____ of _____ London, England as its authorised agent for service of process in the HIgh Court of Justice in England and _____ of _____ New York, USA in the Courts of the State of New York and the Courts of the United States of America. The Borrower agrees that it will at all times maintain an agent, duly appointed, in England and New York to accept service of process on behalf of the Borrower in respect of the aforesaid courts. The Borrower irrevocably consents to the service of process out of any of aforesaid courts in any such legal action or proceedings by the mailing of copies thereof by registered or certified airmail (postage prepaid) to the address for the time being for the service of notices on the Borrower under Clause ... or in any other manner permitted by law. The Borrower hereby irrevocably waives any objection it may have to the laying of venue of any such legal action or proceeding in such courts and any claim that any legal action or proceeding brought in connection with this Agreement in any such court has been brought in an inconvenient forum. The Borrower hereby irrevocably waives any immunity from jurisdiction to which it or its assets might otherwise be entitled (such waiver to have effect under and be construed in accordance with the Foreign Sovereign Immunities Act of 1976 of the United States of America in respect of any legal action or proceedings in the Courts of the United States of America) and hereby irrevocably and generally consents in respect of any legal action or proceedings arising out of or in connection with the Agreement to the giving of any relief or the issue of any process in connection with such action or proceeding, including, without limitation, the making, enforcement of execution against any property, assets or revenues whatsoever (irrespective of their use or intended use) of any order or judgement which may be made or given in such action or proceedings.