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Maritime liens and mortgages

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AND

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The contents of this paper refelects my own personal views and are not necessarily endorsed by the University.

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INTRODUCTION

The purpose of this paper is to discuss and examine the factors restricting the establishment and expansion of merchant marine in developing countries. Long-term financing was essential for the development of merchant fleet,and that the security more readily available was the vessel itself;therefore there should be a need to ensure the best possible protection of the mortgagee. However,because the current situation in regard to maritime liens and mortgages is one of a disunified international regime,the interest of the mortgagee is not satisfactorily protected today. Thus it drew attention to the lack of appropriate national framework,which of made it impossible to register a ship in a developing country under conditions that would enable a lender to obtian a mortgage on a ship and to recover his money in the event of a default in repayments. Further,it also discuss the need of national or international legal provisions relating to the securities given to banks and financial institutions when vessels are ordered and bought in shipyards or bought on the second hand market.

The author noted that maritime liens and mortgages were inextricably connected with each other and that,accordingly was essential that they be treated together.

A maritime lien is defined as a type of privileged security for preferred claims against a ship for

services rendered to it or damage done by it,to be put into effect by legal process(i.e against the ship),which will make it possible to arrest and sell the vessel in order to satisfy the claim. A maritime lien is an incident of most maritime transactions. The underlying claim can be tortious or contractual in nature. Thus,a maritime lien exists as a result of collision or cargo damage and in some,but not all,cases of personal injury. Suppliers of both goods and services normaly aquire a maritime lien. Seamen are given a lien for unpaid wages,and liens exist to secure a salvage award and unpaid general average.

A maritime lien attaches automatically to a vessel whenever there arises in respect of that ship a claim which according to the applicable law,is secured by a maritime lien. Maritime liens are valid against all who have an interest in the ship and this validity operates without any need to register the lien. This means that,in general it is valid even against the person who takes the ship in good-faith without knowledge of the lien or the claim giving rise to it. Further,in principle maritime liens take priority over other creditors of shipowner whether their claims are secured by registered mortgage or in other ways.

On the other hand,shipping is a capital intensive industry and large sums of money were needed for the building,equipping and operation of ships. Thus,the availability of adequate financing possibilities for the creation and expansion of merchant fleets by developing countries has been another permanent concern for these countries. Therefore,in order to purchase

existing vessel or order the building of new vessel, particularly for the developing countries,it is necessary for finance to be freely available.

To encourage the provisions of finance,a method has been developed in most national systems of assuring financiers that their loans are protected. Mortgages (at common law) and *hypotheques* (in civil law) are designed to provide security to the lender of money. i.e since shipping is a capital intensive industry and because the resources of ownership are limited,mortgages are intended to accelerate the pace expansion of the industry.

One of the resources of raising capital for finance is the commercial banks credit. The commercial banks provide the bulk of finance for ship buyers. The loans are usually at medium term with a flactuating rate of interest and they are called term loans which by definition are business credits with maturity of more than one year and less than 15 years. These loans are credits under which the borrower pays interest rate based upon the LIBO (London Interbank Offered Rate) for prime banks,plus a margin which provides the gross profit of the bank. Thus,marine mortgage represents long-term credit and serves to finance the construction of ships. By providing finance for ship buyers banks and other financial institutions wants to ensure that their interests are reasonably protected.

However,maritime liens prejudice the security of the mortgage because they usually have priority over mortgages and because their enforcement by arrest and sale of the vessel may be unsatisfactory to the mortgagee

in that the market prevailing at the time and place of sale may be unfavourable. Because of this a restriction on the number of maritime liens has always regarded as of great importance. All maritime liens recognised by the 1926 Convention take precedence over the mortgage,a circumstance that weakens the long-term credit in ships. Maritime liens relate principally to the safe and efficient operations of the ship. Marine mortgages or hypotheques provide finance to accelerate and expand the industry,therefore,this has to be balanced.

In view of the above brief introduction,Chapter I of the paper attempts to elucidate the historical considerations that necessitated the emergence of maritime liens and mortgages as an institution to enhance maritime commerce.

Chapter II,as contemplated explains the characterstics of maritime liens and mortgages in general and under Ethiopian maritime code in particular,the coming in to being of such security device in maritime affairs in respect of their definition and the point in time at which they commences,their operation. The arrest of a vessel is the means by which maritime liens and mortgages may be enforced and all three topics are inextricably linked. The opportunity has been taken therefore,to define and discuss the subject of arrest under this chapter.

On the assumption of support for the continued existence of maritime liens,it should be questioned which claims ought to be favoured in such a way. Which claims are so important socially and economically that they merit a form of security which is secret,has priority

over all other claims and mortgages and is enfoceable against *bona fide purchaser* ? Each type of claim should be thoroughly investigated to see if a lien is a necessity or if there are alternatives. Therefore, Chapter III attempts to identify and analyse the various types of maritime liens that are recognised by the existing international regime.

Once the type of maritime liens that are accepted by the international regime are identified,it is time to focus on the priority of maritime liens;Chapter IV focuses on the subject of order and priority of maritime liens among themselves and in relation to other claims.

Chapter V tries to elucidate the conditions and factors that extinguish the accrued claims to the lienholder. Under this caption *inter alia*,period of limitation,judicial sale and the doctrine of laches are dealt with.

The core issues of the paper are dealt within Chapter VI and following Chapters respectively. Thus, Chapter VI examined the present International Conventions for the Unification of Certain Rules Relating to Maritime Liens and Mortgages in respect of methods of enforcing claims against ships out side their States of registry. With the variations and differences among national regims ship financing is frustrated and the interest of the mortgagee would be affected. Thus,Chapter VII deals with the problems in the current situation with the variations among national laws. Chapter VIII discuss to what extent marine insurance can play a role in protecting the interest of the mortgagee.

The effort to reduce the number of maritime liens did not end with the adoption of the 1926 Convention. With regard to the demand for greater international uniformity the 1967 Convention in its present form has failed markedly. It has always been recognized with in UNCTAD that the lack of finance for ship aquisition was and remains a major difficulty for developing countries in expanding their national merchant fleet. Therefore both IMO and UNCTAD have placed on their agenda the possible review of the 1926 and 1967 Conventions,and the revised text of the 1967 Convention on maritime liens and mortgages was submitted by the Comite' Maritime International (CMI) to IMO and UNCTAD for their considerations and further study. Thus Chapter IX attempts to identify the changes made in the current (new) draft.

In short it is necessary to formulate ways and means of promoting shipping as an industry,particularly in developing countries and of encouraging economic co-operation among States to the end. For this purpose, emphasis is given in this paper to maritime liens and mortgages in relation to building or purchase of ships.

But once again the writer wishes to remaind to the reader that,the discussions made in this paper are fully based on the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages signed at Brussels on 10 April 1926, and another Convention under the same title but signed at Brussels on 27 May 1967. However,in addition to fill the gaps foreign books and laws have been consulted in which most of them are western published.

CHAPTER I

HISTORICAL BACKGROUND

1.1. The Origin of Maritime Liens

The Maritime Liens represent one of the most important striking features of the contemporary maritime law. There is no doubt that the origins and evolutions of the maritime liens are inseparably linked with the growth and expansion of maritime law and maritime commerce in general.

Some judges and commentatores have tried to trace the origins of maritime liens to the remotest part of human history ,i.e to the day of the Romans . In view of this, Herbert Paul says :

> " .... According to the maritime law of that period the ship was not only the source but also the limit of liability. It was treated as juristic entity bound by its contracts and responsible for its torts. Since the ship was regarded as a legal personality and bound by its contracts it was natural for the Roman doctrine of Hypotecation* of mobiles to find its way in to the maritime law. Accordingly,the historical theory would explain liens arising ... from the Roman law concerning hypotecs.

Hypotecation*:- An incumbrance or the right of a person over a specific property of another with out actully possessing it,but gives him the right to have the property sold and out of the proceeds of the sale his claim will be satisfied.

Roman law recognized as express hypotecation of a vessel by means of a contract very similar to our modern conception of a bottomry bond. It was also recognized that one who repaired or fetted out a vessel had á personal privilege which practically amounted to a tacit hypotecation. It is in these principles we find the origin of the maritime liens."(1)

During the medieval period (700--1500 A.D) maritime commerce had highly developed. And to regulate the maritime activities of the traders of this period, different kinds of maritime codes were enacted although they did not expressely refer to the concept of maritime liens. Among the maritime codes of this period, The *Consulate de la mer*(a) (Laws that deal and recognized the right of seamen against the ship as the security for their wages),**The law of Wisby and of the Hansa Towns**(b)(2) (these laws were developed around the Atlantic and Baltic Port towns dealing with the right of the merchant to exercise against the shipowner in case where his goods are lost or damaged),**The Law Merchant** or *Lex Mercatoria*(c) (developed around Venice by 1400 A.D so as to regulate the maritime and shipping traders of this period),*The Tablets of Amalfi* and the Libre *Del Consolate de mar of Borcelona*(d) (that were developed around the Mediterranean Sea were among the codified customary maritime rules of the period)(3), were quite significant.

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a,b,c and d -These four medieval laws are printed in italics to give emphasis.

During this period , special tribunals known as admiralty Courts began to sit in the town of the great maritime nations. These courts commenced to adjudicate "dispute arising among sea-faring people, and the natural desire of judges and disputants for settled guidance led to the recording of judgments in individual cases."(4) And this led to the codification of the customary maritime laws by which both mariners and maritime tribunals are bound to follow and apply. Violations of these codes led to penal sanctions. This contributed much for the codification of the various customary maritime rules as mentioned above.

Internationally reknown jurists have began to challenge the view that the origin of maritime lien dates back to the days of the Romans. They advocate that maritime liens are of recent origin i.e to the first half of the nineteenth century. Among those jurists who entertain this view,William Tetley, professor of law at McGill University has this to say :

> "Maritime liens,... do not date back to the earliest maritime codes. The true origin seems to lie in the common law of the 19th century and in the uncodified law of European civil law countries of the same period. The common law ...created the lien, embellished it and then statutes confirmed and refined it. The United States is a striking example. Nevertheless, much liens law is still found today in the common law. Only the nations such as France which have adopted the 1926 International Convention does one find almost exclusive statutory lien law."(5)

Despite the disagreement among jurists to trace the exact date of the origin of maritime liens,however, they agree that maritime liens remain an incumbrance on maritime property at least since the nineteenth century. As such, it has enhanced the development of maritime commerce by serving as a security device,i.e if a merchant loses his cargo in the course of the voyage due to the fault of the ship, the cargo owner will have a lien right on the ship so as to recover the damages he has suffered due to the loss of his cargo and vice-versa.

Therefore,the maritime liens were originally developed for the purpose of protecting the ship,her crew and cargo in the course of maritime adventure.

1.2. Historical Prespective of Mortgages

Mortgage as a legal did not come over night, it has to develop through different stages. "The modern Mortgages as known in civil law countries is very much the child of legislation dating from the late eighteenth and early nineteenth centuries, though its ancestry reaches back to the days of the Greeks and Romans."(6)

Continental mortgages has aquired its name if not its substance from the hypothec of the Greek law.(7) Generally speaking the Greek law of hypothec remains for the most part obscure but it was accepted that hypothec was not accompanied by a transfer of possession.(8) The Romans later on developed a non-possessory land security designed *hypotheca*, which was similar to the Greeks. Eventhough the Greeks took the lead in beginning the term hypotheca, it is certainly the Roman hypotheca which became the basic of the subsequent continental European development.(9)

The Roman hypothec, was itself the product of

long and complex. The Roman law created certain forms to security. These were the earliest form *fiducia cum creditore*, in which the creditor obtained possession but not ownership. Finally a type of real security was developed called *hypotheca* which allowed mortgage creditor for the right to take possession whenever default in payment of debt took place.(10)

Footnotes for Chapter I

01. Paul M. Herbert,"The Origin and Nature of Martime Liens", Tulane Law Review, Louisiana:The Tulane University of Louisiana, vol.4, 1930, pp.382-385.

02. "Ibid."

03. Grant Gilmore and Charles L.Black,The Law of Admiralty,2nd.ed. Mineola,N.Y:Foundation press,1957,pp.3-8.

04. "Ibid."

05. William Tetley, "Repair Men's Liens", Journal of Maritime Law and Commerce, No.2,Jefferson Law Book Company, vol.13, 1982, p.178.

06. S.A. Riensenfeld, Security Interests in Land in Modern Civil Law, Louisiana State University press. 1965,p.136.

07. "Ibid."

08. "Ibid."

09. "Ibid."

10. Ryan, Introduction to Civil Law, Halstead press Sydney,1962,pp184-185.

CHAPTER II.

THE NATURE OR CHARACTERSTICS OF MARITIME LIENS AND MORTGAGES/ HYPOTHEQUES

2.1. Difnitions of Concepts

2.1.1. Maritime Liens

No express defintion of a maritime lien is provided either by the domestic legislation of States or by any International Law. Consequently,the concept of maritime lien has no uniform definition. States simply incorporate the elements which constitute a lien.

So is the case in Ethiopia,no where in the maritime code of 1960 or in any other domestic legislation has this concept been expressely defined.

To know what maritime lien means it is of paramount importance to study the existing regime on maritime liens(i.e the Convention of 1926 and 1967). In looking the Conventions,the first striking thing is that the Conventions have also added mortgages in to their body. It is,thus important to know these terms. Therefore,to avoid ambiguities and clearly understand the concept of a maritime lien in general it is of a paramount importance that one should resort to books and dictionaries to find out the exact meaning of the term. So this subsection will limit itself to define the term maritime lien.

The term lien has been explained by Osborn's Concise Law Dictionary (7th.ed.) as:

> "The right to hold the property of another as security for the performance of an obligation. A common law lien lasts only so long as possession is retained, but while it lasts can be asserted against the whole world. An equitable lien exists independently of possession; i.e it may bind property not in possession at the time the obligation is incurred, but it

> cannot avail against the purchaser of a legal estate for value without notice of the lien.... A maritime lien is a lien on a ship or freight either possessory,arising out of contract of carriage,or charging, arising out of collsion or other damage."

It is a preferred or privileged claim because no other claim is paid before a lien attached on a maritime property is first reimbursed.

For example,WMU,a shipowner borrowed 10000 SEK from X on the basis of contract signed between them to be paid with in two months. However,two months after this contract WMU's ship caused damage to the cargo owned by A while being carried by WMU's ship. Now,if A and X bring a suit against the shipowner,WMU; A will be paid first than X,because A has a lien on the ship for the damage of cargo which is preferred to any other claim based on contract or otherwise.

Various definitions have been suggested by different internationally acknowledged jurists to define the concept of maritime lien. But for the purpose of this paper,the classical definition advanced by Price,a famous internationally known jurist,is adopted. According to him, a maritime lien may be defined as,"... a privileged claim upon maritime property for services done to it or injury caused by it ,accruing from the moment when the claim attaches, travelling with property unconditionally and enforced by means of an action *in rem*."(1)
(Emphasis added)

This definition seems sound and comprehensive to this author, because it basically incorporates all the elements or properties that constitute a maritime lien. So,it becomes graphically clear that maritime liens are

privileged or preferred claims over all other claims. They are fundamentally incorporeal rights that are inseparably attached on any of the maritime properties. The holder of the right or the maritime lienee can lawfully proceed against the property by a proceeding *in rem** so as to ascertain his rights in the courts of admiralty.

A word here ought to be mentioned is an action *in rem*. An action *in rem* is merely and basically a procedural remedial measured by which the claimant or the person having a right or a lien on maritime property to have it arrested or be brought to court physically so as to claim his rights against the property.

In general,for the purpose of this paper a maritime lien may be defined as a type of privileged security for preferred claims against a ship for services rendered to it or damage done by it,to be put into effect by legal process *in rem* (i.e against the ship), which will make it possible to arrest and sell the vessel in order to satisfy the claim,which enjoys priority over other claims and goes with the vessel into whoever's possession it may come. Besides vessels,cargo and freight may also be the objects of maritime liens.

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* In an action *in rem* the property itself is proceeded against by means of arrest and forms a fund out of which the judgment of the Court may be satisfied.

2.1.2. Mortgages

In view of the fact that the legal concept of an Anglo-Saxon maritime mortgage differs from the continental *hypotheque maritime*, the concept can be defined only in very broad terms.

In order to purchase existing vessels or order the building of new vessels, it is necessary for finance to be freely available. To encourage the provisions of finance,a method has been developed in most national systems of assuring financiers that their loan are protected. Mortgages(at common law) and *hypotheques* (in civil law) are designed to protect security to lender of money(the mortgagee) in that he has the right to satisfy his claim with priority over most other claimants against the vessel and his security remains intact even if the mortgaged vessel is transferred to new ownership. The right of the mortgagee is enforced through the sale of the mortgaged vessel.

This type of transaction is similar to the method employed in many countries for purchasing land. A person wishing to purchase an existing vessel or order the building of a new vessel(the mortgagor) will borrow the purchase money from a bank or other financial institution(the mortgagee). An agreement will be made between these two parties as the repayment of loan capital and other matters such as the amount of interest on the loan,insurances required and events causing the repayment of the loan. The mortgage agreement gives to the mortgagee the vessel as security which can be realized by arrest and sale in the event that the loan is put in jeopardy. As with land, it is possible to transfer ownership of a mortgaged vessel but the mortgage remains attached to the vessel.

Although the mortgagee acquires "property" in the vessel*,he is not entitled to make use of it so long as the mortgagor is not in default (i.e "except as far as it may be necessary for making a mortgaged ship available as a security for the mortgage debt,the mortgagee shall not by reason of the mortgage be deemed the owner of the ship,nor shall the mortgagor be deemed to have ceased to be the owner thereof",United Kingdom Merchant Shpping Act 1894,sect.34); his "property" ceases automatically and reverts to the mortgagor if the latter has all the obligations which are assumed by the mortgagee, otherwise the mortgagee's right as a proprietor gets effect although only temporarily and to a restricted extent. In civil law system the method differs, and this is elaborated infra (below in the following sub-section).

2.1.3. Hypotheques

Contrary to the common law system where the ship-mortgage gives an immediate right of property, in civil law system; in the case of non-performance of the borrower's obligations, the person entitled may not take possession of the vessel but must apply to the court or to a suitable judicial authority as being competent for

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*The United States law characterized mortgage as "a conveyance of title of the vessel to mortgagee subject to the conditions that the conveyance is void if the debt is paid",Report prepared by the secretariates of UNCTAD and IMO for the second session of the joint Intergovernmental Group, TD/B/C.4/AC.8/6, p.16

enforced sale in order to be satisfied from the proceeds of the forced sale. This is known in French as a hypotheque-maritime, and in Spanish as a hypoteca. The legal institution of hypotheque upon a vessel follows the model of land ownership. Private landed property can be used as security for the land owner's debt(2) or that of third person in whose favour the hypotheque has been granted.

Hypotheque is used for immovable property or real estate ,but the transfer of the possession (but not ownership) of a movable property as security for the payment of a debt or performance of an obligation is called pledge, on default being made the movable property may be sold. However, eventhough the ship is movable property, by the legal fiction it is considered as a real estate or immovable property and was hypotecated for securing a long term financing which is essential for the development of merchant marine.

2.1.4. Arrest*

Claims in respect of debts incurred for a vessel or in respect of damage done by a vessel can arise in a variety of circumstances. Many such claims entitle the claimant to proceed not only against the shipowner inperson (proceeding in-personam) but also against the vessel itself or the res (proceeding *in-rem*).

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*International Convention Relating to the Arrest of Seagoing Ships 1952,lists 17 types of maritime claim in respect of which the ship may be arrested, and a ship may not be arrested for any claim other than those listed.

This procedure is made effectively by the arrest and detention of the vessel and, if the claim is not paid, by the sale of the vessel in order to satisfy the claim. Action in-rem is a proceeding against the ship and is entered into to enforce maritime claims according to the 1952 Convention. Proceedings by way of an action in-rem is a usefull procedural device for obtaining pre-judgment security for the claim and has the advantage of being a means of founding jurisdiction regardless of the nationality, domicile or availability of the shipowner. Generally,a necessary precondition for the arrest and sale of a vessel is personal liability of the owner of the vessel. Should the vessel that is the subject of the claim be sold in the period between the accrual of the claim and the commencement of *in rem* proceedings, the claimant can not proceed to arrest the vessel in its new ownership. In such circumstances the claim ,unless falling in to the categories of claims that give rise to a maritime lien,may in a limited number of claims, be pursued only against another vessel owned by the original shipowner or else in-personam against the shipowner.

According to the Convention relating to the arrest of seagoing ships of 1952, a claimant may arrest either the particular ship in respect of which a claim is made ,or, in respect of certain claims, any other ship owned by the owner of the particular ship at the time of the claim is enfoced (art.3). Furthermore, a ship may not be arrested more than once for the same claim by the same claimant and may be arrested only by order of a judicial authority.

2.2. General Characterstics of Maritime Liens and Mortgages

2.2.1. Characterstics of Maritime Liens

This part of the paper is largely devoted to discussing and analysing the nature or the characterstics of maritime liens. By the nature or characterstics of maritime liens is meant the nature of the right and obligations or the privileges which accrue to a lienholder or against a maritime property. It also includes the right to have it detained by himself or the proper authority for the purpose of ascertaining whatever claim he might have against it.

A close examination of the topic under discussion has revealed that courts in common law countries often refer to the maritime lien as a "Jus-in-re", an "hypotecation", "an inchoate right", a "properietary right" while in Frace it is known as "creances privilgiees".(3) Whatever names may be attributed to it, in all cases and under all circumstances the right which there upon arises remains fundamentally the same, i.e an encumbrance on a maritime property. (4)

A maritime lien is a right against any maritime property.(5) This could be against the ship or her freight or accessories.

The right of a maritime lienholder could be described as a bare right in-rem.(6) The reknowned judge, Scott L.J., deciding the Tolten case referred to the maritime lien as: "the lien consists in the substansive right of putting in to operation the Admiralty Court's executive function of arresting and selling the ship."(7) Therefore,the maritime lien is not merely a procedural

right but is also a substansive right and is part of the substansive law of the common law countries.

A maritime lien is a properietary right attached on the property encumbered. Ordinarily, a maritime lien does not depend on the possession of the property by the maritime lienholder or on the personal responsibility of the owners of the property. A maritime lien is indepedent of possession, it does not require actual or constructive possession of the vessel nor it is created by the consent of the parties concerned or by judicial process. The maritime lien does not require that the maritime lienholder shall retain possession of the *res* in order to secure his lien on it. It is an indelible right that remains uniquely attached on the property where-ever it may go or into whosoever hands it may fall either for consideration or otherwise.(8)

> "....The Bold Buccleugh: Harmer v. Bell; The Bold Buccleugh ran down the plaintiff's vessel. Before proceedings in the Admiralty Court were taken the ship was sold to a purchaser with out notice of the incident. The Court decided, the lien operated against a bona-fide purchaser for value;it related back to the time when it attached. The lien is lost only by negligence or delay, neither of which was proved in this case."(9)

The maritime lien is fundamentally different from other liens because possession of the maritime property as mentioned is not a prerequisite to have the maritime lien executed by an admiralty court. This peculiarity of maritime lien has been elucidiated by Justice Field while deciding The Rock Island Bridge case in the following manner:

"....It is independent of possession. Unlike the common law, the maritime lien does not require that the maritme lienee shall retain possession of the res in order to retain his lien on it. Furthermore, it travelles with the thing in to whosoever possession it may come. It will defeat even a bona-fide purchaser ... no Common Law Court can wipe it off. It may be divested only by the judgment of an admiralty court,proceeding in-rem." (10)

Generally the maritime lien is a privileged claim incumbering a maritime property. So when this claim competes with other liens of a non-maritime in nature, it is provided with the highest priority. It is only when the claims of all maritime claimants are satisfied that the other non-maritime lien claimants are paid as we have already observed. The other unique character of maritime lien is that it is a secret-one operates mostly to the prejudice of prior mortgages or other good-faith purchasers.(11) Therefore,a good-faith purchaser of a ship which was initially subjected to unexecuted lien can not aquire ownership of the ship free from the attached maritime liens even if he had no knowledge of the existance of the lien before or during the transaction.(12) Thus,in such circumstances, a maritime lienholder may apply for the incumbered property or ship to be arrested or detained with the approval of an admiralty court. Then the admiralty court will sell the incumbrance maritime property and out of the proceeds of the sale, the claims of the maritime lienholder will be satisfied. And the good-faith purchaser will aquire whatever is left.(13)

Furthermore, even when a ship to which maritime liens are attached is abondoned by the owners in favour of the underwriters, the liens that have already been created are not extinguished. It will remain attached on the property and the maritime lienholder can still claim against the property in the hands of the underwriter.(14)

Therefore, a maritime lienholder has the advantage of claiming his right even from a *bona-fide* purchaser with out notice up to the value of the property to which the maritime liens are attached. i.e a maritime lienholder can not proceed against the other property of the bona-fide purchaser where the claim is not satisfied after the admiralty court will sell the incumbered maritime property. A maritime lien attaches on the maritime property from the time of the occurrence out of which a maritime lien has materialised. No other property is encumbered except the particular property that has perpetrated the damage or to which beneficial services are rendered. Maritime liens are attached on this particular property "... in its entirely, each part equally and not being limited to a part, and not encumbracing one part more than any other."(15)

To summarize the foregoing discussion relating to the nature of maritime liens, there are numerous claims which entitle the claimant, in respect of money owed or damage done by a vessel,to arrest the vessel and have it sold in order to satisfy his claims*, but maritime liens are granted in respect of selected claims

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* See supra, the concept of arrest.

only** and hence differ from the enforcement of the "ordinary" type of claim in four principal respects. These are:

(i) No prior formalities are required for the accrual of maritime lien. The maritime lien, together with the right inherent in it for the vessel to be arrested and sold, arises, and becomes "attached" to the vessel, authomatically and concurrently with a claim. For example,as soon as salvage services are provided, or the moment a collision occurs, the maritime lien arises. Although there are legal formalities to be observed to institute proceedings for arrest and sale, these relates back to the time of the incident which give rise to the maritime lien. For this reason, maritime liens are often described as being "inchoate" in that they have begun but are invisible and secret. This is not the case with ordinary claims which require some form of legal process prior to acquisition of the right to arrest the vessel and prior to the vessel's becoming encumbered.

(ii) The sale or other transfer of a vessel to which a maritime lien has "attached" will not remove or defeat the maritime lien, with the result that it may still be enforced even when the vessel has been transferred to a *bona-fide* purchaser who has not been notified of the maritime lien. This is not so with ordinary claims. When an ordinary claim arises, in the absence of formalities such as the issue and service of a writ, the vessel can be transferred to new ownership free of any incumbrance in respect of the claim, with the

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**See International Convention for the Unification of certain Rules of Law Relating to Maritime liens and Mortgages,signed at brussels on 10 April,1926.

consequence that the claimant will lose his right of arrest and sale of the particular vessel in respect of which the claim arose.

(iii) Because maritime liens arise automatically they are secret so that any one dealing with the encumbered vessel, such as a purchaser, has no means of knowing of the existence of the maritime lien. In the case of ordinary claims, which require some form of legal process, there will at least be some form of court record.

(iv) One of the most distinctive features of a maritime lien is its privileged position in that claims secured by a maritime lien are paid out-of the proceeds of the sale of the encumbered vessel in priority to all other ordinary claims and mortgages. As between maritime liens and ordinary claims and mortgages, this is so regardless of the time of their attachment.

In view of the fact that the more detailed characterstics of maritime liens vary among different national systems, the author postpone an account of these details to the later discussion of the national variations.

Considering the secret nature of maritime liens, the *bona-fide* purchaser has no means of knowing the existence of maritime liens. These priority and secret character of maritime liens could affect the aquisition of the ship mortgages or other appropriate financing for a ship. i.e eventhough the author of this paper has no evidence to produce that financing institutions have refused, or will refuse, in principle it is a fact that the existing international regime on maritime liens and mortgages has effect on the availability of ship finan-

cing and affect the aquisition of ship mortgages and the development of national fleets in developing countries. Therefore, the author suggested that all difficulties regarding priority and secret would be overcome if provisions were made in the Convention for the registration of maritime liens infavour of international uniformity. Doubts can be expressed whether the registration of maritime liens was desirable or even possible. Particular reference can be made in this context to the problem which would be created by the difficulties of registering certain types of claims (such as crews' wages), particularly if they did not arise out of a special agreement but out of the operation of the ship. Nevertheless, in view of the greatly improved system of communication now existed, the registration of certain maritime liens would be feasible. Therefore, it could be suggested that such system would lead to a desirable increase in commercial confidence in maritime transactions in general and to a reduction in the number of "hiden" maritime liens. It would be necessary to provide for the short period of time (for example six months) during which a maritime lien could have validity without registration.

Furthermore, maritime liens relate principally to the safe and efficient operations of the ship, in that they enable requisite services and facilities to be provided for the ship under conditions essential for the safe navigation of the ship its efficient and uninterrupted operations. Under the current international regime, the services and facilities which give rise to maritime liens include ship repaires, salvage,wreck-removal, pilotage-dues, port-canal, and wages and other sums due to the master, in respect of their service to the ship.

However, it has been noted that "long term

financing is essential for the development of developing countries merchant marine and that the security most readily available and less expensive is the ship iteslf." Accordingly mortgages play a key role in ship financing. With respect to ship financing, considerations has been given to the number of claims which are accorded the status of maritime liens might affect "ship financing" in that the ranking of such liens above mortgages might be considered as lessening the mortgagee's security in the ship. In particular the number of claims for which a ship may be arrested and sold increase the risk of forced sale of the ship in unfavourable conditions, thereby affecting the value of the ship as a security for a mortgage. In this connection, the point has been made that the author's proposal to establish a registration system for maritime liens are aimed protecting potential purchasers and mortgages of ships by making all such claims the object of the public knowledge. It may be argued the encouragement of ship financing is "the single most important objective of developing countries", therefore, more change in the current regime was necessary in order to achieve a higher level of uniformity and to encourage aquisition of ship finance for ship purchase and construction, so as to enable developing countries to develop their merchant fleet. According to the fundamental policy choice of developing countries, if ship financing is deemed to be a primary necessity, mortgages or hypotheque, which constitute a 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 mortgages or hypotheques, the greater is the protection of the holder of the mortgages or hypotheque.

2.2.2. Characterstics of Maritime Liens under Ethiopian Law.

Shipping is an international economic activity. The economic development of a country is closely linked with or enhanced by the growth of its maritime commerce. Therefore, from the time immemorial humanity at large and that of the maritime nations in particular have indespesible interest in the growth and expansion of shipping, trade and industry.

This has been reflected not only by the laws that have been enacted infavour of maritime commerce domestically but also by the real and active participation of national governments and their positive contribution towards the emergence of international conventions. Of the various international conventions that were signed by contracting states to accentuate maritime commerce and to amicably resolve legal disputes that might arise among them in the course of maritime commerce and to create uniform internationally accepted rules among themselves: (1) The International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10th., 1926; (2) The International Convention for the Unification of Certain Rules of Law Relating to the Bills of Lading, 1924 are quite signficant with regard to the influnce they have exerted on the maritime code of Ethiopia of 1960.

Most of the provisions of these Conventions are incorporated in to the maritime code of Ethiopia of 1960 with very insignificant modifications even if Ethiopia was not a signatory to any of these international conventions. For example sub-Arts. 1,2.3,4,and 5 of Article 2 of the International Convention for the Unification of

Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926 are similar to sub-Arts. 1,2,3,4 and 5 of Article 15 of the maritime code of Ethiopia of 1960. Similarly Articles 5 and 6 of the Convention and Articles 16 and 17 of the maritime code of Ethiopia are identical. Article 25 of the maritime code of Ethiopia is a direct copy of Article 8 of the convention.

The promulgation of the maritime code of 1960 has further enhanced the development of the maritime commerce of Ethiopia. This code is very much influenced by International Conventions as well as by the laws of the common law countries. Altogether, the code contains three-hundred and seventy one Articles. These Articles are divided in to 9 Titles whereby these titles are again divided in to chapters and the chapters in to sections. Title I chapter 5 section 1 and 2 of the code starting from Articles 15-44 mainly deal with the maritime liens and mortgages of a ship that are recognised under Ethiopian law. As we shall see in this section there are also other provisions that deal with on the same subject but are scattered through out the code.

As already mentioned in the previous sections of this chapter, no express definitions of a maritime lien are provided in the maritime code of Ethiopia of 1960. So the definitions that are provided in the foregoing sub-section 2.1.1 supra are equally applicable to those maritime liens that are incorporated in to our maritime code.

The Ethiopian maritime code of 1960 Art. 25 states that "Claims secured by lien shall follow the ship in to whatever hands she may pass." This principle is incorporated in to our code with out any change or modification as applied in the common law countries. So, like in the common law countries and in accordace with

the international existing regime any transfer or sale of a ship to which liens are attached, to a third party either for consideration or otherwise will not extinguish the maritime liens already created against it. And they remain attached on the ship even if the purchaser or the receiver was in good-faith and has had no previous knowledge of the existence of the maritime lien. Thus, like in the common law countries,the maritime lien on the ship exists independently of possession.

It is ,therefore,of a paramount importance that a buyer of a ship under the Ethiopian law ought to thoroughly scrutinized (check) to find out the ship he/she is going to buy is free from any lien (encumbranoes).

Under the Ethiopian maritime code creditors that are secured by lien are required to register their liens on the ship's entry of registration.(16) This will definitely help buyers to find out whether the ship they are buying is encumbered by liens or not. The code is silent as to what would happen if a maritime lienholder fails to register his lien. Besides the code is also silent concerning the requirement in regard to the registration of a lien. That is, in order to register his cliam the lienholder what must need to show or produce to the registrar, was given a descretion to the registrar. The author is of the view that for the efficiency of a maritime commerce there is a need to amend the code to include or prescribe the minimum requirement regarding the registration of liens in ship's entry in the register.

Pursuant to Art. 97 (2) and Art. 15 (5) of the maritime code of 1960 an Ethiopian master of a ship who acts with in the scope of his liability and the act is done either for the preservation of the ship or the continuation of the voyage, such dealings can give rise

to a maritime lien both on the ship and on the freight. If such an act , however, is made for the preservation of the cargo a lien will be attached on the cargo.

Additionally in Ethiopia as in the common law countries and the international Convention of 1926, maritime liens could be attached on the ship and its accessories, on the freight aquired in the course of the voyage (17) and on cargo.(18)

In concluding this section ,the author wants to stress that the maritime code of Ethiopia of 1960 has to be amended to follow the International Convention for the Unification of Certain Rules of Law Relating to the Maritime Liens and Morgtages of 1967.

2.2.3. Characterstic Features of Mortgages/hypotheque.

A mortgage charge is created for the purpose to secure payment of sum of money. Both mortgages and hypotheque are created by contract or unilateral declaration of the owner of the vessel. In some countries (e.g Italy and the German Democratic Republic) the hypotheque comes in to existence only with its registration in the ships' register. (19)

In some countries (e.g the Federal Republic of Germany), mortgages or hypotheques may arise by opertion of law (so called statutory mortgages or hypotheques) and the right to register a charge in the ships' register may be recognized,for example, as security for the unpaid portion of the purchase price of the vessel or after the arrest of the vessel as security for the payment of the claim for which the vessel has been arrested. (20)

Since the existing international regime used

both terms (i.e liens and mortgages),it seems to be necessary to put a passing remark if there is any difference with in the foregoing context. Holding national pecularities mortgages and liens can be contrasted,as a result of which minor, difference may be manifested. The author thinks that to show such difference to quate Mr. Thomas is enough. He said :

> "A mortgage and maritime lien are similar in that under both there is created a charge on a ship which may be enforced against the original owner and may subsequent purchases. Not with standing this similarity the two concepts are quite distinct and unrelated. The charge of a mortgagee arises solely by virtue of the mortgage agreement which must be in a form prescribed by statute, where as the charge of a maritime lienee arises by operation of law, and with out any formal requirement from the moment of the circumstances which give rise to claim." (21)

The charge is created by the registered owner of the vessel, and must be registered in the ships' register. The mortgagee should advertise his mortgage to any one proposing to become interested in the vessel. He does this by registering the mortgage. "From the date of registration the mortgagee has priority over all other mortgages registered after his and all unregistered mortgages or charges even if created before his registration."(22) i.e failure to register the mortgage does not affect its validity between mortgagor and mortgagee, but it does affect its priority.

The voluntary sale does not affect the charge

which will continue to exist not withstanding the registration of the sale in the ships' register. The holder of the charge may, therefore, enforce his security at any time after the sale and the purchaser may not object to the sale of his vessel for the satisfaction of the claim of the holder of the charge.

In the case of forced sale of the vessel, in most countries, the holder of the charge is entitled to share in the distribution of the proceeding on the basis of the priority enjoyed by his security. In the case of total loss of the vessel, the charge is extinguished, save that under applicable law, the holder of the charge may enforce his claim, always with the priority, against the insurance indemnity.

In several civil law countries, in case of total loss of or damage to the vessel, the holder of the hypotheque is entitled to satisfy his claim against monies due to the owner by third parties in respect of the loss of or damage to the vessel, general average contribution and salvage.(23) As a general rule, the charge may not be deregistered unless with the consent of the holder thereof or by order of court.

The holder of the charge is, under certain legal systems (common law) entitled to take possession of and operate the vessel in case of default of the debtor. This remedy is granted for example in England to the mortgagee. It is not normally granted to the holder of a hypotheque. If we consider the power of sale, the holder of the charge has, under certain legal systems, the power to sell the vessel and to satisfy his claim out of the proceeds of sale. In England, this power is granted by statute to the first mortgagee. No statutory power of sale is granted in civil law countries to the holder of the hypotheque. In the exercise of this power of sale

the mortgagee must act *bona-fide* for the purpose of realizing his security and must take reasonable precautions to secure a proper price for the vessel, having regard to all the circumstances, otherwise he might be liable to the owner for the difference between what the vessel was sold for, and a reasonably obtained price.(24) If the proceeds of the sale after discharging the mortgage debt show a surplus in the hands of the mortgagee, he become a constructive trustee of such surplus for subsequent encumbrancers and the mortgagor(owner).(25) Therefore,a second or third mortgagee can only effect a sale with the consent of prior mortgagees or by the authority of the court.

Footnotes for Chapter II.

01. Griffith Price, The Law of Maritime Liens, London,Sweet and Maxwell,Limited,1940, p.1

02. William Tetley,Maritime Liens and Claims, London,Business law communications,LTD,1985, p.206.

03. D.R.Thomas,Maritime Liens,London,Stevens and sons, vol.14,1980, p.2.

04. Paul M.Herbert, "Origin and Nature of Maritime Liens",Tulane Law Review,Louisiana:The Tulane University of Louisiana,vol.4,1930, pp.404-405.

05. The Editorial Staff of the American Law Book Co., Corpus Juris Secundum. ,New York: West publishing Company, vol.55,1948, p.714.

06. Thomas, cited above at note 3, p.23.

07. "Ibid."

08. International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, signed at Brussels, April 10,1926, Art.8

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10. Gustavus H.Robinson, Handbook of Admiralty Law in The United States, Minnesota: West publishing Company,1939,pp.363-364.

11. The Editorial Staff of the American Law book, cited above at note 5, pp.716-717.

12. Thomas, cited above at note 3, pp.11-14.

13. "Ibid."

14. Jayson Kraut, American Jurisprudence, 2nd.ed. New York: The Lawyers cooperative publishing Co., vol.70,1973, p.305.

15. Thomas, cited above at note 3, pp.26-27

16. Article 8 ,Maritime Code of Ethiopia of 1960.
17. Art.21, " " " " .
18. Art.97(2), " " " " .

19. Report prepared by UNCTAD and IMO,TD/B/C.4/AC.8/6, 28 April, 1987, p.17.

20. "Ibid."

21. Thomas, cited above at note 3, p.3

22. Chorley and Gils, cited above note 9, p.59.

23. Report prepared by UNCTAD and IMO, cited above at note 19, p.17.
24. "Id." ,p.22
25. "Ibid."

CHAPTER III

TYPES OF MARITIME LIENS

This chapter attempts to identify and analyse the various types of maritime liens that are recognised by the existing International regime and the experience of the common law countries. i.e maritime liens given both to claims in respect of services to the ship as well as claims arising from damage caused by the ship.

3.1. The Master and the Seamen

Before going in to the merit of the seamen's and master's lien for wages, it is essential to define the terms seamen and master. According to the Merchant Shipping Act of 1894 Section 742, a seaman is defined as "every person(except master and pilots) employed or engaged in any capacity on board any ship."(1) Similarly article 111 of the maritime code of Ethiopia of 1960 defines seaman as,every person employed or engaged in any capacity on board any ship, excepting master, pilots and apprentices duly indentured and registered. This status explains itself in respect to what may be called contractual aspect of the relation.

Besides the actual seamen, the Administrative Justice Act 1956, Section 8(1) provides the definition of master as "... every person (except pilot) having command or charge of a ship."(2)

The origin of the lien for seamen's wage can not be traced to the Roman law, but the early maritime codes recognised that the claim of the seamen for wages ought to be preferred to other claims,"*car le matelot doit etre paye quand mere il ne resteroit qu'un clou pour le payer.*"(3) In this country there appears to be little evidence of a lien for wages in the sixteenth century. "In 1565 there occures a suit against a vessel and its owner, and the ship appears to have been arrested

because the seamen were unable otherwise to cover their wages...."(4)

In England there appears to be a little evidence of a lien before the last decades of the sixteenth century.

> "The first trace of its existence arises in Johnson v. The "Black Eagle" (1597) where a decree for wages...pronounced against a ship. There-after the lien emerged as an unequivocal privilege ensuring to the benefit of the seamen,and by the beginning of the nineteenth century its existence was assumed with out dispute."(5)

Favouring the highest priority to the seamen Gustavus H.Robinson has this to say: "The courts of Admiralty have from time immemorial favoured and protected the men who have dared to venture forth on the sea of darkness. Their rights have frequently been said to be nailed to the last plank of the ship, and they are favoured in all countries."(6)

The seamen's lien is a true traditional maritime lien. The key is service to the ship; the lien is not dependent on who hired the seaman, be it the owner or the charterer. "Thus seamen were granted a lien even where they were employed by a person who had stolen the ship,.... Similarly a master had a lien despite having been hired by a fraudulent possessor."(7)

A Seamen's and master's lien for wages materialises from the fact of rendering essential services to a ship. The Merchant Shipping Act 1970,Section 18 provides that "the master of a ship shall have the same lien for his remuneration...as a seaman for his wages."(8) Likewise,the International Convention for the Unification of

certain Rules of Law Relating to Maritime Liens and Mortgages 1926,Article 2(2) incorporating this principle has granted a lien right against the ship for the master as well as for the crew that are engaged in the service of the ship.

Therefore, the master as well as the other people enumerated above will have a maritime lien for wages so long as they render services to a ship in a maritime environment. As regardes the master, he is solely responsible for the maritime adventure however, despite of the fact that the master is involved in carrying out the managerial activities and classified in the managerial group,in effect as long as his lien right against the ship concerned,is put on equal footing with that of the seaman.

The existence of master's and seamen's lien for wages guarantees mariners of every nationalty a preferred privilege and security against the ship. Therefore, the ship upon which the seaman renders services stands as a security for his claim concerning his remuneration.(9) This means,International recognition of the masters' and seamen's wage maritime lien ensures that the security offered is real and effective, regardless of which the ship may go. Further more,the operation of the vessel, which benefits the mortgagee and other claimants by enabling the owner or operatore to earn sufficient money to settle his debts, would not be possible with out the services of the crew.

In situations where a ship is totally destroyed except the cargo, the master and the seamen can not assert their right of wage lien against it because seamen's and master's lien for wages emanates from the services they have rendered to the destroyed vessel and not to the cargo. Therefore, no maritime lien for wages will

be attached on cargo infavour of master and seamen.(10)

At this point of discussion a question may arise whether social insurance contributions are included in the present Conventions. Pursuant to article 2(2) of the 1926 Convention on maritime liens and mortgages and related matters, which is enforce, social insurance contributions are not included. But article 4(1) of the 1967 Convention reads "the following claims shall be secured by maritime liens on the vessel: i)wages and other sums due to the master, officer and other members of the vessel's complement in respect of their employment on the vessel; " From this reading it can be pointed out that these contributions should already be covered by the text adopted in 1967. However,if there will be a revision of the 1967 Convention this point may be worthy of clarification.

It is undoubtful that the wage lien adversely affects the security of mortgages and hypotheques,but it is also undoubtful that it contributes to the safe and efficient operations of the ship. In fact the master and crew of the vessel who do not receive their salary may not be so willing to look after the efficient operation of their vessel and that might affect her safety. The same remarks apply to the part of the social insurance contributions due by the master and crew deducted by the owner but not paid and which consquently, is claimed by the social insurance institution directly from the master and the crew.

Further more, the reference to the master and crew was not satisfactory, because on board a ship there may be employed persons who are not part of the crew, such as, in a passenger vessel, waiters, maids etc. therefore, the author is of the view to replace "crew" by "other members of the vessel's complement" which is

incorporated in article 4(1) of the 1967 convention.

3.2. Cargo Owner.

Goods may be shipped by chartering a ship or under a bill of lading. Nevertheless, every valid claim for cargo loss or damage creates maritime lien on the ship in some conditions. The validity of a claim is the corner stone for the cargo owner to have *in-rem* right on the ship considering the condition under which it is shipped.

The carrier,in the normal course of maritime commerce receives goods to be carried for freight from port to port. This statement presses us to identify the obligation that the carrier impliedly is supposed to carry and deliver the goods in safety. In other words, he is answerable for loss or damage which may take place in the course of the maritime adventure while the goods are under his custody. Here the service of the carriage under the bill of lading involves two essential responsibilities:

1. the transfer of the goods from one to destination.
2. the keeping of the goods safe and undamaged during the voyage.

In general the ship owner has the responsibility,to make the ship sea worthy ,properly man, equip and supply the ship before and at the beginning of the voyage,and deliver the cargo received as he received it, unless relieved by the excepted perils.(11) Therefore, the carrier must prove beyond a shadow of doubt that he did not in any way contributed to the loss or damage sustained by the cargo owner to ayoid the creation of

maritime lien on the vessel concerned.

One of the functions of the bill of lading is,it serves as an evidence of a contract of carriage. In this context it can be argued that the owners of the cargo or luggage should not need protection for they could freely choose the carrier and more over, they could ensure. Thus, they were in a position to recover their claim from a carrier who was financially responsible or from insurers. In particular, it could be stressed that there was no reason why these claims should be preferred to mortgages and hypotheques. In the 1967 Convention this lien had already been reduced to tort claims,on the ground that claimants who are in a contractual relation-ship with the owner can protect themselves by selecting an owner who is financially responsible,whilst tort claimants may not do this.

3.3 Passengers

Article 2(4) of the international Convention for the unification of certain rules of law relating to maritime liens and mortgages,1926 provides that where loss of life or personal injuries are suffered by any person on board a ship due to the fault of that ship and of any other ship,are secured by maritime lien. The injured may follow the property unless satisfied otherwise. In the 1926 Convention the phrase "indemnities for personal injury to passengers and crew" cover the claim 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,was not known either in common or civil law,is the protection of human life. This lien was retained in the 1967 Convention as article 4,1(iii).

This lien should not affect the security of the holder of a mortgage or hypotheque,if the instrument whereby the security is effected provides,as is usual, that the owner must insure his vessel on the basis of the ordinary terms of a hull and machinery policy and also cover his liability against third parties providing,in both instances,that the cover shall remain valid in case of any breach by the owner of the terms of the policy including failure to pay premium,until the lapse of a reasonable period after notice of the breach has been given to the holder of the registered charge. Therefore,even if this lien does not contribute to safe and efficient operation of the ship,it was preserved in the Conventions for the above justification.

3.4 Collision and Damage.

A ship in the course of its maritime adventure or otherwise may collide with another ship. For collision to take place there must,at least,exist two ships.(12) It is a common knowledge that a ship at sea, in the context of commerce,involves various interests, that is,the shipowner,owners of property on board and persons on board.

The American admiralty law considers a vessel a legal entity having the capacity to contract and to cause damage. So,an individual injured by her aquires a maritime lien against the offending vessel directly regardless of the personal liability of the owner.

Where-ever there is a collision between two vessels mainly caused by the negligence of one of them,a maritime lien is created upon the wrong doing ship for the damage sustained by the other.(13) In other words, when any damage to ships,goods or persons has caused by

collision between ship,and one party alone is to blame, he shall be liable to any loss or damage caused thereby, and the innocent party is entitled to full compensation for all loss and is supposed to enforce his right by a proceeding *in rem* and in addition *in personam* right. This lien materialises from the moment of collision, "...and may be enforced in admiralty by a proceeding *in rem* against the offending ship,even in the hands of a *bona fide* purchaser..."(14) The lien for collision is maintained against the ship even if the damage sustained was "...due to a sling of cargo as it comes over the side. The lien for the injury is not against the cargo,but against the vessel just as the lien for collision damage does not extend to the cargo on the offending ship."(15)

Pursuant to article 4 of the 1910 collision Convention,where both vessels or parties are at fault, i.e where loss is caused by a fault of two or more ships, liability to make good any damage or loss shall be in proportion to the degree in each ship was at fault;if it is not possible to establish different degrees of fault, the liability shall be apportioned equally(16) and maritime lien shall attach on the ships automatically in respect of their liabilities.

There is no doubt that the 1910 Convention apply only to those countries which ratified the Convention. The United States is not a party to the collision Convention of 1910 and,in consequence,the divided damage rule was applied by American Courts until recently,i.e the damages were divided equally according to "Both to Blame Clause." "Thus,where ship A suffers a loss of $50,000 and ship B a loss of $100,000,ship B will recover $25,000 net from ship A,being 50% of $100,000 or $50,000 paid by A to B,less $50,000 or $25,000 paid

by B to A."(17)

In 1975,however,the United States Supreme Court replaced this old admiralty rule of equally divided damages with a rule which decrees liability for damage to be allocated among the parties proportionately to the comparative degree of thier fault in respect to damage to ships in the United States petitioner v.Reliable transfer Co.Inc.. the Supreme Court described the old rule unfaire and inequitable.(18)

> "It is submitted that the step taken by the United States Court in Reliable Transfer Co. was correct in that its previous decisions were wrong. Congress,for its part,is still free to legislate as it sees fit and the authority of Congress is therefore unaffected as it has never legislated on the matter.
>
> Unfortunately court decisions are rarely as clear and as neat as legislation. The right of cargo to recover 100% from the colliding vessel when that vessel is only partially at fault is still the law of the United States despite Reliable Transfer Co. and is contrary to the Collision Convention of 1910. One wonders whether this final problem will be setteled by the Courts or by legislation. It can be argued,of course,that the presen American practice is superior to the international practice. Cargo interests would so argue. It is submitted,however,that the principles of the Collision Convention are more equitable and that it is regrettable that America is still out of step in regard to cargo.(19)

This collision maritime lien is embodied by

article 15(4) of the maritime code of Ethiopia of 1960. When a ship negligently or otherwise collides with another ship thereby causing loss or damage to the latter,there will be a collision maritime lien attached on the wrong doing ship infavour of the damaged ship. If the ship additionally caused damage to persons and goods,the persons and goods will have a maritime lien against the ship as already discussed (Art.229 and Atr.231 of the maritime code).

We now come to the last point that deals with damage done to the harbour,dock or piers while ship using it(Art.2(4) of the 1926 Convention). In most instances such structures are owned by governments and dedicated to the puplic. Besides,traffic depends on the facilities being available. Their damage accordingly affects both the property owner and the shipping community. For these reasons the law (Convention) protects works forming part of harbours,docks,etc.by security called maritime liens that attaches automatically on the ship causing in general indemnities in respect of collision and other accidents of navigation. And such lien arising out of collision is attached on the ship from the moment of collision. But because the lien comes in to effect by legal process through a proceeding *in rem*,it relates back to the moment when it was first created and attached to the vessel. It was recognised that its foundation was on the common law rule that collision gives to the party injured a right against the offending ship.(20) This lien was therefore,retained in the 1967 Convention in Article 4(1)(v).

3.5. Salvage.

"Under the term of salvage it is generally understood any action under taken with the aim of averting any hazard from persons or goods at sea."(21) i.e salvage is simply a saving of life and property in a maritime adventure. As a matter of law, persons who saved property at peril on sea receive a reward and secured by a right of lien that can be enforced by selling the property saved to satisfy the claim filed for the service they render. Every act of assistance or salvage which has been successful shall give a right to equitable remuneration which shall not exceed the value of the property salvaged.(22) However,there are some exceptions to it. Forced salvage has no return what so ever, that is no one shall be entitled to any salvage reward who forced his salvage service upon the ship against the express and proper refusal of the person in command.(23) Besides that,no remuneration or reward shall be due from the persons whose lives are saved. Nevertheless, if it is accompanied by property salvage, then, the salvors will not end up in the open sea, but rewarded(24) and lien created. The creation is deemed to secure the remuneration of salvors in case the party saved declines to satisfy willingly.

For all purposes,there are certain essential elements (conditions) that must be satisfied for the rendered service to constitute salvage that can create maritime lien on the property saved. These are:

"...(i) The act of the salvors must been intentionally performed with the aim of effecting a salvage assistance...in the interst of the *res* or life at risk.

(ii) The property salved must be a proper subject of salvage. Life is not a subject of salvage.

(iii) The salvor must have rendered the services as a volunteer....

(iv) There must be a danger from which the property or life as saved.

(v) The salvor must be successful...."(25)

Once these preconditions are fully met a lawful claim of salvage materialises. It is not necessarily contractual, i.e the pre-existance of a salvage contract between the salvor and the owner of the property salved is not required. But it arises independently of contracts by the mere fact of rendering essential services to save life or any maritime property at risk.

The salvage maritime lien attaches on the maritime property that is saved from the loss at sea or from a beneficial services rendered to it by the personal efforts of the salvors. The security of the salvor is maintained by a salvage lien attached to such property salved by him. Salvage maritime lien arises both against the ship and its cargo from the moment that salvage services are rendered to both. Thus,the maritime property salved is incumbered by a salvage maritime lien until it is legally discharged.(26)

The recognition of the salvage maritime lien from the earliest time is based on consideration of public policy, so as to encourage salvours to render invaluable aid and assistance to ships and her cargoes that are indistress at sea.

The importance of the claim of the salvor was recognized on the ground that the services rendered by him benefited all claimants. i.e besides such services being useful also for the holder of a mortgage or

hypotheque,contributes to the safety of ship, for it encourages salvors to render salvage services to ship in danger. This lien was therefore preserved in the 1967 Convention as article 4,1(v). Articles 15(3), 240, 244(1) and (2),and 249(2) of the maritime code of Ethiopia of 1960 incorporate these common law and International Convention principles of salvage maritime lien.

Further more,"marine pollution has placed pressure on the ancient principle of salvage which were not anticipated in the 1910 Convention."(27) In consequence, the ship salvors today are often reluctant or less willing to attempt the salving of oil tankers because of the attendant risk of oil spills during the operations. Salvage,too,has traditionally been on a no cure no pay basis, which system only remunerates the salvore if the ship is saved, and for example the salvor is not entitled to a salvage reward after being able to take a sinking tanker away from a coast to the open sea and there allows her to sink,i.e the service rendered by the salvor avoids millions of dollars of pollution damage. Thus, irrespective of the fact that pollution risk is greater than possibility of success,the general rule is that a mere attempt to save the vessel can not be considered as furnishing any title to salvage reward, if it does not contribute to the ultimate, successful salvage of the property imperiled (art.2 of the 1910 Salvage Convention). The reason is that Salvage is a reward for benefits actually conferred, not for a service attempts to be rendered.

But the right to salvage can also arise from contract and the usual contract is Lloyd's Open Form,1980 (LOF). LOF as the standard form of salvage contract, embraced the ancient salvage principle of "no cure no

pay", which was adopted into the 1910 Salvage Convention. The LOF provides, in clause 1(a), a particular exception to the requirement of success. Having laid down an obligation on the salvor to use his best endeavours to prevent the escape of oil from the vessel whilst salving and having acknowledged the general principle of no cure no pay it does allow expenses plus an increment up to 15% where the property salved is tanker which is ladden or partly laden with a cargo of oil, if the services are not successful or if the salvor is prevented from completing his work. The expenses and the increment of 15% of such expenses are together known as the "safety net" giving as they do some compensation in difficult salvage cases involving oil pollution. In this context the question arises whether the maritime lien apply to the safety net which is provided by the LOF. To give answer to the question, the author has this to say:

(1) Referring back to chapter II of this paper when we discuss the characterstics of maritime liens, we have said that, the charge of a mortgagee arises solely by virtue of the mortgage agreement which must be in a form prescribed by statute, where as the charge of a maritime lienholder arises by operation of law, and with out any formal requirement from the moment of the circumstances which give rise to claim. Thus, the salvor and the vessel owner can not agree to create a maritime lien, a first right against the ship which traveles with the ship no matter who is the owner. The salvor shall have a maritime lien on the property salved for his remuneration, but as explained above, a maritime lien can not be granted by contract.

(2) The 1926 Convention on maritime liens and mortgages, gave rise to a maritime lien on a vessel only to those liens mentioned(enumerated) in Article 2(1)

to (5) inclusive;thus,the safety net principle is not incorporated into the Convention and it does not give rise to a maritime lien.

(3) The ancient salvage principle of no cure no pay, modified by a provision awarding reasonable expenses and an increment up to 15% of those expenses when salvage of a ladden tanker is attempted and is unsuccessful, or partially successful or the salvor is prevented from completing the salvage. The charge here is only against the owner of the cargo.

Therefore, in view of the above reasons the author arrived at a conclusion that, maritime lien does not apply to the principle of "safety-net" which is provided (allowed) by the LOF.

Traditional salvage rules were codified in the 1910 Salvage Convention which was reviewed at the 1981 meeting of the C.M.I (Comite' Maritime International) held in Montreal. This meeting produced a new Draft International Convention on Salvage which is presently under study by the International Maritime Organisation (IMO).

Article 3-3.1,of the Draft provides a special award equivalent to the salvor's expenses where efforts are made to prevent damage to the environment (not necessarily pollution). The compensation is paid by the ship owner. Further article 4-1.,states that the Convention does not affect the salvor's maritime lien under law. From this the conclusion is that the lien will continue to apply to property and life salvage as well as in respect to environment protection.

3.6. General Average.

As admitted from the outset, this paper is not designed to give detail analysis on all concepts of maritime lien, but to pin-point the general principles and of course to determine as to what type of claims give rise to lien on a ship. One of these claims emanates from jettson made under a general average act.

The problem which general average seeks to solve is probably as old as seamen's. It was known certainly to Greeks, probably to the Phoenicians. (28) "The oldest law dealing with general average is the law of the Rhodians which has been presented by the fact that it was reproduced in the Digest of the Roman Emperor Justinian. This law has become part of most modern laws, among them the common law of England. It has now received a statutory definition in S.66 of the Marine Insurance Act 1906."(29) Though the principles of the law are common to all maritime countries, important differences exist in various countries which in turn give rise to problems under conflict of laws. British and foreign ship owners, merchants and underwriters and average adjusters have therefore collaborated, and after joint deliberations produced a standard set of rules relating to general average rules. These rules are known as York-Antwerp Rules, so called from the seats of the conference which first brought in to being.(30)

> "In 1864 the last of a series of International General Average Congress met at York. At this meeting a body of rules was completed which was adopted with slight modifications by the Society for the Reform and Codification of the Law of Nations at a conference held at Antwerp in 1877. It is from this time that they become

known as the York-Antwerp Rules.

In 1890 at Liverpool there was another conference at which the rules were altered and added to,and the result generally agreed to by the conference. Later Conferences have added to and altered the Rules. The last conference was held in 1974 by the International Maritime Committee in Hamburg. These rules are now quite generally incorporated in both Bills of Lading and Charter Parties."(31)

The scheme of the Rules is to start off with a Rule of Interpretation, followed by seven rules, lettered A to G, setting out general principles. The lettred rules are followed by twenty-two numbered rules covering special circumstances.

In view of the above,general average, is a condition under which extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from perils the property involved in a common maritime venture.(32) Act is restricted only to property which involves three classes of interests. These are the interests in the ship; those in the freight and in the cargo exposed in maritime adventure.

General average ordinarily deals with a peril from the ship herself, with out any other assistance, work out her own cargo salvation such as jettison on cargo.

Before dealing with sacrifice of the cargo for common safety (interst that give right lien on the ship) the writer wants to put briefly the general conditions that bring about general average contribution that can give rise maritime lien. These conditions are:-

(1) There must be a danger common to the whole adventure, that is, it must not be imagination but real.

(2) The sacrifice or expenditure must be intentional and reasonable, that is, it must not be accidental but necessitated.

(3) The event which gives rise to the sacrifice or expenditure must be taken with out regard to the fault of the parties, save and other remedy which may be open against that party for such fault.

(4) The property in danger must have been actually benefited by the sacrifice.

(5) Only direct losses are recoverable: loss or damage sustained by the ship or cargo through delay, whether voyage or subsequently, such as demurrage, and indirect loss what so ever, such as loss of market, shall not be admitted as general average(33) and does not give rise to maritime lien.

In a nutshell "the ship and cargo should be placed in a common imminent peril: Secondly, that there should be a voluntary sacrifice of the property to avert that peril: and thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained."(34)

It is not necessary that the goods should have been thrown away with the intention of abandoning them, rather it must have been thrown owing to the extraordinary exposure and done for general safety.

> "In getting the goods...out of the holds, water may unavoidably get in and damage other parts of the cargo, or some of the remaining cargo may be injured or lost in taking out the goods to be jettisoned. In these cases the goods damaged have been exposed to extraordinary risk for general safety: so that, unless the

damage has resulted from improper conduct,it is general average loss.(35)

Therefore, in light of the above consideration, as long as the sacrifice of the goods on board are made under the common conditions previously laid down, then the cargo owner may hold the vessel *in rem* for the full share of her contribution upon her arrival at destination where adjustment of loss and contribution is made. Thus, the party that has sacrificed his property has a maritime lien for the general average contribution upon the cargoes, goods and ship liable for the contribution. To secure this payment the master of the ship, as an agent to the party entitled to the general average contribution has the right to retain them until the amount thus claimed is paid. Besides this, the owner of the goods sacrificed has also a maritime lien on the ship "for the part of their value which the vessel and its freight are bound to contribute towards his indemnity."(36) In other words, the vessel is liable *in rem* for its portion of the loss (Art.4(2) of the 1926 Convention).

It has frequently been noted that general average is a little litigated subject and the general average lien is a little used device. Ships must sail, cargoes must be moved, and the general average adjustment, while accepted by the parties, takes a long time to prepare. As a result, bonds, cash deposite or underwriters' letter of guaranty, are produced as a security for the payment of the contributions after the adjustment, to avoid action *in rem* (i.e arresting the ship) or to avoid holding of the goods (i.e possessory lien) which could be perishable and expensive. "In practice the security takes the form of a Lloyd's Average

Bond,so called from the fact that it was drafted under the auspices of Lloyd's." (37)

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

3.7. Master's Disbursement

Literally the word to disbursement means to pay. Therefore, disbursement for our present purpose is a payment made or liability incurred by a master of a ship in the course of his employment as a master which is necessary for the immediate needs of the ship. The expenses thus incurred is wholly in the interest of the ship.

Under the common law for a disbursement to be lawful, the following pre-conditions ought to be present:

(i) The disbursement must be made... by a master in his capacity as a master.

(ii) The expense or liability must be the product of a transaction entered in to by the master.

(iii) The expense or liability must be incurred on account of the ship.

(iv) The expense or liability must relate to an item or services which is immediately necessary....

(v) The expense or liability must be incurred by the master in the ordinary course of his employment.... (38)

Once the above conditions are satisfied, a master will have a disbursement maritime lien on the ship for all liabilties lawfully incurred. This lien is unique because it is a privilege only to the advantage of a master of a ship and does not extend to seamen.

This lien is attached on both ship and freight and does not extend to the cargo. Therefore, no master's disbursement maritime lien will be attached on cargo.

The principle of the master's disbursemen maritime lien is incorporated by article 2 (5) of the 1926 Convention. Thus,these contractual relations or other acts done by the master emanates with in the scope of the master's authority and are solely done or entered in to for the preservation of the ship or the safe continuation of the voyage and the place where such act or contract performed must be away from the vessel's home port.

. This lien is incorporated also by article 15 sub-article 5 of the maritime code of Ethiopia of 1960. Accordingly, an Ethiopian master of a ship, acting with in the scope of his authority, out side the home port, will have a master's disbursement maritime lien against the ship provided that the act he performed or the contract he has entered into with third parties is necessary for the preservation of the ship or the continuation of the voyage. Like in the common law countries, this right does not extend to seamen. But it is only a privilege given only to the master. As in the common law countries, the master can not incumber cargo with a disbursement maritime lien.

The original reason for this lien was to enable the master, away from the vessel's home port, to obtain supplies and repairs on credit or to borrow money to may for such supplies and repairs. By 1967 it was agreed that the need for such a lien was long past. It was felt

that such a lien would allow a ship owner in poor financial circumstances to continue to operate his ship by imposing new charges on the ship, in order to obtain new loans which he was no longer in a positon to pay. This lien was therefore, deleted in the 1967 Convention.

The fundamental principle followed in redrafting the rule on maritime liens had been to reduce the liens to the minimum, so as to enhance the value of the mortgages (hypotheque). In this connection the author suggested that there was/is no justification for maintaining a maritime lien in respect of claims arising from contracts made by the master, since the security and rapidity of modern communication made money available any where, with out the need for the master to seek supplies and other services on credit. Therefore, the deletion of this lien from the list of maritime liens under the 1967 Convention was correct.

3.8. Bottomry and Respondentia.

Formerly, bottomry and respondentia were vital commercial documents by which a master of a ship in the course of his maritime adventure secured a loan or advance by giving the ship or cargo as a security so as to meet emergencies of the voyage and to successfully complete the voyage already commenced. Accordingly, where either the ship alone or the ship together with the cargo and its freight are charged, we have a bottomry bond. Where as in situations when the cargo alone is incumbered the instrument thus created is known as respondentia. (39)

"The Shorter Oxford English Dictionary

(Third edition) defines *Bottomry* as, a species of contract of the nature of a mortgage,where by the owner or the master of a ship borrows money at a stipulated interst or premium to enable him to carry on or complete a voyage, and pledges the ship as security for repayment. If the ship is lost the lender loses his money.

It defines *Respondentia* as a loan upon the cargo of a vessel, to be repaid (with maritime interst) only if goods arrive safe at their destination." (40) (Emphasis added)

The object of a bottomry and respondentia bond is to help the ship finish the voyage that she has already embarked upon. Therefore,the loan,like bottomry and respondentia, was only repayable if the voyage was successful.

A lawfully contracted bottomry bond gives on the person that has advanced money a maritime lien on the ship, freight and cargo. The lienholder in case of bottomry bond, however, will resort to cargo when and only when the ship and its freight are insufficient to satisfy his claim. The lien on cargo in such case will be valid only to the extent that said bond was as well beneficial to the preservation of the cargo and for the safe prosecution of the voyage.

Both bottomry and respondentia lien arises from the moment of agreement and up to the value of the property thus incumbered. The lien once created subsists so long as the propertry incumbered survives. With the destruction of the incumbered property the lien is also lost. A respondentia bond gives upon the person advancing the loan a maritime lien on the cargo only.

Regrettably,however, "... neither the bottomry nor the respondentia loan have any great modern significance, due to the increase of facility in present day communication and consequent ready touch with the owners." (41)

The concept of the bottomry and respondentia bonds are adopted by article 107(1) of the maritime code of Ethiopia of 1960 which states that "In case of pressing need during the voyage the master may borrow upon the ship, and if the amount raised is insufficient, upon the cargo." Therefore, an Ethiopian master of a ship can create a bottomry and respondentia bonds by hypothecating the ship and when the amount is insufficient against the cargo as well respectively. But the master can do this only when there is an urgent need and has secured "... the authorization of the president of the court of the place where such loan is made, or other wise of the administrative authorities and where abroad of the Ethiopian consul or other wise of the competent local authority." (42)

Like in the common law countries, this right is only confined to the master excluding the seamen. Therefore, in Ethiopia there is a bottomry and respondentia maritme lien against the ship and cargo.

The justification for recognition of these claims was to help the master obtain credit outside the ship's home port. However,the commercial task of the master have been,for one thing,the development of communications has made it much easier for the master to take instructions from his owner. The ship owner is no longer unaware of the fate of his ship during the voyage. Therefore,to protect the interest of the mortgagee these rights have to be deleted from the code.

Footnotes for Chapter III.

01. D.R,Thomas,Maritime Liens,London,Stevens and sons,vol.14, 1980, pp.188-189.

02. "Ibid"

03. Thomas,cited above at note 1, p.175.

04. Griffith Price, The Law of Maritime liens, London,Sweet and Maxwell Limited,1940,p.56.

05. Thomas,cited above at note 1, p.175

06. Gustavus H.Robinson, Handbook of Admiralty Law in the United States, West publishing Company,1939, pp.369-371.

07. William Tetley,Maritime Liens and Claims, London, Business Law Communications LTD.,1985, p.101.

08. Thomas, cited above at note 1, p.180.

09. Robinson, cited above at note 6,pp.369-371.

10. Thomas,cited above at note 1,pp.181-182. And International Convention for the Unification of Rules Relating to Maritime Liens and Mortgages, Brussels,April 10,1926.Articles 2 and 4.

11. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels,August 25,1924 as amended and refered as Hague-Visby Rule,article 4.

12. International Convention for the Unification of certain Rules of Law with Respect to Collision between Vessels,Brussels,September 23,1910,art.1

13. "Id." article 3.

14. Jayson Kraut, American Jurisprudence,2nd.ed. NewYork:The Lawyers Cooperative publishing Co. vol.70,1973, pp.473-474.

15. Robinson,cited above at note 6,pp.404-409.

16. The 1910 Convention cited above at note 12,art.4.

17. William Tetley,Marine Cargo Claims,2nd.ed., Toronto,Butterworths, 1978, pp.303-304.

18. Christopher Hill,Maritime Law,2nd.ed.,London Lloyd's of London press Ltd.,1985, p.171.

19. Tetley,cited above at note 17,p.310.

20. IMO report,Consideration of work in respect of Maritime Liens and Mortgages and related subject,LEG 55/4/1,18 September 1985,p.20

21. Predrag Stankovic,Law of Salvage Sea,Malmo Lecturenotes,World Maritime University,1987,pp.1-2.

22. Convention for the Unification of certain Rules of Law Respecting Assistance and Salvage at Sea,signed at Brussels,September 23,1910 art.2.

23. "Id." art.3

24. "Id." art.9

25. Thomas,cited above at note 1, pp.139-140.

26. "Id." pp.150-151.

27. Edgar Gold, International Maritime Law Basic Principles, 2nd.ed.,International Center for Ocean Development,Canada, 1987, p.376.

28. Chorley and Giles, Shipping Law, 8th.ed., London, pitman publishing,1987,p.287.

29. "Ibid."

30. "Ibid."

31. Carlos Moreno,General Average, Malmö,World Maritime University,Lecturenotes, February 1987,p4.

32. Rule "A" of the Humburg Rules of 1974.

33. "Id." Rule C.

34. Robinson, cited above at note 6,p.769.

35. Raoul P.Colinaux,British Shipping Law, 1963, p.731

36. "Id." pp.822-825.

37. Chorley and Giles, Shipping Law, 7th.ed., London, pitman book Limited, 1980,p.232.

38. Thomas,cited above at note 1,pp.193-198.

39. Price,cited above at note 4, p.28.

40. UNCTAD,Consideration of Maritime Liens and Mortgages And related subjects... ,TD/B/C.4/ AC.8/ 6, 28th.April 1987,p.12.

41. Robinson,cited above at note 6,pp.369-371.

42. Art.107(1),Maritime Code of Ethiopia 1960.

CHAPTER IV

ORDER OF PRIORITIES OF MARITIME LIENS.

Once the type of maritime lien that are accepted by the 1926 Convention and incorporated in to the Ethiopian maritime code are identified in the foregoing chapter, it is time to focus her on their priorities. The subject of priority is of prime importance in maritime shipping venture when several liens are charged upon the object of the maritime lien by special contracts or by operation of the law.

The crux of putting in one lien a higher rank than other is simply due to the availability of insufficient fund to satisfy all arisen claims. However, what is the basis of ranking is the question that needs deliberation.

Hence, it is Articles, 2,3,5,6 and 7 of the 1926 Convention which have a direct relevance to cover the subject matter under discussion. From the wording of Article 2 of the Convention claims enumerated under it are the only claims that can give rise to maritime lien with the given priority no more.

Now, we shall see the priority rule in respect of other claims, different voyage, the ranking of claims with in the same voyage and claims of the same nature under one class.

4.1. Priorities of Maritime Liens With Respect to Non-Maritime Liens

Generally, in questions of priorities of liens, the maritime lien that is attached on any maritime property is always superior to any other non-maritime lien(other claims) or security device (mortgages, hypotheque)(Article 3 of the 1926 Convention). This is better explained by Justice Mathews when deciding the case on

the Guiding Star in the following terms: "in determining the order of priority among several claimants, the first classification therefore, is in to liens, maritime and non-maritime, the latter being postpond until after satisfaction of the former."(1)

This policy is adhered to in common law countries because of the exigencies of commerce, consideration of equity and publice policy that maritime liens should take precedence of non-maritime liens or claims.(2) So in the distribution of the fund, it is only when all the maritime liens are satisfied that surplus will be discharged in the interest of non-maritime liens (claims). Therefore, what is advantageous for a claimant to have his claim rank as a maritime lien is that besides the priorities that is accorded to it over non-maritime liens or claims, will additionally be available to him the right to proceed *in-rem* against the maritime property. For this reason the maritime liens are occassionally described as lien "of the first class " or "as being of a very high and sacred character."(3)

4.2. Maritime Liens Arising out of:

4.2.1. Different Voyages.

From earlier times it has been recognised that some liens of a latter date are paid prior to those of an earlier date.(4) This is purley a classification of maritime lien claims in point of time of accrual. However,Article 6 of the 1926 Convention basis its classification on voyage, which in actual fact involves time factor on a different time. Claims secured by lien in the last voyage of what ever priority shall be

preferred against those of previous voyages(Art.6 of the Convention),Subject to certain limitations to be discussed later,i.e the last in voyage is first in right. This principle is upheld because it is considered that the last essential services furnished to the ship and cargo serve as a means of preserving them for the benefit of the earlier lienholder and with out which the prior lienholder would have completely lost their security. (5)

The voyage rule has been presented by Judge Addison in the proceeds of the Gratitude case as follows:

> "The general maritime law adjusts all liens by the voyage.... By the general rule ... the priority of liens continues only until the next voyage. The lien connected with every new voyage start with a priorty over all former ones after the ship sails, if these has previously been opportunity to enforce them." (6)

Logically, therefore, liens of the same class that have materialised at different point in time (voyage),will naturally be paid in the inverse order of their dates of attachment. The concept of the "last voyage comes first" under this caption is widely accepted among the shipping nations.

More over,the idea of "inversely to their order of date" is in applicable to certain class of lien, that is,claims arising out of one and the same crew's article shall be deemed claims in the last voyage, even when they arise out of the earlier voyage (Art.6 of the Convention). Liens that have materialised during the same maritime incident shall be deemed to have arisen at the same time (Art. 5 of the Convention).

Having seen the accrual of maritime liens and

their priority in different voyages, we shall proceed to the ranking of maritime claims secured by lien arising out of the same and one voyage.

4.2.2. The Same Voyage.

The more difficult question arises as regards class ranked rather than as to voyage. The class rank is set-up under the 1926 Convention Art. 2 according to the character of lien *perse*. Such claims as enumerated under the same article are supposed to be operative with regard to their priority when they arise with in one particular voyage. Therefore, "... a voyage may be taken to be the normal route of sailing between the port of loading and the port of discharging, as defined by geography and by trade customs which the parties are taken to have incorporated by reference." (7)

Here under, we shall attempt to pin-point the in-built reason as to why the various claims are ranked in that order under Article 2 of the 1926 Convention.

Under the mentioned Convention the first claim that must be satisfied as provided under Art. 2(1) are "Law costs due to the State,... light or harbour dues, and other publice taxes and charges of the same character; pilotage dues, the cost of watching the preservation from the time of the entry of the vessel in to the last port."

This is clear from the out set that the erection of harbours undertaken is a big venture, and the amount of capital involved is enormous. Hence,the granting of the operation of its activities is paramount. To secure its normal operations governments have to have revenues to finance activities and of course return for what ever services they render.

To satisfy the exigency of commerce, the state has an obligation to facilitate all marine services with out which shipping venture is totally impossible such as, service light harbours, docks, and piers is a publice service just as the provision of light houses...they are built for publice use, and they can only be constructed at certain place determined by the favour of nature and the exigencies of trade. (8)

Hence, the Ethiopian maritime code has provided that such charges be claimed and satisfied first when the vessel is subject to sale, *inter alia*, due to its prime importance to the marine commerce *perse*.

This is followed by claims arising out of the articles of agreement involving the master, the crew, and the other persons engaged in the services of the ship in what ever capacity (Art.2(2) of the 1926 Convention). These people are given the second place of priority because with out them the ship can not make a voyage and make profit. In the first place, a ship with out a master and his fellow seamen is not in any way different from any product of the market. It is the master that gives the life, that it becomes a profit making object. In the words of Gilmore, professore of law Yale Law school, "this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master." (9) Besides this, these are the first people that are exposed to all sorts of danger in the course of the maritime adventure.

Therefore, the Convention has taken care of persons who are tied up with the ship by a contract of employment and are supposed to rank second. Furthermore, the maritime code of Ethiopia Art. 15(2) has adequately safeguarded the people engaged in the maritime adventure.

The third rank of priority goes to salvage and

assistence(Art.2(3) of the Convention). In most shipping nations, it is given prime importance and takes priority over seamans wage, they argue that this is "probably becuase of the interest of the community in the conservation of the property, salvage has been preferred to all other lien." (10) But the author of this paper argues other wise, despite the fact that the right of other creditors depend on the well-being of the ship and the salvors are there to save the whole of the *res* and also it is necessary to encourage the salvage enterprise by giving them maximum legal protection, it must not be denied that the accomplishment of such tasks would absolutely depend upon the existence and mobility of the ship in the sea. In other words for salvors to exist, there must first be a property to be conserved which is injected life by the master and his fellow seamen. Hence the priority of seamen's wage over salvors should not be denied.

The 1926 Convention in its rule of priority preferes the right of salvors with the exception of seamen's wage, to others fore the mere reason that the various creditors of the ship who would have had nothing upon which to claim if the exertions of the salvors had not been made.

Hence, the protection of the right of salvors under third class rank is justified under the mentioned Convention and in addition under the Ethiopian maritime code (Art.15(3) and Art.249(2)). Likewise, the contribution for the general average sacrifice is given equal rank or put on equal footing with that of the remuneration due for assistance and salvage as they are designed to stand for the protection and saving, at least one of the objects of maritime lien.

Under Article 2(4) of the 1926 Convention

extra-contractual claims are put in the fourth. This may be damage to things or injury to person.

This part of the claim is supposed to take priority among other contractual claims,except seamen's wage. This is simple because in the contractual relations the parties forsee the possible out come of the adventure and try to balance and govern the risk that may take place in the currency of the voyage in the instrument that creates the relation. Unlike the contractual relation,extra-contractual act is usually a surprise to both parties, that is, to the culprit and the victim. Therefore, the Convention wants to protect the helpless victim by providing him a prior compensation to make the damage good.

More over, one of the basic tenets of extra-contractual law and action is the maintenance of publice safety. . For this, such acts must not be permitted to hinder business activities. Thus, creating a situation of balancing interests seems practical. The Ethiopian maritime code has done it in such a way that, by placing extra-contractual claims in the fourth degree,maritime business is encouraged and public interest protected.

The 5th place of priority of maritime liens under the 1926 convention is given to contractual relations or other acts done by the master provided that such contractual relations emanates with in the scope of the master's authority and are solely done or entered in to the preservation of the ship or the safe continuation of the voyage and the place where such act or contract performed must be away from the vessel's home port. We have previously mentioned that the master is the one who is appointed by the manager or by the charterer to whom the ship is demised. He is the husband of the ship, solely responsible for the maritime adventure. Among

other things, the master is conferred with a right, in case of pressing need during the voyage to borrow money upon the ship. The power is given to the master in order to circumvent certain emergency cases,for instance the ship might have been disabled and need repair quickly to bring perishable goods home and other similar cases while the ship is in foreign port. This had been widely practiced "before submarine cables and wire less established a close net work of communications through out the world, ship's master's in foreign ports had to be given authority to act on behalf of their owners and of cargo owner when in any emergency they could not communicate with them."(11) Such contract made by the master gives the lender a maritime lien upon the ship or cargo that can be effected by the process of admiralty court that ranks 5th under the Ethiopian code Art.15(5).

Under Art.3 of the 1926 Convention, creditors secured by mortgage/hypotheque on the ship rank for priority in order of registration immediately after the creditors secured by lien referred to in Article 2(1)to (5) inclusive.

The Convention gave rise to maritime lien on a vessel only to the above five mentioned (discussed) liens. However,under art.6 of the Convention Contracting Stases are free to create other liens and right of retention, provided they do not prejudice the enforcement and the priority of the maritime liens listed in Article 2(1) to (5) and of registered mortgages and hypotheque which comply with the requirement of Article 1. In view of this the 6th place in the priorities of maritime liens under Ethiopian law are given to damages that result due to charterers (art.15(6)). Thus,damage payable to charterers under Ethiopian law are rank immediately after mortgage claims (art.20 cum.art.15(6)). Of course, such

resulting damage must spring from the contract established relating to the use of the ship. When the ship is chartered by demise, the owner shall be liable for damage resulting from unsea-worthiness,unless he can show that such unsea-worthiness was caused by a latent defect which a prudent owner could have discovered (art.129).

With regard to voyage charter and time charter,the ship owner is expected to place the ship at the disposal of the charterer at the time and place agreed upon. If he fails to perform such duty, the charterers are provided two remedies under art.142 and art.143 of the Ethiopian maritime code of 1960.

These remedies are (1) to terminate the contract by giving notice in writing to the owner (art.142);

(2) to claim compensation with out lodging any formal claim, unless the shipowner can show that the delay is not due to his fault (art.143).

Hence,if the ship owner fails to compensate such damage,the charterers are entitled to resort against the ship to satisfy their claim under art.15(6) of the Ethiopian maritime code.

An insurance under the Ethiopian maritime code has a lien right for unpaid premium,when the amount of premium for insurance taken out on the hull of the ship and the fittings and equipment of the ship (art.15(7)).

Finally any claim based upon an in accurate or incomplete statement in a bill of lading rank last with regard to priority of lien under Ethiopian maritime code (art.15(8)).

The classification of maritime liens of the same nature under the same rank that accrue with in the same voyage is practically impossible. However, the Ethiopian maritime code approaches such problems in a

practical way. When claims arise out of the same voyage and which are of the same priority they are supposed to share concurrently and rateably (art.17(2)). With regard to the date of claims arising out of the same maritime incident they are deemed to have come in to being at the same time (art.18).

Under the Ethiopian maritime code of 1960 the claim for a maritime lien does not require any special formality unless it is required by a specific or provision that obliges claimant that such formalities or conditions ought to be adhered to . So all liens under the Ethiopian law comes into being, "as soon as the claim is set up" (art.19). i.e when the maritime lien claimant has become aware of the liens that have accrued in his favour and institutes a claim to that effect to the proper authorities subject of course to the period of limitations as will be discussed in chapter V infra.

Inlight of the above context it is the author's view that without losing any sight that some maritime liens were needed to ensure the safety of the ship, consideration must be given by developing countries that the number of claims which are accorded the status of maritime lien affects ship financing. Therefore the mortgagee has to be accorded a reasonably high priority by limiting the number of maritime liens having precedence over the mortgage.

Footnotes for Chapter IV

01. Gustavus H.Robinson,Hand book of Admiralty Law in the United States, Minnesota:West publishing company, 1939, pp.419-421.

02. Jayson Kraut,American jurisprudence,2nd.ed., New York: The Lawyers cooperative publishing co., vol.70,1973, pp.486-487.

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06. Robinson,cited above at note 1,pp.424-426.

07. Grant Gilmor and Charles L.Black, The Law of Admiralty,2nd.ed.,NewYork:Foundation press, 1957, p.156.

08. Chorely and Giles, Shipping Law, 5th.ed. London, pitman publishing, 1963, p.236.

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CHAPTER V

EXTINCTION OF MARITIME LIENS

In the proceeding chapters, we tried to see the chronological development of maritime rules towards uniformity, the development of maritime liens as a security device, its nature, type etc. in brief.

Now, we shall attempt to display, in a nutshell some of the modes of extinction (termination) of maritime liens under this caption.

Once a maritime lien is created, it does not remain attached to the maritime property for good. There are various ways in which the maritime liens thus created are extinguished. Thus,this part of the paper tries to discuss the theoretical and legal aspects of the modes of extinction of the maritime liens under the present Convention and the common law system.

5.1. Period of Limitation

This has been explained by D.R.Thomas as "...the period during which the law permits him to delay,with out losing his right...."(1) Accordingly, a lienholder is required to bring his case in to the attention of the admiralty court with in the time limit as set out by a given statute. Delaying in enforcing one's right with in the statutory time limitation will result in the loss of the lien.

Under the common law for example a damage and salvage liens claimant can not bring his claim after the passage of two years from the date when the damage has materialised or salvage service rendered. Like wise, a cargo lien and seamen's wages claimant can't sue after the passage of one year from the date of the delivery of the goods and after the passage of six years from the date of the cause of action has accrued respectively.(2)

The invalidation of lien by ways of passage of time serves as a safety valve against the accumulation of claims. Provisions for extinction of such liens are, therefore included in the 1926 Convention to meet the aforementioned purpose. Article 9 of the 1926 Convention provides that maritime liens cease to exist,apart from the cases provided for by national laws,at the expiration of one year from the date of their accrual,except maritime liens securing claims in respect of contract 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 (this liens are no longer secured by a maritime lien under the 1967 Convention).

The 1967 Convention in its turn provides (Art.8) that marítime liens extinguished after the lapse 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 and, following such arrest, is sold through a forced sale.

A definite period gives the lienholder the advantage of knowing the period of his liens effectivness.(3) However, there is a disadvantage in fixing the period of bring an action by the claimant. The lienholder prevented from arresting the vessel by circumstances beyond his control and as a result suffers from the extinction of his lien.(4) Such occurrences are reconciled by article 9 which provides that the Contracting parties may extend the period of extinction in cases where it has not been possible to arrest the vessel to which the lien attached in the territorial waters of the state in which the claimant has his domicile. This is purely a protection given to the lienholder. Thus, such a provision in general favours the lienholder by increasing the possibility of arresting the ship in the

State of the creditor's domicile.

But whilst the 1926 Convention leaves 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 hypotheques. In fact the more numerous 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 hypotheques, as well as for prospective buyers of the vessel.

(i) If a loan is sought on a vessel already in operation, the difficulty for the prospective lender to make enquiries in respect of existing maritime liens increases with the period in respect of which such enquiries must be carried out; to trace the history of a ship for a long period of time is in fact a difficult task.

(ii) During the life of the mortgage or hypotheque maritime liens increase in number in proportion with the length of the period during which they remain in existence. In fact holders of maritime liens may refrain from enforcing their claims 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 vessel.

The problem has to do particularly with the question whether the running of the time limit is interrupted if the claimant commences ordinary proceedings against his debtor for the payment of his claim. The commencement of judicial or arbitration proceedings should suffice that it may sometimes be difficult or expensive to arrest a vessel, particularly when security is required by the court as a condition precedent to the arrest, and that might prevent small claimants, such as crew members, from protecting their rights.

If, however, commencement of judicial proceedings could prevent the running of the one year extinction period, the holders of mortgages and hypotheques would have no knowledge of this and consequently maritime liens unknown to them might add up year eroding the security of the mortgage or of the hypotheque. Thus,since third parties are not aware of the commencement of proceedings, the holder of mortgages and hypotheques as well as prospective buyers of the vessel would not know how many maritime liens, which would otherwise have been extinguished by lapse of time, are still in existence because the claimants have commenced proceedings against their debtor (who may be persons other than the owner of the vessel,viz. bareboat or other charterers) before a court in one country or another. One of the usual covenants of a mortgage or of the hypotheque is ,in fact,the obligation of the debtor to satisfy any claim secured by a maritime lien and the right of the holder of the security to enforce it if this obligation is breached. But the default of the debtor may not come to the knowledge of

the mortgagee for a very long time if judicial proceedings would suffice to prevent the extinction of maritime liens.

An attempt to solve this problem has been made in the 1967 Convention, by providing Art.8 paragraph 1 as follows:

> " 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 a forced sale."

It has been deemed necessary, for the protection of holders of mortgages and hypotheques and generally of all creditors, as well as for greater certainty of rights and for the encouragment of the trade that only an action which becomes immediately known to the world at large, and which leads to the satisfaction of the claim, may have the effect of preventing the extinction of maritime liens. Such action is the arrest of the vessl, since when a vessel is prevented through arrest from continuing to trade,this becomes known to all those who have a relationship with such vessel. But it is not sufficient to arrest the vessel; it is necessary that the vessel remains under arrest until she is sold by the court or other competent authority with a view to then distributing the proceeds of the sale amongst the creditors. i.e the Convention requires that the arrest should lead to the forced sale,viz. should continue until the vessel is actually sold by the court. Such a provision seems necessary, for if the arrest is lifted (followed by the release of the vessel) the holder of mortgages or hypotheques may not become aware of it

whilst the maritime lien might, if the requirement that the arrest should lead to the forced sale of the vessel did not exist, continue indefinitely. Furthermore, the claimant remains free to choose the alternative course of releasing the vessel. In this context the fact that the arrest which does not lead to a forced sale does not prevent the extinction of the maritime lien is not prejudicial to the holder of such lien, for he will release the vessel from arrest only against satisfactory security which replaces, such as a bank guarantee or a letter of undertaking of a P and I.Club. In such a case the claimant does not need a maritime lien any more, since he can obtain settlement from the guarantor, provided it is found to be well grounded.

The arrest of the vessel by one claimant, provided it leads to the forced sale of the vessel, benefits all other claimants, and thus prevents the extinction of all other maritime liens existing on the vessel at the time the arrest is effected.

In view of the above discussion, if the period with in which these maritime liens can be enforced or extinguished are specifically known, the next logical question then would be from when does the period of limitation begin to ran, Article 9 of the 1926 Convention provides the answere for the different kinds of maritime liens, as follows:

(i) For the assistance and salvage services, the period of limitaion shall run from the day when the services terminated.

(ii) In as far as liens securing claims in respect of collision and other accidents in respect of bodily injuries are

concerned, the period of limitation shall run from the day when the damage or injury was caused.

(iii) In the case of liens for the loss of or damage to cargo or baggage, the period of limitation shall run from the day of the delivery of the cargo or baggage or from the day when they should have been delivered.

(iv) The period of limitation for repairs and supplies and 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 (5), which cease to exist after six months (6), shall run from the day when the claim originated.

For all other liens securing claims other than those mentioned above and recognised as maritime liens under article 2 of the 1926 Convention, the period of limitation shall run from the enforceability of the claim (art.9 of the aforementioned Convention). These maritime liens include the liens specifically mentioned under number 1 of article 2, the contribution of the ship in the general average (7), damage caused to works forming part of harbours, docks and navigable waterways and the cost of removal of objects obstructing navigation due to the acts of the ship.

Further more, Article 9 of the 1926 Convention reads "the fact that any of the persons employed on board mentioned in No 2 of Article 2 has a right to any payment

in advance or on account does not render his claim enforceable." This leads us to the conclusion that claims arising out of the articles of agreement of the master, the crew and other persons hired on board, the period of limitation shall run from the enforceability of the claim.

In light of the above consideration Articles 26 and 27 of the maritime code of Ethiopia of 1960 clearly provides for the automatice extinction of each lien one year after its creation with the exception of lien securing claims attached to the ship's store which shall be barred after six months. Besides the code clearly sets the date from which the one year period is to run, and one can find this is similar to the 1926 Convention.

5.2. Judicial Sale.

A judicial sale performed according to the proper procedure terminates all maritime liens and mortgages (hypotheques) on a vessel. "The only sale which expunges a maritime lien is a judicial sale." (8) But the court that sells the property must be a court of competent jurisdiction. So, when the sale conducted by a court of a competent jurisdiction, all the liens that are attached to the *res* are wholly extinguished and pass a lawful and a valid title to the buyer free from all maritime encumbrances. The title is good against the whole world. "It has been said that the foreclosure of a maritime lien by process *in rem* is like the drydocking processing in which the hull is scraped clean of her encumbrances."(9)

> "A sale by order of a court of competent jurisdiction in proceeding *in rem* operates

to extinguish all liens attaching to the *res* and to convey a valid title to the purchases which is free of all incumbrances and good against the whole world. An American commentator has viewed the effect of judicial sale as like the drydocking process in which the hull is scraped clean of her incumbrances."(10) (Emphasis added)

Therefore, with the proper adherence in the procedure the forced sale frees the vessel from all encumbrances imposed upon previously. "However, not every Marshal's sale of a vessel will discharge maritime liens existing against the vessel. A vessel may be arrested and sold by a Marshal, in a proceeding in an admiralty court, where the process is issued, not *in rem* against the vessel, but *in personam* against her ower, as by writ of foreign attachment. Such a sale is not equivalent of a judicial sale in admiralty, and does not free the vessel of other maritime liens."(11)

Articles 10 and 11 of the 1967 Convention deals with the forced sale of a vessel. Article 10 of the Convention provides that thirty days written notice of the time and place of such sale shall be given to registered creditors (i.e registered mortgages and hypotheques) and to the holders of maritime liens set out in Art.4 of the Convention whose claims have been notified to the court. From the interpretation of this article one can come up with the conclusion that in a time of judicial sale there is a great probablity for a creditor secured by a maritime lien to loose his right as registration of lien is not mandatory under the Convention.

The requirement of an advanced notice of the

time and place of the forced sale must be considered in conjunction with the provisions of Article 11 on the effect of the forced sale as regards the charges on the vessel and on the duty of the registrar to either register the vessel in the name of the buyer or delete it from the register as the case may be.

Article 11(1) of the Convention states that,as a consequence of the forced sale,all encumbrances cease to attach to the vessel provided the vessel is, at the time of the sale, in the jurisdiction of the Contracting State where the sale is effected and the sale has been effected in accordance with the law of such State and the provisions of the Convention,i.e those set out in Articles 10 and 11(2). This provision is of great importance, for the recognition of the effects of the forced sale in all Contracting States substantially improves the prospects of sale of the vessel, and this is to the advantage of the creditors among whom the proceeds of the sale must be distributed.

Article 11(2) of the Convention regulates the distribution of the proceeds of sale amongst the holders of all kinds of priority rights,namely registered mortgages or hypotheques and similar charges, maritime liens listed in Article 4(1) of the Convention and maritime and other liens or rights of retention created under the applicable national law. The only charges which are not mentioned are unregistered mortgages, hypotheques and similar charges. The reason of this omission is that Contracting States are under no obligation to recognize them. This,however,does not mean that the holders of such charges are not entitled to participate in the distribution of the proceeds of sale, but only that they may do so after all the priority claimants are satisfied. i.e that they are in the same position as ordinary

creditors. This sub-article,in fact, states that the proceeds of the sale are distributed among the priority claimants to the extent necessary to satisfy their claim. The surplus, if any, is distributed among other claimants and thereafter is paid to the owner.

Paragraph 3 of Article 11 requires the registrar to delete all registered mortgages or hypotheques and to register the vessel in the name of the purchaser or to issue a certificate of deregistration as the case may be, when a certificate issued by the court which has effected the sale is produced to him. Such certificate must state that the vessel is sold free of all mortgages, hypotheques and of all liens and other encumbrances, provided that the requirements set out in paragraph 1, sub-paragraphs a) and b) have been complied with, and that the proceeds of such forced sale have been distributed in compliance with paragraph 2 of this article. This does not mean that the proceeds of the sale must be distributed among the holders of priority rights, but among all those who have joined the proceedings for the forced sale and have asked to participate to the distribution,always provided that timely notice has been given to all those who were known to the court,in accordance with Article 10.

5.3. Laches.

A maritme lien under the common law may be extinguished because of unreasonable delay on the part of the lien claimant in enforcing it. A lienholder who sleeps on and delays in enforcing his lien will find the courts of admiralty unco-operative to grant him any judicial remedy if the delay was particularly due to his lacking in deligence or harmful to the interest of third

parties. We have seen that a maritime lien is a secret one. It is always advisable that it should be enforced with out any unnecessary delay for it becomes stale and eventually will be lost and the right of the lien itself will cease to exist.(12)

Warning lien claimants the reasonable deligence ought to be exercised in the enforcement of their right to a lien, the Admiralty Court has to say the following while deciding the Europa case:

> "A maritime lien follows the ship in to whosoever hands she may pass, and may be enforced after a considerable lapse of time; but to effect the right of the third persons, reasonable deligence in its enforcement must be used, other wise the lien may be lost." (13)

In deciding what amounts to a reasonable deligence, the court of Admiralty decide every case based on the general principles of fairness, justice and equity. The court is also bound to make a careful scrutiny surrounding the circumstances of the delay in every case.

Hence, a lienholder that does not enforce his lien with in a reasonable time and with reasonable deligence having regard to all the circumstances of the case will find his lien lost because of the doctrine of laches under the common law. The lien will be lost if there has been long delay and reasonable opportunity to enforce it, even if the statute of limitations has not yet run.

> "In *The Everosa*, it was held that a lien not enforced after reasonable opportunity will be barred by laches against an innocent purchaser. In this case, a Chandler who missed six

opportunities to libel the vessel in the mere four months after his lien arose was found to have been lacking in deligence by not libeling the vessel until two and a half years later when the vessel next returned to an American port, and his lien was held to have been barred by laches. In the same case, a paint supplier did not demonstrate a lack of deligence by passing up two opportunities to libel the vessel before doing so upon her return two and a half years later. In this situation the court felt the equities to be nearly in balance and the delay was excusable enough to preserve the lien." (14)

Marine mortgage represents a long-term credit and serves to finance the construction of ships. But because the maritime liens have priority over mortgages, it is often argued by financial institutions that maritime liens seriously threatens the permanent credit on ships. In this context the law or policy should be such that loans granted for the building or purchase of a ship should be so secured that the security granted would assure recovery of the loan. Thus,the registered mortgage should receive greater protection. Therefore,in addition to the period of limitation and a forced sale (judicial sale), this paper forwards the inclusion of other similar modes of extinction of maritime liens in to the international Conventions and in particular in to the maritime code of Ethiopia for the protection of the interest of the mortgagee.

Footnotes for chapter V

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02. "Ibid".

3. International Uniform of Maritime Lien and Mortgages "New York University Law Review" Extinction of Liens, vol.41, 1966, p.553.

04. "Ibid."

05. Article 2 of the 1926 Convention.

06. Artticle 9 paragraph 1 of the 1926 Convention.

07. No.3 of article 2 of the 1926 Convention.

08. William Tetley, "Repairmen's Liens",Journal of Maritime Law and Commerce, no.2, Jefferson Law book Company, vol.13,1982, p.178.

09. John S.Rogers, "Enforcement of Maritime Liens and Mortgages",Symposium on Maritime Liens and Securities:Ship Sale and Finance, Admiralty law institute,Tulane Law Review, vol.47, no.3, 1973, p.787.

10. Thomas,cited above at note 1, p.295.

11. Rogers,cited above at note 9, p.787.

12. The Editorial Staff of the American Law book Co., Corpus Juris Secundum, New York West publishing company,vol.55,1948, pp.760-764.

13. Thomas,cited above at note 1, pp.281-283.

14. Frank G.Harmon, "Discharge and Waiver of Maritime Liens" Syposium on Maritime Liens and Securities: Ship Sale and Finance, no.3, Tulane Law Review, vol.47,1973, p.802.

CHAPTER VI

THE PRESENT CONVENTIONS

Long-term financing was essential for the development of merchant marine,and that the security more readily available was the vessel itself,therefore,there should be a need to ensure the best possible protection of the mortgagee.

There are five Conventions relevant to the area of maritime liens,mortgages and arrest. The two directly concerned with maritime liens and mortgages are the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages,1926, and the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages,1967.

A further Convention is the Convention Relating to Registration of rights in Vessels under Construction of 1967 which as its title suggests,allows those rights which are registrable to be so registered in respect of a vessel under construction,that is,before it has become a "vessel" as such.

The Convention directly concerned with arrest of vessels is the Intrnational Convention Relating to the Arrest of Seagoing Ships,1952.

Of more indirect relevance are two other Conventions relating to limitation of liability. These are Convention Relating to the Limitation of Liability of Owners of Seagoing Ships,1957, and the Convention of Limitation of Liability for Maritime Claims,1976. The most directly relevant Conventions are discussed briefly below.

6.1. The Convention of 1926.

This was the situation when,at the end of the 19th.century,the idea arose of making the rules relating to maritime liens internationally uniform.(1)

The primary aim was to achiève international recognition of the mortgage and to strengthen its position as a credit security. To do this,it was considered necessary to limit the number of liens ranking prior to the mortgage.

Although the general rational of maritime liens, including the principle that maritime liens take priority over contractual charges such as mortgages and hypothecs,appeared to have been accepted in both common law and civil law legal jurisdiction,there was a basic difference of approach between the two systems with regard to the number and types of cliams which were secured by maritime liens. In general the situation was that in civil law countries contractual claims were secured by liens while in common law countries maritime lien status was given both to claims in respect of services to the ship as well as claims arising from damage caused by the ship.(2)

It was to bring a measure of uniformity in this respect that the preliminary work on a draft convention initiated by the CMI in Hamburg 1902 and continued at confrences in Amsterdam 1904;Liverpool 1905 and Venice 1907 and the diplomatic conference in Brussels 1909, finally resulted the adoption of the 1926 Convention (3) and the revised of that Convention in 1967.

Through out the process of discussion of the various draft,the purpose was to strengthen long-term credit. It was repeatedly urged that the law should be such that loans granted for the building or purchase of a ship should be so secured that the securty granted would assure recovery of the loan in case of a forced sale of the vessel. In this context the suggestion was made that one way of achieving this objective would be to eliminate altogether,or at least reduce radically,maritme liens

which had priority over mortgages or other secured charges on the ship.

Although there was general agreement that all appropriate and necessary protection should be given to mortgages and other secured charges,there was no such consensus in favour either of the abolition of maritime liens altogther or a radical reduction in the number of maritime liens. This reluctance was based on the view that some maritime liens were still needed "to ensure the preservation of the ship and the continuance of its journey". It was also pointed out that "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."

Nevertheless,it appeared to have been accepted that not all claims proposed for maritime lien status satisfied the rational which had been asserted for maritime lien, and serious considerations was given to reducing the number of claims which would be given the status of lien in the future international convention.

The general result of the 1926 Convention on maritime liens and mortgages was the adoption of five classes of so called pre-mortgage liens. The limitation of five classes is somewhat mis-leading,as it must be remembered that several claims are included in each class. The five classes were:-

(i) claims for judicial costs,harbour dues and other public dues;

(ii) claims for wages to masters and crew;

(iii) claims for salvage reward and contributions in general average;

(iv) claims for damages in respect of collision,personal injuries and damage to goods and,

(v) claims arising from contracts made by the

master in his capacity as such outside the ship's homeport for the preservation of the ship or the continuation of the voyage.

Furthermore,this Convention established a framework for maritime liens and mortgages and provided for:

(i) The registration of mortgages in a public register(4) and the recognition of registered mortgages and hypotheques in Contracting States;

(ii) The priority among maritime liens themselves and between mortgages and other claims;(5)

(iii) The enforceability of maritime liens against subsequent owners and to vessels under the operation of non-owners (except where the owner has been dispossesed by an illegal act) ;

(iv) The termination of the maritime liens, primary through time-limits but also on other grounds recognized by national law;

(v) The power of national laws to grant liens in respect of claims not specified in the Convention but without altering the priority of the specified liens and mortgages;

(vi) The Convention to be applied in all Contracting States when the vessel to which the claim relates "belongs to a Contracting State" ;(6)

(vii) Exclusion of vessels of war and government vessels appropriated exclusively to the public service. (7)

But the 1926 Convention was not a great success. As at January 1,1981,the Convention had been ratified and acceded by 26 countries,(8) and a number of important maritime countries,including Canada,the Federal Republic of Germany,Japan,the Netherlands,the USSR,the

United Kingdom and the United States had not done so (i.e they decided to remain outside). This could be mainly due to great diversity in the various national laws pertaining to maritime liens and other difficulties of getting the necessary approval of various commercial bodies for the ideas of the Convention. On the other hand,the actual position cannot be judged entirely from the list of ratifications of the Convention,as the situation is complicated by the fact that some countries have adopted the provisions of the Convention without ratifying it (for example,Ethiopia). There are some that have ratified it but have not given full effect to its provisions. There are those countries that have ratified but do not interpret the provisions in a uniform manner and there are those that have ratified the Convention but have altered it,to a greater or lesser extent,in order to give effect to the 1967 Convention.

At this point of discussion the question arises whether the interest of the mortgagee was ensured (protected) under the 1926 Convention. The author of this paper believe that the interest of the mortgagee is not protected in the above mentioned Convention in the following matters,that the 1926 Convention:-

(a) does not regulate the forced sale in such a manner as to enable the buyer to obtain a title to the vessel which is recognzed as valid in all Contracting States.

(b) at the same time it does not ensure that the proceeds of sale are distributed according to the provisions of the Convention,and thus the mortgagee is satisfied according to his priority.

(c) it does not accord to the mortgagee a reasonably high priority by limiting the number of maritime liens having precedence over the mortgage.

The purpose of maritime mortgagee is to secure the establishment and expansion of merchant fleet. A shipowner,or a prospective shipowner,is not always in a position to purchase a vessel outright,pay the cost of any repairs and alterations,equip the vessel for some particular form of employment,and meet all the incidental expenses involved in preparing the ship for a voyage,out of his immediate resources. Hence,it will often occur that a banker or any other financial institution is approached to aid the shipowner by accepting the security of the ship in return for a mortgage loan.

Nowadays ships are commonly financed with the aid of loans repayable over a number of years at a rate of interest which is usually charged on the outstanding balance of the loan. The vessel will be the means of generating income and is normally the main security of the loan.

The availability of adequate financing schemes for the establishment and expansion of merchant fleet by the developing countries (including Ethiopia) is a matter of permanent concern for liner shipping in those countries. With the exception of a few developing countries with ship building industries,most developing countries usually acquire vessels from foreign countries and usually have to pay for those vessels in foreign currencies. With many of these countries facing severe balance of payments difficulties,competing demands for capital from other sector,the availability of foreign finance on good condition is of crucial importance in the establishment and expansion of their merchant fleet. The commercial banks and other financial institutions provide the bulk of finance for ship buyers,through the setting up of ship mortgage banks.

Developing countries in expanding their

activities towards maritime transportation they will improve their balance of payments by the amount of foreign currency their ships will earn. In the first case the foreign currency previously paid by the national residents to foreign ships for imports,will be saved when paid in national currency to their ships. The freight paid in foreign currency to national ships for the outward leg of transporting trade to foreign countries will be a new source of the balance of payments.

Therefore,in view of the above considerations with out losing any sight for the rational that some maritime liens were needed to ensure the safety of the ship and the continuance of its journey,consideration must be given by developing countries (including Ethiopia) that the number of claims which are accorded the status of maritime liens under the 1926 Convention, affecting "ship financing" in that the ranking of such liens above mortgages might be considered as lessening the mortgagee's security in the ship. For a developing country if ship financing is deemed to be a primary necessity,the policy must be that mortgages or hypothecs, 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 mortgages or hypothecs,the greater is the protection of the holder of the mortgage or hypothec. Thus,to achieve international recognition of the ship mortgage and to strength its position as a credit security,it is necessary to limit the number of maritime liens ranking ahead of the marine mortgages.

To accord the mortgagee a reasonably high priority by limiting the number of maritime liens having precedence over the mortgage,the author of this paper has

the following to say :

(i) The justification for recognition of the claims arising from contracts made by the master is to help the master obtain credit outside the ship's home port. Very often the master was not in a position to consult his shipowner and has to make a prompt decision.

Above all,it is shipping practice that has brought about changes and affected the attitudes towards the maintenance of this maritime lien. The commercial tasks of the master have been considerably reduced,for one thing,the development of communications has made it much easier for the master to take instructions from his owner. Another reason is the development towards the increased liner traffic,with ships calling at regular ports and being handled by the owner's agents,ship brokers etc. who have more or less taken over the master's commercial duties. In addition to the foregoing there is the development of the banking and insurance business,with representatives in most parts of the world, representatives who are ready to protect the interest of the owner in foreign ports. It is obvious that nowadays the lien no longer fulfills the same purpose. Improved communications have undoubtedly altered the grounds for the maintenance of this maritime lien. With the aid of telegraph,telephone,telex or telefax,the master is able to contact the shipowner where ever he is. The shipowner is no longer unaware of the fate of his ship during a voyage. On the contrary he can give instructions to the master and advance money to cover the running costs (expenses). Besides the maritime lien arising from contracts made by the master,there is the mortgage,which represents the long-term credit and serves to finance the construction of ships. Since liens have priority over

mortgages theoretically it is true that the maritime lien seriously threaten the permanent credit on ships. Therefore,to protect the interest of the mortgagee the claims in respect of the "master's disbursements" must be deleted from the list of the maritime lien,so as to enhance the value of the mortgage (hypotheque).

(ii) With respect to Indemnities for loss of or damage to cargo or luggage,the owners of the cargo or luggage should not need protection for they could freely choose the carrier and more over,they could ensure. Thus they were in a position to recover their claims from a carrier who was financially responsible or from insurers. In particular it should be stressed that there was no reason why these claims should be preferred to mortgages and hypotheques,and thus must be deleted from the list of maritime liens to ensure ship financing is protected. However,according to the insurance policy Institute of Cargo Clauses(c) any loss,damage or expense arising from insolvency or financial default of the owners,managers, charterers or operators of the vessel is not covered under the policy.

6.2. The Convention of 1967

The effort to reduce the number of maritime liens did not end with the adoption of the 1926 Convention. One of the major objectives of the revision of the 1926 Covnention was to endeavour to reduce further the list of maritime liens under the Convention,and also to reconsider the ranking of maritime liens *interse*. Thus,the preparation of the 1967 Convention involved a full review of the list of the liens in the 1926 Convention and a re-examination of the reasons for the maintenance or deletion of the various liens.

A working group within the Comite' Maritime International (CMI) started to work on a draft of a new Convention relating to maritime liens and mortgages,to strengthen the international position of the holders of marine mortgages and thereby to improve the conditions for the financing of ships on international level. It was clear that the solution of this problem would,depend on the nature and number of liens which according to the new Convention,should have priority over marine mortgages. It is true that this object could be achieved only if the number of those liens was restricted to the greatest possible. After the preparation of the draft,a new Convention was adopted on 27 May 1967 at the Diplomatic conference in Brussels. Pursuant to article 19 of the Convention,it comes into force three months after the fifth ratification. But the outcome was not a success. The Convention was signed by a number of States but as at January 1,1981 it had been ratified by Denmark,Sweden and Norway and acceded to by Syria.(9) (Thus,the Convention has not yet come into force,the conditions required in art.9,not having been ful-filled).

At this point of discussion it is useful to compare the list of maritime liens and the two Conventions and to note the reasons for the changes which were made in 1967,as well as the justification given for maintaining those provisions which were not changed. These were as follows:-

(i) The lien in respect of legal(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.

It was noted that these costs are deducted before the proceeds of the sale are distributed so that

there was no need to secure them by a maritime lien. Art.11, paragrahp 2 of the 1967 Convention,therefore, states that the costs awarded by the court and incurred in arresting and selling of the vessels and distributing the proceeds shall be the first charge on the proceeds, the balance being then distributed among holders of maritime lien and of mortgages and hypothecs in accordance with their priorities.

(ii) The lien in respect of tonnagedues,light or harbour dues,and other public taxes and charges of the same character.

This was recognised as necessary for the protection of the interest of the State or other public authorities. It was therefore,preserved in the 1967 Convention,with a slightly different wording,i.e "port, canal and other waterway dues" (article 4,1(ii) of the 1967 Convention).

(iii) Pilotage dues.

This was retained in the 1967 Convention and given the same status as "port,canal and waterway dues" (article 4,1 (ii)).

(iv) Cost of watching and preservation from the time of entry of the vessel into the last port.

This is now included in 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 (article 11,2 of the 1967 Convention).

(v) Claims arising out of the contract of engagment of the master,crew and other persons on board.

This lien was necessary in order to protect the crew. Furthermore,the operation of the vessel,which benefits the mortgagee and other claimants by enabling the owner to earn sufficient money to settle his debts, would not be possible without the services of the crew.

This lien was therefore retained in the 1967 Convention as artilce 4,1 (i).

(vi) Remuneration for assistance and salvage. The importance of the cliam of the salvore was recognised on the grounds that the services rendered by him benefited all claimants. This lien was therefore preserved in the 1967 Convention as articl 4,1(v).

(vii) Contribution of the vessel in general average.

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

(viii) Indemnities for collisions and other accidents of navigation. This lien was retained for the reason that it gives to the party injured a right against the offending ship itself. This lien was preserved in the 1967 Convention as article 4,1(iv).

(ix) Indemnities for damage caused to works, forming part of harbour,docks and navigable ways.

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. It was retained in the 1967 Convention as article 4,1 (iv).

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

This cover the claims of passengers and crew against the owner of the vessel on which they are embarked; i.e,claims normally based on contract. This lien was retained in the 1967 Convention as article 4,1 (iii).

(xi) Claims resulting from contracts entered

into or acts done by the master acting with in 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,where 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 shiphandlers,repairers,lenders, or other contractual creditors.

The original reason for this lien was to enable the master,away from the vessel's home port,to obtain supplies and repairs on credit or to borrow money to may for such supplies and repairs. By 1967 it was agreed the need for such a lien was long past. That lien was therefore,deleted in the 1967 Convention.

Above all long-term financing was essential for the development of merchant marine,and that the security more readily available was the vessel itself,and therefore,there should be a need to ensure the best possible protection of the mortgagee. In this context the author is of the view that the 1967 Convention satisfied this requirement (i.e the need to ensure the best possible protection to the mortgagee) in the following conditions;that the 1967 Convention in fact:

(a) ensure that a mortgage which is validly constituted according to the law of the country of registration is recognised in all Contracting States, provided that certain basic conditions are complied with; thus,rules were established for uniform substansive law providing for the keeping of national ship's registers and for various information to be included in such registers. These rules aim at protecting the mortgagee in the event that the ship is transfered to a new owner;

(b) ensure that,except in the case of forced sale,the vessel is not de-registered without the consent of the mortgagee;

(c) regulating the forced sale in such a manner as to enable the buyer to obtain a title to the vessel which is recognised as valid in all contracting States,thus enhancing the possibility of sale at the market price;

(d) ensure that,the proceeds of sale are distributed according to the provisions of the Convention,and thus the mortgagee is satisfied according to his priority;

(e) accords the mortgagee a reasonably high priority by limiting the number of maritime liens having precedence over mortgage.

Further,in common with the 1926 Convention,it provides that maritime liens rank before mortgages and that the mortgages rank before so called "statutory liens" created by domestic law.

The 1967 Convention is also lenient in the granting of national liens provided,however,they are ranked after the pre-mortgage liens and mortgages. However,as regards possessory liens or right of retention granted by national laws in respect of vessels in possession of shipbuilders or ship repairers to secure claims for building or repaire,such lien or right of retention may be preferred to registered mortgages/ hypotheques (art.6 of the 1967 Convention). Concerning the right of retention or possessory lien of a ship builder or a ship repairer, if these securities are preferred to the registered mortgages,the mortgages will

be faced with a risk that their shares in the proceeds of the vessel's sale are diminished. It seems that many of the arguments advanced infavour of the dimolition of the maritime lien for master's contracts would work the same way in respect to claims by a shipbuilder or a ship repairer and that consequently the right of retention should not be permitted to rank in priority to mortgages.

6.3. Convention Relating to Registration of Rights In Respect of Vessels Under Construction,1967.

This Convention was designed to extend registration provisions to vessels under construction. It provides for the registration of titles,mortgages and hypotheques once a contract is executed for the building of a ship or a declaration is made by a builder on his own account. The Convention allows the national laws of Contracting States to extend these registrable rights to machinery,equipment and other materials in the builder's yard which are distinctly identified as intended to be incorporated in the vessel. The effects of the registration are to be governed by the law of the country of construction. With the exception of priority between rights of retention and registered rights,priority is treated as one of the effects of registration. There is a prohibition against deregistration of registered rights, except in the case of a forced sale,without the written consent of the holders of the rights. The ability to register may be restricted by national law to ships which on completion,will be eligible for registration,or to ships that are being built for a foreign purchaser.

6.4. International Convention Relating to the Arrest of Seagoing Ships,1952.

This Convention deals with both arrest as a provisional security and arrest as a basis of jurisdiction. The primary purpose of the 1952 Convention was to protect the interests of both ship and cargo in avoiding interruptions of the voyage by arrest for claims without any relationship with the operation of the ship. It lists 17 types of maritime claims in respect of which the ship may be arrested. Although extensive,this is not exhaustive of all possible types of maritime claims and a ship may not be arrested for any claim other than those listed (article 1 and 2 of the Convention). This is the principal rule of the Convention.

According to article 3 arrest may be made in most cases either of the ship in respect of which the maritime claim arose or of other ship owned by the owner of the particular ship at the time the claim is enforced. In the case of ships under bareboat charter and other cases where the owner is not liable for the claim,other ship in the same ownership may not be arrested but instead ships in the ownership of the bareboat charterer or other person liable may be arrested.

According to the Convention a ship may be arrested by order of a State only with in the jurisdiction of that State;it may not be arrested more than once for the same claim by the same claimant and may be arrested only by order of a judicial authority (art.3 and 4 of the Convention). The Convention allows the arrest of ships of non-Contracting States and authorizes States wholly or partly to exclude "from the benefits of" the Convention Governments of non-Contracting States and persons who,at

the time of the arrest,do not have habitual residence or a principal place of business in a Contracting State (atr.8,3). A ship may be released on provisions of adequate security and the lodging of such security means that the ship can not be arrested in other Contracting States by the same claimant in satisfaction of the same claim.

The Convention provides that the courts of the State where the arrest is made shall have jurisdiction to decide the case on its merits. Where there is no jurisdiction to decide on the merits,the security given to obtain release of the ship is to be held as security for the satisfaction of any judgment or the claim,and the court of the country in which the arrest is made must fix a time with in which proceedings must be brought. If proceedings are not so brought,the security or ship may be released (art.7).

Article 9 provides that nothing in the Convention shall create a right of action or a maritime lien, which means that this Convention fits with the pattern of the Convention on maritime liens and mortgages.

The 1952 Convention was reviewed at the meeting of the Comite' Maritime International (CMI). This meeting produced a new draft which is presently under study by IMO and UNCTAD.

The new draft extended the list of claims in which arrest of a ship may be made,to include a number of claims.

The main purpose of arresting a vessel is to obtain security before judgment for the claim. Thus,a ship once arrested will remain arrested until a financial guarantee is provided. " This means that the owner will not be able to fulfil the contracts,but at the same time he will continue to incure expenses". (10)

In view of the foregoing context the question was raised whether the traditional method of securing a maritime lien by arrest still necessary. The ship is the focal point of all transactions and acts which give rise to maritime claims. Therefore,it should always be possible to arrest the ship in respect of which a maritime lien is asserted,regardless who is the owner of the ship and whether the owner is liable for the claim or not. This can be based partly on practical,partly on legal considerations.

On the basis of practical considerations the interests of third parties lead to this opinion. Third parties who have a claim or at least assert that a claim has arisen in connection with the operation of the ship, be it in contract or in tort,find it natural to be able to pursue this claim against the ship,regardless who the owner is,and the arrest would create a security. Therefore,this points us to the conclusion that,at the present time the vessel itself should be regarded as the most readily available and practicable asset at hand for the maritime claimant in seeking a settlement,and the 1952 arrest Convention is the only means of enforcing maritime liens in favour of the claimant.

To conclude this chapter,my personal view is that,the interest of the mortgagee is not protected in the present international regime,particularly the 1926 Convention which is in force. If ship financing and development of merchant marine is deemed to be a primary policy,all appropriate and necessary protection should be given to mortgages and serious considerations must be given to reducing the number of claims which would be given the status of maritime liens in the future international regime.

Footnotes for chapter VI

01. Jan Sandström, Abrogation of Maritime Liens for Master's Contracts, Sweden, Elanders Boktryckeri Aktiebolag, Göteborg, 1965, p.13.

02. IMO, Considerations of Work In Respect of Maritime Liens and Mortgages ..., LEG/55/4/1 18 September 1985, p.16.

03. Sandström, cited above at note 1, p.13.

04. International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, signed at Brussels on 10 April 1926, art.1

05. "Id" art.5

06. "Id" art.14

07. "Id" art.15

08. Carlos Moreno, Maritme Liens and Mortgages, Lecturenotes, Malmo, World Maritime University, November, 1987, p.6.

09. "Ibid"

10. Chorley and Giles, Shipping Law, 8th.ed., London, Pitman publishing, 1987, p.7

CHAPTER VII

PROBLEMS IN THE CURRENT SITUATION

The fact that shipping is an international and multijurisdictionl activity means that the variations and differences among national regimes may frustrate the achievement of the national econonmic objectives of a particular State. For example,when a State decides to encourage the growth of its merchant fleet,it will give financiers a privileged claim above other claimants. However,this economic objective may be frustrated if the vessel becomes involved with a different State either because lien attach while the vessel is in another jurisdiction or because the vessel is arrested and sold in a different ranking in the economic order. In this context this part of the paper discuss problems in the current situation with the variations and differences among national regimes.

7.1. Failure of the Present Convention on Maritime Liens and Mortgages.

The endeavour to achieve uniformity by means of international legislation has not met with very great success. The current position as regards international legislation on maritime liens and mortgages is that the Convention of 1926 is in force,having been ratified by 13 States and acceded to by another 13 States. Among those States which are not a party to the Convention however, are numerous developing countries and some major maritime countries(see chapter vii supra).

The 1967 Convention is not in force,having been ratified by only three countries Denmark,Norway and Sweden and acceded to solely by the Syrian Arab Republic. The study on the revision of the two Conventions started with an investigation of the reasons why the 1926 Convention had not been ratified by the common law

countries,and the 1967 Convention had not even come into force. With regard to the 1926,it is stated in the preliminary report of the International sub-committee considering maritime liens and mortgages in 1965 that the "...fact that this Convention has been subject of an ever increasing number of criticism of a varying and some times conflicting nature and that these criticisms are being voiced,not only in countries which did not accede to it,but also in those which became parties thereto, seems to indicate that the Convention does not meet with the present time requirement."(1)

The report catalogues some of the objections made regarding the 1926 Convention. The objectives include,liens securing "claims resulting from contracts entered into or acts done by the master,etc."(2) The modern method of communication available to ships' masters enable them to be in daily contact with the shipowners so that the latter can have such contracts concluded in thier own names. Furthermore,such creditors now have other means available for securing the payment, for example,of bank guarantees. Other objections are as follows:

(a) The Convention recognizes too many liens, thereby reducing the ranking and security of the mortgages.

(b) The Convention eliminates what are known as "possessory liens",which include right such as the right of retention of the vessels in respect of certain debts which rank above mortgages,and many States wish to preserve possessory liens for debts to ship repairers and shipbuilders.

(c) The Convention does not prevent contracting States from creating or maintaining a right of retention in their domestice law.

(d) Liens against freight should be abolished because such a lien reduces the security of a creditor who has granted a loan to the shipowner against an assignment of freight or charter-hire. In any event the liens against freight were badly drafted and required revision.

(e) The Convention does not deal with the position of long-term charterers.

(f) The Protocol of signature,stating that it has the same force as if its provisions were inserted in the text of the Convention itself,entitles each contracting State to change to a certain extent the order of priorities set out in the Convention and to recognize or confer certain liens other than those recognized by the Convention. The Protocol thereby interfers with the international uniformity aimed at and should be abolished

(g) The fact that article 9,which deals with extinction of liens against a ship,is incomplete in that a number of causes of extinction are not listed and are therefore subject to ,and vary with,the municipal law of each contracting State.

(h) Article 9 also provides that the grounds upon which the period of extinction of liens may be interrupted are to be determined by the law of the court where the cause is heard,and that contracting States may provide in their domestice law for an extention of the said periods under the circumstances set out in that article. International uniformity,as to the causes of extinction is therefore impossible.

(i) The failure to define "maritime lien". The Convention provides for the granting of liens by national law apart from maritime liens,but also uses the term "lien" and to refer to the latter(atr.5 of the 1926 Convention). Owing to the loose usage of the word "lien" and the failure to define "maritime lien",it is difficult to know whether the Convention,in refering to enforceability and extinction of "lien" in article 8 and 9,is refering to maritime liens as listed in it or liens as provided by it.

(J) The failure to define "mortgage". In view of the fact that the legal concept of an Anglo-saxon maritime mortgage differs from that of the continental *hypotheque maritime*, the concepts should have been defined,albeit in broad terms only.

The method of improving the international situation proposed by the CMI (Comite Maritime International) was the "elaboration of a revised set of rules of uniform law",and the drafting of what became the 1967 Convention. One of the majore arguments for reform was that conditions had changed so much since 1926 that the importance of maritime mortgages had grown at the expense of maritime liens. The 1967 Convention was adopted with no dissenting votes but all States present, except the Scandinavian States, failed to ratify. That Convention fails to deal with what may be regarded as a number of basic aspects, which include the following:

(a) Although the Convention describes certain characterstics of a maritime lien,(3) it still fails to define the concept on the grounds that the absence of definition in the 1926 Convention had not caused serious

problems. Of the aspects it describes the Convention excludes termination other than through the passage of time or forced sale. The Convention does not give any indication that a mortgage is different from a *hypotheque* or whether a mortgage must entail a right of possession.(4) Further, the words "other similar charges" which appeared in the 1926 Convention were deleted. It is not clear,however,whether the Convention excludes "charges".

(b) Another criticism of the Convention conerns article 8,which provides that maritime liens shall be extinguished after a period of one year,unless the vessel has been arrested prior to the expiry of such period and the arrest has led to a forced sale. The objection to this rule is that it weakens the maritime lien given to the "small interests",such as seamen, because when arresting a ship,the holder of the claim could be asked to provide a prohibitive amount as security for the loss suffered by the shipowner if it transpires that the claim is not maintainable. Furthermore,it is difficult for a small claimant to arrest a ship in a distant country and pursue his claim by a forced sale in such a country.

(c) The requirement in article 1 that the amount secured by the mortgage should be mentioned in the register or in the instrument deposited with the register is questionable because in some forms of modern mortgage no figure is mentioned.(5)

(d) The mortgagee is protected by article 3, which provides that a vessel cannot be deregistered without his consent and cannot be re-registered in another State unless a certificate of deregistration has been obtained from the first State. Attention has been drawn to the fact that transactions involving second-hand

vessels would be facilitated if provisions could be made for the re-registration of mortgages in new registres in the event of a change of flag.(6) It has been stated that there may be problems in the United States regarding article 11(3),which provides that,upon production of a certificate from the court that has conducted the forced sale attesting that the vessel was sold free of all mortgages,liens and encumbrances,the registrar must issue a certificate of deregistration. The problems are caused by the existence of restrictions on the transfer of vessel from United States citizen to foreigners and also requirements that ships' built under Government subsidy must remain under the United States flag for a certain period.

(e) Some States have suggested an increase in the number of liens or in the scope of a particular lien. One of the most frequent suggestions has been to include social insurance contributions with in the lien for wages. Some States, however,have questioned the lien in respect of wreck removable and contributions in general average.(7)

(f) There is no uniformity as regards the type of action which prevents the exinction of maritime liens. In some States the issue has not been settled;for example,France,Italy and Portugal. In other States,the arrest of the vessel suffices,for example Argentina. In others again,for example Switzerland and Yugoslavia, ordinary judicial proceeding are sufficient to prevent the extinction of maritime liens.(8)

7.2. Different National Approaches.

One of the majore reasons for the failure of both the 1926 and 1967 Conventions is probably the fact that the area of maritime liens and mortgages has for so long been governed by national provisions. National approaches often differ from one another and this has serious repercussions on ship financing possibilities. The protection given to ship's creditors may vary according to the circumstances and the country where credit is granted and the security is enforced. The differences which exist among various legal regims extend to the number of claims recognized as maritime liens,the nature and survival of the lien,the range of property encumbered and the priority accorded to the lien.

The following account of some of the varying national approaches is not intended to be an exhaustive survey of national provisions but merely to illustrate the divergencies among various national approaches.

7.2.1. Claims Giving Rise to Maritime Liens

The United kingdom has not ratified either the 1926 or the 1967 Convention and under English law the categories of maritime liens arise from various sources both common law and statute. Such liens appear to include the following claims:(9)

(a) bottomry,salvage,seamen's wages,collision damage;

(b) master's wages and disbursements;

(c) fees and expenses of receivers of wreck;

(d) remuneration for services rendered by coastguards;

(e) damage to adjoining lands in cases of shipwreck assistance;

(f) loss of life/personal injury.

Under the United States system, it has been asserted that "the law of liens is ...open ended",(10) and as new situation arise it has to be decided whether the claim will fall into categories of liens. What can be said is that under United States law the categories of incidents that give rise to a maritime lien are wider than under English law. Thus,such liens appear to include the following claims:

(a) wages,loss of life/personal injury, property damage,salvage;

(b) wreck removal,general average,preservation expenses,contract claims with respect to cargo;

(c) towage,any person furnishing repairs, supplies,use of dry dock.

As in the case of English law, the Australian, India and Newzealand have a restricted number of maritime liens and,they do not include pilotage dues. (This information is based on appendix iii).

French maritime liens are governed by law no.67-5 of 3 January 1967 (articles 31 to 57) and Decree no.67-967 of 27 October 1967 (articles 10 to 25). Law no.67-5 provides a list of maritime liens (11) reproduced from article 2 of the 1926 Convention with small alterations. Claims listed in article 2(1) of that Convention are enumerated in article 31-1 and 31-2 with the deletion of the "expenses incurred in the common interest of the creditors in order to preserve the vessel",and "light

dues". Article 31-3 covers claims arising out of the contract of engagement,which includes not only wages but indemnities or compensation owed to master and crew,and fees having a social character and related to the contract of engagement. Claims set out in article 31-4 to 31-6 are the same as in article 2(3) to 2(5) of the 1926 Convention. The maritime claims mentioned in article 31 are called "first rank liens" or, because they are stipulated in the 1926 Convention, "international liens", and have priority over mortgages,hypothecations or any other charge on ships.

A number of States such as China, the Republic of Korea,the USSR and Poland adopted the list of maritime liens as set out in the 1926 Convention.(12)

Some States,for example Srilanka, adopt the list of maritime liens recognized by English law,while others,including India,provide for only a limited number of English common law liens.(13)

In Denmark,Norway and Sweden,the maritime liens are practically the same as those set out in article 4 of the 1967 Convention.(14) In some States the liens are those of the 1967 Convention with modifications. Example of the latter include the German Democratic Republic whose water pollution claim is added to the list in article 4 of the Convention and,in the Federal Republic of Germany,"claims of the body responsible for the social insurance against the shipowner" are like wise added to the list of the 1967 Convention.(15)

In Liberia not only does a preferred mortgage constitute a maritime lien upon the mortgaged vessel,(16) but a furnisher of repairs,towage,use of a drydock or marine railway,or other necessaries,to any foreign or domestic vessel upon the order of the owner or his authorized agent,has a maritime lien on the vessel.(17)

The South American countries adopt even wider list of maritime liens. They include claims for loss of or damage to cargo,and claims for the price of goods or materials supplied to a ship for its operation or maintenance.(18)

7.2.2. Property Encumbered by a Maritime Lien.

According to article 2 of the 1926 Convention, maritime lien attaches to the freight for the voyage during which the lien came in to being and to ship's accessories and freight aquired after the commencement of the voyage.

"Freight:- When is still due or the amount of the freight is still in the hands of the master or the agent of the owner.

Accessories:

(1). Compensation due to the owner for material damage sustained by the vessel and not repaired,or for the loss of freight.

(2). General average contributions due to the owner,in respect of material damage sustained by the vessel and not repaired.

(3). Remuneration due to the owner for assistance and salvage services rendered at any time before the end of the voyage,any sum alloted to the master or other persons in the service of the vessel being reduced."(19)

Considering the national variations in view of the above context,under English law,the categories of property capable of being encumbered are ships and associated property such as cargo and freight,although the type of property varies among the individual liens. The bottomry lien can attach to the ship,freight, and cargo,the collision lien attaches to the ship and freight; the salvage lien attach to the ship,freight, cargo and wreck;and the wages and disbursements lien attaches to the ship and freight.

United States law is often stated to be based on the personification theory;the ship is regarded as a judicial entity and the action is directed solely against the maritime property. Judgment in all actions *in rem* cannot be for more than the combined value of the ship and freight.

Under the French system,maritime liens attach to the vessel,the freight,and"the accessories of the vessel and freight accrued since the commencement of the voyage".(20) Article 34 of Law no.67-5 restates the text of article 4 of the 1926 Convention as to the matters which are considered as accessories of the vessel and freight. They include:-

(a) general average contributions,and compensation,due to the owner for material damage sustained by the vessel and not repaired,or for loss of freight,and

(b) remuneration due to the owner for assistance and salvage services rendered at any time before the end of the voyage,and sum allotted to the master or other persons in the services of the vessel being deducted. According to article 35,however,payments made or due to the owner on policies of insurance and other subsidies of the State or public bodies are not considered as accessories of the vessel or of the

freight. This concept was introduced in order to reserve the insurance indemnities for the mortgagee.

In Norway,maritime liens attach to the ship(21) and to the cargo in cases of salvage,general average contribution,claim arising as a result of any step taken by the carrier or the master or any expenditure incurred by one or other of them for the account of the cargo-owner,and finally any claim by the carrier,arising out of the contract of carriage,against the person claiming delivery.(22) A similar situation exists in Denmark.(23)

Pursuant to article 21(1) of the Ethiopian maritime code, property to which maritime liens attach are practically the same as those set out in article 2 of the 1926 Convention.

7.2.3. The Extinction of Maritime Liens by Laps of Time.

Under French law,maritime liens cease to exist at the expiration of one year,except in respect of claims resulting from contracts entered into or acts done by the master for the preservation of the vessel or the continuation of its voyage, when the lien does not continue in force for more than six months.(24) French law also specifies the day on which these periods begin. Under Norwegian system a maritime lien also extinguished after a period of one year from the time when the claim secured thereby arose unless prior to the expiry of such period the vessel has been arrested,such arrest leading to a forced sale by auction,also the one year period shall not run while the beneficiary of the lien is by law prevented from arresting the ship,otherwise the one year period shall not be subject to extention or interruption.(25)

In the laws of the United Kingdom and the United States,there are no fixed time period for the extinction of maritime liens but the doctrine of laches (see chapter V supra) applies which means an inordinate and culpable delay by the claimant in enforcing his claim will cause the claim expire.

Furthermore,article 26(1) of the Ethiopian maritime code provides for automatic extinction of each lien one year after its creation (for detail see chapter V supra).

There are many other causes of exinction of maritime liens other than laps of time ,for example,by payment of amount of the claim,release of the vessel by the bond,proceedings in personam,destruction of the vessel etc.,and these vary among the different States.

7.2.4. Transfer or Assignment of Maritime Liens.

Under English law,maritime liens,except the lien for bottomry,are generally not assignable. Under the laws of Argentina,Bulgaria,Denmark,the Federal Republic of Germany,Finland,the German Democratic Republic,Japan,the Netherlands,Peru,the Republic of Korea,Sweden and the United States among others,the assignment of a claim secured by a maritime lien entails the transfer of security.(26) In some States,such as Canada,maritime liens are not transferable,and in some cases the transfer of certain maritime liens is specifically prohibited,such as the assignment of salvage remuneration in Newzealand, and seamen's rights to wage and salvage in Australia.(27)

7.2.5. mórtgages

The mortgage reflects a more common legal concept than the maritime lien,but there are differences in national approaches to it.

Mortgages of ships in English law are treated for the most part in the same way as mortgages of other moveable goods. The special characterstics of ships and registration have necessitated certain special provisions regarding mortgages of ships, which are contained in sections 31 to 38 of the Merchant Shipping Act (MSA), 1894. These provisions cater only for mortgages of British registered ships,which means they do not relate to foreign vessels,unregistered British vessels,or ships under construction which are not capable of being registered.

Under most systems a mortgaged vessel is sold with the permission of the mortgagee and the mortgagee remains a charge on the vessel in the hands of the new owner. Moreover,some national legislations either do not allow a mortgaged ship that is entered in a register to be transferred outside the current State of registry (art. 57,Law no.67-5 of France) or make such a transfer dependent upon a previous provision. According to article 3 of the 1967 Maritime Liens Convention and the Convention Relating to Registration of Rights in Respect of Vessel under Construction of 1967,the vessel should not be re-registered with out the written consent of the mortgagee. In the case of deregistration,the mortgagee has more reasons to hesitate in consenting to a transfer,as he must be careful of losing control and influence over the operation and managment of the vessel. Some systems provide for renewal of a mortgage in 10 years by application to the registrar, otherwise the

mortgage will be extinguished.(28)

In cyprus any registered ship or share therein may be the subject of a mortgage without restriction as to the type of the ship. According to section 31(1) of the Cyprus Merchant Shipping (Registration of Ships Sales and Mortgages) law of 1974,a mortgage must be in the form specified in Part 1 of the First Schedule,or as near thereto as circumstances permit. Transfer of a registered mortgage of a ship or share is allowed under Cyprus law,provided the instrument effecting the transfer takes the form contained in Part 1 of the First Schedule,or as near thereto as possible.(29)

Under Ethiopian law a mortgage instrument shall be in writing,it may be by simple contract. The instrument creating the mortgage may be transferable and negotiations by endorsement shall transfer the mortgage claim. Registration shall be effected by an entry in the register at the port office where the ship is registered. Registration preserve the mortgage for a period of five years from the date thereof and it shall cease to have effect where not renewed before the expiry of five years.

Under Canadian law any registered vessel,whether commercial or pleasure craft,can be mortgaged.
A registered mortgage attaches to the ship and its appurtenances which include all articles appropriated to the ship necessary for its navigation even if they are removed from the ship temporarily with the intention of returning them. In the event of the total loss of a mortgaged ship the mortgage does not attach to insurance money,but the underwriter is normally bound by notice of the mortgage debt to protect the mortgagee. Registration of mortgage of a ship under construction is permitted under Canadian law.(30)

In Liberia a mortage which complies with the

conditions required in section 101 of the Liberian Maritime Law (Title 22 of the Liberian Code of Laws of 1956 as amended 1973) is described as a "preferred mortgage". A valid mortgage, which at the time it is made,includes the whole of any vessel,is given a preferred status in respect of that vessel from the date it is recoreded,provided:

(a) .the mortgage is endorsed upon the vessel's document;

(b) the mortgage is recorded according to the provisions of section 100;

(c) an affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good-faith and without the intention of hindering, delaying,or defrauding any existing or future creditor of the mortgagor or any lien holder of the mortgaged vessel;

(d) the mortgage does not stipulate that the mortgagee waives his preferred status.(31) Thus,a mortgage which does not cover the whole of the vessel is not considered as a "preferred mortgage",though it is valid and can be recorded. The term "preferred mortgage" includes any mortgage,hypothecation or similar charge created as security upon any documented foreign vessel provided such mortgage,hypothecation,etc.,has been duly and validly executed and registered in accordance with the laws of the nation where the vessel is documented,and the term "preferred mortgage lien" includes the lien of such mortgage,hypothecation or similar charges. (32)

7.2.6. Priorities.

In English law,according to a decision of the courts in 1927(33) the ranking of liens *inter se* is based on the flexible principle that equity should be

done to the parties in the individual circumstances of each particular case and the judge retains discretion as to priorities. One rule is fairly well established and that is where a vessel is sold by order of the court in any action *in rem*,whether a statutory claim or maritime lien,the costs of the Admiralty Martial have first priority,followed by the costs of the plaintiff in whose action the vessel was arrested including the costs of appraisement and sale of the vessel.

Further,it is possible to isolate general principles that find favour with the courts which are based upon two theories:-

(a) the "beneficial service" theory that later liens for the benefit of the vessel,for example wages and salvage,are preferred because they have preserved the vessel and hence benefited all lien holders;and

(b) the "proprietary interest" theory that a prior lienholder has in a sense become a part-owner and so subjected "his vessel" to later liens,as he could have enforced his lien but has chosen not to do so and has taken the risk of subsequent liens attaching thereto. As between maritime liens of the same character,generally those for benefit rank in the inverse order in which they arose,last in time being first in priority,whereas damage claims rank *pari passu*.

Mortgages are not affected by the personal debts of the shipowner,except in so far as they attach to the ship. As regards his claim against the ship;the mortgagee is postponed to all maritime liens from the moment of their attachment.

With respect to repairs and necessaries supplied to the ship,there is no maritime lien,and foreign law cannot be adduced to alter the English rule of ranking under which the claim of "necessaries man"rank after

those of a mortgagee. On equitable principles,a necessaries claimant might be preferred to a mortgagee if the latter stood up,knowing that the shipowners were insolvent and that the claimant was carrying out work or supplying materials that were directly benefiting his interest.(34) Where a repairer has done work on the ship to the order of the owner and can retain the ship by virtue of his repairer's "possessory lien", a mortgagee cannot take possession without first discharging this possessory lien and if the repairer is forced to give up possession by the court(for example by arrest of the ship at the suit of another necessaries man),the court will protect his right by giving him priority over all claims and mortgages except for maritime liens that have attached before the possessory lien.

Under United States law,the question of priorities between maritime liens depends on statute law and the general maritime law. "The former is far from all encompassing and the latter is often so indefinite,that ranking is at times left to the judge who must fix the order of priorities".(35) The position is further complicated by the so-called "preferred mortgage" which was created by the Ship Mortgage Act enacted as part of the Merchant Marine Act of 1920. Although a preferred mortgage is given the status of a maritime lien,it is nevertheless deferred to preferred maritime liens,which are those liens arising prior to the recording and endorsement of the mortgage,as well as liens for collision damage or for personal injury,in respect of crew wages, general average and salvage claims. Generally,if there is more than one maritime lien with in a class,the last in time is the first in priority.

Under the French regime,according to article 38, paragrahp 1,of law no.67-5,the maritime liens attaching

to each voyage have priority over those attaching to the previous voyage. In French law, claims secured by a lien and relating to the same voyage rank in the order set out in articl 31 of law no.67-5. Claims included under any one heading share concurrently and rateably if the funds available are insufficient to satisfy the claims in full. It is provided, however,that the claims mentioned under paragrahp 4 and 6 of the article (that is salvage,general average contributions,and claims resulting from contracts entered into or acts done by the master for the preservation of the vessel or the continuation of its voyage, etc.) rank,in each of the two categories,in the inverse order of the dates on which they came into existance. Claims arising from one and the same occurrence are deemed to have come into existence at the same time (art.37, para.3 of the same law. This is equivalent to art.5 of the 1926 Convention). Priorities between maritime liens and martgages are governed by article 32 of the law no.67-5,which introduces provisions of art.3 of the 1926 Convention. It provides that the "securd claims" (i.e maritime liens) enumerated in article 31 of the law are given priority over any mortgage whatever the rank of its registration may be. It follows that "second rank liens", which granted,rank after mortages.

The same situation exists in Poland. Article 65 and 66 of the Polish Maritime Code contains provisions which are reproduced from article 5 and 6 of the 1926 Convention.

Under the Norwegian system maritime liens take priority over all other charges against the ship. They rank in the order in which they are listed,and liens of the same class rank *pari passu* among themselves. Nevertheless,maritime liens securing claims for salvage,

wreck removal and general average contributions take priority over all other maritime liens which have attached to the vessel earlier in time,and among themselves, priority is accorded to those arising most recently (art.245 of the Norwegian Maritime Code). A shipbuilder or ship repairer is also granted a right of retention in respect of a ship to secure his claim arising out of the building or repair of the ship,so long as he remains in possession of the ship. Such a right is postponed to all maritime liens on the ship but is preferred to mortgages or other charges against it (art.247 of the Norwegian Maritime Code). The position is also the same in Denmark (sec.245 of the Danish Merchant Shipping Act 1974). Finally,under Liberian law, a preferred mortgage constitutes a maritime lien which has priority over all claims against the vessel,except liens arising prior in time to the recording and endorsement of the preferred mortgage, liens for damages arising out of tort,crew's wages,salvage,and expenses and fees allowed and costs taxed by the court (sect.113 of the Liberian Maritime code,as amended 1973).

To conclude this chapter,ship financing is a distinctive field which needs to be harmonized internationally in such a way to achieve reasonable predictability and security. Only if the laws are harmonized will shipping be able to achieve financing at reasonable cost. Thus,because of differences in law among the nations of the world and because of the unwillingness of some courts to recognize foreign substantive law it is clear that an international Convention providing universal and uniform law of maritime liens and mortgages is required. Perhaps we should consider the 1967 Convention. It is the author's view that we should do so with out delay.

Footnotes for chapter VII.

01. International sub-committee on Maritime Liens and Mortgages,preliminary report and questionnaire (Hypo-1/1-64), CMI XXVIIth. Conference,NewYork, 1965, p.79.

02. "Id." art.2(56),appendix 1.

03. see,for example,art.4-the claims to which maritime liens are attached; art.5 priority in respect of all other claims and among maritime liens themselves;art.7(1)enforceability against an operator, manager,charterer or owner;art.7(2)-enforceability against a ship eventhough ownership or registration is changed; art.9-assignability; art.11-enforceability against proceeds of a forced sale; arts.8-11-extinction. It omits,however,to give any indication of the time of commencement or accrual of a maritime lien.

04. English law, for example recognizes unregistered mortgages,and it is not clear,from either Convention whether such mortgages are merely ignored or that their recognition is actually prohibited.

05. This objection was raised at the first session of the CMI International sub-committee on Maritime Liens and Mortgages held in London on 20 and 21 September 1983; see the CMI "News Letter", September 1983.

06. "Ibid."

07. "Ibid."

08. Report of the CMI Working Group on Maritime liens and Mortgages,submitted to the CMI at Genoa,Italy,on 20 April 1983.

09. UNCTAD,Consideration of Maritime Liens and Mortgages ....TD/B/C.4/AC.8/6. 28 April 1987. P.7

10. G.Gilmor and C.L.Black, The Law of Admiralty, 2nd.ed. New York,the foundation press,Inc.1957, p.633. and UNCTAD cited above at note 9.

11. See article 31 of the French law on the Statut des Navires et autres Batiments de mer, Law no.67-5 of 3 Jan.1967 modified by the law of 29 April 1975.

12. See annex I,replies to CMI questionnaire,CMI document no.MLM 1926-67,and article 64 of the Polish Maritime Code of 1961.

13. See CMI document cited above at note 1 and 8.

14. Francesco Berlingieri, Maritime Liens A Comparative Analysis. (unpublished)

15. "Ibid."

16. See section 107 of the Liberian Maritime Law 1973.

17. "Id." section 114(1).

18. See CMI document cited above at note 1 and 8.

19. Carlos Moreno, Maritime Liens and Mortgages Lecturenotes,Malmo,World Maritime University November,1987.

20. See art.31 of Law no.67-5 of 1967,cited above at note 11.

21. See sect.244 of the Norwegian Maritime Code of July 1893,as amended,including an Act dated 20 Dec.1974.

22. "Id." sect.251.

23. See sects.244(1) and 251 of the Danish Merchant Shipping Act 1974.

24. See articles 31-6 and 32-2 of Law no.67-5 of 1967, cited above at note 11.

25. See sect.248 of the Norwegian Maritime Code, cited above note 21.

26. CMI document,cited above at note 1 and 8,annex I.

27. "Ibid."

28. French Law no.67-5 cited above at note 11; and art. 95 of the Moroccan Maritme Code,1919; renewal of mortgage is every five years.

29. See sect.37 of the Cyprus Merchant Shipping (Registration of ships,Sales and Mortgages) Law of 1974.

30. International Bar Association. Committee on Maritime and Transport Law, Handbook on Maritime Law,Registration of vessels;Mortgages on vessels, London,Law and Taxation Publishers, vol.III,1983, pp.71-85.

31. See sect.101 of the Liberian Maritime Law.

32. "Id." sect. 112A.

33. The "Stream Fisher" (1926) 26 Ll.L.Rep.4

34. The "Pickanninny" (1960) 1 Lloyd's Rep. 533.

35 William Tetley, Maritime Liens and Claims, London Business law communications LTD.,1985, p.394.

CHAPTER VIII

THE ROLE OF INSURANCE

The Marine Insurance Act,1906,Section 1,defines a contract of marine insurance as follows:-

"A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed,against marine losses,that is to say,the losses incident to a marine adventure."

Clearly,both the mortgagor and mortgagee have an insurable interest in the subject insured. The Marine Insurance Act,1906,Section 14(1) reads:-

> "(1) Where the subject matter insured is mortgaged,the mortgagor has an insurable interest in the full value thereof,and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage."

Therefore,taking in to account the role of insurance,this part of the paper intends to highlight the issues (i) whether the availability of insurance should be a significant or controlling criterion in determining the ranking to be given to various maritime liens over mortgages, and (ii) a brief discussion as to the position (remedy) of the mortgagee and the lienholder to the ship owner's insurance proceeds,where the vessel is total loss,(i.e actual or constractive total loss).

Considerations may be given to the view that the use of the vessel as security for claims is a dated concept. An argument in favour of giving a more extensive role to insurance is that the detention of the vessel would become less extensive and less important in consequence.

Insurance,as an alternative technique to detaining vessels,may be viewed from two stand points. These are:

(1) It may be argued that, where a shipowner's liability for a claim is customarily covered by insurance then no harm is done to a mortgagee by allowing lien status to attach to such claims because the claimant or lien holder will be satisfied by the proceeds of the shipowner's liability insurance. It may be noted that many of the maritime liens provided for by the 1967 Convention in respect of types of claims against which shipowner's ordinarily seek to protect themselves by policies of liability or indemnity insurance.

(2) Another way of viewing the role of insurance is to argue ,in the case of those claims which give rise to a maritime lien,liability for which can insured against,that there is no reason why the claim should require lien status. As the claimant can be protected by the more modern technique of recourse to the shipowner's insurance proceeds, it is reasonable to ask why the claimant should also be protected by the high ranking charge of a maritime lien.

Whichever of these ways of employing insurance is used,the result would be to avoid the conflict between preferential creditors and mortgages by providing a separate asset to guarantee their claims.

To go further,there is the possibility of an assignment of additional insurance against "recourse of third parties", which is a common form of insurance and which a prudent mortgagee may,and in fact always should, demand from the mortgagor before granting credit. By these techniques,either the preferred creditor(maritime lienholder) will be indemnified by the insurances and will not seize the vessel,or,when they seize the vessel

and proceed to sale,the mortgagee will find compensation in the insurance indemnities. Thus,the mortgagee should protect himself by establishing his mortgage contract or collateral deed that a condition of his granting credit is the insurance of the ship against the various forms of liability,for example,collision,salvage claims,cargo damage and personal injury.

One of the difficulties with the abolition of liens in favour of compulsary insurance is the practicability of aquiring insurance against non-tortious matters. It may be argued that insurance against contractual liabilities incurred by the shipowner(for example,wage,salvage) and some claims (such as legal costs, taxes) would be difficult to aquire. i.e it would either be impossible to insure them or that the cost of such insurance,if available,would be unreasonably high. It should be remembered,however,that there were claims in respect of which insurance was currently available and taken out in practice. In such cases,little emphasis was put on the aspect that a particular claim was privileged, this was especially the case in contractual liabilty situations,such as contracts for carriage of goods. i.e P and I clubs are already willing to provide insurance against various forms of contractual liability,for example, claims for loss or damage to cargo carried on contractual terms no less favourable than those contained in the Hague-Visby Rule. Further,the Protection and Indemnity mutual shipowners Club provide cover in respect of oil pollution liability which arises under the contractual agreement contained in TOVALOP*. The major

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*TankerOwners' Voluntary Agreement Concerning Liability for Oil and Pollution.

problem would involve the lien in respect of wages, which would be difficult to replace with insurance.

In view of the above highlight,if ship financing and development of merchant marine is deemed to be a primary policy,mortgages or hypotheques, which constitute the security of the lenders, should be accorded the greatest possible protection. In this context it could be suggested that subjecting maritime liens to insure would in effect avoid a conflict over priorities of maritime liens and mortgages and would therefore better protect the interest of the mortgagee. Thus,mandatory liability insurance resulted in greater predictability of risk exposure of the potential mortgagee and would therefore be benefit.

But the author of this paper has also some difficulties in which the system of a compulsary insurance would appear both impracticable and cumbersome at the present time. i.e

- Even where a particular claim secured by lien was covered by insurance, this would not always provide full protection to the mortgagee since,under some legal systems,the insurance might have the right of subrogation to enforce the claim against the ship after the insurance had been paid.

- It is also noted that a system of compulsary insurance might not seem appropriate in the present context,particularly since it would bring with it the need for complex administrative arrangements.

- Compulsary liability insurance would require the backing of legal sanctions. Even assuming adequate sanctions are introduced,there would still be cases of uninsured shipowners and a compensation fund would be required to satisfy claimants against uninsured shipowner.

- Further,to be fully effective,a compulsary insurance scheme would probably require "direct action" provisions to ensure that preferred claimants have immediate recourse to the insurance fund.

Coming back to the second issue, i.e the remedy of the mortgagee and lienholder to the shipowner's insurance proceeds in the case of total loss of the ship,it is of paramount importance to give some highlight what a total loss meant. Thus,the risk of total loss may occure in two circumstances:

(i) <u>Actual total loss</u> (1)

According to the Marine Insurance Act 1906 Section 57 total loss is defined:

- when the ship is destroyed or is so seriously damaged as to cease to be a ship. or
- when the ship is sunk in deep water and cannot be saved. "As an example,a tanker has caught fire and has sunk is no longer a thing of the kind insured, a tanker,but is rather a charred hulk of twisted metal." (2)

(ii) Constructive total loss(3)

Pursuant to section 60 of the Marine Insurance Act 1906 constructive total loss is defined:

- when the cost of recovery and repair of damage would exceed the ship's insured value,then the ship can be classified as a constructive total loss. (4)

It is up to the insured whether to treat the constractive total loss as a partial loss or to abandon the property (ship) to the underwriter as an actaul total loss. "The difference between treating the loss as a partial loss and abandoning the property may be seen in the following example:

A ship is valued and insured for	$20,000
She is damaged and repairs cost	$10,000
Her value when repaired will be	$ 8,000

In these circumstances,the insured is entitled to treat the loss as a constructive total loss and claim $20,000, but only if he gives notice of abandonment to the insured with reasonable diligence. If he fails to do so,or elects not to do so,he has lost the right of abandonment. He can still claim for a partial loss of $10,000."(5) In light of the above considerations,a person whishing to purchase an existing vessel or order the building of a new vessel (mortgagor) will borrow the purchase money from a bank or other financial institution (mortgagee). An agreement will be made between these two parties, as to the payment of the loan,who is to be responsible for insuring the vessel etc.. Insurance is usually taken out by the mortgagor who is declared to have an insurable interest in the full value of the property. The mortgagee by virtue of the interest aquired in the vessel,is capable of pro-

ceeding directly against the vessel in the event of a default under the mortgage. Consequently in the case of total loss of the vessel,the mortgagee is able to recover from the hull underwriters to the shipowner's insurance proceeds. Under the general insurace principles,the mortgagee is simply an appointee of the insurance fund,whose right of recovery is no greater than the right of the mortgagor. Consequently,if the mortgagor insured breaches the policy's conditions and the policy is voided,the mortgagee stands in no better position than the mortgagor insured and can not recover. The circumstances in which the mortgagee might not be able to recover from the hull underwriters presumably include cases where the hull underwriters decline liability on the ground of misrepresentation or non-disclosure,or because the vessel has been wilfully cast away with the connivance of the owner.

Further,the mortgagee also insured his intrest under a mortgagee's interst policy,in which case the policy has to pay if an occurrence which takes place has during the period of the policy causes total loss to the vessel. The mortgagee insured his interest,to protect against the possibility of his security (vessel) in two sets of circumstances:

- If the vessel were to become a total loss and the mortgagee was to find himself unable to recover from the hull underwriters,as they could ordinarily be able to do,as assignees of the hull policy ;
- If the vessel were to insure liability to a third party,and the vessel's P and I clubs were to decline liability on the ground of the shipowner's privity.

Considering the remedies of the lienholder to the shipowner's insurance proceeds in the case of the total loss of the ship,it is necessary to refer chapter II of this paper. When we examine the characterstics of the maritime liens,we have said that a maritime lien is a proprietary right attached on the property encumbered. A maritime lien attaches on the maritime property from the time of the occurrence of which a maritime lien has materialised. No other property is encumbered except the particular property (vessel) that has perpetrated the damage or to which beneficial services are rendered. Thus,a maritime lien is essencially and exclusively linked to the property (vessel) to which it is attached. If that is destroyed the lien is extinguished.(6)

Therefore, since the very basis of jurisdiction *in rem* is the presence of the vessel,it seems safe to argue that if the vessel or *res* is destroyed,to the point where it no longer exist (actual total loss) then the maritime liens which might have previously existed against it are discharged, because there is no *res* that can be arrested in an in *rem* proceeding in order to enforce the lien. The 1926 Convention does not give an answere as to what will happen if a property (vessel) to which maritime liens are attached to is destroyed,to the point where it cease to be a vessel. Under the common law the lien is destroyed with the demolition of the property (vessel). Therefore, this points us to the conclusion that where the vessel is destroyed,and resulted actual total loss (where it cease to be a vessel) and was not a *res* subject to the jurisdiction of the court the lienholder can not claim to recover shipowner's insurance proceeds against the hull underwriters. Thus,it can probably be safely assumed that insurance proceeds in a sunken vessel will not be subject to the

maritime liens.

> "In *A.M.Bright Grocery Co. Vs. Lindsey*,the court distinguished a previous decision by the district court of Indiana in *The Conveyor* which held that the proceeds of insurance placed in the hands of a trustee (to whom the owners of the sunken vessel,the mortgages, and holders of liens against the vessel had agreed the insurance proceeds should be paid) should be applied to satisfy the liens against the sunken vessel. The court in *Bright Grocery Co.* concluded that the decision in *The Conveyor*,holding that the insurance proceeds were subject to the maritime liens of various claimants,was based on the agreement, and absent agreement, such proceeds would not be subject to the payment of maritime liens against the sunken vessel." (7)

However,the situation is different in the case of a constructive total loss,i.e where the vessel was not sunken or not damaged as to cease to be a vessel. In the constructive total loss irrespective of the fact that the cost of recovery and repair of damage would exceed the ship's insured value,the vessel is still existing and not destroyed. Maritime lien is essentially and exclusively linked to the property (vessel) to which it is attached. If that is not destroyed (actual total loss) the lien is not extinguished, because there is a vessel or *res* that can be seized in an in *rem* proceeding in order to enforce the lien. Consequently,even when a ship to which maritime liens are attached is abandoned by the owners in favour of the underwriters, the liens that have already been created are not extinguished. It will

remain attached on the property and the lienholder can still claim against the property in the hands of the underwriter.(8) "In *The George W.Edler*,the court held a vessel which sank and was abandoned by her owners to the underwriters who sold her,and was thereafter raised by her purchasers, was still a vessel and subject to admiralty jurisdiction."(9) In addition pre-existing liens do attach to any part of a vessel that is salvaged.

From the above the only way of protecting mortgages by the technique of insuring all maritime liens would be to demand mandatory liability insurance. Although worthy of discussion,the revolutionary step of abolishing all maritime liens or even merely tort liens would appear both impracticable and cumbersome at the present time. Over the long term,it may well be of some value to debate some of the radical changes like the mandatory liability insurance. The fact that such reforms have been brought into the open may give rise to further investigation and discussion,and lead one day to a more radical approach to this area of commercial law. In the short term,however,the current situation is such that there is a need for immediate action rather than protracted investigation and debate.

As regards the second issue the lender(mortgagee) on ships must consider the importance of insurance because,if the ship is lost or damaged,the lender is interested in seeing that the borrower is in a position to make repairs and that,in any case,the loan will be repaid. The mortgagee must also make sure that the borrower(mortgagor) has adequate Protection and Indemnity coverage,because,otherwise,the claims that would be covered by the P and I cover may become liens having a priority ahead of the mortgage.

Footnotes for Chapter VIII

01. E.R Hardy Ivamy, Chalmers' Marine Insurance Act 1906, 9th.ed., London, Butterworth and Co. publishers Ltd., 1983, p.84

02. Edgar Gold, International Maritime Law Basic Principles, 2nd.ed., International Center for Ocean development, 1987, p.487

03. Ivamy, cited above at note 1, p.87

04. Gold, cited above at note 2, p.487

05. "Id.", p.488

06. D.C. Jackson, Enforcement of Maritime Claims, London, Lloyd's of London press LTD., 1985, p.246

07. John S.Rogers, "Enforcement of Maritime Liens and Mortgages" Symposium On Maritime Liens and Securities: Ship Sale and finance No.3, Tulane Law Review, vol.47, 1973, p.800.

08. Jayson Kraut, American Jurisprudence, 2nd.ed., NewYork: The Lawyers co-operative publishing Co., vol.70, 1973, p.305

09. S.Rogers, cited above at note 7, p.798

CHAPTER IX

FUTURE TREND OF THE PRESENT CONVENTIONS

One of the serious problems facing developing countries is that shipping is a capital intensive industry.

If ship financing is deemed to be a primary necessity,mortgages or hypotheque which constitute the security of the lenders,should be accorded the greatest possible protection both as regards enforceability and priority. The establishment of a legal framework that would encourage greater international uniformity in the area of maritime liens and mortgages and provide greater protection for the mortgagee would be of considerable benefit to both developed and developing countries. To encourage ship financing the position of the lenders should be strengthened.

In order to strengthen the international position of the holders of maritime mortgages and thereby to improve the conditions for the financing of ships at the international level,both International Maritime Organization (IMO) and United Nations Conference on Trade and Development (UNCTAD) have placed on their agenda the possible review of the 1926 and 1967 Conventions,and the Comite' Maritime International (CMI) has offered them its co-operation,setting up an International Sub-Committee to study the problem and placing this subject on the agenda of its international conference,which was held in Lisbon, in may 1985. The revised text of the 1967 Convention on maritime liens and mortgages was submitted by the CMI to IMO and UNCTAD for further action. Therefore,this part of the paper attempts to identify and analyse the changes made in the current (new) draft.

The express wish of developing countries to increase their participation in world shipping is comprehensively reflected in the numerous resolutions of the committee on shipping and those of UNCTAD conferences.

The importance attached by developing countries to shipping is highlighted by the fact that the International Development Strategy for the Third United Nations Development Decade calls for an increase in these countries' participation in world transport of international seaborne trade,through the appropriate structural changes,where necessary,and also calls for a 20 percent share of the dead-weight tonnage of the world merchant fleet for the developing countries by the year 1990.(1)

The relative priorities of investment in shipping,the facilitation of funds for building and acquisition of vessels,the net effect of shipping operations on balances of payments,and shipping as a factore in national employment policies and an instrument for the promotion of exports are all important subjects of study. It is necessary to review the economic and commercial aspects of international legislation and practices in the field of shipping from the stand point of conformity with economic development needs,in particular of the developing countries,in order to identify areas where modifications were felt to be necessary with a view to the drafting of legislation or to other appropriate action. Studies have been undertaken to formulate ways and means of promoting shipping as an industry,particularly in developing countries and of encouraging economic co-operation among States to that end. For this purpose,emphasis is given to maritime liens and mortgages in relation to the building or purchase of ships. It has always been recognized within UNCTAD that the lack of finance for ship acquisition was and remains a majore difficulty for developing countries in expanding their national merchant marines. The activities of UNCTAD aiming at the alleviation of this problem include, in-

teralia,the elaboration of recomendations urging for increased finance to be given to developing countries on favourable terms for the aquisition of ships,the development of the mechanism for the facilitation of requests for ship financing,and the examination of ways and means of providing developing countries with information regarding the availability and terms of finance for the aquisition of ships.

There are significant differences between national regimes governing maritime securities not only in the type of claims that are accorded the status of maritime liens but also in the order of priority given to maritime liens among themselves and in relation to other claims. These differences lead to complexity and uncertainty in the international enforcement of liens and mortgages and frustrate the implementation of national objectives as to the recognition and priority given to maritime claimants.

In view of the above findings,it is imperative for the international community to develop a generally acceptable legal framework governing the recognition and enforcement of maritime liens and mortgages. Therefore, to achieve a greater degree of international uniformity in this area,following the decision of IMO and UNCTAD to replace on their work programme the revision of the 1926 and of the 1967 Brussels Convention on maritime liens and mortgages,the CMI decided to offer its co-operation to both such intergovernmental Orgainzations,and two International Sub-Committees were appointed by the assembly.(2) In this connection,it may be noted that the subject of ship financing was considered by the CMI at the beginning of its current study on the existing legal regime relating to maritime liens and mortgages. At the first meeting of the CMI's International Sub-Committee on

maritime liens and mortgages,the suggestion was indeed made that,"if any substantive change was to be made to the 1967 Convention,it should be to increase the protection given to mortgages." The Sub-Committee unanimously agree that long term financing was essential for the development of merchant marine,and it therefore considered that there was the need to ensure the best possible protection of the mortgagee.(3)

The study on the revision of the two Conventions on maritime liens and mortgages started with an investigation of the reasons why the 1926 Convention had not been ratified by common law countries,and the 1967 Convention had not even come into force,and a questionnaire was prepared by the International Sub-Committee. From the replies it appeared that the 1926 Convention was considered unsatisfactory by the National Associations of the countries which had not ratified it,and obsolete by many Associations of the countries which had ratified it. It also appeared that the 1967 Convention was considered satisfactory,save minor changes, by great majority of the National Associations.(4) It was therefore decided to take the 1967 Convention as a basis for the further work and to thoroughly investigate with changes were desirable.
The Sub-Committee agreed that:(5)

(a) long-term financing is essential for the development of merchant marine;

(b) the security more readily available and less expensive is the vessel itself;

(c) the need for uniform rules is increasing, for ship financing is becoming more and more international;

(d) the essential features of a satisfactory security are;

(i) the possibility of enforcement wherever the vessel may be found,and to this effect the security must be recoginised in as many countries as possible through an international Convention;

(ii) the possibility of sale of the vessel at the market price,and to this effect it is necessary to offer the prospective buyer a valid title where-ever the ship may go after the forced sale;

(iii) the possibility of recovering the outstanding portion of the loan from the proceeds of the forced sale,and to this effect the claim of the lender must be granted the highest possible priority.

In view of the above consideration the draft of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages was adopted by the CMI at the Lisbon Conference in may 1985,and this draft was submitted to IMO and UNCTAD for their considerations and further studies.

For further work on the subject IMO and UNCTAD have agreed to undertake further studies in order to determine the need for international legislation or other appropriate action,and also the nature and scope of such action,if deemed necessary. On this base the Joint Intergovernmental Group of experts (JIGE) on maritime liens and mortgages was established by IMO and UNCTAD.

In order to determine whether any international action is required and,if so,what the scope and purpose of that action should be,two major issues have been considered. The two issues were:(6)

(a) Whether there is any evidence from govern-ments,agencies of the United Nations or other financial institutions that the number of maritime liens currently recognized,and their relationship with maritime mortgages constitute any major impediment to the aquisition of ship

mortgages or other appropriate financing for ships,when all other technical and economic criteria and requirements have been fulfilled;

(b) Whether the abolition or displacement of any or all of the existing internationally recognized maritime liens in favour of mortgages would contribute to or adversely affect,the ability of developing countries to run their shipping efficiently and profitably at the international level,taking into account reasonable operational needs and the revenue possibilities likely to be required by funding institutions.

These issues will need detailed examination. The solutions to them must then be formulated on the basis of conceret evidence provided by Governments and by international agencies concerned with advice and financial assistance to developing countries in the field of shipping.

The issues identified above include a number of objectives to which the existing international legal regime on the subject might be evaluated. Among the objectives were the following:

(a) encouragement of ship financing by affording appropriate protection to persons providing such financing;

(b) granting of protection in respect of selected claims for the purpose of encouraging the provision of services or facilities to the ship;

(c) protection of ship against multiple actions in the enforcement of the same claim in different States,such as "double arrest" ;

(d) minimization of potential encumbrances to the operation of the ship.

Therefore,in view of the above facts at this point of discussion it is a paramount importance to make

some analysis on the new (current) draft and to note the changes which were made in the 1967 Convention.

It could be pointed out that the 1967 Convention lacks a definition of mortgages and hypothecs. But a definition is difficult, unless it is confined to the description of the fundamental characters of these securities,i.e of those characters the existance of which is required for the recognition of the security in other countries. However,the mere reference to mortgages and hypotheques may not suffice,for a number of maritime countries securities of the same nature have a different names and therefore their recognition by other Contracting States is only ensured by the fact that they comply with the requirement set out in sub-paragrahp (c) of Article 1. Although this might be deemed sufficient,it could also be said that the recognition is limited to securities named mortgages or hypothecs,provided they comply with the aforesaid requirements. For the avoidance of doubts a more general wording could be added after "mortgages and hypotheques" viz."registerable charges." However,the insertion of these words only might lead to confusion,for in case maritime liens might be registerable,they could be included in the description of Article 1 as amended. In order to avoid this,reference was made to the voluntary character of this type of security,as opposed to the statutory nature of liens. Thus,the original text of Article 1 was amended by inserting the words "similar registerable charges",which connote one of the characters of mortgages and hypotheques,followed by the indication that these charges are "effected",i.e are created voluntarily, "to secure payment of monies",i.e their nature is that of a security interest.

The words "similar registerable charges" have been added,throughout the Convention,after the words

"mortages and hypotheques",except where registration is a feature also of mortgages and hpotheques,i.e Article 2,5(1),6(1) and (2),10 (a) and (b) and 11(1),(2) and (3) or reference is made to deregistration as in Article 3(1)

As regards to the ranking and effects of mortgages,hypotheques and charges,no change was made to the text of article 2 of the 1967 Convention.

In order to make clear that the rule whereby States Parties cannot permit deregistration of a vessel without the written consent of all holders of registered mortgages or hypotheques does not apply in case of forced sale,the words "subject to the provision of article 11" had been inserted in the 1967 Convention at the begining of paragrahp 1 of article 3. It was however felt more appropriate to provide affirmatively that the rule in article 3 applies in the event of a voluntary sale of the vessel. And to this effect the original text was amended by inserting the words "in the event of a voluntary change of ownership or registration of a vessel."

A very important question to be decided is whether the maritime lien accrues also when the claim secured thereby is not against the owner of the vessel, but against a person to whom the uses of the vessel has been given by the owner,i.e the charterer by demise,the time charterer or the voyage charterer. According to article 4(1) of the 1967 Convention the word owner include the demise or other charter of the vessel. However,in the new draft the word "or other" proceeding the word "charterer" were deleted. From this deletion one can conclude that claims against time and voyage charter shall not be secured by a maritime liens on the vessel. Thus, according to the new draft if the owner voluntarily transfers to others i.e time or voyage charter,the use of the vessel,he must not bear the

consequences,and that the claimants are deprived of their security only because the vessel is operated by a person other than its owner. Therefore,the original text was amended by inserting in the opening sentence of article 4(1) the words "against the owner,demise charterer, manager or operator of the vessel" after the words "The following claims", thereby avoiding the need of a definition of owner at the end of this paragraph.

Article 4(1)(i) of the 1967 Convention is not clear whether the lien securing wages may be extended to claims of master and crew in respect of social insurance contributions deducted by the owner but not paid and therefore claimed by the social insurance institution directly from the master and crew. It is undoubtful that this lien adversely affects the security of the mortgages and hypotheques,but it is equally undoubtful that it contributes to the safe and efficient operation of the ship. Therefore,in the revised text of article 4 paragrahp 1(i) "the social insurance contributions due to the master,officers and other members of the vessel's complement has been inserted".

Pursuant to article 4 (1)(ii) port,canal and other waterway dues and pilotage dues were granted a second rank. But under the new draft these liens were ranked to the end of the list,i.e the rank of claims in respect of life or personal injury occurring whether on land or on water,in direct connection with the operation of the vessel is upgraded,due to the low grading of the liens for port,canal and other waterway dues and pilotage dues (moved to the bottom of the list).

Claims for salvage were placed at the end of the list of maritime liens under article 4(1)(v) of the 1967 Convention. It has been pointed out that since salvage preserves the ship for the benefit of all

claimants,the claim of the salvor should be given a very high priority. In view of the foregoing context the new draft has placed claims for salvage,after the two maritime liens mentioned above.

As regards to the priority of maritime liens under article 5 no amendment is made,save the addition of the words "or similar charges." Paragraph 1 of article 5 constitute the heart of the Convention for it regulates the priority between mortgages or hypotheques and other claims. The approach adopted in the 1967 Convention which does not differ from that adopted in the new draft,is to establish the priority of mortgages and hypotheques over all other claims,except those mentioned in the Convention itself. The other paragraphs of article 5 regulates the priority of maritime liens *inter* se. The general rule is that maritime liens rank in the order in which they are listed.

Under article 6 of the new draft Contracting States are free to create other liens and rights of retention,provided they do not prejudice the enforcement and the priority of the maritime liens listed in article 4(1) and of registered mortgages and hypotheques which comply with the requirements of article 1. Paragrahp 2 sets out the exception to this rule,in that it permits Contracting States to create possessory liens or right of retention as security of the claims of ship builders or ship repairers and,if they so decide,to grant to such liens priority over mortgages and hypotheques. The reference to reconstruction was inserted in paragrahp 2(b) with the words "including reconstruction",so as to make it clear that all kinds of work on board a vessel were included,for example,not only reconstruction but also conversion.

Considering the characterstics of maritime

liens under article 7 of the 1967 Convention,no substantial change has been made to the provisions of this article. But the article was redrafted in to one paragrahp and the reference to change of flag was inserted. Further,the words "except in the case of a forced sale" were added at the end of the sentence.

In respect to the extinction of maritime liens under article 8 no amendment to the 1967 was made other than the addition of the word "seizure" after "arrest",to cover actions in execution of a judgment. However,some delegates have proposed the extinction of maritime liens,when any of the following events first occurs:(7)

(a) payment of claim in full;or

(b) execution by the lienholder of a discharge of the lien;or

(c) arrest (seizure) of the vessel,leading to:

  (i) the giving of bail or other security in respect of claim secured by the maritime lien;or

  (ii) a forced sale;or

(d) expiration of a period of one year from the time when the claim secured by the lien arose.

Article 10 of the 1967 Convention which deals with the notice of a forced sale,was changed the order of the three sub-paragrahps by placing sub-paragraph(c) before sub-paragraphs (a) and (b). Differing views were expressed as to the period of notice to be given for a forced sale. Some delegations felt that 30 days a minimum, others emphasized that urgent action was necessary because of the losses which occurred if a vessel was kept idle.

Article 11 states that,as a consequence of a

forced sale,all encumbrances cease to attach to the vessel provided the vessel is at the time of the sale,in the jurisdiction of the Contracting State where the sale is effected and the sale has been effected in accordance with the law of such State and the provisions of the Convention,i.e those set out in article 10 and 11(2). In addition of the words "and expenses" after "costs" at the beginning of paragrahp 2 of article 11 was inserted in the new draft in order to avoid any danger of a restricted interpretation of "costs " such as to exclude the expenses of maintenance of the vessel after her arrest or seizure. If such expenses are not paid first out of the proceeds of the sale,nobody would be willing to take care of the maintenance of the vessel,and the lack of maintenance would adversely affect the possibility of selling the vessel at the market price.

From the new (current) draft discussed above,it can be concluded that no proof had been given to date, that the existing regime,particularly the 1967 Convention on maritime liens and mortgages has an adverse effect on the availability of ship financing. Specifically,it had been emphasized that no evidence has been produced to show that financing institutions had refused,or would refuse,financing for the aquistion of ships,merely because of the priority status granted to maritime liens vis-a-vis maritime mortgages.(8) There was also no information or data which showed that the presnet regime did not have any adverse impact on ship financing. However,in this connection,it may be noted that the subject on ship financing was considered in the current study on the existing legal regime relating to maritime liens and mortgages, and from the draft it seems that the list of maritime liens in article 4 of the 1967 Convention is satisfactory, save with relatively minor changes where

required.

It is the author's view that the encouragement of ship financing has to be the single most important objective of a modern maritime liens and mortgages regime. Accordingly it has to be claimed that any further reform of the area must be directed to increasing the protection afforded to the mortgagee. On the other hand it is also true that some of the maritime liens were still needed to ensure the safty and the preservation of the ship,and this has to be balanced. But with the variations and differences among national regimes,shipping activity will be frustrated. Therefore,in order to have universal and uniform law of maritime liens and mortgages countries,particularly developing ones,have to follow and implement the trend of the new (current) draft which is under study by IMO and UNCTAD.

It is hoped,through the work now being done,to improve methods of ship financing,particularly in developing countries,and to build up an international framework enabling financial institutions to obtain mortgages on ships when they lend money for the purchase of vessel.

Footnotes For Chapter IX

01. United Nations General Assembly resolution 35/56 of December 1980, annex containing the strategy, para.128.

02. IMO, Considerations of work in respect of Maritime Liens and Mortgages and Related Subjects LEG 55/4 Annex page 10, 15 august 1985.

03. IMO, Considerations of work in respect of Maritime Liens and Mortgages and Related Subjects LEG 52/5/Add.1,8 August 1984.

04. IMO, cited above at note 2, pp.10-11.

05. "Id.", pp.11-12.

06. IMO, Considerations of work in respect of Maritime Liens and Mortgages and Related Subjects LEG 52/5/Add.1, 8 August 1984, p.19.

07. UNCTAD, Considerations of work in respect of Maritime Liens and Mortgages and Related Subjects TD/B/C.4/AC.8/12, 25 March 1988, p.11.

08. IMO, Considerations of work in respect of Maritime Liens and Mortgages and Related Subjects LEG 55/4/1, 18 September 1985, p.9.

CONCLUSION

Ship financing is a distinctive field intertwined with laws relating to both financing and commercial contracts generally. The law relating to ship financing, especially with respect to bankruptcy,commercial contracts,conflict of laws,and enforcement of creditors' right,needs to be harmonized internationally in such a way as to achieve reasonable predictability and security. Only if the laws are harmonized will shipping be able to achieve financing at a reasonable cost that,in turn is necessary to maintain this necessary industry.

However,the current situation in regard to maritime liens and mortgages as demonstrated in this paper,is one of a disunified international regime,a regime in which financiers,creditors and maritime claimants cannot be certain as to the scope,validity and ranking of their security. This situation is a cause of concern for both developed and developing countries in that States in either category may find their national objectives frustrated. Developing countries suffer in particular by being unable to obtain sufficient finance for their fleet development and,in the case of States with no settled rules,to develop their national legislation. In the case of developed States with settled rules,the objectives of their national laws may be invalidated by the variations in national legislation on maritime liens and mortgages. This can occur whenever a lien arises in one State,either by the same or another lienholder and the second State regards maritime liens as procedural,consequently applying its own laws on the recognition and ranking of such liens. Thus,a lien that

arises in one State can be wiped out by the arrest of the vessel in another State if the second State does not recognise the lien. In any event,the State of the arrest will,in virtually all cases,apply its own rules,on the ranking of liens,so the objectives of the first State in giving the lien a particular level of priority may well be frustrated by the other jurisdiction which gives it a different ranking.

The most desirable improvements of the current situation would be,first to improve the ranking and security given to the mortgagee and to financiers of ship building and ship purchase and secondly,to encourage greater international uniformity.

As regards the first improvement,it should be recalled that the rational underlying the drafting of the 1967 Convention was that the registered mortgagee should receive greater protection and the Convention reduced the number of maritime liens accordingly. With regard to the demand for greater international uniformity,the 1967 Convention in its present form has failed markedly.

Therefore,two general problems must be considered in respect of maritime liens,viz.:

(i) Whether and to what extent the maritime liens listed in article 4(1) of the 1967 Convention adversely affect the security of the holders of mortgages,hypotheques or similar registerable charges,and thus,the ability of shipowners to develop their fleet and obtain adequate financing.

(ii) Whether and to what extent maritime liens contribute to the safe and efficient operation of ships.

If in respect of any given maritime lien the answere to the first question is no and that to the second question is yes,the maritime lien should be obviously retained. In the opposite situation the lien

should be abolished. There are then intermediary situations,where a lien adversely affects mortgages and hypotheques but contribute to the safe and efficient operation of the ship;in such a case a policy choice must be made,and the balance of interests between mortgages and maritime liens creditors is of prime importance.

In view of the dual aims of the 1967 Convention for greater protection of mortgages and greater international uniformity,considerations may be given to using the 1967 Convention as a basis for reform in these areas under the following objectives:i.e

(i) The establishment of a system of preferential securities in a ship in order (a)to encourage ship financing;and (b)to afford protection of selected creditors.

(ii) The international harmonization of rules in respect of (a) above in order to avoid the frustration of national objectives as the result of differences in the treatment of preferred securities,priorities and other provisions among States and the ensuing uncertainties in respect of the treatment of preferred securities in different States.

(iii) The international harmonization of rules in respect of (a) above in order to encourage uniformity of the methods of enforcing claims against ships outside their States of registry and to protect ships against multiple actions in the enforcement of such claims in different States.

Greater international uniformity would enable the lender to make a reasonable estimate of the number and nature of claims which might take precedence over his security. It would also enable the prospective purchaser to make inquiries as to the existence and number of claims secured by the maritime lien. The end result

would be the facilitation of ship financing and sales.

It is hoped,through the work now being done by IMO and UNCTAD,to improve methods of ship financing, particularly in developing countries,and to build-up an international framework enabling financial institutions to obtain mortgages on ships when they lend money for the purchase of vessels.

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C- Documents. D. Conventions

E- Laws;include different national legislations.

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ANNEX I

INTERNATIONAL CONVENTION FOR THE UNIFICATION
OF CERTAIN RULES RELATING TO
MARITIME LIENS AND MORTGAGES
done at Brussels 10th.April 1926.

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO MARITIME LIENS AND MORTGAGES, BRUSSELS 1926

The President of the German Reich, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Brazil, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Chief of the Estonian State, the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Possessions beyond the Seas, Emperor of India, His Serene Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, the President of the Portuguese Republic, His Majesty the King of Rumania, His Majesty the King of the Serbs, Croats and Slovenes, His Majesty the King of Sweden and the President of the Republic of Uruguay,

Having recognized the utility of laying down in common accord certain uniform rules relating to maritime liens and mortgages have decided to conclude a convention to that effect and have designated as their plenipotentiaries, namely: ...

Who, duly authorized therefor, have agreed on the following:

Article 1

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

Article 2

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

1. Law costs due to the state, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbor dues, and other public taxes and charges of the same character; pilotage dues; the cost of watching and preservation from the time of the entry of the vessel into the last port;
2. Claims arising out of the contract of engagement of the master, crew, and other persons hired on board;
3. Remuneration for assistance and salvage, and the contribution of the vessel in general average;
4. Indemnities for collision or other accident of navigation, as also for damage caused to works forming part of harbors, docks, and navigable ways; indemnities

for bodily injury to passengers or crew; indemnities for loss of or damage to cargo or baggage;
5. Claims arising on contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the same time owner of the vessel, and whether the claim is his own or that of ship-chandlers, repairers, lenders, or other contractual creditors.

Article 3

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

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

Article 4

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

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

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

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

Article 5

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

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

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

Article 6

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

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

Article 7

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

Article 8

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

Article 9

The liens cease to exist, apart from other cases provided for by national laws, at the expiration of one year, and, in the case of liens for supplies mentioned in No. 5 of article 2, shall continue in force for not more than six months.

The periods for which the lien remains in force in the case of liens securing claims in respect of assistance and salvage runs from the day when the services terminated; in the case of liens securing claims in respect of collision and other accidents and in respect of bodily injuries from the day when the damage was caused; in the case of liens for the loss of or damage to cargo or baggage from the day of the delivery of the cargo or baggage or from the day when they should have been delivered; for repairs and supplies and other cases mentioned in No. 5 of article 2 from the day when the claim originated.

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

The fact that any of the persons employed on board, mentioned in No. 2 article 2 has a right to any payment in advance or on account does not render his claim enforcible.

As respects the cases provided for in the national laws in which a lien is extinguished, a sale shall extinguish a lien only if accompanied by formalities of publicity which shall be laid down by the national laws. These formalities shall include a notice given in such form and within such time as the national laws may prescribe to the authority charged with keeping the registers referred to in article 1 of this convention.

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

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

Article 10

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

Article 11

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

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

Article 12

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

Article 13

The foregoing provisions of this convention apply to vessels under the management of a person who operates them without owning them or to the principal

charterer, except in cases where the owner has been dispossessed by an illegal act, or where the claimant is not a bona fide claimant.

Article 14

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

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

Article 15

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

Article 16

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

Article 17

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

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

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

Article 18

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

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

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

Article 19

The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They

may also denounce the convention separately in accordance with its provision in respect of any self-governing dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

Article 20

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

Article 21

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

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

Article 22

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

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

PROTOCOL OF SIGNATURE

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

I. It is understood that the legislation of each state remains free:
1. To establish among the claims mentioned in No. 1 of article 2 a definite order of priority with a view to safeguarding the interests of the Treasury;
2. To confer on the authorities administering harbors, docks, lighthouses, and navigable ways, who have caused a wreck or other obstruction to navigation to be removed, or who are creditors in respect of harbor dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the vessel, wreck, or other property, to sell the same, and to indemnify themselves out of the proceeds in priority to other claimants, and
3. To determine the rank of the claimants for damages done to works otherwise than as stated in article 5 and in article 6.

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

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

IV/1 - International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels 1926

STATUS : Entered into force on 2nd June 1931

RATIFICATIONS AND ACCESSIONS

Algeria	13. 4.64
Argentina	19. 4.61
Belgium	2. 6.30
Brazil	28. 4.31
Cuba	21.11.83
Denmark	2. 6.30(1)
Estonia	2. 6.30
Finland	12. 7.34(1)
France	23. 7.35
Haiti	19. 3.65
Hungary	2. 6.30
Iran	8. 9.66
Italy	7.12.49
Lebanon	18. 3.69
Madagascar	23. 8.35
Monaco	15. 5.31
Norway	10.10.33(1)
Poland	26.10.36
Portugal	24.12.31
Romania	4. 7.37
Spain	2. 6.30
Sweden	1. 7.38(1)
Switzerland	28. 5.54
Syrian Arab Rep.	14. 2.51
Turkey	4. 7.55
Uruguay	15. 9.70
Zaire	17. 7.67

ANNEX I I

INTERNATIONAL CONVENTION FOR THE UNIFICATION
OF CERTAIN RULES RELATING TO
MARITIME LIENS AND MORTGAGES
done at Brussels 27th.May 1967.

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO MARITIME LIENS AND MORTGAGES

Signed at Brussels, 27 May 1967

The Contracting Parties,

Having recognized the desirability of determining by agreement certain rules relating to maritime liens and mortgages.

Have resolved to conclude a convention for this purpose, and thereto agreed as follows:

Article 1

Mortgages and "Hypotheques" on sea-going vessels shall be enforceable in Contracting States provided that:

(a) such mortgages and "hypotheques" have been effected and registered in accordance with the law of the State where the vessel is registered;

(b) the register and any instruments required to be deposited with the registrar in accordance with the law of the State where the vessel is registered are open to public inspection, and that extracts of the register and copies of such instruments are obtainable from the registrar, and

(c) either the register or any instruments referred to in paragraph (b) above specifies the name and address of the person in whose favour the mortgage or "hypotheque" has been effected or that it has been issued to bearer, the amount secured and the date and other particulars which, according to the law of the State of registration, determine the rank as respects other registered mortgages and "hypotheques".

Article 2

The ranking of registered mortgages and "hypotheques" as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where

enforcement takes place.

Article 3

1. Subject to the provisions of Article 11, no contracting state shall permit the deregistration of a vessel without the written consent of all holders of registered mortgages and "hypotheques".

2. A vessel which is or has been registered in a contracting state shall not be eligible for registration in another contracting state, unless:

(a) a certificate has been issued by the former State to the effect that the vessel has been deregistered or,

(b) a certificate has been issued by the former State to the effect that the vessel will be deregistered on the day when such new registration is effected.

Article 4

1. The following claims shall be secured by maritime liens on the vessel:

(i) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;

(ii) port, canal and other waterway dues and pilotage dues;

(iii) claims against the owner 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;

(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;

(v) claims for salvage, wreck removal and contribution in general average.

The word "owner" mentioned in this paragraph shall be deemed to include the demise or other charterer, manager or operator of the vessel.

2. No maritime lien shall attach to the vessel securing claims as set out in paragraph 1. (iii) and (iv) of this Article which arise out of or result from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive product or waste.

Article 5

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

2. The maritime liens set out in Article 4 shall rank in the order listed, provided however that maritime liens securing claims for salvage, wreck removal and contribution in general average shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.

3. The maritime liens set out in each of sub-paragraphs (i), (ii), (iii) and (iv) of paragraph (1) of Article 4 shall rank pari passu as between themselves.

4. The maritime liens set out in sub-paragraph (v) of paragraph (1) of Article 4 shall rank in the inverse order of the time when the claims secured thereby accrued. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was performed; claims for salvage shall be deemed to have accrued on the date on which the salvage operation was terminated.

Article 6

1. Each contracting state may grant liens of rights of retention to secure claims other than those referred to in Article 4. Such liens shall rank after all maritime liens set out in Article 4 and after all registered mortgages and "hypotheques" which comply with the provisions of Article 1; and such rights of retention shall not prejudice the enforcement of maritime liens set out in Article 4 or registered mortgages or "hypotheques" which comply with the provisions of Article 1. nor the delivery of the vessel to

the purchaser in connection with such enforcement.

2. In the event that a lien or right of retention is granted in respect of a vessel in possession of

(a) a shipbuilder, to secure claims for the building of the vessel, or

(b) a ship repairer, to secure claims for repair of the vessel affected during such possession,

such lien or right of retention shall be postponed to all maritime liens set out in Article 4, but may be preferred to registered mortgages or "hypotheques". Such lien or right of retention may be exercisable against the vessel notwithstanding any registered mortgage or "hypotheque" on the vessel, but shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or ship repairer, as the case may be.

Article 7

1. The maritime liens set out in Article 4 arise whether the claims secured by such liens are against the demise or other charterer, manager or operator of the vessel.

2. Subject to the provisions of Article 11, the maritime liens securing the claims set out in Article 4 follow the vessel notwithstanding any change of ownership or of registration.

Article 8

1. The maritime liens set out in Article 4 shall be extingished 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 a forced sale.

2. The one year period referred to in the preceding paragraph shall not be subject to suspension or interruption, provided however that time shall not run during the period that the lienor is legally prevented from arresting the vessel.

Article 9

The assignment of or subrogation to a claim secured by a maritime lien set out in Article 4 entails the simultaneous assignment of or subrogation to such maritime lien.

Article 10

Prior to the forced sale of a vessel in a contracting state, the competent authority of such State shall give, or cause to be given at least thirty days written notice of the time and place of such sale to:

(a) all holders of registered mortgages and "hypotheques" which have not been issued to bearer;

(b) such holders of registered mortgages and "hypotheques" issued to bearer and to such holders of maritime liens set out in Article 4 whose claims have been notified to the said authority;

(c) the registrar of the register in which the vessel is registered.

Article 11

1. In the event of the forced sale of the vessel in a Contracting State all mortgages and "hypotheques", except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature shall cease to attach to the vessel, provided however that:

(a) at the time of the sale, the vessel is in the jurisdiction of such Contracting State, and

(b) the sale has been effected in accordance with the law of the said State and the provisions of this Convention.

No charter party or contract for the use of the vessel shall be deemed a lien or encumbrance for the purpose of this Article.

2. The cost awarded by the Court and arising out of the arrest and subsequent sale of the vessel and the distribution of the proceeds shall first be paid out of the proceeds of such sale. The balance shall be distributed

among the holders of maritime liens, liens and rights of retention mentioned in paragraph 2 of Article 6 and registered mortgages and "hypotheques" in accordance with the provisions of this Convention to the extent necessary to satisfy their claims.

3. When a vessel registered in a Contracting State has been the object of a forced sale in a Contracting State, the Court or other competent authority having jurisdiction shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all mortgages and "hypotheques", except those assumed by the purchaser, and all liens and other encumbrances, provided that the requirements set out in paragraph 1, sub-paragraphs (a) and (b) have been complied with, and that the proceeds of such forced sale have been distributed in compliance with paragraph 2 of this Article or have been deposited with the authority that is competent under the law of the place of the sale. Upon production of such certificate the registrar shall be bound to delete all registered mortgages and "hypotheques", except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of re-registration, as the case may be.

Article 12

1. Unless otherwise provided in this Convention, its provisions shall apply to all sea-going vessels registered in a Contracting State or in a non Contracting State.

2. Nothing in this Convention shall require any rights to be conferred in or against, or enable any rights to be enforced against any vessel owned, operated or chartered by a State and appropriated to public non-commercial services.

Article 13

For the purposes of Article 3, 10 and 11 of this Convention, the competent authorities of the Contracting States shall be authorized to correspond directly between themselves.

Article 14

Any Contracting Party may at the time of signing, ratifying or acceding to this Convention make the following reservations:

1. To give effect to this Convention either by giving it the force of law or by including the provisions of this Convention in its national legislation in a form appropriate to that legislation;

2. To apply the International Convention relating to the limitation of the liability of owners of sea-going ships signed at Brussels on the 10th October 1957.

Article 15

Any dispute between two or more Contracting Parties concerning the interpretation of application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Article 16

1. Each Contracting Party may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by Article 15 of the Convention. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

Article 17

This Convention shall be open for signature by the States represented at the twelfth session of the Diplomatic Conference on Maritime law.

Article 18

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government.

Article 19

1. This Conventon shall come into force three months after the date of the deposit of the fifth instrument of ratification.

2. This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the fifth instrument of ratification, three months after the date of the deposit of the instrument of ratification.

Article 20

1. States, Members of the United Nations or Members of the specialized agencies, not represented at the twelfth session of the Diplomatic Conference on Maritime Law, may accede to this Convention.

2. The instruments of accession shall be deposited with the Belgian Government.

3. The Convention shall come into force in respect of the acceding State three months after the date of deposit of the instrument of accession of that State, but not before the date of entry into force of the Convention as established by Article 19 (1).

Article 21

Each Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such Contracting Party. Nevertheless, this denunciation shall only take effect one year after the date on which notification thereof has been received by the Belgian Government.

Article 22

1. Any Contracting Party may at the time of signature, ratification or accession to this Convention or at any time thereafter declare by written notification to the Belgian Government which, among the territories under its sovereignty or for whose international relations it is responsible, are those to which the present Convention applies.

The Convention shall three months after the date of the receipt of such notification by the Belgian Government,

extend to the territories named therein.

2. Any Contracting Party which has made a declaration under paragraph (1) of this Article may at any time thereafter declare by notification given to the Belgian Government that the Convention shall cease to extend to such territories.

This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government.

Article 23

The Belgian Government shall notify the States represented at the twelfth session of the Diplomatic Conference on Maritime Law, and the acceding States to this Convention, of the following:

1. The signatures, ratifications and accessions received in accordance with Articles 17, 18 and 20.

2. The date on which the present Convention will come into force in accordance with Article 19.

3. The notifications with regard to Articles 14, 16 and 22.

4. The denunciations received in accordance with Article 21.

Article 24

Any Contracting Party may three years after the coming into force of this Convention, in respect of such Contracting Party, or at any time thereafter request that a Conference be convened in order to consider amendments to this Convention.

Any Contracting Party proposing to avail itself of this right shall notify the Belgian Government which, provided that one third of the Contracting Parties are in agreement, shall convene the Conference within six months thereafter.

Article 25

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall

replace and abrogate the International Convention for the unification of certain rules relating to Maritime Liens and Mortgages and Protocol of signature, signed at Brussels on April 10th, 1926.

IN WITNESS WHEREOF the undersigned plenipotentiaries, duly authorised, have signed this Convention.

DONE at Brussels, this 17th day of May 1967, in the French and English languages, both texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

IV/2 - International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels 1967

STATUS : Not in force 31st December 1982 (2)

RATIFICATIONS AND ACCESSIONS

Denmark	23. 8.77
Norway	13. 5.75
Sweden	13.11.75
Syrian Arab Rep.	1. 7.74

ANNEX III

TABLE IDENTIFYING THE VARIOUS MARITIME LIENS RECOGNIZED BY NATIONAL LEGISLATIONS.

PART A

	Judicial costs arising out of arrest and sale	Wages	Social insurance contributions	Port and Pilotage dues	Loss of Life/Personal Injury	Property Damage	Salvage	Wreck removal	General Average	Preservation Expenses	Contract Claims with respect to cargo/baggage	Claims based on Acts of Waste within scope of authority	Tax Claims	Bottomry and Respondentia	Pollution Damage	Wreck Receiver Fees	Coast Guard Fees	Damage to Adjoining Lands (from ship-wreck)	Claims from Construction, sale Equipment of Vessel	Tonage	Warehouse/Storage Costs	Freight
Algeria	x	x		x	x	x	x		x	x	x	x										
Argentina	x	x		x	x	x	x	x	x													
Australia		x			x[n]	x[n]	x					x		x								
Belgium	x	x	n	x	x	x	x	x[n]	x	x	x	x										
Brazil	x	x		x	x	x	x		x	x	x	x										
Canada	x	x		x	x	x	x					x										
Chile	x			x			x	x			x	x										
China	x	x		x	x		x		x			x										
Colombia	x	x		x	x	x	x		x	x	x	x	x									
Costa Rica	x	x					x		x	x		x	x	x								
Cuba	x	x		x	x	x	x		x	x	x	x										
Czechoslavakia		x	x	x	x	x	x		x			x										
Denmark	x	x	x	x	x	x	x	x	x													
Finland	x	x	x	x	x	x	x	x	x													
France	x	x	x[n]	x	x[n]	x[n]	x		x	x	x	x	n									
German Dem. Republic		x		x	x	x	x	x	x				x		x		x[n]					
Germany, Fed. Republic of	x	x	x	x	x	x	x	x	x													
Greece	x[n]	x	x[n]	x	n	n	x	x		x			x[n]									

n = See note under this item in the Appendix

	Haiti	Hungary	India	Iran	Israel	Italy	Japan	Lebanon	Liberia	Madagascar	Mexico	Monaco	Netherlands	New Zealand	Nigeria	Norway	Peru	Philippines
Judicial costs arising out of arrest and sale	×	×		×	×	×	×	×	×	×		×	×		×	×	×	×
Wages	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
Social insurance contributions						×					×					×		
Port and Pilotage dues	×	×		×	×	×	×	×	×	×		×	×		×	×	×	
Loss of Life/Personal Injury	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×		×
Property Damage	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×		×
Salvage	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×		×
Wreck removal									×						×	×		
General Average	×	×		×	×	×	×	×	×	×		×				×	×	×
Preservation Expenses	×	×		×	×	×	×	×	×	×		×					×	
Contract Claims with respect to cargo/baggage	×	×		×	×	×	×	×	×	×		×		×			×	
Claims based on Acts of Maste within scope of authority	×	×	×	×	×	×	×	×	$\times_n$	×	×	×					×	
Tax Claims							×		$\times_n$		×						×	
Bottomry and Respondentia									×					×	×		×	
Pollution Damage							$\times_n$		×						×			
Wreck Receiver Fees									$\times_n$						×			
Coast Guard Fees																		
Damage to Adjoining Lands (from ship-wreck)									×									
Claims from Construction, sale Equipment of Vessel							×											
Towage							×		×									
Warehouse/Storage Costs																		
Freight																		

n - See note under this item in the Appendix

	Judicial costs arising out of arrest and sale	Wages	Social insurance contributions	Port and Pilotage dues	Loss of Life/Personal Injury	Property Damage	Salvage	Wreck removal	General Average	Preservation Expenses	Contract Claims with respect to cargo/baggage	Claims based on Acts of Waste within scope of authority	Tax Claims	Bottomry and Respondentia	Pollution Damage	Wreck Receiver Fees	Coast Guard Fees	Damage to Adjoining Lands (from shipwreck)	Claims from Construction, sale Equipment of Vessel	Towage	Warehouse/Storage Costs	Freight
Poland	x	x		x	x	x	x		x	x	x	x										
Portugal	x	x		x	x	x	x		x	x	x	x							x	x		
Rep. of Korea	x	x		x	x	x	x		x	x		x	x							x		
Romania	x	x		x	x	x	x		x	x	x	x										
Spain	x	x		x	x	x	x		x	x	x	x										
Sweden	x	x	x	x	x	x	x	x	x													
Switzerland	x	x		x	x	x	x		x	x[n]	x	x										
Syrian Arab Republic	x	x		x	x	x	x		x	x	x	x										
Turkey	x	x		x	x	x	x		x	x	x	x										
U S S R	x	x	x	x	x	x	x		x	x	x	x										x
United Kingdom	x	x			x	x	x					x		x		x	x	x				
United States	x	x			x	x	x	x	x	x	x	x			x			x		x		
Uruguay	x	x		x	x	x	x		x	x	x	x										
Venezuela	x	x		x	x	x	x	x	x				x									
Yugoslavia	x	x	x	x	x	x	x		x	x	x	x										
Zaire	x	x		x	x	x	x		x	x	x	x										

n = See note under this item in the Appendix

ANNEX IV.

DRAFT REVISION OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO MARITIME LIENS AND MORTGAGES.

done at Brussels 27th.May 1967.

DRAFT ARTICLES ON MARITIME LIENS AND MORTGAGES

Article 1 1/

Recognition and enforcement of mortgages, "hypothèques" and charges

Mortgages, "hypothèques" and registerable charges of the same nature, which registerable charges of the same nature will be referred to hereafter as "charges", effected on seagoing vessels by their owners to secure payment of monies shall be enforceable in States Parties provided that: 2/

(a) Such mortgages, "hypothèques" and charges have been effected and registered in accordance with the law of the State in which the vessel is registered;

(b) The register and any instruments required to be deposited with the registrar in accordance with the law of the State where the vessel is registered are open to public inspection, and that extracts of the register and copies of such instruments are obtainable from the registrar; and,

(c) Either the register or any instruments referred to in subparagraph (b) specifies at least the name and address of the person in whose favour the mortgage, "hypothèque" or charge has been effected or that it has been issued to bearer, [the maximum amount secured] 3/ and the date and other particulars which, according to the law of the State of registration, determine the rank as respects other registered mortgages, "hypothèques" and charges.

Notes

1/ See paragraph 5 of the Report on the Work of the Sessional Group, JIGE (II)/3, Annex (hereinafter referred to as "the Report").

2/ See paragraph 6 of the Report.

3/ See paragraphs 7 to 10 of the Report.

COMMENTS:

The object of this article is to describe in very general terms the characteristics of the types of security which States Parties undertake to recognize and enforce, and to set out the conditions the securities must comply with to this effect.

The characteristics of the securities are their purpose, which is that to secure the payment of sums of money, and the fact that they may be registered in a public register. The traditional types of securities having these characteristics are mortgages and "hypothèques", and therefore, these names are used in article 1 and throughout the text. Since, however, securities with these characteristics may be called otherwise, it has been deemed proper to add a more general word, so to cover any such securities. In order better to identify them, it has been suggested that they be linked with the mortgages and "hypothèques" by providing that such other securities, called "charges", must have the same nature of mortgages and "hypothèques". It could be objected that if mortgages and "hypothèques" do not have the same nature, it would be impossible that the other charges have simultaneously the same nature of both. However, it appears, and to some extent this has emerged from the debates, that the differences between mortgages and "hypothèques" are now relatively marginal, and are not such as to affect the nature of the two types of securities, which is identical.

The conditions for the recognition and the enforcement are three, viz.:

(a) That the mortgages, "hypothèques" or charges are valid in the State of registration of the vessel and are registered in such State;

(b) That the register and any instruments required to be deposited are open to public inspection and that extracts and copies may be obtained. The reason of the reference to the instruments, the deposit of which may be required, is that if the mortgage and the "hypothèque" as well as the deed of covenants (which normally is embodied in the "hypothèque") must be deposited with the registrar, it is in the general interest of all creditors that these documents are open to public inspection and that copies may be obtained;

(c) That some minimum information is contained in the register or in the documents required to be deposited. There has been a general consensus that such minimum information should include:

(i) the name and address of the person in whose favour the mortgage, "hypothèque" or charge has been effected, or the indication that it has been issued to the bearer;

(ii) the date and other particulars which, according to the law of the State of registration, determine the rank of security.

On the contrary, no consensus emerged on the need for the amount secured by the mortgage, "hypothèque" or charge to be specified. Those in favour of it indicated that this was an essential element in their national laws. Those against it pointed out that in the case, which nowadays is very frequent, of current account mortgages or "hypothèques", it is impossible to indicate the amount secured, for such amount varies continuously.

In order to reach uniformity, those favouring retention of a reference to the amount secured might consider whether it would not be sufficient that the convention does not prevent the States Parties from requiring that additional information is mentioned in the register, so that their national laws ought not to be changed. On the other hand, those favouring the deletion might consider whether words flexible enough to allow them to maintain the system of floating charges (e.g. "maximum amount secured") would be acceptable.

Article 2 1/

Ranking and effects of mortgages, "hypothèques" and charges

The ranking of registered mortgages, "hypothèques" or charges as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.

Note

1/ See paragraph 11 of the Report.

COMMENTS:

This article contains two provisions of private international law, neither of which call for special comment.

Article 3

Change of ownership or registration 1/

1. In the event of a voluntary change of ownership or registration of a vessel, no State Party shall permit the owner to deregister the vessel without the written consent of all holders of registered mortgages, "hypothèques" or charges. 2/

2. A vessel which is or has been registered in a State Party shall not be eligible for registration in another State Party unless either:

(a) A certificate has been issued by the former State to the effect that the vessel has been deregistered, or

(b) A certificate has been issued by the former State to the effect that the vessel will be deregistered when such new registration is effected.

Notes

1/ See paragraph 12 of the Report.

2/ See paragraphs 13 to 15 of the Report.

COMMENTS:

The purpose of this article is to avoid a change of nationality of the vessel adversely affecting the holders of mortgages, "hypothèques" or charges.

If, in fact, a vessel is sold by its owner to a buyer who does not fulfil the nationality requirements of the flag State, as a consequence of the sale, the vessel may be deregistered regardless of the charges appearing in the register. It is, therefore, important to provide that no State Party to the convention will effect deregistration unless all registered mortgages, "hypothèques" or charges are previously deregistered, or the holders thereof have given their consent in writing. This latter alternative is not a duplicate of the first one, since there may be situations where the security may be transferred from one national register to another, in which event there is no need to deregister the security from the first register prior to the deregistration of the vessel, since the vessel is registered in the new register together with its original security.

If it is felt that the wording of paragraph 1 is too generic and could also apply to a change of registration within a State, then the following alternative text might be considered instead for paragraph 1. As a consequence, the title and text of the article might be changed:

"Change of registration

1. In the event that a voluntary change of ownership entails the deregistration of the vessel from the national register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all mortgages, 'hypothèques' or charges are previously deregistered, or the written consent of all holders of such mortgages, 'hypothèques' or charges is obtained."

The second paragraph regulates the same problem from the standpoint of the new flag State. In order to avoid double registration and possible registration of new securities in the new register, whilst those existing in the former register are still in effect, it is necessary to provide that registration in a national register is conditional to deregistration from the former register.

Two alternative procedures are contemplated, since the practice may differ from State to State. In certain States, in fact, registration of a vessel is conditional to a certificate of deregistration from the former national register being made available. In other States, in order to avoid a vessel remaining without nationality for even a short time, and also, when a vessel is mortgaged and the security will continue to exist after the change of flag, in order to ensure continuity of registration of such security, registration is effected before deregistration, provided such deregistration follows immediately.

Article 4

Maritime liens

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(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 [including social insurance contributions, payable on their behalf]; 1/

(ii) Claims 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; 2/

(iii) Claims of salvage; 3/

(iv) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel; 4/

(v) Claims for [wreck removal] [and contribution in general average]; 5/

(vi) [Port, canal, and other waterway dues and pilotage dues]. 6/ 7/

2. No maritime lien shall attach to a vessel to secure the claims as set out in subparagraphs (ii) and (iv) of paragraph 1 of this article which arise out of or result from oil pollution 8/ or the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive product or waste.

Notes

1/ See paragraph 31 of the Report.
2/ See paragraph 33 of the Report.
3/ See paragraph 32 of the Report.
4/ See paragraph 33 of the Report.
5/ See paragraph 34 of the Report.
6/ See paragraph 35 of the Report.
7/ One delegation has proposed the addition of the following subparagraph to this article:

"(vii) claims in respect of the repair or reconstruction of a vessel".

This text had been proposed on the assumption that paragraph 2 of article 6 is deleted.

8/ See paragraph 36 of the Report. Some delegations proposed the insertion of a provision similar to article 3 (b) of the Convention on Limitation of Liability for Maritime Claims, 1976.

COMMENTS:

A very important question to be decided is whether the maritime lien acrues also when the claim secured thereby is not against the owner of the vessel, but against a person to whom the use of the vessel has been given by the owner, i.e., the charterer by demise, the time charterer or the voyage charterer. In favour of this extension, it may be said that if the owner voluntarily transfers to others the use of the vessel, he must bear the consequences, and that it would be unfair to deprive the claimants of their security only because the vessel is operated by a person other than its owner. Against the extension, it may be argued that it is contrary to the general principles that the owner should suffer the expropriation of his vessel for the satisfaction of debts which are not his own.

Subparagraph (i). The reasons why reference is made to the vessel's complement rather than to the crew is that there may be employed on board persons, such as, in a cruising ship, shopkeepers, tour organizers, etc. who may not form part of the crew. "Complement" has been deemed to be a word wider than crew.

The reference to social insurance has been placed in square brackets since several delegations stated that it is not necessary, social insurance contributions being treated as part of the wages and, thus, being included anyhow.

An express reference is useful if there are doubts as to whether or not social insurance contributions are secured if not mentioned. It is also useful in case, on the assumption that the lack of an express reference does not prevent States Parties from treating social security contributions as wages, it is decided to grant a maritime lien only to that part of the social insurance contributions due to the crew and deducted from the salary. It has been pointed out that if the owner deducts from the salary the social insurance contribution payable by the crew and then does not pay it, such contribution must be treated as the salary, whilst there is no reason to grant a similar priority to the claim of the social insurance institutions against the owner for the payment of the part of the contribution due by the owner. In fact, since in most countries the lack of payment of the contribution by the owner does not affect the insurance, there does not seem to be any reason why the social insurance institutions should be given preferential status.

If these reasons are deemed to be acceptable, it remains to be seen whether the wording suggested is satisfactory. It has in fact been pointed

out by one delegation that the part of the contribution due by the owner may also come under the description "payable on their behalf", since all the contribution is paid for the benefit of the crew.

There has been a general consensus that the claims of the crew shall be given first priority.

Subparagraph (ii). Some doubts have been expressed that the words "in direct connection with the operation of the vessel" may also cover situations in which the accident is not caused by the ship but is still in direct connection with the operation of the ship, as would be the case if a shore crane is used for loading or unloading operations. It was, however, pointed out that the Convention does not deal with liability, and that if the owner is not liable for damage caused by shore cranes, no maritime lien would arise; whilst if he is liable, it may be fair to grant the claim a preferential status. It may be added that the same words appear in the 1976 Convention on Limitation of Liability for Maritime Claims (Article 2 paragraph 1 (a) and (c)) and this shows that the formula has been deemed to be satisfactory.

Subparagraph (iii). Whilst no objection has been raised as to the preferential status of claims for salvage remuneration, the ranking of this lien has been debated. It has been pointed out that since salvage preserves the ship for the benefit of all claimants, the claim of the salvor should be given a very high priority. This is undoubtedly correct vis-à-vis the claims arisen prior to the salvage operations, but the high priority does not seem to be equally justified as respects claims arisen after the salvage operations. Instead of giving a fixed priority as for other claims, it might, therefore, be advisable to give salvage top priority, ahead of wages, in respect of maritime liens accrued before the salvage operations, and to give salvage a lower priority when the salvage operations are prior in time to other claims.

A reasonable solution would be, in such case, to rank salvage after claims for wages and claims in respect of loss of life or personal injury. This could be achieved by ranking salvage after such claims and by providing in a separate provision that, as an exception to the general principle according to which liens rank in the order listed, liens securing claims for salvage shall take priority over all other maritime liens which have attached to the vessel before commencement of salvage operations.

Subparagraph (iv). It has been pointed out by some delegations that uniform treatment should be granted for all loss or damage based on tort, whilst this text excludes claims in respect of cargo, containers and passengers' effects. However, since the claims in tort in respect of loss of or damage to cargo are excluded only in respect of cargo (including containers and passengers' effects) carried on board the ship on which the maritime lien arises, only in exceptional cases is a claim against the owner, operator or charterer of a ship in respect of loss of or damage to cargo carried on such ship in tort and in all likelihood such exceptional cases are those referred to above, i.e. of the actual carrier being a person other than the contracting carrier.

Subparagraphs (v) and (vi). Opinions were divided as to whether these claims should be secured by a maritime lien ranking ahead of mortgages and "hypothèques".

Paragraph 2. A maritime lien in favour of these claims is expressly excluded in paragraph 2 of article 4, for the reason that the liability of the owner of a tanker for pollution damage is compulsorily insured under the 1969 Civil Liability Convention. It must be considered whether the cases which are not covered by the 1969 Convention are sufficiently important to justify an exception to the general exclusion, which, as has been suggested, could be formulated along the lines of article 3 (b) of the 1976 Convention on Limitation of Liability for Maritime Claims. The cases not covered by compulsory insurance under the 1969 Civil Liability Convention include the following:

(a) Pollution by a tanker flying the flag of a non-contracting State whose liability is not covered by insurance;

(b) Pollution caused by a tanker carrying less than 2,000 tons of oil in bulk as cargo;

(c) Pollution caused by a vessel not carrying oil in bulk as cargo.

In addition, it is possible that the insurer does not settle the claims for pollution damage. In the light of these considerations and noting the provisions of the 1971 International Oil Pollution Fund Convention, the Group might give further consideration to whether a general exclusion should be provided for such claims or whether an approach similar to the one contained in the 1969 LLMC Convention should be followed.

Article 5

Priority of maritime liens

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

2. The maritime liens set out in article 4 shall rank in the order listed, provided however that maritime liens securing claims for salvage, [wreck removal] and [contribution in general average] shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed. 1/

3. The maritime liens set out in each of subparagraphs (i), (ii), (iv) [and (vi)] of paragraph 1 of article 4 shall rank pari passu as between themselves.

4. The maritime liens set out in subparagraphs (iii) [and (v)] of paragraph 1 of article 4 shall rank in the inverse order of the time when the claims secured thereby accrued. [Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was performed]; claims for salvage shall be deemed to have accrued on the date on which the salvage operation was terminated.

Note

1/ Paragraphs 2-4 were not subject to detailed discussion at the second session.

COMMENTS:

Paragraph 1 regulates the priority between maritime liens and mortgages or "hypothèques" and provides that no other claim shall take priority over the maritime liens set out in article 4 or over mortgages, "hypothèques" or charges, provided, however, they comply with the requirement of article 1.

Paragraph 2 regulates the priority of maritime liens inter se. The general rule is that maritime liens rank in the order in which they are listed, except liens securing claims for salvage, for the reasons previously stated, when dealing with the order in which such liens are listed in article 4.

No specific comment seems to be required in respect of paragraphs 3 and 4.

Article 6 1/

Other liens and rights of retention

1. Each State Party may grant maritime or other liens or rights of retention to secure claims other than those referred to in article 4. Such liens shall rank after the maritime liens set out in article 4 and after registered mortgages, "hypothèques" or charges which comply with the provisions of article 1 and such rights of retention shall not prejudice the enforcement of maritime liens set out in article 4 or registered mortgages, "hypothèques" or charges which comply with the provisions of article 1, nor the delivery of the vessel to the purchaser in connection with such enforcement.

2. If a lien or right of retention is granted in respect of a vessel in possession of either:

(a) A shipbuilder, to secure claims for the building of the vessel, or

(b) A ship repairer, to secure claims for repair, including reconstruction of the vessel effected during such possession,

such lien shall be postponed to, and such right of retention shall not prejudice the enforcement of, all maritime liens set out in article 4, but may take priority over registered mortgages, "hypothèques" or charges on, or be exercisable against, the vessel. Such lien or right of retention shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or ship repairer, otherwise than in consequence of an arrest or seizure.

Note

1/ See paragraphs 43 to 55 of the Report.

One delegation has proposed the following text:

"Each State Party may grant liens or rights to secure claims other than those referred to in article 4. Such liens or rights shall rank after the maritime liens set out in article 4 and after registered mortgages, 'hypothèques' or charges which comply with the provisions of Article 1."

This proposal required deletion of article 6 (2).

COMMENTS:

In this draft, only maritime liens which rank with priority over mortgages or "hypothèques" are set out. It may be considered that there are two reasons for this. The first is that the difficulties to reach

international uniformity would increase if all maritime liens, including those ranking after mortgages or "hypothèques", were set out in the Convention. The second is that once it is agreed which liens rank with priority over mortgages or "hypothèques", the fact that other maritime liens may be recognized by national laws does not adversely affect the security of the holders of mortgages or "hypothèques", or at least not in an appreciable manner. Complete uniformity would certainly be preferable, for it would make all maritime liens subject to the same rules, such as that relating to the period of extinction.

The question, therefore, is whether a sufficiently wide consensus could be reached if States Parties were not allowed to keep in existence national liens different from those set out in the Convention.

If this approach is approved, a provision such as that of article 6, paragraph 1, in so far as it relates to maritime liens and other liens, is necessary. The question whether it is advisable to also mention the rights of retention has been the subject of debate. When considering this problem, attention should be drawn to the fact that if no reference is made in the Convention to rights of retention, States Parties would be free to grant such right to as many claimants as they like; this would adversely affect the security of the mortgage and of the "hypothèque" if, as seems to be the case in several legal systems, the holder of a right of retention can refuse to surrender possession even if the vessel is the subject of a forced sale.

If it is decided that, for the protection of mortgages and "hypothèques" it is preferable to maintain the reference to rights of retention, the fact that the legal nature of rights of retention differs from that of maritime liens does not seem to present a serious obstacle. In fact, a difference exists between the legal nature of mortgages, "hypothèques" and maritime liens but it is accepted that they should be regulated in one Convention. Nor is the fact that the loss of possession causes the loss of the security a particular feature of rights of retention, since the same rule applies also to possessory liens. The wording of this paragraph takes into account the difference between liens and rights of retention; in fact, whilst it provides that national liens shall rank after the maritime liens set out in article 4 and mortgages and "hypothèques", it then states that rights of retention shall not prejudice the enforcement of such maritime liens, mortgages and "hypothèques". That means that the holder of a right of retention must surrender possession if the vessel is arrested or seized for the purpose of its forced sale.

The second paragraph makes an exception to the general rule in that it authorizes States Parties to provide that possessory liens or right of retention in favour of shipbuilders and ship repairers may take priority over, or be exercised against holders of mortgages or "hypothèques". This provision has been retained at least for the time being since it appeared that it had received a reasonably wide support. The two alternative suggestions made at the second session go in opposite directions. According to one suggestion, this exception should be abolished, for it adversely affects the priority of mortgages and "hypothèques"; according to the other suggestion, a maritime lien should be expressly granted in the Convention in favour of the ship

repairers. The former suggestion is a radical one. The problem is to establish whether the general principle established in paragraph 1 would be accepted if the exception set out in paragraph 2 were abolished. It has been pointed out that to grant States the power to maintain or create these two rights of retention would seem to be essential in order to achieve or to ensure a wide uniformity.

The concern which was expressed in respect of the position of holders of mortgages or "hypothèques" may, perhaps, be reduced if one thinks that a conflict between the shipbuilder who exercises his right of retention and the holder of a mortgage or "hypothèque" on the vessel under construction will very rarely exist. In fact, the holder of the charge is aware that the vessel, which normally during construction is owned by the builder, will not be delivered until the construction price is paid unless the contract provides otherwise. As regards the ship repairer, in most circumstances the cost of repairs is covered by insurance, and in the deed of covenant collateral to the mortgage or in the "hypothèque" there are usually provisions to the effect that the owner is required to notify the holder of the charge about the works to be carried out. In any event, it may be assumed in the majority of cases that repairs or maintenance works would increase the value of the vessel or, at least, prevent a decrease of such value.

As to the second suggestion, viz. to provide a maritime lien in favour of the ship repairer, two observations may be made. One is that States Parties may take advantage of the freedom granted by paragraph 2, but may not do so; the other is that a possessory lien or a right of retention ceases to exist when possession is lost, whilst a maritime lien continues for one year. It may, therefore, be better for the holder of a mortgage or a "hypothèque" that the claim of the ship repairer be secured by a possessory lien or a right of retention. At least he will know immediately if the owner of the vessel will not pay the cost of repairs, and will be able to take prompt action: failure to pay the cost of repairs is, in fact, an event of default which entitles the holder of the charge to enforce his security.

Article 7 1/

Characteristics of maritime liens

[Subject to the provisions of article 11] the maritime liens set out in article 4 follow the vessel notwithstanding any change of ownership or of registration or of flag [except in the case of a forced sale].

Note

1/ See paragraph 56 of the Report.

COMMENTS:

This article does not call for particular comment.

Article 8 1/

Extinction of maritime liens

1. 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 [or seized], such arrest [or seizure] leading to a forced sale. 2/

2. The one-year period referred to in the preceding paragraph shall not be subject to suspension or interruption, provided, however, that time shall not run during the period that the [arrest or seizure of the vessel is not permitted by law] [lien or is legally prevented from arresting the vessel].

Notes

1/ See paragraphs 57 to 66 of the Report.

2/ The following text for paragraph 1 has been proposed by one delegation:

"1. A maritime lien set out in article 4 shall be extinguished when any of the following events first occurs:

(a) payment of the claim in full; or

(b) execution by the lienholder of a discharge of the lien; or

(c) arrest or seizure of the vessel, leading to:

(i) the giving of bail or other security in respect of the claim; or

(ii) a forced sale; or

(d) expiration of a period of one year from the time when the claim secured by the lien arose."

COMMENTS:

A question that has been raised is whether commencement of proceedings should suffice to prevent extinction. If the purpose of the extinction period is to avoid secret charges remaining in existence for too long, the question is whether commencement of proceedings does in any way bring the charges to the knowledge of third parties, and particularly of holders of mortgages and "hypothèques".

Article 9 1/

Assignment and subrogation

The assignment of or subrogation to a claim secured by a maritime lien set out in article 4 entails the simultaneous assignment of or subrogation to such maritime lien.

Note

1/ See paragraph 67 of the Report.

COMMENTS:

This provision was not discussed at the previous session.

Article 10 1/

Notice of forced sale

Prior to the forced sale of a vessel in a State Party the competent authority of such State shall give, or cause to be given, at least 30 days written notice of the time and place of such sale to:

(a) All holders of registered mortgages, "hypothèques", or charges which have not been issued to bearer;

(b) Such holders of registered mortgages, "hypothèques" and charges issued to bearer and to such holder of maritime liens set out in article 4 whose claims have been notified to the said authority;

(c) The registrar of the register in which the vessel is registered.

Note

1/ See paragraphs 68 to 70 of the Report.

COMMENTS:

See Comments to article 11.

Article 11 1/

Effects of forced sale

1. In the event of the forced sale of the vessel in a State Party all mortgages, "hypothèques" or charges except those assumed by the purchaser with the consent of the holders and all liens and other encumbrances of whatsoever nature shall cease to attach to the vessel, provided however that:

(a) At the time of the sale, the vessel is in the jurisdiction of such State; and

(b) The sale has been effected in accordance with the law of the said State and the provisions of this Convention.

2. The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel and of the distribution of the proceeds shall be paid first out of the proceeds of sale. The balance of the proceeds shall be distributed among the holders of maritime liens, liens and rights of retention mentioned in paragraph 2 of article 6 and registered mortgages, "hypothèques" or charges, in accordance with the provisions of this Convention to the extent necessary to satisfy their claims. 2/

3. When a vessel registered in a State Party has been the object of a forced sale in a State Party, the competent authority shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all mortgages, "hypothèques" or charges, except those assumed by the purchaser, and of all liens and other encumbrances provided that the requirements set out in paragraph 1 (a) and (b) have been complied with. Upon production of such certificate the registrar shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser, and 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. 3/

Notes

1/ See paragraphs 71, 74, 78 and 79 of the Report.

2/ See paragraph 29 of the Report.

3/ See paragraphs 72, 73 and 75 to 77 of the Report.

COMMENTS:

Articles 10 and 11 are best considered together. Their purpose is, in fact, to provide rules for the recognition of the effects of a forced sale effected in a country other than that of registration by the registrar of the

register where the vessel is registered and, generally, by all States Parties. Recognition by the registrar is necessary in order to enable the deregistration of registered charges and the registration of the vessel in the name of the purchaser or its deregistration from the register as the case may be. Recognition by other States is necessary in order to ensure that their courts will recognize that the purchaser has acquired a clean title, free from all pre-existing charges, whether maritime or other liens or mortgages or "hypothèques", and consequently will not authorize the enforcement on the vessel or any pre-existing claims.

Some minimum requirements had to be provided, similarly to what is done in article 1 for the recognition and enforcement of mortgages and "hypothèques". These requirements aim at ensuring a reasonable protection to holders of registered charges so as to enable them to protect their interest, and generally to all holders of preferred rights, so as to enable them to participate in the distribution of the proceeds of sale in accordance with their priority.

The first aim - notice to holders of registered charges - is achieved by article 10, whereby notice of the forced sale must be given to them at least 30 days in advance.

The second aim - distribution of the proceeds of sale in accordance with the priorities of the claimants - is achieved in paragraph 2 of article 11 whereby the proceeds of sale, after payment of the cost and expenses arising out of the arrest and forced sale of the vessel, must be distributed among the holders of maritime liens, liens and rights of retention mentioned in paragraph 2 or article 6 and registered mortgages, "hypothèques" or charges in accordance with the provisions of the Convention.

The effects of the recognition of the forced sale vis-à-vis the registrar are set out in paragraph 3, whereby the registrar, upon production of a certificate issued by the court which has conducted the forced sale that the vessel is sold free of all charges, must register the vessel in the name of the purchaser or issue a certificate of deregistration as the case may be. Two objections have been raised against this provision: the first is that it must be made sure that the proceeds of sale are freely transferable; the second is that deregistration may be withheld for public policy reasons.

The first objection is easy to cure. It could, in fact, be provided that the certificate issued by the competent court should also state that the proceeds of sale are freely transferable. Precedent for this could be found, e.g., in the 1976 LLMC, article 13. The second objection is more difficult to deal with and the sessional Group may wish to give further consideration to this issue.

The recognition of the effects of forced sale by all State Parties is dealt with in paragraph 1 of article 11. If the registration of the vessel in the name of the purchaser or the issuance of a certificate of deregistration is made conditional upon the proceeds of sale being freely transferable, such a condition should probably be mentioned in paragraph 1 in addition to the other two already existing.

Article 12 1/

Scope of application

1. Unless otherwise provided in this Convention, its provisions shall apply to all seagoing vessels registered in a State Party or in a State which is not a State Party.

2. Nothing in this Convention shall create any rights in, or enable any rights to be enforced against, any vessel owned, operated or chartered by a State and appropriated to public non-commercial services. 2/

Notes

1/ See paragraphs 80 to 82 and 85 of the Report.

2/ One delegation proposed the addition of a further paragraph which would read as follows:

"3. Nothing in this Convention shall enable rights on maritime liens to be enforced against a vessel owned by a State and used for commercial purposes if the vessel carries a certificate issued by the appropriate authorities of the State of the vessel's registry stating that the vessel is owned by that State and that the vessel's liability under the claims enumerated in article 4 is covered."

See paragraph 84 of the Report.

COMMENTS:

With regard to paragraph 1, the principle whereby States Parties undertake to apply the provisions of the Convention irrespective of the nationality of the vessel and thus also to vessels registered in States not Parties, has been adopted in many other Conventions. See, for example, the 1969 Civil Liability Convention (Article 1, No. 1), the 1976 Convention on Limitation of Liability for Maritime Claims (Article 15, paragraph 1), the 1924 Brussels Convention on Bills of Lading as amended by the 1968 Protocol (Article 10), the Hamburg Rules (Article 2, paragraph 1), the 1980 United Nations Convention on Multimodal Transport of Goods (Article 2).

Article 13 1/

Communication between States Parties

For the purpose of articles 3, 10 and 11 of this Convention, the competent authorities of the States Parties shall be authorized to correspond directly between themselves.

Note

1/ See paragraph 86 of the Report.

COMMENTS:

This article does not call for any particular observation.

Article 14 1/

Conflict of conventions

Nothing in this Convention shall affect the application of an international convention providing for limitation of liability or of national legislation giving effect thereto.

Note

1/ See paragraph 87 of the Report.

COMMENTS:

This article does not call for any particular observation.