

NOV 05 1987



NISA COLLECTION  
**United Nations Conference  
on Trade and Development**

Distr.  
GENERAL

TD/B/C.4/AC.8/9  
1 September 1987

Original: ENGLISH

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TRADE AND DEVELOPMENT BOARD

Committee on Shipping  
Joint UNCTAD/IMO Intergovernmental Group  
of Experts on Maritime Liens and  
Mortgages and Related Subjects  
Third session  
Geneva, 30 November 1987  
Item 2 of the provisional agenda

CONSIDERATION OF MARITIME LIENS AND MORTGAGES AND RELATED  
SUBJECTS, IN ACCORDANCE WITH THE TERMS OF REFERENCE OF  
THE JOINT INTERGOVERNMENTAL GROUP

Note by the UNCTAD secretariat

The attached report \*/ has been prepared for the third session of the Joint Intergovernmental Group, in response to the request made by the Joint Intergovernmental Group at its second session.

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\*/ Also circulated under the symbol LEG/MIM/9.

Joint UNCTAD/IMO Intergovernmental  
Group of Experts on Maritime Liens  
and Mortgages and Related Subjects  
Third session  
Geneva, 30 November - 11 December 1987  
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CONSIDERATION OF MARITIME LIENS AND MORTGAGES AND RELATED  
SUBJECTS, IN ACCORDANCE WITH THE TERMS OF REFERENCE OF  
THE JOINT INTERGOVERNMENTAL GROUP

Note by the secretariats of UNCTAD and IMO

Introduction

This document contains draft articles for a possible convention on maritime liens and mortgages which have been prepared at the request of the Joint Intergovernmental Group of Experts on Maritime Liens and Related Subjects. The draft articles have been prepared by the Chairman of the Joint Intergovernmental Group of Experts (JIGE) with the assistance of the secretariats of UNCTAD and IMO, taking account of the discussions at the second session of the JIGE. A number of notes have been added with the assistance of delegations.

In accordance with the wishes of the JIGE, the Chairman, with the assistance of the two secretariats, prepared explanatory comments on the draft articles. These comments, which follow immediately after the text of the respective draft articles, are intended to facilitate further consideration of the draft articles by the JIGE.

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.

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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.

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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.

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Note

1/ See paragraph 11 of the Report.

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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.

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Notes

1/ See paragraph 12 of the Report.

2/ See paragraphs 13 to 15 of the Report.

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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.

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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 accrues 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.

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Note

1/ Paragraphs 2-4 were not subject to detailed discussion at the second session.

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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.

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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).

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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].

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Note

1/ See paragraph 56 of the Report.

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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].

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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."

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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.

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Note

1/ See paragraph 67 of the Report.

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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.

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Note

1/ See paragraphs 68 to 70 of the Report.

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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/

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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.

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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/

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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.

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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.

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Note

1/ See paragraph 86 of the Report.

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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.

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Note

1/ See paragraph 87 of the Report.

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COMMENTS:

This article does not call for any particular observation.