



NOV 24 1988
United Nations Conference
on Trade and Development
UN/ISA COLLECTION

Distr.
GENERAL

TD/B/C.4/AC.8/17
5 September 1988

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD

Committee on Shipping
Joint UNCTAD/IMO Intergovernmental Group
of Experts on Maritime Liens and
Mortgages and Related Subjects
Fifth session
Geneva, 12-20 December 1988
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 OF EXPERTS

Note by the UNCTAD secretariat

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

*/ Also circulated under the symbol LEG/MLM/17.

JIGE(V)/2
24 August 1988

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Note by the secretariats of UNCTAD and IMO

Introduction

To facilitate the work of the Joint Intergovernmental Group of Experts (JIGE), a revised set of draft articles on maritime liens and mortgages has been prepared by the Chairman of the JIGE with the assistance of the two secretariats, taking account of the discussions at the fourth session of the JIGE. The text of these draft articles is contained in Part A of this document. The brief notes contained in Part B have been prepared by the secretariats in response to a request from the JIGE at its fourth session regarding the possibility of the application of the draft Convention to ships registered in non-Contracting States under draft article 12.

Part A

REVISED DRAFT ARTICLES ON MARITIME LIENS AND MORTGAGES

Article 1

Recognition and enforcement of mortgages,
"hypothèques" and charges

Mortgages, "hypothèques" and registrable charges of the same nature, which registrable charges of the same nature will be referred to hereafter as "charges", [effected on seagoing vessels] [to secure payment of monies] shall be enforceable in States Parties provided that:

(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, if that is a requirement of the national law of the State of registration, or, otherwise, if that amount is specified in the instrument creating the mortgage, "hypothèque" and charge, 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.

[(d)] 1/

[(e)] 2/

Article 2

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.

Article 3

[Voluntary] change of ownership or registration

1. In the event that a voluntary change of ownership [or voluntary change of registration] 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.

[2. [Without prejudice to article 11.3] 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 with immediate effect at such time as the new registration is effected. The date of registration shall be the date of deregistration of the vessel by the former State.]

[Article 3 bis

1. No State Party shall consent to a vessel registered in that State being permitted to fly temporarily the flag of another State unless all registered mortgages, "hypothèques" or charges on that vessel have been previously deregistered or the written consent of the holders of all such mortgages, "hypothèques" or charges has been obtained.]

[2. 3/1

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;
- (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;
- (iii) claims for salvage [and contribution in general average];
- [(iv) port, canal, and other waterway dues and pilotage dues;]
- [(v) claims for wreck removal;]
- [(vi) 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.]

2. No maritime lien shall attach to a vessel to secure the claims as set out in subparagraphs (ii) and [(vi)] of paragraph 1 which arise out of or result from oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, 1969 or of any amendments or protocol thereto which is in force, or the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties or nuclear fuel or of radioactive product or waste.

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 such 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 lien were performed.
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 claim 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

[Maritime or] 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.

Article 7

Characteristics of maritime liens

The maritime liens follow the vessel notwithstanding any change of ownership or of registration or of flag.

Article 8

Extinction of maritime liens by [passage][lapse] of time

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. 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] [lienor is legally prevented from arresting the vessel].

Article 9

Assignment and subrogation

The assignment of or subrogation to a claim secured by a maritime lien set out in [article 4] [and in article 6] [this Convention] entails the simultaneous assignment of or subrogation to such maritime liens.

Article 10

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) the competent authority in charge of the register in the State in which the vessel is registered; 4/
- (b) all holders of registered mortgages, "hypothèques", or charges which have not been issued to bearer;

(c) 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.

Article 11

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] [under] [in the area of] the jurisdiction [in the territory] of such State, and

(b) the sale has been effected in accordance with the law of the said State and all the provisions of this Convention have been observed.

2. The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel including the costs incurred for the upkeep of the vessel from the time of arrest [and the costs of repatriation of the crew], 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.

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 paragraphs 1 (a) and (b) have been complied with and that the proceeds of such forced sale have been deposited with the authority that is competent under the law of the place of sale and that these proceeds are actually available and freely transferable. 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.

[4. 5/]

Article 12

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. 6/

Article 13

Communication between States parties

For the purpose of articles 3, 10 and 11, the competent authorities of the States Parties shall be authorized to correspond directly between themselves.

Article 14

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.

Article 15

[Rule of interpretation

If a vessel registered in one State is permitted to fly temporarily the flag of another State, references in this Convention to the "State where the vessel is registered" or to the "State of registration" shall be deemed to be references to the first-mentioned State and references to the "competent authorities in charge of the register" shall be deemed to be references to the competent authority in charge of the register in the first-mentioned State.]

Part B

At its fourth session in May 1988, the Joint Group of Experts requested the secretariats of IMO and UNCTAD to prepare a document outlining the relevant provisions of the international conventions to which reference had been made during the consideration of draft article 12 (Scope of application), regarding the possible application of the draft Convention to ships registered in non-Contracting States (JIGE (IV)/5, para. 124 of annex).

In response to this request, the secretariats submit herewith the following information:

(a) The texts of the scope of application provisions in the 1926 Convention and the 1967 Convention;

(b) A summary of the discussions at the 27th conference of the International Maritime Committee (CMI) in 1965 concerning the scope of application of the draft 1967 Convention; and

(c) texts of the relevant provisions of the international conventions referred to in document JIGE (III)/2 (page 21, comments relating to article 12).

(a) Texts from the 1926 Convention, the 1967 Convention, and the "Lisbon" draft convention of the CMI

Article 14 of the 1926 Convention reads as follows:

"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 favour of the nationals of a non-Contracting State."

Article 12 of the 1967 Convention reads as follows:

"Unless otherwise provided in this Convention, its provisions shall apply to all seagoing vessels registered in a Contracting State or in a non-Contracting State."

Article 12, paragraph 1 of the CMI draft revision of the 1967 Convention:

"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."

(b) Discussions at the 27th CMI Conference (1965)

At its 27th conference in New York, 1965, the CMI examined the scope of application provision in the proposed new Convention to replace the 1926 Convention.

The draft article on scope of application which had been prepared for consideration by the Conference, as a revision of article 14 of the 1926 Convention (draft Article 13 of the "Antwerp draft"), read as follows:

"Unless otherwise provided in this Convention the Contracting States shall apply the provisions of this Convention to all seagoing vessels, no matter whether they are registered in a Contracting State or in a non-Contracting State."

A proposal was made to replace this text by the following text:

"This Convention shall apply whenever the ship attached by a mortgage, 'hypothèque' or maritime lien is registered in a Contracting State."

The sponsor of this proposal suggested that the scope of application of the Convention should be restricted to ships registered in Contracting States, and stated that it would not be useful to grant the guarantees of the Convention to ships registered in a non-Contracting State.

The proposal was opposed by several speakers. Among the reasons given for the opposition were:

(a) The aim of the Convention was not to protect the shipowner but to improve the mortgage credit and the situation of the mortgagee. This could best be accomplished if the Convention had a wide scope of application.

(b) Without a broad scope of application, a court or a Contracting State might be obliged to apply the law of a non-Contracting State. This could result in recognition being given to a greater number of liens than were provided for in the Convention.

(c) With a wide scope of application, questions regarding the ranking among maritime liens would be determined in accordance with the law of the Contracting State. This would mean that the rules of the Convention would be applied whether or not the vessel in question was registered in a Contracting State.

(d) A restricted scope of application would create doubts about the law which should apply in cases where the purchaser was in a Contracting State but the claimant was in a non-Contracting State. The ranking of liens might be different depending on the law which would be deemed applicable.

(e) A wide scope of application encouraged a uniformity of maritime law.

Following the discussion, the proposal was withdrawn.

Texts of provisions from other conventions

The Joint Group of Experts noted the comment, made during the discussions on draft article 12, in document JIGE (III)/2, concerning provisions in some conventions which enabled or required States Parties to apply the conventions to vessels registered in States which were not Parties to the conventions in question. The wish was expressed that these provisions might be made

available to the Joint Group of Experts. In response, the secretariats have identified the following texts on scope of application which the Group may find useful in their consideration of the matter.

- (a) International Convention on Civil Liability for Oil Pollution Damage (1969):

Article VII, paragraph 11: "Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph 1 of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries more than 2,000 tons of oil in bulk as cargo." 7/

- (b) Convention on Limitation of Liability for Maritime Claims, 1976:

Article 15, paragraph 1

1. This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State. Nevertheless, each State Party may exclude wholly or partially from the application of this Convention any person referred to in Article 1 who at the time when the rules of this Convention are invoked before the Courts of that State does not have his habitual residence in a State Party or does not have his principal place of business in a State Party or any ship in relation to which the right of limitation is invoked or whose release is sought and which does not at the time specified above fly the flag of a State Party.

- (c) Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924 (Visby Rules, 1968):

Article 5 (revised text of Article 10)

"The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a Contracting State, or
- (b) the carriage is from a port in a Contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above.

This Article shall not prevent a Contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs."

- (d) United Nations Convention on the Carriage of Goods by Sea, 1978 (the "Hamburg Rules"):

Article 2

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

- (e) Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974:

Article 2, paragraph 1

1. This Convention shall apply to any international carriage if:

(a) the ship is flying the flag of or is registered in a State Party to this Convention, or

(b) the contract of carriage has been made in a State Party to this Convention, or

(c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

- (f) United Nations Convention on International Multimodal Transport of Goods, 24 May 1980:

Article 2

The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

(a) the place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or

(b) the place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.

Notes

1/ If it is decided that the draft Convention should deal with bareboat charter registration, it might be appropriate to insert an additional subparagraph which will read as follows:

"(d) If a vessel registered in one State is permitted to temporarily fly the flag of another State, the register of the former State specifies the State whose flag the vessel is permitted to fly and the register of that State specifies the State of original registration."

2/ The delegation of the United Kingdom indicated that it would submit a new text concerning the cases of simultaneous multiple registration in a single State. See paragraph 11 of the Report of the Sessional Group at its fourth session, JIGE (IV)/5.

3/ If it is decided that the Draft Convention should deal with bareboat charter registration, it might be appropriate to insert an additional subparagraph which will read as follows:

"2. No State Party shall consent to a vessel registered in another State Party being permitted to temporarily fly its flag unless a certificate has been issued by that State to the effect that the vessel is permitted to temporarily fly the flag of another State."

4/ If it is decided that the draft Convention should deal with bareboat charter registration, it might be appropriate to amend subparagraph (a) to read as follows:

"(a) The competent authority in charge of the register in the State in which the vessel is registered and, if the vessel is temporarily flying the flag of another State, the competent authority in charge of the register in that State."

5/ If it is decided that the draft Convention should deal with bareboat charter registration, it might be appropriate to insert an additional subparagraph which will read as follows:

"4. If at the time of the sale the vessel is temporarily flying the flag of a State Party other than the State of registration, the competent authority in charge of the register in the State whose flag the vessel is temporarily permitted to fly shall, upon production of the certificate mentioned in paragraph 3, issue a certificate to the effect that the right to fly the flag of that State is revoked."

6/ During the second session of the JIGE, 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 carried 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 the vessel's liability under the claims enumerated in article 4 is covered."

7/ In this connection, it is also noted that the Protocol of 1984 to CLC 1969 includes a provision (Article VII, para. 2) which reads: "A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a Contracting State such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a Contracting State it may be issued or certified by the appropriate authority of any Contracting State."