

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

In order to bring this matter before the Maritime Law Association, a motion will be made at the next regular meeting to adopt the views of Hon. Harrington Putnam and William J. Dean, Esq., expressed in the attached report, as the sense of the Association.

HAROLD S. DEMING,
Secretary.

April 28, 1925.

TO THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES:

The undersigned, appointed as a Committee to consider and report upon "The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages," as proposed at the Brussels Meeting of October, 1923, beg leave to report:

The text of this Convention, as translated into English, comes to this country with careful and detailed comments by Mr. Benjamin Constant of London, author of "The Law Relating to the Mortgage of Ships." The plan reflects the efforts to give greater security to the mortgage creditor and the contract lienors, which in result prejudice the right of reparation for torts, like collisions. Such a wide departure from our system, which has held preserved the offending *res* as an entirety to make good the damages inflicted, is a radical step demanding our close scrutiny. A few years ago, a plan of the sort would not have received serious consideration by Congress, or by our shipping interests.

But the Ship Mortgage Act of 1920 is a step tending in the same direction. Your Committee has therefore attempted to compare the provisions of this Convention with that Act, and the articles, one to sixteen, are thus treated in detail. The subsequent articles, seventeen to twenty-two, dealing with the adop-

tion, ratification, and the steps to denounce the Convention, also the calling of a future conference for possible amendments, are omitted from this report.

Your Committee cannot regard this measure as now in a shape to receive our assent and is not convinced that these proposals to aid the operation of merchant ships by loans and credits will work out successfully. Past experience does not encourage an expectation that shipping thus operated upon borrowed funds, and encumbered with a series of liens, whether inscribed or secret, will be a sound basis for the American Merchant Marine.

Respectfully submitted,

HARRINGTON PUTNAM,
WILLIAM J. DEAN,
Committee.

ARTICLES OF CONVENTION FOR LIENS AND MORTGAGES REVIEWED.

ARTICLE 1.

The *hypothèques*, mortgages and pledges on ships duly established in accordance with the laws of the contracting State under whose flag the vessel sails and recorded in a public register either at the Port of Registry or at a central office, shall be considered as valid and effective in all other contracting countries.

COMMENT:

In making validity depend on the law of the ship's flag, the proposed Convention would settle a question on the conflict of laws which has been decided several different ways. The Supreme Court in *Liverpool Steam Co. v. Phenix Insurance Co.*,

129 U. S. 397, 453, said that "contracts are to be governed, as to their nature, their validity and interpretation, by the law of the place where they were made, unless the contracting parties clearly appeared to have had some other law in view." In some cases the Supreme Court has determined the validity of contracts by the law of the place of performance. The English courts in addition to these rules have applied the law of the flag. Constant in "The Law Relating to the Mortgage of Ships," page 97, says:

"It is submitted, however, though with some little hesitation, that the law of the ship's flag is that which *prima facie* governs a maritime mortgage where a conflict of law arises."

The proposed Convention seems to be limited to those *hypothèques*, mortgages and pledges that have been recorded in a public register. In this respect, it reflects the foreign codes which provide that no mortgage shall be of any legal effect until registered at the ship's port of registry.

The proposed Convention includes *hypothèques*, mortgages and pledges of ships irrespective of their tonnage. Our Ship Mortgage Act does not apply to vessels under 200 gross tons.

ARTICLE 2.

The following create a maritime lien on the ship, the freight of the voyage during which the lien claim arises, and on the accessories of the ship and of the freight acquired since the commencement of the voyage:

- (1) Law costs due to the State and expenses incurred in the common interest of the Creditors for the preservation of the ship or for procuring her sale, and the distribution of the proceeds of sale; tonnage dues, light or harbour dues, and other taxes and charges of a similar nature imposed by the State; pilotage dues, and the cost of watching and maintenance from the entry of the ship into the last port;

- (2) Claims resulting from the contract of employment of the Master and crew, and other persons engaged in the service of the ship;
 - (3) Remuneration due for salvage and *assistance* and the contribution of the ship to General Average;
 - (4) Compensation resulting from the fault of the owner or of a person in the service of the ship, for a collision or other accident of navigation, for bodily injury caused to passengers and to crew, for loss or damage to cargo and for damage caused to works forming part of harbors, docks, and navigable ways;
 - (5) Claims resulting from contracts made or acts done by the Master away from the Port of Registry, by virtue of his legal powers, where necessary to ensure the preservation of the ship or the continuation of her voyage, without distinguishing whether the Master is or is not at the same time owner of the ship, and whether the claim is his own or that of the necessaries men, repairers, charterers, or other contractual parties;
 - (6) Claims resulting from the Bills of Lading.
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COMMENT:

This Article describes the privileged claims which create a maritime lien on the ship, the freight of the voyage during which the lien claim arises, and on the accessories (described in Article 4 and unknown to our law as maritime liens) of the ship and of the freight acquired since the commencement of the voyage. Article 3 gives those privileged claims provided by Sections 1 to 4 inclusive priority over claims secured by *hypothèques*, mortgages or pledges.

(1) *Law costs due to the State and certain expenses and dues.*

The words "law costs due to the State" may mean the costs taxed by the court. The Ship Mortgage Act, 1920, subsection M, provides that the preferred mortgage lien shall not have priority over "expenses and fees allowed and costs taxed, by the

court." Before the Act, marshals' and clerks' fees were paid out of the proceeds of sale.

The words "expenses incurred in the common interest of the Creditors for the preservation of the ship" may mean expenses so incurred, while the ship is in custody of the court.

Tonnage dues, etc., give rise to a maritime lien which under our law is probably superior to a preferred mortgage (*The Melissa Trask*, 1923 A. M. C. 193).

Our law allows a lien for pilotage, but such lien is not superior to a preferred mortgage.

It is not clear what is meant by "cost of watching and maintenance." By the weight of authority the cost of watching a ship does not, under our law, give rise to a maritime lien. If "maintenance" refers to the care and upkeep of the ship while in port, it may include wharfage, repairs and supplies furnished the ship from the time of entry into the last port. These by our law may give rise to a maritime lien, but such lien would not be superior to a preferred mortgage lien.

(2) *Claims resulting from the contract of employment of the Master and crew, and other persons engaged in the service of the ship.*

In the United States the Master has no lien for his wages. The words "other persons engaged in the service of the ship" are broad enough to include wages of stevedores. The Ship Mortgage Act, 1920, subsection M, makes wages of a stevedore a preferred maritime lien (one superior to a preferred mortgage lien) only when the stevedore is "employed directly by the owner, operator, master, ship's husband, or agent of the vessel."

(3) *Remuneration due for salvage and ASSISTANCE and the ship's contribution to general average.*

Salvage and also general average are by the Ship Mortgage Act preferred maritime liens. The meaning of *assistance* is doubtful. Possibly it means standing by or aid short of salvage, which our courts sometimes reward as in the nature of salvage.

(4) *Compensation resulting from the fault of the owner or of a person in the service of the ship for collision or other accident of navigation, for personal injury, for cargo damage and for damages to works forming part of harbors, etc.*

This section gives a lien for loss or damage to cargo caused by the fault of the shipowner or of "a person in the service of the ship." The quoted words, in view of their use in Section (2) above, seem to include others besides the Master and crew.

This conflicts with the sections of the Harter Act beneficial to the shipowner.

The clause creating a lien for bodily injury to the crew resulting from such fault conflicts with our law that the shipowner is not liable in damages (as distinguished from the expenses of maintenance and cure) for personal injury to the crew, unless such injury was due to unseaworthiness or unsafe appliances. The clause is broad enough to include injury to the crew caused by the assault of a fellow seaman or of an officer, for which our law gives no lien.

The Convention fails to cover death of passengers or crew.

The words "works forming part of harbors, docks, and navigable ways" seem to include piers, bulkheads, bridges and abutments; if so, this section creates a maritime lien which our law does not recognize.

(5) *Claims resulting from contracts made or acts done by the Master away from the Port of Registry.*

By our law the Master has no lien for his disbursements, nor have the ship's general agents a lien for their disbursements. Charterers certainly would have no lien for disbursements which the charter required them to make for their own account. Those furnishing necessaries and repairs would not have a lien, if they were lacking in the diligence required by the Federal Maritime Lien Act.

(6) *Claims resulting from the Bills of Lading.*

This seems broad enough to include bills of lading not issued by the Master or owner or by one authorized by the owner.

Such bills of lading under our law do not bind the vessel, unless ratified by the owner, by the sailing of the vessel or otherwise.

ARTICLE 3.

The *hypothèques*, mortgages and pledges on ships mentioned in Article 1 take rank immediately after the privileged claims mentioned in Sections 1 to 4 of the preceding Article.

The municipal laws may grant a maritime lien to claims other than those provided for in the Article aforesaid or modify their rank, without, however, modifying the rank reserved to claims guaranteed by *hypothèques*, mortgages or pledges and to the maritime liens taking priority thereto.

The privileged claims provided for in Article 2, Sections 5 and 6 take precedence over *hypothèques*, mortgages and pledges if they arose before the registration of the mortgage, and if the maritime lien has been recorded on the register provided for in Article 1 within one month from the date of the creation of the claim.

The record may be entered on the register on production of a telegram stating the amount and cause of the claim.

COMMENT:

This Article gives priority to the privileged claims mentioned in Sections 1 to 4 inclusive of Article 2 over claims guaranteed by *hypothèques*, mortgages or pledges. The privileged claims mentioned in Sections 5 and 6 have a priority "if they arose before the registration of the mortgage and if the maritime lien has been recorded on the register provided for in Article 1 within one month from the date of the creation of the claim." Our Ship Mortgage Act, subsection M, provides that the term "preferred maritime lien" means "(1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when

employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage." This Act, as is pointed out under Article 2 above, also gives priority over a preferred mortgage lien to the expenses and fees allowed and costs taxed by the court.

While this Article permits the contracting countries to grant maritime liens for claims not mentioned in Article 2 or to modify the rank of such liens, it forbids modification of "the rank reserved to claims guaranteed by *hypothèques*, mortgages or pledges and to the maritime liens taking priority thereto."

Conformation with Article 3 would require an amendment of the Ship Mortgage Act and an extension of the Act to all ship mortgages.

ARTICLE 4.

The accessories of the ship and of the freight mentioned in Article 2 include:

- (1) Damages due to the owner for material damage sustained by the ship and not yet repaired, or for loss of freight;
- (2) Contributions in General Average due to the owner in so far as these constitute either material damage sustained by the ship and not yet repaired, or loss of freight;
- (3) Remuneration due to the owner for *assistance* given or salvage effected up to the end of the voyage, deduction being made of sums allowed to the Master and other persons in the service of the ship.

Passage money and, eventually, the *forfait* provided for in Article 4 of the Convention for the Limitation of Liability of Shipowners, are assimilated with the freight.

Neither the indemnities due to the owner in pursuance of insurance contracts nor premiums, subventions or other postal subsidies are considered as accessories of the ship or the freight.

By derogation from Article 2, Section 1, the lien provided for the benefit of persons in the service of the ship attaches to the full amount of freight due for all voyages effected during the continuance of the same contract of employment.

COMMENT:

Our law gives no maritime lien to the claims described in this Article as accessories of the ship and of the freight.

ARTICLE 5.

Claims resulting from the same voyage take priority in the order in which they appear in Article 2. The claims comprised in each of the categories rank equally and *pro rata* in case the fund is insufficient.

The claims noted in Sections 3 and 5 in each of these categories are repaid preferentially in the inverse order of the dates on which they arose.

Claims resulting from the same occurrence are considered to have been created at the same time.

No separate comment. See next article.

ARTICLE 6.

The privileged claims of the last voyage take precedence over those of the preceding voyages.

Nevertheless, claims resulting from a single contract of employment covering several voyages all rank equally with claims of the last voyage.

COMMENT:

The ranking of liens established by Articles 5 and 6 differs materially from our law, which is not uniform. The Conven-

tion ranks, according to voyage, claims of the same voyage taking priority in the order in which they appear in Article 2.

ARTICLE 7.

With a view to the distribution of the proceeds of sale of the property subject to the maritime lien, the privileged creditors have the right of lodging proof of claim for the full amount of their claims, without deduction being made pursuant to the rules of Limitation of Liability of Shipowners, provided that the dividends payable to them shall not exceed the sum due under the said Rules.

No comment.

ARTICLE 8.

The privileged claims follow the ship into whosoever possession she may come.

COMMENT:

The provision that privileged claims follow the ship into whosoever possession she may come is doubtless subject to the qualification intimated in Article 9 that the claim would be extinguished by a sale "accompanied by the formalities of publicity laid down by the municipal laws."

ARTICLE 9.

Apart from any other provisions in the municipal laws, liens are extinguished at the expiration of one year from the date on which the claim became enforceable, provided that, for debts mentioned in Article 2, Section 5, the delay shall not exceed two years from the date on which the claim arose.

Nevertheless, amongst the cases for extinction prescribed by the municipal laws, sale does not extinguish the maritime liens unless it is accompanied by the formalities of publicity laid down by the municipal laws. These formalities shall require that previous notice be given, in the manner and time prescribed by these laws, to the administration responsible for the maintenance of the registers prescribed in Article 1 of the present Convention.

The right of demanding advances or payments on account does not result in rendering enforceable, within the meaning of the first paragraph hereof, the claims of persons engaged in the service of the ship mentioned in Article 2, Section 2.

In the case of liens guaranteeing the remuneration for *assistance* or salvage the delay runs from the date on which these operations were terminated and, in the case of the lien guaranteeing compensation for collision and the other indemnities mentioned in Article 2, Section 4, from the date on which the damage was caused.

The motives for suspending and interrupting the delays aforesaid shall be determined by the law of the Tribunal trying the case.

The high contracting parties reserve to themselves the right of admitting in their legislation, as prolonging the delay above fixed, the fact that the ship the subject of the lien could not be arrested in the territorial waters of the State in which the Plaintiff is domiciled or has his principal place of business, provided that this delay shall not exceed three years from the creation of the claim.

COMMENT:

This Article in effect fixes a period of limitation of one year for all claims except those mentioned in Article 2, Section 5, for which the limitation is to be two years. But it permits legislation to extend the period of limitation where the ship could not be arrested in the territorial waters of the State in which the lienor is domiciled or has his principal place of business, provided that the period of limitation shall not exceed three

years from the creation of the claim. This Article also provides that a sale does not extinguish maritime liens unless it is accompanied by the formalities of publicity required by the municipal laws, but the Article requires that previous notice of the sale must be given "to the administrators responsible for the maintenance of the registers prescribed in Article 1."

ARTICLE 10.

The maritime lien on freight may be exercised so long as the freight is still due or the amount thereof is still in the hands of the Master or the agent of the Owner. This also applies to the maritime lien on the accessories.

No comment.

ARTICLE 11.

Except as mentioned in the present Convention, the maritime liens established by the preceding provisions are neither subject to any formality, nor to any special condition of proof.

This provision does not abolish the right of each State to maintain in its legislation provisions requiring the Master to comply with special formalities, either for certain loans on the vessel, or for the sale of the cargo.

COMMENT:

The provision that maritime liens shall not be subject to "any special condition of proof" seems to be inconsistent with the provision in our Federal Maritime Lien Act requiring inquiry concerning a charterer's authority to bind the vessel.

ARTICLE 12.

The municipal laws must determine the nature and the form of the ship's papers on which the *hypothèques*, mortgages and pledges mentioned in Article 1 must be recorded, provided nevertheless that the creditor who has made application, in the prescribed manner, for the record to be made, shall not be responsible for omissions, errors or delays in connection with the entry on these documents. If he has omitted to apply for this record to be made he cannot set up his *hypothèque*, mortgage or pledge against holders of maritime liens acting in good faith.

The municipal laws shall also determine the form in which the record of the maritime liens made pursuant to Article 3, paragraph 3, shall appear.

 COMMENT:

The provision that a creditor who has omitted to apply for record "cannot set up his *hypothèque*, mortgage or pledge against holders of maritime liens acting in good faith" indicates that the document would be binding as between the parties.

ARTICLE 13.

The preceding provisions are applicable to ships run by a person not being the owner thereof (*armateur non-propriétaire*) or by a principal charterer, except where the owner has been dispossessed of his ship through an illicit act and when, moreover, the creditor is not acting in good faith.

 COMMENT:

This Article conflicts with our Federal Maritime Lien Act and also with our general maritime law concerning the authority of charterers to bind vessels.

ARTICLE 14.

The provisions of the present Convention shall be applied in each contracting State when the ship the subject of the lien is registered in a contracting State, as well as in the other cases prescribed by the municipal laws.

Nevertheless, the principle formulated in the preceding paragraph does not abolish the right of the contracting States not to apply the provisions of the present Convention in favor of ships sailing under the flag of a non-contracting State.

No comment.

ARTICLE 15.

The present Convention shall not apply to ships of war or to State-owned vessels exclusively employed in the service of the State.

No comment.

ARTICLE 16.

Nothing in the preceding provisions shall affect the jurisdiction of the Tribunals, the procedure and the methods of execution created by the municipal laws of the Powers.

No comment.

