DOCUMENT NO. 488
JULY, 1965

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

REPORT OF J. T. ASSER, CHAIRMAN OF THE INTERNATIONAL SUB-COMMITTEE OF THE COMITÉ MARITIME INTERNATIONAL ON THE DRAFT CONVENTION ON MARITIME LIENS AND SHIP MORTGAGES.

1. On behalf of the International Sub-Committee the undersigned begs to submit to the New York Conference the attached draft of an International Convention relating to Maritime Liens and Mortgages (hereinafter to be referred to as "the Antwerp draft").

The Antwerp draft is the result of the proceedings of two meetings of the International Sub-Committee; it was preceded by two drafts, the "Oxford" draft and the "Portofino" draft. The first of these two drafts (the Oxford draft) was prepared by a Working Group which met in Amsterdam in December 1963 and at Oxford in April 1964. This draft was subsequently submitted to the International Sub-Committee which discussed its contents at its first meeting at Amsterdam on the 19th and 20th, June, 1964, and appointed a Drafting Committee which subsequently revised the text of the Oxford draft in accordance with the decisions of the International Sub-Committee. This revised draft (the Portofino draft) was in its turn considered in great detail by the second meeting of the International Sub-Committee held at Antwerp on the 4th, June, 1965 and once more referred to the Drafting Committee. On the next day, June 5th, 1965, the Drafting Committee met and amended the wording of the Portofino draft in accordance with the decisions of the meeting held on the previous day, thus producing the Antwerp draft.

2. At this point, it would seem useful to recall in a few words the main reasons which induced the Bureau Permanent to decide, at its meeting held in Stockholm in June 1963, to put this topic on the Agenda of the Comité Maritime International. Those reasons were twofold, namely, *firstly* the fact that so far only a relatively small number of countries had ratified or had adhered to the 1926 Convention relating to Maritime Liens and Mortgages, and *secondly*, the

increased need for the financing of ships and especially of new buildings which need requires a strengthening of the position of holders of maritime mortgages and moreover a uniform treatment of such mortgages, if possible on a world wide scale. Since a number of the most important maritime nations, some of which moreover play an important part in the financing of ships, had refused to become a party to the 1926 Convention and a change of attitude on their part was not to be expected, it was felt that either a revision of the 1926 Convention or the drafting of an entirely new instrument in substitution for that Convention would be desirable in the interest both of shipowners and of the financial institutions concerned. Moreover the need for new international legislation in this field was not sufficiently met by the draft Convention relating to Registration of Rights in respect of Ships under Construction adopted in 1963 by the Stockholm Conference of the C. M. I. (hereinafter referred to as "the Stockholm draft") in as much as its provisions are limited to registered mortgages on and other registered rights in respect of ships under construction and do not apply to maritime liens attaching to ships during the construction period, and therefore do not provide either for the international enforcement of such liens or for their ranking either "inter se" or with respect to such mortgages, or subsequent maritime mortgages effected on and subsequent maritime liens attaching to the vessel when in operation.

3. Already at an early stage it become manifest that most of the national associations which submitted reports, were in favour of preparing a new Convention rather than attempting a revision of the 1926 Convention, which came in for serious criticism not only in non-Contracting, but also in those countries which had acceded to it (vide the Preliminary Report, doc. Hypo-1 and Hypo-2). Those criticisms were levied both at certain principles underlying that Convention and at many of its articles. The drafting of an entirely new Convention therefore seemed an easier task and, as is hoped, might prove acceptable to a large number of states, including those which had stayed outside the 1926 Convention.

So far, only the Danish Association and in a lesser degree the French Association have expressed the view that there exists no real need for a new Convention (doc. Hypo-31 and Hypo-41).

4. At this stage, it may be desirable to make a few remarks of a more general nature, before discussing the several articles of the Antwerp draft.

(a) In its report dated March 29, 1965, the Norwegian Association draws attention to the Stockholm draft and proposes that the new draft Convention be geared to the Stockholm draft prior to its presentation to the New York Conference. At the June 1965 meeting of the International Sub-Committee the Norwegian delegate stated however that, as in the view of his Association the Portofino draft conflicted with the Stockholm draft, the said proposal was to be understood as a proposal to entirely delete Article 12 of the Portofino draft. After a lengthy discussion, the International Sub-Committee rejected the Norwegian proposal and therefore decided to maintain Article 12. On the other hand, a study of the question whether and if so, to what extent the two drafts contain conflicting provisions, and how, in that case, such conflicts could be remedied, would have far exceeded the time available. For that reason, the International Sub-Committee decided to set up a small Committee from among its members which was entrusted with the task to investigate this particular problem and report to the Bureau Permanent which, it is understood, will be neeting in New York immediately before the beginning of the New York Conference.

(b) Article 3, par. (2) of the International Convention relating to the limitation of the liability of owners of sea-going vessels signed at Brussels on October 10th, 1957, provides that in each portion of the limitation fund referred to in par. 1 of the said Article, the "distribution among the claimants shall be made in proportion to the amounts of their established claims".

Consequently, when a limitation fund set up in accordance with the 1957 Convention is distributed, all claims against each portion of the fund rank *pari passu* irrespective whether or not they are secured by a maritime lien.

Shortly after the 1957 Convention had been adopted, the question arose whether the said par. 2 of Article 3 is not inconsistent with Article 5 of the 1926 Convention on maritime liens and mortgages, from which latter article it might perhaps be inferred that, in the event that a limitation fund should have been set up, the distribution of such fund will have to be effected with due regard to existing

liens. In this connection attention was also drawn to the 1924 Brussels Convention on limitation of liability, which in its Articles 6 and 7 refer to the order of liens to be observed in connection with the amount(s) representing the extent of the owner's liability. Pursuant to instructions from the Bureau Permanent the undersigned prepared in March 1963 a Preliminary Report with accompanying Questionnaire which however met with little response, only the French, German and Swiss Associations having submitted reports.

When the Working Group referred to above prepared the Oxford draft, the same problem came up for discussion, although otherwise than in the 1926 Convention, the Oxford draft did not contain any reference to a limitation fund. Nevertheless, in order to prevent from the outside that any incongruity could be considered as existing between the 1957 Convention and the new Convention, the Working Group decided to insert in the Oxford draft a specific provision (Article 11 of the said draft), providing that a creditor in respect of whose claims the shipowner is entitled to limit his liability may not rely on a maritime lien securing such claim once a limitation fund has been constituted.

However, the Amsterdam meeting of the International Sub-Committee decided to entirely delete Article 11 of the Oxford draft, while a Yugoslavian proposal to reinstate in the new Convention a provision similar to the said Article 11 of the Oxford draft, was defeated by a unanimous vote of the Antwerp meeting of the said Sub-Committee.

The undersigned thought it proper to draw the attention of the New York Conference to this particular problem, although for the reasons set out above, the problem discussed here will have lost its importance, once the new Convention on Maritime Liens and Mortgages will have come into force, anyway for those States who will have become parties to that Convention.

Of course, the problem would remain open, in the event that a new Convention along the lines of the Antwerp draft should not be adopted, and moreover in the event that such Convention should be adopted, in so far as States having acceded both to the 1926 Convention and to the 1957 Convention, would not become parties to the new Convention. However, in both cases the problem would

be *outside* the topic now under review and therefore need not be discussed in connection therewith.

(c) With the exception of the French Association, all national associations which submitted reports and which were represented at the meetings of the International Sub-Committee, expressed their approval with the general system both of the Oxford draft and of the Portofino draft.[1] The French Association, however, takes a different view which is the opposite of the one expressed by its delegate to the Amsterdam meeting of the International Sub-Committee when the Oxford draft came up for discussion. In its second Report (doc. Hypo-41) this Association seems to agree tentatively with the principle of a new draft convention being prepared, provided that such draft be, anyway provisionally, confined to setting up an international régime of maritime mortgages. The said second Report argues that the problem of the recognition of maritime mortgages is distinct from that of the recognition of maritime liens and from that relating to the respective ranking as between such mortgages and liens; that for the time being the efforts of the C. M. I. should be limited to reaching international agreement on the international recognition of maritime mortgages only; that the French Association fundamentally objects to the provisions of Article 4 of the Portofino draft, but that in its opinion it is not excluded that at some future date it may prove possible to reach international agreement also with respect to maritime liens.

In order to facilitate agreement, the French Association attached to its second Report a draft-convention relating only to maritime mortgages.

At the outset of the Antwerp meeting of the International Sub-Committee it was decided not to discuss the French draft; the reasons for that decision being:

(i) that already at its Amsterdam meeting the International Sub-Committee had decided to prepare a draft-Convention covering both mortgages and liens and that, in consequence, the French proposal was out of order, anyway at this stage of the proceedings;

(ii) that the system of the French draft varied considerably from that of the Portofino draft (in so far as the provisions

[1] Subject to the view taken by the Danish Association mentioned in par. (3) above.

of the latter related to maritime mortgages) and that the French draft introduced certain new concepts which were foreign to those of the Portofino draft;

(iii) that it was feared that a discussion of the French draft would lead to confusion and moreover would take up the time required for a full discussion of the Portofino draft;

(iv) that the said decision could not in any way prejudice the right of the French Association to submit its proposal to the Plenary Conference at New York.

(d) A final remark relates to the important question concerning the number of maritime liens which ought to be given international recognition under the new Convention.

At this point it may be useful to recall one of the main purposes that actuated the decision to prepare a new draft convention, namely the need of strengthening the legal position of holders of maritime mortgages. It may be argued that this would entail and justify a restriction of the number of maritime liens, but when comparing the maritime liens listed in Article 4 and the so-called "law costs" mentioned in Article 11, par. 2, of the Antwerp draft with Article 2 of, and the Protocol of signature attached to the 1926 Convention, it may be asked whether this purpose is being attained.

This comparison shows that, while in Article 4 of the Antwerp draft, the category of claims mentioned in Article 2, par. (5o) of the 1926 Convention, has been omitted, on the other hand the said Article 4 lists the following claims to which the 1926 Convention does not grant a maritime lien, namely:

(i) claims in respect of loss of life of or personal injury to *all* persons whether on board or not on board the vessel, while in Article 2 (4o) of the 1926 Convention the corresponding lien is limited to claims in respect of personal injury to passengers and crew;

(ii) tort claims in respect of loss of or damage to *all* property whether on board or not on board the vessel, while the corresponding provision of the 1926 Convention limits the so-called property claims to those caused by a collision or other accident of navigation, to those with respect to dam-

ages caused to works forming part of harbours, docks and navigable ways and finally to claims with respect to loss of or damage to cargo or baggage.

The several reports presented by national Associations and the proceedings of the meetings of the International Sub-Committee show that even more maritime liens than those actually listed in Article 4 have been proposed, but were ultimately rejected by those meetings. It is not excluded that amendments of that nature will be submitted once more to the New York Conference. It may be asked if such attempts, if successful, would not defeat the main object of the new Convention.

5. The Antwerp Draft.

A comparison between the Portofino draft and the Antwerp draft shows that many of the changes effected concern matters of drafting and as such do not call for special comments. The same applies to the reversal of the order of Articles 2 and 3 as appearing in the Portofino draft. Further it is not intended to deal in this Report with the large number of amendments to the Portofino draft which were proposed at the Antwerp meeting of the International Sub-Committee, but were rejected by that meeting, as a discussion of those amendments would exceed the scope of this Report.

Article 1.

The only change of substance consists of the reference to mortgages to bearer which has been inserted in sub-par. (c). In consequence, those countries, the national law of which allows a mortgage to bearer to be registered, will not be forced to change their legislation when ratifying the new Convention.

An amendment to the effect that only "contractual" mortgages should be recognized under the Convention, was defeated. As the wording of Article 1 reads, it covers also the so-called "hypothèque légale" and the "hypothèque judiciaire" in so far as existing in the legislation of certain countries, provided of course that such mortgages comply with the requirements of Article 1.

ARTICLE 2 (ARTICLE 3 OF THE PORTOFINO DRAFT).

No change.

ARTICLE 3 (ARTICLE 2 OF THE PORTOFINO DRAFT).

The only changes effected are changes in drafting.

ARTICLES 4, 5 AND 7, PAR. (1).

The following changes of substance were decided upon:

(a) In par. 1(iii) corresponding to par. 1(iv) of the Portofino draft, and in par. 1(iv) corresponding to par. 1(vi) of the Portofino draft, the words "in connection with the operation of the vessel" have been inserted, while moreover those two sub-paragraph specify that the claims referred to therein are secured by a maritime lien only if they are "against the owner" as defined in the last sentence of par. (1), namely the shipowner or the demise or other charterer, manager or operator of the vessel.

The insertion first mentioned was deemed necessary as without this qualification loss of life and personal injury claims and tort claims in respect of property would have been secured by a maritime lien, even although the loss of life, personal injury or loss of or damage to property should have occurred without any connection with the ship or its operation.

As a result of the insertion of the words "in direct connection with the operation of the vessel" the further qualification appearing in the Portofino draft, namely that the loss of life, personal injury and loss of or damage to property must have been caused by the owner or by a person in the service of the vessel for whom the owner is responsible, became superfluous and was therefore deleted.

The insertion of the words "against the owner" (as defined) was deemed to be necessary, in order to prevent a construction according to which all the claims listed in the said sub-pars. (iii) and (iv) should be secured by a maritime lien, even those in respect of which no liability would attach to the owner (as defined). This latter qualification is not needed with respect to the other claims listed in

par. (1) as such claims are "per definitionem" against the shipowner or possibly against the other persons mentioned in Article 7, par. (1).

(b) The International Sub-Committee decided to change the respective priorities of the maritime liens "inter se" as set out in Article 5 of the Portofino draft, which decision necessitated changes in the order of listing as appearing in Article 4 of the said draft. According to this decision claims for wages etc. of Master, Officers and crew are given the highest priority, the reason being that those claims are neither insured nor insurable, while claims for wreck removal (referred to as "wreck raising" in the Antwerp draft) together with claims for salvage have been listed in the fifth category after the property claims. Finally, claims for contribution in general average have been removed to the sixth and last category.

According to Article 5 of the Antwerp draft, all liens rank in the order listed in Article 4, however with the one exception that when salvage and wreck-raising concur with other maritime liens, the liens first mentioned shall take priority over all such other liens, whenever the salvage or wreck-raising operations concerned will have been performed *after* such other maritime liens have attached to the ship, the reason being that in that case the holders of those other maritime liens will have benefited by the salvage or wreck-raising whereby their security will have been (partly) preserved.

Article 6, Par. 2.

No change of substance except that for purposes of clarification the words "and neither the delivery of the vessel to the purchaser in a forced sale" were inserted at the end of this paragraph.

However, four national associations, namely those of Denmark, Great Britain, Japan and the Netherlands, strongly objected against the prohibition of all rights of retention or possessory liens securing the claims of a shipyard. They contended that, anyway in so far as claims for repairs are concerned, some protection should be granted to the yard, for instance by granting a maritime lien with respect to that particular claim, as in most cases the yard is required to carry out the repairs at once and therefore without in fact having had an opportunity of asking for and obtaining security from the shipowner.

ARTICLE 7.

No change.

ARTICLE 8.

The substantive rule as intended to be expressed by Article 8 of the Portofino draft has been maintained but the wording of that article was neither clear nor correct and needed to be changed.

As the article now reads, it provides for an extinction of all maritime liens after a two years' period unless prior to the expiry of that period the ship should have been arrested, such arrest leading to a forced sale, while, except for the case of the arrest and sale of the ship mentioned above, the two years' period is not subject to interruption.

Similarly, no suspension of the two years' period of extinction will be allowed, except if during the two years' period the lienor should have been *legally* prevented from arresting the vessel, owing to the vessel having been requisitioned or the shipowner being bankrupt or in compulsory liquidation.

Those three events, namely requisitioning, bankruptcy and compulsory liquidation will make it impossible for the lienor to arrest the vessel within the territory of the State in which it has been requisitioned (anyway in case of a requisitioning for title) or in which the shipowner has been declared bankrupt or has been put into compulsory liquidation. Not to allow in that case a suspension of the two years' period would amount to an unjustified hardship on the lienor. On the other hand the exception would not apply, if during the two years' period the lienor could have arrested the vessel in the territory of another country.

ARTICLE 9.

No change.

ARTICLE 10.

No change, except the requirement that the notice referred to therein shall be in writing.

ARTICLE 11.

No change of substance. The words inserted at the end of par. (2) make it clear that the amounts to be collected by lienors and mortgagees out of the proceeds of the sale of the vessel shall never exceed the amounts of their respective claims.

In par. (3) the words "in a Contracting State" have been inserted after "forced sale". Those words had been inadvertently omitted from the printed English text of the Portofino draft (vide: the French text of that draft).

ARTICLE 12.

No change.

ARTICLE 13.

No change of substance.

ARTICLE 14.

Article 14 of the Portofino draft might have led to complications in the relationship as between two States, both of which have ratified the 1926 Convention, while only one has ratified the new Convention. The International Sub-Committee therefore decided to substitute for Article 14 of the Portofino draft a new text providing that each State which ratifies the new Convention or accedes to it, shall forthwith denounce the 1926 Convention. The result will be the same as that which the old Article 14 tried to achieve, but the danger that the aforementioned complications would arise will be avoided.

Amsterdam, June 1965.

J. T. ASSER.