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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE REPORT OF THE COMMITTEE

on

COMITÉ MARITIME INTERNATIONAL

on

**THE CONVENTION ON MARITIME LIENS
AND SHIP MORTGAGES**

At a special meeting held on Friday, September 10, 1965, our Association approved in principle the Antwerp draft of the International Convention on Maritime Liens and Ship Mortgages, which was approved by the International Committee of the Comité at its last session in Antwerp in June, 1965, but with two amendments:

1. That all maritime liens arising prior to the registering of the mortgage should come ahead of the mortgage, and
2. That Article 10 be deleted in its entirety.

We presented at the opening meeting of the plenary session of the Comité the above amendments as directed and seven others. Some of the seven were clarifying amendments, others were the result of requests of lending institutions which requests were received after the special meeting of the Association on September 10th.

Our amendment putting liens in existence at the time of the recording of the mortgage ahead of the mortgage received no support. We did not press our amendment deleting Article 10 because of other amendments to Article 10 and the lack of support for our position.

Article 4

Our principal concern was with Article 4. On the afternoon of Tuesday, September 14th, drastic amendments to Article 4 were proposed on behalf of the delegations of the United Kingdom, the Netherlands, Belgium and Italy (hereinafter referred to as the U.K. Group). These proposed amendments were designed to make

drastic changes in the Antwerp draft, principally in Paragraph 1, (iii) and (iv). Paragraph 1, (iii) of the Antwerp draft was:

“Claims against the owner which arise in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel.”

The proposed (iii) was:

“Claims against the owner in respect of loss of life or personal injury, arising from a defect of the vessel or from an act, neglect or default of those employed on board the vessel in the course of such employment.”

Paragraph 1 (iv) of the Antwerp draft was:

“Claims not based on contract against the owner which arise in respect of loss of or damage to property or in connection with property occurring in direct connection with the operation of the vessel.”

The proposed (iv) was:

“Claims against the owner based on tort and not capable of being based on contract in respect of loss of or damage to property arising from a defect of the vessel or from an act, neglect or default of those employed on board the vessel in the course of such employment.”

The effect of Paragraph 1 (iii) of the Antwerp draft was to put ahead of the mortgage all claims which constituted a lien on the ship for loss of life or personal injury.

The proposed Paragraph 1 (iii) of the U.K. Group cuts those claims down to those due to a defect of the vessel, or the negligence of those employed on board the vessel in the course of their employment.

The proposed Paragraph 1 (iv) of the U.K. Group eliminates all cargo claims and limits property damage liens to those resulting from an act, neglect or default of those employed on board the vessel.

Under both the proposed (iii) and (iv) claims based upon the negligence of shore employees would not come ahead of the mort-

gage. If an owner should send a ship to sea in an unseaworthy condition when he knew or should have known of the unseaworthy condition, the claim resulting from that unseaworthiness for which there was a lien would not come ahead of the mortgage.

These amendments were presented by Lord Justice Diplock of the United Kingdom delegation on behalf of the U.K. Group. He stated:

101-102 The attitude of the United Kingdom towards maritime liens is on the whole one of dislike of them. We have a very small number of maritime liens existing in our national law. But if we are going to achieve our object, which is of making the security of the mortgagee a better security so as to facilitate the financing of new building, we have got to make some compromise with other countries which take a different view and a more favorable view of maritime liens.

* * *

We work on the Antwerp draft, and we do that because a great deal of work and care has been put into that draft, and we look at the liens set out there and ask ourselves one or two questions about them.

103 The first question I think which was asked is what is the practical effect of this lien in the ordinary course of maritime business with prudent lenders.

The second is what are the chances of getting ratification from governments which are concerned not only with maritime interests, or other interests, but other interests as well, if we cut out a lien which has social or political reasons behind it.

Lord Justice Diplock also stated that they were willing to go along with (i), wages, and (ii) canal dues, for political or social reasons.

The only lien he would accept as having any merit was that for salvage (104).

The German Amendment to Paragraph 1 (iv)

We joined in supporting the German amendment to (iv) which would have made this provision read as follows:

“Claims for damage or loss of cargo, whether based on contract or tort and other claims not based on contract against the owner, as far as arising in respect of or loss of or damage to property or in connection with property occurring in direct connection with the operation of the vessel.”

In opposing the German amendment, Lord Justice Diplock stated at 125:

“We are opposed to this extension of maritime liens to cargo claims in contract, to bills of lading holders.

It may be that such a lien exists in some countries, but the carriage of cargo by sea has gone on for many, many years, many hundreds of years, with a complete absence of such a remedy in the case of bills of lading holders.

126 As I said earlier, the purpose of this convention is to improve the security of the mortgagee, and if we are going to bring this new claim, which may be a very large claim, into the ranks of secured lien, ranking above the mortgage, then we are going to fail in the object of this convention.

In our submission, and I speak here for the four delegations, this is an unnecessary extension of maritime liens, and I am bound to say, so far as the United Kingdom delegation is concerned, that this is not one which is within the possible extension of those which we are prepared to accept.”

Lord Justice Diplock apparently was not familiar with our American law. We have always had a lien for damage to cargo.

Mr. Rein of Norway, while stating that he agreed with Lord Justice Diplock from the theoretical point of view, stated:

126 “From the practical point of view, the Norwegian delegation will support the American amendment.

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I quite agree that as to the contractual relationship between cargo and ships, cargo has within its power, from a very theoretical point of view, to have the security arranged by contract. They don't need anything else.

Secondly, cargo is invariably—almost invariably insured and we don't very much care about the underwriters' claim for compensation.

So with this theoretical departure, the British point of view is unassailable.

On the other hand, it is a practical difficulty to distinguish between cargo for which there is a contract and other objects on board the ship for which there is no contract.

Any physical damage caused to things carried on the ship will have a lien, but not cargo, because it is a contractual relationship.

That will create difficulties and it isn't worthwhile to create those difficulties, because cargo claims can be effectively insured against by the owners taking out P & I insurance, and the prudent owner ought to do so.

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Furthermore, the prudent mortgagee—and as Lord Justice Diplock pointed out previously today, we are only concerned about the prudent mortgagee—the prudent mortgagee, I say, should see to it that the owner is adequately covered by P & I insurance.

Therefore, it is unnecessary to leave out cargo claims in order to protect the prudent mortgagee.

Therefore, in our opinion, no harm is done by including the lien for cargo claims.

And now, finally, comes the consideration which to us is paramount:

We want this convention to be adopted by as many nations as possible. We know very well that among some of the great nations whom we very much want to have included among those who ratify this convention, that there is a strong feeling that cargo claims should be protected by liens. This applies to the United States, for instance.

I have a feeling—I have, as a matter of fact, been told by my American friends that the chance of having America adhere to this convention will be much greater if we protect cargo claims with a lien.

And as has been pointed out, it doesn't cost very much to do so; why shouldn't we?

This is a practical compromise, and as the British delegation has already pointed out, this should be the governing principle in this respect.

Let me point out in concluding that I understand the American proposal in Document 51 to be only a proposal in principle, but cargo claims should be included.

Therefore, I think that the Americans have no great feelings about the rest of the wording of their article—the Americans want to propose in No. 51 to have cargo included in principle, and the rest of the question of the wording of subparagraphs 3 and 4 can be left until we vote on the British, Italian and Netherlands proposal in No. 50.”

This German amendment was lost by a vote of 7 to 13. Those in favor were—Argentina, Denmark, Germany, Japan, Norway, the United States and Yugoslavia. France and Poland abstained. Those against were Belgium, Canada, Spain, Finland, the United Kingdom, Greece, Ireland, Israel, Italy, Mexico, the Netherlands, Sweden and Switzerland.

The Vote on the U.K. Group's Amendments (iii) and (iv)

The vote on the U.K. Group's (iii) was carried by a vote of 10 to 8. Those opposing were Argentina, Canada, Germany, Japan, Norway, Poland, the United States and Yugoslavia. Those in favor were Belgium, Spain, United Kingdom, Greece, Ireland, Italy, Mexico, the Netherlands, Portugal and Sweden; abstentions, Denmark, Finland, France and Israel.

When it came to a vote on (iv) Lord Justice Diplock stated that he wanted to explain the words “claims based on tort and not capable of being based on contract.” He further stated:

165 “In English law, whatever the position may be in the United States law, it is possible for goods to be carried on board a vessel without a contract, or without the effect of a contract where a deviation occurs.

It is a curious anomaly of English law, and it was for that particular reason that these words were adopted in this form.

You will see that this restricts the claims, the maritime lien claims, to cases where there is no contract, and to accidental damage to people who have no opportunity of avoiding it.

In those circumstances, we feel that it is one which ought to be accepted.

It is, of course, one which can be and should be insured against, both by the owner and with the mortgagee as a party to the insurance."

Under our law all cargo is carried under a contract, even if it is an oral contract. There can be no deviation without a contract because there is no deviation until there is a breach of contract.

The U.K. Group amendments do not improve the quality of the mortgage because the lender or mortgagee can and does require insurance against all claims which would constitute liens for personal injury and property damage.

This U.K. Group amendment (iv) was carried by a vote of 11 in favor and 7 against.

Those voting in favor—Belgium, Spain, the United Kingdom, Greece, Ireland, Israel, Italy, Mexico, the Netherlands, Portugal and Sweden. Those voting NO—Argentina, Canada, Denmark, Germany, Norway, United States, Yugoslavia. Abstentions: Finland, France, Japan and Poland. All those voting in favor of the first amendment voted in favor of this and in addition, Israel.

When it came to the final voting on the Convention, Article by Article, all of the articles were adopted by substantial votes with the exception of Article 4. This was carried by 12 to 7 with 5 abstentions, that is, one-half of the delegates present voted in favor of the Article, but only half.

The vote on Article 4—those in favor were Argentina, Denmark, Finland, the United Kingdom, Ireland, Israel, Italy, the Netherlands, Norway, Sweden and Yugoslavia. Those against were Canada, Chile, France, Germany, Greece, Mexico, the United States; abstentions were Spain, Japan, Poland, Portugal and Switzerland.

Argentina and Norway, which had voted NO on Paragraph 1 (iii) and (iv) of Article 4 voted for the Article as a whole.

Japan and Poland which had voted NO on (iii) abstained.

Portugal which had voted for (iii) abstained.

Switzerland, which did not vote on (iii) also abstained.

Norway and Argentina voted NO on (iv) but for the Article as a whole.

Chile did not vote on (iv) and voted against the Article as a whole.

Spain voted YES on (iv) and abstained on the Article as a whole.

Finland abstained on (iv) but voted YES on the Article as a whole.

France abstained on (iv) but voted against the Article as a whole.

Denmark voted NO on (iv) but YES on the Article as a whole.

Mexico voted YES on (iv) but NO on the Article as a whole.

Portugal voted YES on (iv), but abstained on the Article as a whole.

Switzerland did not vote on (iv) and abstained on the Article as a whole.

Yugoslavia voted NO on (iv) and YES on the Article as a whole.

The U.K. Group got the votes of exactly half of the delegations present for Article 4 as a whole, but it did not have a majority.

Article 6

Article 6 was amended and in presenting the amendment Lord Justice Diplock said that this was a compromise which they were willing to accept to give the repair yard a lien while it still retains possession of the ship which would come ahead of the mortgage but not ahead of the other liens enumerated in Article 4. This amendment was adopted.

Lord Justice Diplock's idea of a compromise is to accept the British law as it is without permitting any liens to come ahead of the mortgage which are not recognized by British law.

The Greek delegation submitted a proposal not to take any action on the Convention at this time on the theory that things had been moving so fast that many of the delegates were confused and needed more time to consider some of the questions involved. This proposal was opposed by the U.K. Group. They were sure they had votes enough to support their position and did not want to lose a decision. This proposal lost by a vote of 10 to 14. Those in favor of delaying action were Argentina, Chile, Spain, France, Greece, Mexico, Poland, Portugal, the United States and Yugoslavia. This is the only vote that gave the U.K. Group a majority.

The lending institutions have stated no objections to the liens coming ahead of the mortgage that are listed in the Antwerp draft. They can protect themselves by insurance against all claims for personal injuries and cargo damage.

They would like some provision in the Convention which would preserve the time charter which has been assigned to the mortgagee as security for the debt. They would like to be in a position to go in and bid the ship in at a foreclosure sale and have the time charter still in full force and effect. This does not impair the interests of any other party. I do not know how it can be worked out but it is something that should receive consideration.

There are other provisions of the Convention that need some further amendment but these are not nearly as important as are the provisions of Article 4.

This Convention will be considered at a diplomatic conference which has not yet been called. When one is called, the Association should advise the State Department of its position and endeavor to be represented in the delegation that our government sends to the diplomatic conference and at that diplomatic conference attempt to get a convention more acceptable to us than that adopted by the Comité.

It is the hope of your Committee that the Association will stand on the position it took at the special meeting of September 10th and that it insist that Paragraph 1 (iii) and (iv) be amended so as to cover all liens for personal injury and death and all liens for cargo damage.

A copy of the Convention in English is forwarded to you with this report as Document No. 499.

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