

SHIP MORTGAGES, MARITIME LIENS, AND THEIR ENFORCEMENT: THE BRUSSELS CONVENTIONS OF 1926 AND 1952

JOHN M. KRIZ*

PART ONE†

INTRODUCTION

THE PURPOSE of this article is to examine the provisions and operation of two international conventions which have heretofore not received the attention that they merit from the American admiralty bar. These are the Brussels Convention of 1926 for the Unification of Certain Rules of Law Relating to Mortgages and Liens¹ and the Brussels Convention of 1952 on Arrest of Sea-Going Vessels.² Although the United States is not a party to either of these

* A.B. 1958, Princeton; LL.B. 1961, Harvard. Member, New York Bar; associated with firm of Kramer, Marx, Greenlee & Bachus, New York, N.Y.

† PART TWO of this article will be published in the first issue of 1964 DUKE L.J. It will deal primarily with the 1952 Brussels Convention on Arrest of Sea-Going Vessels and problems arising thereunder.

¹ International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages [hereinafter cited as Liens Conv.], Brussels, April 10, 1926, official text in French and in custody of Belgian government, published in L.N.T.S. No. 2765 and 13 REVUE DE DROIT MARITIME COMPARÉ 535 (1926). For English translations see 6 BENEDICT, ADMIRALTY 382 (7th ed. Knauth 1958) [hereinafter cited as BENEDICT]; PRICE, MARITIME LIENS 239 (1940) [hereinafter cited as PRICE]. A semi-official English translation of the 1926 Convention is printed next to the official French version in INTERNATIONAL MARITIME COMMITTEE, MINUTES OF XXVth CONFERENCE, ATHENS, 1962 at 78 [hereinafter cited as XXVth CONFERENCE MINUTES]. This volume contains, *inter alia*, texts of all Brussels conventions on maritime law, ratifications and accessions, and minutes and resolutions of the 1962 conference.

The English text used in the present article is the PRICE translation as printed in BENEDICT; the translation varies in certain respects from that of the International Maritime Committee.

For background on international conferences and work of the Comité Maritime International leading up to this convention, see PRICE 218-37; Diena, *Principes du Droit International Privé Maritime*, 51 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL 409, 438-40 (1935).

² International Convention Relating to the Arrest of Sea-Going Ships (Saisie Conservatoire des Navires de Mer) [hereinafter cited as Arrest Conv.], Brussels, May 10, 1952, official texts in English and French. See XXVth CONFERENCE MINUTES 118 (French and English texts); 6 BENEDICT 9 (English text with notes on signatories); [1952] DROIT MARITIME FRANÇAIS 582 [hereinafter cited as D.M.F.] (French text). For a general discussion, see Ripert, *Les Conventions de Bruxelles du 10 Mai 1952 sur l'Unification du Droit Maritime*, [1952] D.M.F. 343, 353-59.

conventions, they have been accepted by a considerable number of nations and have formed the basis for domestic legislation on maritime liens and their enforcement in a number of newly independent nations.³ The 1926 Liens Convention has furthered uniform recognition of ship mortgages; it has delimited the number of maritime claims entitled to the status of liens upon a vessel and provided uniform rules on priority questions. The 1952 Arrest Convention has made available in a larger number of countries the provisional remedy of arrest or attachment of a vessel in order to assure maritime lienors an effective means of enforcement of their claims.

Unfortunately these two conventions have been only partially successful in achieving their objective of furthering uniformity in the laws of the maritime nations on questions relating to the creation and enforceability of security interests in ships. According to one view, "the principle of uniformity has come into conflict with various private interests which have felt that the added convenience of international accord and predictability would not compensate for the economic disadvantage of alteration of national law."⁴ Chance continues to play a very significant role in determining rights in a vessel, whether arising out of contract claims, tort claims, or security interests. With the laws of nations differing so widely on the creation and enforcement of maritime liens, "a lienor may have his claim substantially satisfied or entirely shut out, depending upon the jurisdiction in which the vessel is seized and sold."⁵

The need for uniformity in this area may be illustrated by posing a number of questions affecting all types of organizations concerned with shipping—whether the financing, construction, ownership or supplying of ships. If a ship mortgage is created in the United States on an American flag vessel, will it be recognized as valid in the many possible countries where the vessel may call and in whose courts the mortgagee may be obliged to assert his rights? If an American creditor holds a ship mortgage on a foreign flag vessel, will the mortgage be enforceable in the United States⁶ or in various foreign coun-

³ See table of states having ratified or adhered to the 1926 and 1952 Conventions, p. 674-75 *infra*. Other nations having patterned domestic law on the conventions are listed on p. 675.

⁴ See Comment, 64 YALE L.J. 878, 899 (1955).

⁵ *Id.* at 893.

⁶ Ship mortgages in the United States are recognized as valid liens in admiralty only if complying with the statutory formalities of the Merchant Marine Act of 1920 § 30 (Preferred Ship Mortgage Act of 1920), 41 Stat. 1005 (1920), 46 U.S.C. §§ 911-61 (1958). The Preferred Ship Mortgage Act was amended June 29, 1954, by what is popularly referred to as the Foreign Ship Mortgage Act, 68 Stat. 323 (1954), 46 U.S.C. § 951

tries? If a supply or repairman in New York furnishes supplies or repairs to a Panamanian vessel, this ordinarily gives rise to a maritime lien under American law⁷ and the supplyman may bring a libel in rem against the vessel and have it sold by order of the court in the event of nonpayment or the shipowner's insolvency. If, however, the vessel never returns to the United States but is known to be lying in a foreign port, may the supplyman enforce his maritime lien there? And if the Panamanian vessel in the example above is subject to a ship mortgage and the funds obtainable from judicial sale of the vessel are insufficient to pay all creditors, who will be entitled to priority—mortgagee or supplyman?

Unfortunately, the answers to these and many other related questions affecting the rights of persons advancing credit to shipowners are far from clear when a ship bearing the flag of one nation and creditors who are nationals of another nation are engaged in litigation in the courts of a third nation, or for that matter, even in the national courts of one of the parties. Although the United States is not a party to either convention, the American litigant may very well find his rights determined according to one or the other or both of these international conventions. Conversely, an American admiralty court adjudicating the rights of foreign litigants should, under modern choice of law principles, apply the maritime law most closely connected with the transaction, and this will not always be the substantive rules of our own maritime law.⁸

(1958). Until this 1954 amendment, it was uncertain whether mortgages on foreign flag vessels would be recognized or could be enforced in United States admiralty courts. See GILMORE & BLACK, *ADMIRALTY* 576-79 (1957) [hereinafter cited as GILMORE & BLACK]. For cases under the 1954 act, see note 108 *infra*.

The history of ship mortgages in the United States and an evaluation of the ship mortgage as a form of investment in the light of the Preferred Ship Mortgage Act of 1920 and recent decisions construing it are excellently treated in Gyory, *Security at Sea: A Review of the Preferred Ship Mortgage*, 31 *FORDHAM L. REV.* 231 (1962).

⁷ The maritime lien law of the United States was made the subject of a federal statute in what is popularly known as the Federal Maritime Lien Act of 1910 (Act of June 23, 1910), 36 Stat. 604 (1910), merged into Merchant Marine Act of 1920 § 30, 41 Stat. 1005 (1920), 46 U.S.C. §§ 971-75 (1958). The supplyman's lien for necessities arising under 46 U.S.C. § 971 is discussed in PART TWO of this article. For a comprehensive discussion of the act, see GILMORE & BLACK 537-68.

⁸ Subject to the doctrine of forum non conveniens, United States admiralty courts take jurisdiction of suits on maritime claims arising out of transactions anywhere in the world. It would be highly unjust to apply United States law to "maritime occurrences having no connection with the United States beyond the circumstance that suit is brought here." GILMORE & BLACK 46-47.

Typical conflict of laws problems in the area of maritime liens will be discussed in PART TWO of this article. Both American and foreign decisions on this subject are cited in 4 RABEL, *CONFLICT OF LAWS: A COMPARATIVE STUDY* [hereinafter cited as RABEL] 113-22 (1958).

In this article, an attempt will be made to correlate the basic provisions of these two conventions, the one dealing with creation and international recognition of liens and mortgages, and the other with their enforcement. The case law support will center on French decisions, for France is one of the few countries to be a party to both conventions and in addition to have enacted domestic legislation based upon the 1926 Convention.⁹ Wherever possible the solutions reached under the conventions will be compared with American admiralty practice.

I

SIGNATORIES TO THE BRUSSELS CONVENTIONS OF 1926 AND 1952

The countries which have ratified or adhered to the 1926 Liens Convention and the 1952 Arrest Convention, or to both, and the dates of their ratification or adhesion are indicated in the table below.¹⁰

Convention on Maritime Liens (1926)		Convention on Arrest of Sea-Going Vessels (1952)	
*Argentina	April 19, 1961	Belgium	April 10, 1961
Belgium	June 2, 1930	*Cambodia	November 12, 1956
Brazil	April 23, 1931	*Costa Rica ¹¹	July 13, 1955
Denmark	June 2, 1930	Egypt ¹²	August 24, 1953
Estonia	June 2, 1930	France	May 25, 1957
*Finland	July 12, 1934	Great Britain and Northern Ireland	March 18, 1959
France	August 23, 1935		

⁹ Since 1885, French maritime cases as well as maritime cases of general international interest from other countries have been reported in a series of periodicals as follows: 1885-1922, *REVUE INTERNATIONALE DE DROIT MARITIME*, vols. 1-34; 1923-1939, *REVUE DE DROIT MARITIME COMPARÉ*, vols. 1-40 (edited by Leopold Dor) [hereinafter cited as *REV. DOR*] and *REVUE DE DROIT MARITIME COMPARÉ: SUPPLEMENT BIMENSUEL DE DROIT MARITIME FRANÇAIS*, vols. 1-17 (also under the editorship of Leopold Dor) [hereinafter cited as *DOR SUPP.*]; 1949-present, *D.M.F.* The early maritime cases are also reported in *JOURNAL DU DROIT INTERNATIONAL PRIVÉ* [hereinafter cited as *CLUNET*] (since 1874) and *JOURNAL DE JURISPRUDENCE COMMERCIALE ET MARITIME DU TRIBUNAL DE COMMERCE DE MARSEILLE*, vols. 1-116 (1820-1939).

The treatises on French maritime law upon which principal reliance was placed in the preparation of this article are *CHAUVEAU, TRAITÉ DE DROIT MARITIME* (1958) [hereinafter cited as *CHAUVEAU*] and *RIPERT, TRAITÉ DE DROIT MARITIME* (4th ed., 3 vols. 1950-53) [hereinafter cited as *RIPERT*]. The French law of February 19, 1949, harmonizing the French Code of Commerce with the 1926 Convention on Liens and Mortgages, is discussed in note 50 *infra*.

¹⁰ This table is based upon information received from the Comité Maritime International, Antwerp, Belgium. See XXVth CONFERENCE MINUTES 208, 212.

¹¹ Costa Rica adhered, subject to reservations, *inter alia*, that a vessel may not be arrested unless it is the vessel with respect to which the maritime lien arose. See 6 *BENEDICT* 14.

¹² Egypt adhered subject to the reservation permitted in the 1952 Convention, art. 10. *Ibid.*

Convention on Maritime Liens (1926)		Convention on Arrest of Sea-Going Vessels (1952)	
Hungary	June 2, 1930	*Haiti	November 4, 1954
Italy	December 7, 1949	Portugal	May 4, 1957
*Monaco	May 15, 1931	Vatican	August 10, 1956
Norway	October 10, 1933	Spain	December 8, 1953
Poland	October 26, 1936	*Switzerland	May 28, 1954
*Portugal	December 24, 1931	*Overseas Territories of France; Togo, Cameroon	April 23, 1958
Rumania	August 4, 1937		
Spain	June 2, 1930		
*Syria	February 14, 1951		
Sweden	July 1, 1938		
*Switzerland	May 28, 1954		
*Turkey	July 4, 1955		

A number of contracting states to the 1926 Convention have enacted domestic legislation based upon the provisions of that convention. These include Belgium,¹³ France,¹⁴ Italy¹⁵ and Poland.¹⁶ The conventions have also been the models for domestic legislation in other countries which neither were signatories nor chose to adhere formally to the conventions, for example, Egypt,¹⁷ Israel,¹⁸ Japan,¹⁹ Lebanon²⁰ and Tunisia.²¹

* States which were not original signatories but which have adhered to the conventions by formally notifying the Belgian government, official custodian of the conventions.

¹³ See Belgian Commercial Code, as amended by Law of Nov. 28, 1928. See *Sté. Walcke Frères v. Van Neuville*, Cour d'Appel, Ghent, June 12, 1933, *aff'g*, *Ostend*, Aug. 12, 1932, 32 *REV. DOR* 126 (1935).

¹⁴ Law of April 19, 1949, modifying French Code of Commerce, arts. 190-96. See note 50 *infra*.

¹⁵ Italian Code of Navigation, arts. 548-64 (1942), translated in MANCA, *THE ITALIAN CODE OF NAVIGATION* (1958). For an American court's view on what constitutes Italian maritime law and what choice of law principles govern in Italian courts, see *Brandon v. S.S. Denton*, 302 F.2d 404 (5th Cir. 1962).

¹⁶ Polish Maritime Code (1961), discussed in Lopuski, *Le premier code maritime de Pologne*, [1962] *D.M.F.* 240. Prior to enactment of this code, Polish maritime law followed the German Commercial Code of 1897, bk. IV.

¹⁷ Law No. 35 of March 6, 1961, adopted the provisions of the 1926 Convention into Egyptian domestic law, with one exception (see note 43 *infra*). See Chlala, Note, [1952] *D.M.F.* 444.

¹⁸ Law No. 5720 of 1960, which came into force February 17, 1961, incorporates the features of the 1926 Convention. Prior to this act, maritime law was a mixture of English and Turkish law. See Friedman, *Le droit maritime d'Israel*, [1962] *D.M.F.* 52; Gottschalk, *Les développements récents du droit maritime Israélien*, [1963] *D.M.F.* 373.

¹⁹ Commercial Code of Japan, bk. IV (Maritime Commerce), ch. VII (Ship's Creditors), arts. 842-51. See also, on privileges, Civil Code of Japan, arts. 303-05, 333-37. The proceeds obtained by a creditor as a result of successful exercise of a preferential right may be taxable under national and local Japanese law.

²⁰ Lebanon, Code de Commerce Maritime, arts. 48-60 (1947).

²¹ Code de Commerce Maritime Tunisien, promulgated in *Journal Officiel*, April 27 and May 4, 1962, incorporates provisions derived from 1926 Liens Convention and 1952 Arrest Convention. See Bokobza, *Aperçus sur le code de commerce maritime tunisien*, [1962] *D.M.F.* 760, where the author also points out that maritime codes have recently been promulgated in other newly independent nations including Malegache Republic (June 15, 1960); Ivory Coast (November 9, 1961); Mauritania (January 20, 1962); Cameroon (March 31, 1962) and Senegal (not yet in effect).

II

THE 1926 CONVENTION ON LIENS AND MORTGAGES

One of the principal purposes of the 1926 Convention was to assure recognition in the courts of one country of ship mortgages validly executed according to the laws of another country. A second objective was to fix by international agreement the types of maritime claims entitled to recognition as liens and to preference over mortgages in the event of a shipowner's insolvency.²²

A. Uniform Recognition of Mortgages

Article 1²³ of the 1926 Convention provides for the uniform recognition in the courts of any contracting state of ship mortgages or hypothecations created under the laws of another contracting state. This provision has the effect of a uniform choice of law rule under which the validity of a mortgage on a vessel is to be determined by the law of the flag, rather than by the law of the place of contracting or the law of the forum. The principle of the 1926 Convention that the validity of ship mortgages should be governed by the law of the flag has gained general acceptance, even in non-signatory countries, such as Great Britain²⁴ and the United States.²⁵

²² The 1926 Convention represented over twenty years of deliberations by the Comité Maritime International. These efforts at international unification are reviewed in detail in PRICE 218-37. Prior to World War I, the United States delegation was very much opposed to suggestions that the lien for necessities be relegated to an inferior position. By the time objections of the United States delegation were heeded and a lien for necessities was given priority over mortgages, the relative ranking of liens and mortgages had been reversed in the United States by virtue of the Ship Mortgage Act of 1920. See also Franck, *The New Law for the Seas*, 42 L.Q. REV. 308 (1926); Ripert, *La Conférence Diplomatique de 1926*, 14 REV. DOR 34 (1936); Comment, *supra* note 4, at 893-905.

²³ Article 1 provides: "Mortgages, hypothecations and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or at a central office, shall be recognised and treated as valid in all the other Contracting States."

²⁴ In *The Colorado*, [1923] P. 102 (C.A.), a French vessel was arrested by an English repairman. The mortgagee, holding a "hypothèque" registered under the law of France, intervened. It was held that the mortgagee should be treated as having a claim equivalent to a domestic registered mortgage, with priority over the repair lien, and not as having an unregistered mortgage. While under French law a mortgagee did not possess the right to take possession, but only a right to proceed by legal process to arrest the vessel, nevertheless this right followed the ship into whoever's hands it might come, and hence the mortgagee had a property right in the vessel at the time when the repairman arrested her. The case is noted in 2 REV. DOR 191 (1923). In *The Acrux*, [1962] 1 Lloyd's List L.R. 405 (Adm. Div. 1962), [1963] D.M.F. 242, an English court gave effect to an Italian mortgage. See also Lord & Glenn, *The Foreign Ship Mortgage*, 56 YALE L.J. 923, 931-34 (1947).

²⁵ Foreign Ship Mortgage Act of 1954, 68 Stat. 323 (1954), 46 U.S.C. § 951 (1958). See note 108 *infra*. Prior to the 1954 enactment, the status of foreign ship mortgages

It may fairly be said that the convention was "the first significant step toward a firm international recognition of rights in vessels."²⁶ Thus in courts of contracting states, mortgages on vessels of contracting states will by virtue of the convention be governed by the law of flag; mortgages on vessels of noncontracting states, e.g. a mortgage upon a United States flag vessel in France, will most likely be governed by the law of the flag under general conflict of laws principles rather than under the convention.²⁷

Aside from the question of uniform recognition of mortgages, the other pressing problem of an international dimension in 1926 was the determination of the number of maritime liens entitled to preference over mortgages. Even in those countries where they were recognized as valid, foreign ship mortgages were treated as inferior in rank to the older maritime liens like materialmen's liens, bottomry and respondentia.²⁸ A vessel subject to a ship mortgage would pick up higher ranking liens as it traveled from port to port, prejudicing the security of mortgagees. Article 3²⁹ of the 1926 Convention established that mortgages rank immediately below certain types of liens enumerated in article 2,³⁰ which include materialmen's liens. In this respect the convention differs from American law where, under the Preferred Ship Mortgage Act of 1920, registered mortgages

in United States courts was dubious. See *The Secundus*, 15 F.2d 711 (E.D.N.Y. 1926); GILMORE & BLACK 576-79.

²⁶ 4 RABEL 110. The ship mortgage was a mid-19th century innovation, developed during the period of transition from sail to steam to provide security to lenders who financed the construction of ships. CHAUVEAU 121-22. The Anglo-American courts were first inclined not to recognize ship mortgages as within the admiralty jurisdiction. In the United States, the ship mortgage was considered to be a nonmaritime contract. *The J. E. Rumbell*, 148 U.S. 1 (1893); *Bogart v. The John Jay*, 58 U.S. (17 How.) 399 (1854). In England, the mortgage statute granted recognition in admiralty to registered domestic mortgages only. See Lord & Glenn, *supra* note 24, at 923, 932.

In civil law countries where the chattel mortgage was unknown, the ship mortgage was especially suspect. The early decisions in France and Belgium, for example, refused to give effect to English mortgages and Greek hypothecations. See decisions collected in 2 RIPERT 24. It was not until the laws permitting the hypothecation of vessels were enacted in France and Belgium that the courts there came to recognize foreign mortgages and to hold that an English mortgage was similar in essential respects to a civil law hypothecation. *Barbaressos v. Mitaras*, Marseille, April 8, 1876, 3 CLUNET 455 (1876), *Cour d'Appel*, Aix, Nov. 22, 1876 (1878), *Cour de Cassation* (Ch. Civ.), Nov. 25, 1879, 7 CLUNET 583 (1880).

²⁷ *The Wang Importer*, Tribunal de Grande Instance, St. Nazaire, May 26, 1961 (unreported), *on appeal*, *Cour d'Appel*, Rennes, Feb. 6, 1962, [1962] D.M.F. 475 (court looked to American law to determine validity of mortgage on American flag vessel). See 4 RABEL 111 and discussion on conflict of laws in PART TWO of this article. Foreign decisions giving effect to United States preferred ship mortgages are discussed in Gyory, *supra* note 6, at 251-52.

²⁸ See Lord & Glenn, *supra* note 24, at 926-27.

²⁹ See note 69 *infra*.

³⁰ See note 37 *infra*.

on United States vessels have priority over subsequent materialmen's liens,³¹ and mortgages on foreign flag vessels have substantially the same priority as domestic mortgages, except that liens of United States materialmen will prevail over the foreign mortgage.³² Likewise in Great Britain, registered ship mortgages are superior in rank to claims of supply and repairmen under municipal law.³³

The difficult problems of priority arise when a vessel of a nonconvention state is arrested and sold in a contracting state, or a vessel of a contracting state is libeled in a nonconvention state such as the United States. Although validity of a foreign mortgage is usually governed by the law of the flag, the relative priority of mortgages and nonconsensual liens is usually subject to the *lex fori*.³⁴

The 1926 Convention does not purport to regulate the formalities necessary for the creation of a mortgage or to set forth the respective rights of mortgagor, mortgagee or holder of a "hypothèque." These matters are left to domestic law.³⁵

B. Maritime Liens and Their Ranking

1. *Liens Entitled to International Recognition*

The 1926 Convention equates the maritime lien of Anglo-American admiralty law with the "privilege" recognized in the civil law

³¹ 41 Stat. 1003, § 30K (1920), as amended, 68 Stat. 323 (1954), 46 U.S.C. § 951 (1958). See text at notes 104-08 *infra* for a discussion of the relative priority of mortgages and materialmen's liens under United States law and under the convention.

³² 68 Stat. 323 (1954), 46 U.S.C. § 951 (1958). See note 108 *infra*.

³³ Under English law, supply and repairmen are considered to have "statutory" maritime liens, under § 6 of the Admiralty Court Act of 1840, 3 & 4 Vict. c. 65, and § 5 of the Admiralty Court Act of 1861, 24 Vict. c. 10. Statutory liens, as compared to the ancient liens of wages, salvage, collision, bottomry, attach to the vessel only upon its arrest, as opposed to the time when the underlying obligation arises. TEMPERLEY, *MERCHANT SHIPPING ACTS* 32 (6th ed. 1963) [hereinafter cited as TEMPERLEY]. The registered ship mortgage has, by judicial decision, been given a relative priority subsequent to the ancient liens existing before creation of the mortgage, but prior to the "statutory" liens. Lord & Glenn, *supra* note 24, at 932; PRICE 106-07.

³⁴ 4 RABEL 119-22. See also PART TWO of this article dealing with the Brussels conventions and conflict of laws problems.

³⁵ Liens Conv., art. 12, provides that: "National laws must prescribe the nature and form of documents to be carried on board the vessel on which entry must be made of mortgages, hypothecations, and other charges referred to in Article 1"

The convention treats common law mortgages and civil law hypothecations as being substantially equivalent. The Anglo-American ship mortgage developed out of the chattel mortgage. Since chattel mortgages were not recognized in civil law, the hypothecation of vessels was the outgrowth of the hypothèque on land and immovables. The essential difference between the mortgage and hypothèque lies in the mortgagee's automatic right to take possession of the vessel upon the mortgagor's default. See TEMPERLEY 28; note 29 *supra*. For a full comparative treatment, see Franck, *De l'Hypothèque Maritime: Droit Comparé et Conflit de Lois*, 11 REV. INT. DU DROIT MARITIME 256 (REV. AUTRAN) (1895-96).

countries³⁶ and then attempts to reduce conflict of laws problems by providing a uniform set of rules which are to be applied in each of the contracting states on the questions of creation, extinction, and relative priority of liens. The convention divides liens into two categories. The first category³⁷ includes five classes of liens which must be accorded international recognition in the courts of any contracting state; these liens will prime ship mortgages.³⁸ The second category³⁹ includes any liens existing under the domestic law of a contracting state but not recognized as a lien in the first category; liens in the second category are inferior to ship mortgages.⁴⁰

The five classes of liens in the first category are (1) legal costs and expenses of preserving the vessel during the period in which it

³⁶ Maritime liens are in essence secret liens, neither dependent upon possession nor requiring recording or notice of any kind. They are largely nonconsensual and arise by operation of law out of certain claims in contract and in tort. They have little in common with the liens recognized on land. See GILMORE & BLACK 480-83; PRICE 1-15; Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381 (1930).

The American lien has recently been described as a synthesis of rights, including "the creditor's right to be satisfied out of a particular piece of the debtor's property, the creditor's preferred rank entitling him to full satisfaction to the extent of the property's value ahead of other creditors and the right to follow the property and make a claim upon it after its ownership has been transferred." On the continent, the privilege is essentially one against the owner, but with a right over to his property. Gyory, *supra* note 6, at 251. There are at least five different systems of allowing privileged rights in the case of a judicial sale of a vessel. 4 RABEL 114. On maritime liens in Great Britain, see note 33 *supra*.

³⁷ Liens Conv., art. 2: "Maritime liens shall attach to a vessel, to the freight for the voyage during which the secured claim arises, and to the accessories of the vessel and freight accrued since the commencement of the voyage, in respect of the following—

(1) Law costs and fees due to the state and other expenses incurred in the common interest of the creditors in order to preserve the vessel, or to procure her sale and the distribution of the proceeds of sale; tonnage dues, light, dock and harbour dues, and other public rates and charges of the same character; charges for pilotage, and charges for watching and preserving the vessel from the time of her entry into the last port;

(2) Claims under the contract of service of the master, crew, or other persons serving on board the vessel;

(3) Remuneration for salvage, and the contribution of the vessel in general average;

(4) Claims due for collision or other accidents of navigation, and for damage caused to works in or about harbours, docks, and navigable waterways; for personal injury to passengers or crew and for loss of or damage to cargo or passengers' baggage;

(5) Claims resulting from contracts entered into or transactions carried out by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or transactions are necessary for the preservation of the vessel or the continuation of her voyage, whether the master is or is not at the same time owner of the vessel, and whether the claim is his own or that of ship suppliers, repairers, lenders or other contractual creditors."

³⁸ Liens Conv., art. 3, para. 1, note 69 *infra*.

³⁹ *Id.* at para. 2.

⁴⁰ *Ibid.*

is in the custody of the court;⁴¹ (2) wages of master and crew;⁴² (3) salvage, general average; (4) claims for collision and damage to harbors and canals,⁴³ personal injury and damage to cargo;⁴⁴ (5) supplies, repairs and master's disbursements.⁴⁵ A lienor in the first category enjoys two advantages over an ordinary creditor: first, a right to follow the vessel and assert the lien against it, even into the hands of a bona fide purchaser;⁴⁶ secondly, a right of preference over

⁴¹ See, e.g., *The Wang Importer*: (Sté. Algérienne des Pétroles Mory, République Federale des États Unis v. Sté. Emerson S.S. Corp., États Français), Cour d'Appel, Rennes, Feb. 6, 1962, [1962] D.M.F. 475, where court holding proceeds totaling 1,180,000 new francs from sale of a vessel held that first priority should be granted to legal costs of 996.43 N.F. under art. 191 (1) of the Code of Commerce; second priority to a privileged claim of 116,717.30 N.F. for expenses of arresting the vessel and preserving it (including watchmen's fees) under the Code, art. 191 (2). In the lower court proceeding (Tribunal de Grande Instance, St. Nazaire, May 26, 1961 (unreported)), the American mortgagee was granted preference over all but local costs of attachments and actual wages. Apparently the French court rejected an attempt by American pension and welfare vacation plans to pursue remedies in France which did not exist in America. See Gyory, *supra* note 6, at 251-53. Related actions were brought in United States courts. See Barnouw v. The Ozark, 304 F.2d 717 (5th Cir. 1962), *cert. denied*, 371 U.S. 923 (1962); Wall St. Traders, Inc. v. Wang, 1961 Am. Mar. Cas. 986 (Sup. Ct. N.Y. 1960), *aff'd*, 13 App. Div. 2d 767, 217 N.Y.S.2d 501 (1961) (memorandum decision).

⁴² E.g., *The Wang Importer*, *supra* note 41 (American crewmen and officers entitled to privilege under art. 191 (3) of French Code of Commerce for wages and other benefits owing under contracts of service and repatriation costs); *Decima v. Sté. Comaric*, Trib. Comm., Seine, June 9, 1958, [1959] D.M.F. 434 (wages of musicians on cruise ship privileged under art. 191 (3)); *Faux v. Faillite des Etablissements Métallurgiques Moyen*, Trib. Comm., Cherbourg, Nov. 12, 1954, [1955] D.M.F. 487 (wages of master); *The Agadir*: (Syndic de la faillite Cie. générale de gérance d'affrètements et de navigation v. Cie. privée marocaine), Cour d'Appel, Rabat, Morocco, Jan. 5, 1954, [1954] D.M.F. 623 (medical expenses of crew; repatriation costs).

⁴³ Under Egyptian domestic law based upon the convention, the liens for damage to canals and harbor works rank first. See note 17 *supra*.

⁴⁴ The continental law on privileges, much of it based upon the French Commercial Code of 1808, did not originally grant a maritime privilege to tort, salvage or general average claims. Ripert, *La réforme des privilèges maritimes par la loi du 19 fevrier 1949*, [1949] D.M.F. 223, 226.

⁴⁵ See notes 77, 108 *infra* and accompanying text.

⁴⁶ *Liens Conv.*, art. 8: "Claims secured by a lien shall follow the vessel into whatever hands she may pass." See, e.g., *Faux v. Faillite des Etablissements Métallurgiques Moyen*, Trib. Comm., Cherbourg, Nov. 12, 1954, [1955] D.M.F. 487 (purchaser of vessel liable for wage claims of captain and captain's disbursements for necessities). This right to follow the vessel, in French *droit de suite*, corresponds to what in American admiralty is referred to as the indelibility of liens, and is reflected in the right of the lienor to sue the vessel itself in an in rem proceeding. See GILMORE & BLACK 482, 489-92. English lien theory differs somewhat, in that the proceeding in rem is in substance a proceeding against the owner. See Hebert, *supra* note 36. Continental jurisdictional concepts, which will be discussed in PART TWO of this article, do not recognize an action in rem, and all actions are in personam.

Although the *droit de suite* in article 8 is not expressly limited to voluntary alienations, it should, under general principles of law, be so limited. Despite occasional decisions to the contrary, judicial sales by admiralty courts having proper jurisdiction

mortgagees and other creditors.⁴⁷

The convention itself is primarily applicable in courts of the contracting states to resolution of disputes involving nationals or vessels of other contracting states.⁴⁸ Ratification or adhesion to the convention was, however, but a first step towards international unification and the reduction of conflicts in domestic laws. A second step was the enactment of domestic legislation based upon the convention.⁴⁹ This has required reduction in the number of liens recognized for domestic law purposes to the five classes in the first category. Thus, for example, in France the Law of February 19, 1949, caused the provisions of the convention to be codified as part of the Code of Commerce, replacing obsolete articles on maritime privileges which dated from 1808.⁵⁰ One of the principal changes effected by this legislation was elimination of many maritime privileges of a contractual nature⁵¹ and the recognition for the first time in France of privileges for salvage, general average and for maritime tort claims, such as collision and personal injury, which enjoyed lien status under Anglo-American law but not generally under continental law.⁵² Thus one of the benefits of the convention has been to reduce the number of differences between types of claims giving rise to liens under Anglo-American law on the one hand and to privileges under continental law on the other.

accompanied by sale of the vessel are internationally recognized. See 4 RABEL 108; note 67 *infra*.

It should be noted, further, that the *droit de suite* of certain liens may be extinguished if the applicable domestic law provides a system for giving preliminary notice of a contemplated sale at the port of registry. See Liens Conv., art. 9, para. 4; text accompanying note 64 *infra*.

⁴⁷ Liens Conv., art. 3, para. 1, note 69 *infra*.

⁴⁸ Liens Conv., art. 14: "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."

⁴⁹ See notes 13-21 *supra*.

⁵⁰ Law No. 49-226 of Feb. 19, 1949, Journal Officiel de la République Française 1890 [hereinafter cited as J.O.], Feb. 19, 1949, [1949] D.M.F. 345. This law repealed old arts. 190-96 of the Code of Commerce and substituted therefor new arts. 190-96; it also modified art. 214 of the Code of Commerce (relating to priorities between creditors) and arts. 320 and 331 of the Code of Commerce. Inconsistent provisions of the Law of July 10, 1885, the basic French statute relating to ship hypothecations, were abrogated. For legislative history of Law of 1949 see Ripert, *supra* note 44. This law was made applicable to French overseas territories and to the then trusteeship territories of Togo and Cameroons by Decree No. 50-1047, Aug. 19, 1950, J.O. 9199, Aug. 27, 1950.

⁵¹ *E.g.*, privileges given formerly to shipbuilders, outfitters, insurance companies for premiums, towage, warehousemen. See CHAUVEAU 132-33; PRICE 190-205; Ripert, *supra* note 44, at 227.

⁵² See note 44 *supra*.

2. Property Subject to Liens or Privileges

Liens or privileges attach to the "vessel,"⁵³ the "freight for the voyage during which the secured claim arises"⁵⁴ and to the "accessories of the vessel."⁵⁵ If a vessel has been chartered by the owner, the provisions of the convention on the creation of liens continue to apply, even where a charter party provides that the charterer shall not be authorized to permit liens to attach against the vessel.⁵⁶ There are no formalities prescribed for proof of the liens enumerated in article 2, except in so far as domestic law applicable otherwise pro-

⁵³ See Liens Conv., art. 2, note 37 *supra*. The vessel includes the hull, appurtenances, victuals, food, and generally all equipment on board. CHAUVEAU 137. When a wrecked vessel has been deregistered, the privilege is deemed extinguished. See Trésor Public v. Sté. d'Entreprise de Travaux Publics de l'Ouest, Cour de Cassation (Ch. civ., sect. comm.), March 8, 1954, [1954] D.M.F. 325. On circumstances under which a lien attaches to a wreck under United States law, see PRICE 171.

⁵⁴ Liens Conv., art. 2, *supra* note 37. The last paragraph of article 4 provides, however, that the lien of master and crew for wages, etc. attaches to the "total freight due for all voyages" and not merely the last voyage. See CHAUVEAU 137.

⁵⁵ Liens Conv., art. 4, provides, in part: "The accessories of the vessel and freight, mentioned in Article 2, mean—

(1) Compensation due to the owner for material damage sustained by the vessel and not repaired, or for loss of freight;

(2) General average contributions due to the owner, in respect of material damage sustained by the vessel and not repaired, or in respect of loss of freight;

(3) Remuneration due to the owner for salvage services rendered at any time before the end of the voyage, excluding any sums allotted or apportioned to the master or other persons in the service of the vessel.

Freight shall be deemed to include passage money. In cases where liability is limited pursuant to the provisions of the Convention on the Limitation of Shipowners' Liability the fixed sum of 10 per cent on the value of the vessel at the beginning of the voyage provided for by Article 4 of that Convention shall be substituted for freight for the purpose of this Convention.

Payments made or due to the owner on policies of insurance, as well as bounties, subventions, and other national subsidies, are not included as accessories of the vessel or of the freight.

Notwithstanding anything in the opening words of Article 2, the lien in favour of persons in the service of the vessel shall extend to the total amount of freight due for all voyages made during the subsistence of the same contract of service."

Insurance proceeds are specifically excluded from the accessories of the vessel to which liens or privileges attach. See Liens Conv., art. 4, and its French domestic law equivalent, art. 192, Code of Commerce. Prior to the reform law of 1949, this point was unclear in France. See CHAUVEAU 138. As a result of the law of 1949, it is now possible in France for mortgagees to expressly provide in the ship mortgage that the proceeds of insurance will first be allocated to satisfaction of the mortgage. Compare with doctrine under United States law that when a vessel is destroyed, the lien does not attach to the insurance money, this being the proceeds of a collateral personal contract between the owner and the insurer, and not an interest in the vessel. *A. M. Bright Grocery Co. v. Lindsey*, 225 Fed. 257 (S.D. Ala. 1915); PRICE 171.

⁵⁶ Liens Conv., art. 13: "The foregoing provisions of this Convention also apply to vessels in the possession of a time charterer or other person operating, but not being the owner of the vessel, except in cases where the owner has been dispossessed by an illegal act, or where the claimant is not a *bona fide* claimant."

vides.⁵⁷ It should be noted that the convention does not apply "to vessels of war, nor to government vessels appropriated exclusively to the public service."⁵⁸

3. *Extinction of Liens*

Liens or privileges may be extinguished by (1) the passage of time, (2) voluntary sale of the vessel or (3) judicial sale upon foreclosure. Article 9 (1) of the 1926 Convention provides explicit guidance on the first of these grounds for extinction. A lienor must look to municipal law and to the "general maritime law" to determine the effect of sales, whether voluntary or in judicial foreclosure proceedings, upon his right to exercise a lien or privilege against the vessel in the hands of a purchaser.

One of the principal differences between the 1926 Convention and United States law is that the convention sets a fixed period of limitation within which liens must be enforced. The purpose of this provision is to provide for a quick turnover of those liens which arise by operation of law without any formality and of which future creditors have no notice. The limitation period is one year, except in the case of supply and repair liens where the period is six months.⁵⁹ Of course, if the lien or privilege has been extinguished, the debtor continues to be liable on the underlying claim.⁶⁰ All that the creditor loses is the right of preference and the right to follow the vessel.

Under United States admiralty law, there is no fixed period of limitation within which maritime liens must be enforced. Rather, the doctrine of laches applies under which the particular equitable circumstances of each case determine whether the creditor has acted with sufficient promptness to allow his claim as a lien upon the vessel.⁶¹

⁵⁷ Liens Conv., art. 11. One of the principal reforms resulting from adoption of the Law of Feb. 19, 1949, in France was the elimination of detailed formalities of proof of maritime privileges under the old articles of the Code of Commerce.

⁵⁸ Liens Conv., art. 15.

⁵⁹ Liens Conv., art. 9 (1): "Maritime liens shall cease to exist, apart from any provision of national laws for their extinction upon other grounds, at the expiration of one year: provided that the lien referred to in Article 2 (5) for necessities supplied to the vessel shall cease at the expiration of six months."

⁶⁰ See CHAUVEAU 307-21 and art. 216, French Code of Commerce. However, the owner may limit his liability in France to his *fortune de mer* by abandoning the vessel, freight, etc. See notes 109-13 *infra* for discussion on limitation of liability proceedings.

⁶¹ *The Key City*, 81 U.S. (14 Wall.) 653 (1871). See GILMORE & BLACK 606, 627-40. In some cases, the state lien acts, relics of the era before federal enactment of the

Since one of the principal rights of a lienor is the right to arrest the vessel and, if necessary, to require its sale and payment from the proceeds, there is a distinct drawback to an arbitrary time limitation. A claimant who has not had a reasonable opportunity to arrest a vessel should not be barred from enforcing his lien. Article 9 (6)⁶² of the convention attempts to mitigate the rigid time limitation of article 9 (1) by providing that in the event a vessel cannot be found within the territorial waters of a contracting state during a period of six months, national legislation may provide for a longer period, not to exceed three years, within which the vessel may be arrested. This provision is far from satisfactory, however, because not all the signatories to the 1926 Convention have enacted such legislation. Thus in a case involving a vessel named *Commodore Grant*,⁶³ a conflict arose between Spanish law, which extended the statute of limitations under such circumstances, and French law, which did not. The plaintiff, a Spanish supplyman, had arrested the vessel in Marseille, France, eighteen months after furnishing fuel oil under circumstances giving rise to a lien or privilege under article 2 (5) of the convention. Spain, the place where the supplies were furnished, was a signatory to the 1926 Convention and had availed itself of the reservation permitted in article 9 (6), allowing a creditor up to three years in which to enforce its claim. France was a contracting state but had not passed legislation of the type permitted in article 9 (6). The shipowner, after obtaining release of the vessel upon posting security, appealed from the order of arrest, first to the Court of Appeal of Aix and then to France's highest tribunal, the Court of Cassation. It alleged that, more than six months having elapsed since the supplies were furnished, the arrest was improper. It was held upon a remand to the Court of Appeal of Nîmes that arrest was governed by the *lex fori*, and under French law the strict six

Maritime Lien Act of 1910, may provide limitation periods; however these will be merely indicative of whether or not a creditor has acted promptly.

⁶² Liens Conv., art. 9 (6): "The High Contracting Parties reserve to themselves the right to provide by legislation in their respective countries that the said periods shall be extended, in cases where it has not been possible to arrest the vessel to which a lien attaches in the territorial waters of the state in which the claimant has his domicile or principal place of business, provided that the extended period shall not exceed three years from the time when the obligation attached."

⁶³ The *Commodore Grant*: (North Eastern Freighters, Ltd. v. Cia Espanola de Petroleos, S.A.), Trib. Comm., Aix en Provence, Jan. 13, 1954, [1955] D.M.F. 375, *aff'd*, Cour d'Appel, Aix, May 11, 1954, [1955] D.M.F. 157, *on appeal*, Cour de Cassation (Ch. civ., sect. comm.), July 17, 1957, [1958] D.M.F. 54, *on remand*, Cour d'Appel, Nîmes, July 2, 1958, [1959] D.M.F. 593.

months limitation was applicable. Hence the arrest was unjustified and the supplyman was not entitled to a lien or privilege.

Assuming that the time limitations of article 9 (1) have not run, article 9 (4) provides that liens or privileges on a vessel may be extinguished in a shorter time if the vessel is sold and notice of sale is publicized, in the manner provided under the municipal law of a contracting state.⁶⁴ In comparison, under American admiralty law it is a fundamental characteristic of the maritime lien that a lienor is entitled to pursue his in rem remedy against a bona fide purchaser.⁶⁵

The 1926 Convention is virtually silent⁶⁶ on the question of the recognition to which a judicial sale in a contracting state is entitled in another contracting state, as, for example, the sale of a vessel of state A in the courts of state B. As a matter of general maritime law, attachments, seizures and judgments in rem by a competent admiralty court are internationally recognized⁶⁷ despite occasional

⁶⁴ Liens Conv., art. 9 (4): "It shall not be permissible by a national law to make the sale of the vessel a ground for extinction of any lien upon her unless the sale is accompanied by such publicity as may be prescribed by the national law, including notice to the authority charged with keeping registers referred to in Article 1 of this Convention of such length and in such form as may be so prescribed."

In France, for example, art. 196, Code of Commerce, provides that all privileges will be deemed extinguished two months after publication in an official bulletin of notice of the sale or change of ownership of a vessel.

⁶⁵ GILMORE & BLACK 510.

⁶⁶ Liens Conv., art. 16: "Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunals, mode of procedure or methods of execution authorised by the national laws."

⁶⁷ For collected decisions from various countries, see 4 RABEL 108. In *The Acrux*, [1962] 1 Lloyd's List L.R. 405 (Adm. Div. 1962), [1963] D.M.F. 242, an Italian vessel was arrested in England by a French supplyman and multiple creditors intervened including an Italian bank as mortgagee under an Italian ship mortgage. The vessel was sold by court order to a Liberian company, which was unable to register the vessel because the Italian ship registrar refused to recognize the English sale, ordered by the court over the objection of the Italian liquidator. The court, as a condition to payment of the funds from its registry to the mortgagee, required the mortgagee to file an undertaking that it would not proceed elsewhere in the world against the ship in respect to the unsatisfied balance of its mortgage claim. The court emphasized that the purchaser received a valid title good against all the world: "So far as all claimants against this ship before her arrest are concerned, their claims are now against the fund in this Court. . . . Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give a clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court. . . ."

"This Court recognizes proper sales by competent courts of Admiralty, or Prize, abroad—it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade." [1962] 1 Lloyd's List L.R. at 409. The English court relied principally on two older decisions, *Castrique v. Imrie*, L.R. 4 H.L. 414 (1869) and *The Tremont*, 1 Wm. Rob. 163, 166 Eng. Rep. 534 (Adm. 1841).

decisions to the contrary.⁶⁸

4. Priorities

Articles 3, 5 and 6 of the convention set up a system of priorities. Article 3⁶⁹ provides that liens in the first category (including supply and repair liens) will prevail over mortgages, hypothecations and other charges. As between the five classes of liens in the first category, their rank is in the order of their enumeration in article 2, e.g., legal costs, etc., wages, salvage, general average, tort claims, supply and repairmen.⁷⁰ Multiple liens of the same class are ranked inversely by voyage, *i.e.*, last voyage first.⁷¹ Liens of the same class and voyage "share equally and *pro rata* in the event of the fund available being insufficient to pay the claims in full,"⁷² except that salvage, general average, and supply and repair liens⁷³ of the same

A creditor having a lien on a German flag vessel who fails to receive notice of a foreclosure in a foreign country may have a restitution remedy against claimants who have been paid out of the proceeds of sale. In Federal Court of Justice, July 6, 1961, II ZR 161-66, von Laun, *Jurisprudence allemande de Droite Maritime*, [1963] D.M.F. 46, a German flag vessel was sold at execution sale in Sweden. Two German mortgages intervened and shared in the proceeds. The plaintiff, who never received notice of the Swedish proceeding but who had a claim under the social security laws, brought an action for restitution against the mortgagees on theory that they were unjustly enriched in receiving more than their *pro rata* share of proceeds. Such action was justified on the ground that the sale in Sweden cut off plaintiff's rights against the vessel, although plaintiff had a claim which under German law primed the mortgages.

Although there are no recent American cases, the basic rule is that a sale in an *in rem* proceeding divests all liens against the ship in the hands of the purchaser, not merely all liens held by claimants who intervened in or had notice of the proceeding. See *Zimmern Coal Co. v. Coal Trading Ass'n*, 30 F.2d 933 (5th Cir. 1929); *The Trenton*, 4 Fed. 657 (E.D. Mich. 1880); RESTATEMENT, CONFLICT OF LAWS, § 98, illustration 1 (1934). See also GILMORE & BLACK 640-44; Gyory, *Security at Sea: A Review of the Preferred Ship Mortgage*, 31 FORDHAM L. REV. 231, 261-62 (1962).

⁶⁸ In 4 RABEL 108 it is noted that: "Unjustifiedly, however, the French Court of Cassation, in its only decision in point, has proclaimed that a mortgage in a French vessel cannot be purged by a foreign sale of the ship, but only by application of the French procedure, that is, in a French Court."

⁶⁹ Liens Conv., art. 3: "The mortgages, hypothecations and other charges on vessels referred to in Article 1 shall rank immediately after the liens mentioned in the preceding Article."

"National laws may grant a lien in respect of claims other than those specified in the preceding Article; but no modifications may be made in the priority conferred on mortgages, hypothecations or other charges, nor in that of the liens which take precedence thereof."

⁷⁰ Liens Conv., art. 5, first sentence.

⁷¹ Liens Conv., art. 6: "Claims secured by a lien and attaching to the last voyage shall have priority over those attaching to previous voyages; provided that claims under one and the same contract of service extending over several voyages shall all rank with claims attaching to the last voyage."

⁷² Liens Conv., art. 5, para. 1; *id.* art. 6.

⁷³ Liens Conv., art. 5, para. 2.

voyage rank inversely to the order in which they arose. Liens in the second category, if any, follow mortgages, but prime claims of ordinary creditors.⁷⁴

The principal difference in United States law on the ranking of liens relates to the position of ship mortgages. Under the convention, liens of a contractual nature, such as supplymen's and repairmen's liens, will prevail over ship mortgages,⁷⁵ if timely exercised, whereas under American law, preferred ship mortgages will prevail over liens of supply and repairmen.⁷⁶ However, this priority of supply or repairmen under the convention is somewhat illusory because, as will be explained below, the circumstances under which these claims are privileged or give rise to liens are much more limited than in the United States.

5. *Position of Materialmen and Mortgages Compared*

The comparative position of mortgagees and materialmen under the convention, on the one hand, and under United States law, on the other, can be summarized as follows:

a. Lien status is conferred upon supply or repair claims only if the supplies or repairs are furnished outside of the home port of the vessel; no such home port limitation now exists under United States law.

b. Under the convention, supply and repairmen must prove that the supplies or repairs were "necessary for the preservation of the vessel or the continuation of her voyage"; under United States law, the test of necessity is less stringent.

c. A shipowner who charters a vessel cannot contractually relieve himself of liability for supply and repair liens incurred by the charterer, whereas he may do so under United States law.

d. Under the convention, a strict time limitation period of six months will extinguish the lien; under United States law, the more flexible doctrine of laches prevails.

e. Generally speaking, under the convention, but not under United States law, supply and repair liens will prime mortgages; however, this broad statement is subject to qualifications.

⁷⁴ Liens Conv., art. 3 (2), note 39 *supra*. For examples of claims privileged under French domestic law, but not under the convention, see notes 103-05 *infra*.

⁷⁵ See Liens Conv., art. 3, note 69 *supra*.

⁷⁶ The order of priority in United States courts is as follows: (1) law costs, (2) liens arising prior in time to recording of preferred mortgages, (3) tort damages, (4) wages of crew and stevedores, (5) general average and salvage, (6) preferred mortgages, (7) supplies, repairs, towage, etc., (8) nonmaritime claims including nonpreferred mortgages. Ship Mortgage Act of 1920, 41 Stat. 1003, § 30 (M), 46 U.S.C. § 953 (1958). See 1 BENEICT 19 (6th ed. 1940).

a. *Home Port Exclusion.* Under the Federal Maritime Lien Act of 1910,⁷⁷ a supply or repair lien will arise regardless of the place where furnished. Under the 1926 Convention⁷⁸ and under its domestic law codifications (e.g., article 191 (6) of the French Code of Commerce),⁷⁹ a lien attaches upon vessels only if repairs or supplies were furnished outside of the vessel's port of registry. This limitation reflects the view that the principal purpose for granting a lien or privilege to supply and repairmen was to assure credit to the vessel in foreign ports where the owner was unknown. A shipowner dealing with materialmen in the home port of his vessels could arrange for other types of security, and it was believed by the draftsmen of the convention that the position of mortgagees should not be weakened by allowing claims incurred in the vessel's port of registry to continue to rank ahead of ship mortgages.⁸⁰

b. *Types of Transactions Giving Rise to a Lien.* Under the United States federal maritime law, materialmen's liens arise in favor of "any person furnishing repairs, supplies, towage, use of dry-dock or marine railways or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of the vessel or any other person authorized by the owner"⁸¹ This language may be compared with article 2 (5)⁸² of the 1926 Convention and

⁷⁷ 36 Stat. 604 (1910) merged into 41 Stat. 1005, § 30 (P) (1920), 46 U.S.C. § 971 (1958). See 46 U.S.C. § 971 quoted in text at note 81 *infra*. Prior to the Act of 1910, liens under the federal general maritime law did not attach upon vessels repaired or furnished in home port. GILMORE & BLACK 527-29, 548. In such cases, a supply or repairman was presumed to intend to deal directly with the owner and was not extending credit to the vessel. This rule was changed by the Maritime Lien Act of 1910, so that now in the United States a supply or repair lien attaches upon a vessel, if the requirements of the act are met, regardless of whether in the home port or outside thereof. *The Little Charley*, 31 F.2d 120 (D. Md. 1929). *But see The Muskegon*, 275 Fed. 348 (2d Cir. 1921); *The Princess*, 12 Fed. 2d 808 (D.C.N.Y. 1926).

⁷⁸ Liens Conv., art. 2 (5), note 23 *supra*.

⁷⁹ See, e.g., *The Wang Importer*, Cour d'Appel, Rennes, Feb. 6, 1962, [1962] D.M.F. 475, construing art. 191 (6), French Code of Commerce. CHAUVEAU 135.

⁸⁰ See note 22 *supra*.

⁸¹ Maritime Lien Act of 1910, 36 Stat. 604, as amended, 41 Stat. 1005 (1920), 46 U.S.C. §§ 971-75 (1958). The following items are illustrative of those which have been deemed to be "supplies . . . or other necessities" within the meaning of § 971: *Jeffrey v. Henderson Bros.*, 193 F.2d 589 (4th Cir. 1951) (machinery for dredge barge); *Carr v. George E. Warren Corp.*, 2 F.2d 333 (4th Cir. 1924) (boiler tubes); *The Pinthis*, 286 Fed. 122 (3d Cir. 1923) (spare engine parts); *The M. V. Contessa*, 196 F. Supp. 649 (S.D. Tex. 1961) (cigarettes to a shrimping vessel); *The City of Athens*, 83 F. Supp. 67 (D. Md. 1949) (liens for advances made for supplies); *The Odysseus III*, 77 F. Supp. 297 (S.D. Fla. 1948); *The Bavois*, 43 F. Supp. 109 (S.D.N.Y. 1942) (liquor supplied to a pleasure yacht); *The Reina Victoria*, 298 Fed. 765 (S.D.N.Y. 1924) (food and water); *The Fortuna*, 213 Fed. 284 (W.D. Wash. 1914) (boots, oil hats, wool blankets, tobacco).

⁸² See note 23 *supra*.

its domestic law equivalents, e.g., article 191 (6) of the French Code of Commerce.⁸³ Under article 2 (5) of the convention, a privilege arises in favor of "suppliers, repairers and other contractual creditors" for "contracts entered into or transactions carried out by the master" which "are necessary for the preservation of the vessel or the continuation of her voyage . . ." Claims for services such as repairs, drydock, or towage do not automatically give rise to a lien or privilege by virtue of their nature. They must be proved to have been necessary for the preservation of the vessel or continuation of the voyage, as where, for example, a vessel is repaired subsequent to a collision.⁸⁴ It has been held that the painting and scraping of a hull rendered necessary in the course of a voyage gave rise to a privilege under the convention and article 191 (6) of the French Code of Commerce.⁸⁵ Similarly, repair of a cargo vessel's refrigeration equipment where necessary for the transport of perishables was privileged.⁸⁶

Supplies such as fuel oil,⁸⁷ food and water⁸⁸ will be deemed to have been necessary "for the continuation of the voyage" and will be privileged. Equipment necessary for navigation of the vessel will presumably be privileged; however this will be a question of fact.⁸⁹ Thus where radiotelephone and radiotelegraph equipment were furnished to a vessel, the court found that only the former was required by the navigation law and could be deemed to be "necessary for the preservation of the vessel." Hence, it was held that the radiotelephone was privileged, but not the radiotelegraph.⁹⁰

⁸³ See note 50 *supra*.

⁸⁴ *The Isabella*: (Sté. des Ateliers Terrin v. Marrona et Cie. Orlando Castellano), Trib. Comm., Marseille, Dec. 17, 1954, [1955] D.M.F. 671.

⁸⁵ *Entreprise Bolconi v. C.A.F.R.I.N.A.*, Trib. Comm., Marseille, Feb. 5, 1957, [1958] D.M.F. 103 (gave rise to a privilege in first category under Liens Conv., art. 2 (5), but in this instance it was barred by six month period of limitations; however, there continued to exist a privilege in the second category under art. 2102 (3) of the Civil Code.

⁸⁶ *The Agadir*, Cour d'Appel, Rabat, Morocco, Jan. 5, 1954, [1954] D.M.F. 623.

⁸⁷ See, e.g., *The Wang Importer*, Cour d'Appel, Rennes, Feb. 6, 1962, [1962] D.M.F., 475; *The Berbère*: (Sté. Esso Standard v. Me. Castellan et C.A.F.R.I.N.A.), Trib. Comm., Marseille, Feb. 5, 1957, [1958] D.M.F. 106; *The Commodore Grant*, Trib. Comm., Aix en Provence, Jan. 13, 1954, [1955] D.M.F. 375 (claim for fuel oil was privileged, but eventually claim was dismissed because time limit had run).

⁸⁸ *The Agadir*, Cour d'Appel, Rabat, Morocco, Jan. 5, 1954, [1954] D.M.F. 623.

⁸⁹ *The Berbère*, Cour de Cassation (Ch. civ., sect. comm.), Jan. 31, 1962, [1962] D.M.F. 272.

⁹⁰ *The Berbère*, *supra* note 89. In *Louis Désiré*: (Cie. Radio Maritime v. Pinta), Cour de Cassation (Ch. civ., sect. comm.), March 18, 1963, [1963] D.M.F. 396, the *pourvoi* of a radio equipment company, which claimed that the rentals of radio equipment were privileged under the French Code of Commerce, art. 191 (6), was rejected. The court stated that radio equipment was not essential for the preservation of a coastwise

It is clear that if the master or some other person has advanced funds to the owner for the purchase of necessaries, the person furnishing the funds will be entitled to a right of preference.⁹¹

c. *Charter-Party Clauses.* When a vessel has been chartered, particularly under a bareboat or demise charter, it is very often provided in charter party agreements drawn up in the United States that the charterer shall be without any authority to permit maritime liens to arise upon the vessel. The owner, having given up the control of the vessel, wishes to avoid being a guarantor of the debts of the charterer. The Maritime Lien Act of 1910 expressly provides that a clause absolving the owner and the vessel of responsibility under such circumstances is valid in the United States if the furnisher of supplies or repairs "knew or by the exercise of reasonable diligence could have ascertained that, because of the terms of the charter party . . . or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."⁹²

Under the Liens Convention, however, such charter clauses are probably not valid.⁹³ It has been held that French courts may order arrest of a vessel upon the demand of a supply claimant having a privilege under the convention, and that the court is not required to determine upon this application for arrest whether the owner or the charterer will be ultimately liable.⁹⁴ Thus a shipowner may be

fishing vessel of less than 500 tons; some emphasis was put on the fact that equipment of this sort was not essential on vessels of this size. The lower court had found that the claims were privileged under article 191 (6), at least those rentals due in the six months prior to bankruptcy. Trib. Comm., Seine, June 24, 1959, [1960] D.M.F. 610. A similar claim by suppliers of electronic equipment was rejected in *Le Picorre*: (Cie. Radio Maritime v. Muller), Cour de Cassation (Ch. civ., sect. comm.), March 18, 1963, [1963] D.M.F. 399, *aff'g*, Cour d'Appel, Rouen, Jan. 17, 1958, [1959] D.M.F. 225. The privilege was claimed under art. 2102 (3) of the Civil Code.

Cf., *The Handel*, Supreme Court of the Netherlands, March 22, 1935, *Weckblad van het Recht*, No. 12,949, French translation in 35 *REV. DOR* 343 (1937) (supplier of more powerful engine to a vessel not entitled to a privilege, since this is "improvement," not "preservation"). In Holland, which is not a party to the 1926 Convention, the lien for necessaries is inferior to mortgage. See *Netherlands Maritime Law*, Commercial Code, bk. II.

⁹¹ *Faux v. Faillite des Etablissements Moyen*, [1955] D.M.F. 487.

⁹² 46 U.S.C. § 973 (1958). The circumstances under which a supplyman will be put to inquiry have been the subject of much litigation. See, e.g., *First Nat'l Bank & Trust Co. v. The Seneca*, 179 F. Supp. 847 (E.D. La. 1960), *aff'd*, 287 F.2d 366 (5th Cir. 1961); *The Hoxie*, 291 Fed. 599 (D. Md. 1923); GILMORE & BLACK 219, 558-68.

⁹³ See Liens Conv. art. 13, note 56 *supra*. For a comparative treatment of the respective liability of shipowner and bareboat charterer under the laws of various maritime nations, see Muller, *Proprietaire-Armateur et Armateur Exploitant*, [1962] D.M.F. 131. See also 4 RABEL 116 and cases cited note 75 *supra*.

⁹⁴ *The Commodore Grant*, Trib. Comm., Aix en Provence, Jan. 13, 1954, [1955]

forced to put up a bond in order to obtain a vessel's release, even though the goods or services were ordered by the charterer.

d. *Period of Limitation.* As earlier noted, the period of limitation under the convention in the case of supply and repair liens is six months, whereas, in the case of other liens, it is one year.⁹⁵ Supply and repair liens were singled out for this short period of limitations in an effort to strike a balance between the competing interests of mortgagees and suppliers. Indeed, one of the points upon which there was the greatest disagreement among the delegates to the various international conventions was whether or not there should be allowed a lien for supplies, repairs and necessaries. It was urged by the delegates from Norway, Sweden, Belgium and Holland that this lien was prejudicial to the interests of bankers and others who financed the sale and construction of vessels.⁹⁶ It having been decided to place supply and repair liens in the first category of liens with priority over mortgages, the six months period of limitations was imposed upon these liens to counterbalance the advantage of priority. The *Commodore Grant* case,⁹⁷ discussed earlier, has illustrated the need for prompt enforcement by suppliers if they can find the vessel.

Another question arising by virtue of the strict limitation period is what a claimant must do within the six months following the time when credit was extended in order to prevent extinction of his lien. The convention provides⁹⁸ that, in the case of the lien for necessaries and repairs, the limitation period will run from the date when the obligation attached. Assuming that supplies were furnished on January 1 and that the invoice provided that payment must be made within thirty days, it would appear from the language of the convention that the period of six months would begin to run on January 1 and not on January 31. While it could

D.M.F. 375. In France, prior to reform law of 1949, no privilege was allowed where a creditor had dealt with the charterer rather than shipowner. CHAUVEAU 28.

⁹⁵ Liens Conv., art 9 (1), note 59 *supra*.

⁹⁶ PRICE 230.

⁹⁷ See text accompanying note 63 *supra*.

⁹⁸ Liens Conv. art. 9 (2): "The period runs for the lien for salvage from the date of the termination of the services; for the liens for collision, accidents of navigation and personal injuries from the date when the damage was caused; for the lien for loss of or damage to cargo or passengers' baggage from the date of delivery or when delivery ought to have been made; for the lien for necessaries and repairs from the date when the obligation attached. In all other cases the period runs from the date when the claim becomes enforceable." The French domestic law equivalent is art. 194, Code of Commerce.

be argued that the period should begin to run on the latter date, since that was the date when the obligation of payment arose, this interpretation has been rejected. The French courts at least have held that the period of limitation should be strictly complied with, and that a supplyman, by fixing a period of credit, should not be allowed to extend the time limitation prescribed by law.⁹⁹

Assuming that the start of the six month period is measured by the date "when the obligation attached," what type of action must a creditor take in order to assert his lien within six months? In a number of cases where the shipowner was placed in bankruptcy, the courts have arbitrarily cut off all claims arising prior to six months from the date of adjudication of bankruptcy.¹⁰⁰ Suppose, however, that a creditor has commenced legal proceedings to enforce his claim several years before the bankruptcy adjudication but has not recovered a judgment. It has been held that it will not be enough for the creditor merely to have served a summons (citation) upon the debtor, but he must actually have arrested the vessel.¹⁰¹

Article 9 (5) of the 1926 Convention, which leaves this matter up to domestic law, provides that "the grounds upon which the above periods may be interrupted shall be determined by the law of the court where the case is tried." In France, there is no statute specifying under what circumstances the running of the statutory period may be interrupted. In the case of *Enterprise Bolconi v. C.A.F.R. I.N.A.*,¹⁰² the French court concluded that no period of interruption having been set forth in the Law of 1949, the legislature must have

⁹⁹ *Enterprise Bolconi v. C.A.F.R.I.N.A.*, Trib. Comm., Marseille, Feb. 5, 1957, [1958] D.M.F. 103.

¹⁰⁰ *E.g., Cie. Maritime v. Pinta*, [1960] D.M.F. 610.

¹⁰¹ *Enterprise Bolconi v. C.A.F.R.I.N.A.*, Trib. Comm., Marseille, Feb. 5, 1957, [1958] D.M.F. 103. In this case the claimant had scraped and painted the hull of a vessel in December, 1953, and billed defendants a total of 775,811 francs. Suit against the owners was commenced in June, 1954, but not diligently prosecuted at that time. The defendant having been adjudicated a bankrupt August 2, 1955, the claimant intervened in the bankruptcy proceedings and urged that its claim for the painting and scraping was a privileged lien under art. 191, Code of Commerce. Claimant further urged that, having commenced suit within six months of the time when the obligation arose, his claim was timely within article 194. The court rejected this contention and noted that although suit had been brought within six months, the claimant had allowed more than a year to elapse between June, 1954, and August, 1955, and that the mere service of a summons (citation) in June, 1954, for nonpayment of the debt was not a manifestation of intention to exercise the maritime privilege but merely an intention to collect a debt upon the underlying obligation. The court further noted that art. 2244 of the Civil Code, which states that a "citation en justice" stops the running of a period of prescription, is not applicable since it merely reflects an intention to pursue a debt and not to invoke the privilege.

¹⁰² *Ibid.*

intended to continue the judicial doctrine prevailing under the pre-1949 law. This rule was that a privilege was deemed to be extinguished when a vessel had completed a "sea voyage" subsequent to the "voyage" when the lien arose. Only by arresting the vessel prior to expiration of the "voyage" or of the time period could a right of preference be exercised.

Although a lien or maritime privilege under article 2 (5) of the convention may have been lost, it may still be possible for a claimant to maintain that his claim constitutes a privilege in the second category of privileges, ranking below mortgages. In France, article 2102 (3) of the Civil Code grants a privilege to claims representing goods or services "necessary for the preservation of the vessel."¹⁰³

e. Priorities. The broad statement that mortgages under the convention, and under French law, rank below supply and repair liens, whereas in the United States the opposite order prevails, is subject to several qualifications. In France, at least, the courts have sometimes recognized that supply and repair claims which fail to meet the requirements for classification as a maritime privilege fall into the second category of privileges.¹⁰⁴ In the event that such privilege exists, the claim will rank below mortgages and hypothecations, but will prevail over unsecured claims.¹⁰⁵

The priority of mortgages under the law of the United States is subject to several conditions. In the case of mortgages on United States flag vessels, the mortgage must comply with all the formalities of the Preferred Ship Mortgage Act of 1920.¹⁰⁶ Otherwise it is an "ordinary" mortgage and ranks as an unsecured claim.¹⁰⁷ In the

¹⁰³ See, e.g., *Enterprise Bolconi v. C.A.F.R.I.N.A.*, Trib. Comm., Marseille, Feb. 5, 1957, [1958] D.M.F. 103 (claims for painting and scraping hull allowed under Civil Code, art. 2102 (3), after period of limitations on maritime privileges had run); *Fèvre v. Gaudet*, Cour de Cassation (Ch. civ.), Nov. 3, 1925, 13 Rev. Dor 267 (1926) (repairs). If, however, the claim represents supplies necessary for the "exploitation" of the vessel as opposed to "preservation," it will not be entitled to a privilege under the Civil Code. *The Berbère*, Trib. Comm., Marseille, Feb. 5, 1957, [1958] D.M.F. 106 (fuel oil).

¹⁰⁴ By judicial decision, the courts have recognized that these claims may be entitled to a nonmaritime privilege under the Civil Code. See CHAUVEAU 136; note 103 *supra*.

¹⁰⁵ CHAUVEAU 136. The privileges of the tax and customs authorities likewise rank below the maritime privileges and hypothecations but prevail over unsecured creditors. *Pendelis v. Administration des Douanes*, Cour d'Appel, Aix, Dec. 18, 1951, [1952] D.M.F. 370.

¹⁰⁶ 41 Stat. 1000 (1920), 46 U.S.C. § 922 (1958). See GILMORE & BLACK 579-90.

¹⁰⁷ 1 BENEDICT 162-64 (6th ed. 1940); GILMORE & BLACK 574.

case of mortgages on foreign flag vessels, the mortgagee will take subject to the liens of United States supply and repairmen, due to a very parochial clause in the Foreign Ship Mortgage Act of 1954.¹⁰⁸ Presumably, the mortgagee of a foreign vessel will prevail over foreign supply and repairmen.

6. *Liens and Limitation of Liability Proceedings*

The drafters of the Liens Convention wished to correlate its provisions with the Brussels Convention of 1924 on Limitation of Liability.¹⁰⁹ Their objective was to provide a lien for those maritime claims for which a shipowner could limit his liability by abandoning vessel, freight and accessories.¹¹⁰ The 1924 Convention, in effect, adopted the continental system of limitation of liability to the shipowner's *fortune de mer*.¹¹¹ In 1957 a new Convention on Limitation of Liability was drafted which, following the Anglo-

¹⁰⁸ After providing that foreign ship mortgages duly executed under foreign law will be entitled to recognition in the United States as preferred mortgages, the Foreign Ship Mortgage Act, 68 Stat. 323 (1954), 46 U.S.C. § 951 (1958), concludes with this proviso: "Provided, however, That such 'preferred mortgage lien' in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessities, performed or supplied in the United States." In *The Tradewind*, 153 F. Supp. 354 (D. Md. 1957), which involved the sale of a Liberian vessel subject to Liberian preferred mortgage, the order of priority adopted was: (1) United States supplymen; (2) Liberian preferred mortgage; (3) foreign supplymen. In *Brandon v. S.S. Denton*, 302 F.2d 404 (5th Cir. 1962), an Italian oil bunkering concern, which intervened in a libel in rem proceeding in a United States court, urged that under the most favoured nation clause in the Treaty of Friendship and Navigation between Italy and the United States, Italian supplymen were entitled to as high a priority as American supplymen. Relying upon the clear language of the proviso in the Foreign Ship Mortgage Act, the court rejected this contention and held that the claim of a United States mortgagee was entitled to a priority, thus exhausting the available fund. See Lord & Glenn, *The Foreign Ship Mortgage*, 56 YALE L.J. 923 (1947); Comment, 64 YALE L.J. 878, 900-03 (1955).

¹⁰⁹ International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of the Owners of Sea-Going Vessels, Brussels, Aug. 25, 1924, official text in French, L.N.T.S. No. 2763. For other texts see 6 BENEDICT 394 (English translation and list of signatories); XXVth CONFERENCE MINUTES 44 (French and English texts). For a discussion of the convention provisions, see CHAUVEAU 327-34.

Liens Conv., art. 7 provides that when a limitation petition has been filed by a shipowner, "creditors whose claims are secured by a lien shall have the right to prove for their claims in full, without any deduction on account of the rules relating to limitation of liability; provided, however, that the dividend receivable by them shall not exceed the sum due having regard to the said rules."

¹¹⁰ Compare art. 2, Liens Conv. (liens attach to "vessel, to the freight . . . and to the accessories") with art. 1 of 1924 Limitation Conv. ("The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories. . ."). One of the unresolved problems of American limitation law is whether or not maritime lien priorities should be observed in the distribution of a limitation fund. See GILMORE & BLACK 724.

¹¹¹ CHAUVEAU 327-34.

American system, substitutes a liability fund of a fixed monetary amount per ton for vessel, freight and accessories.¹¹² If the 1957 Convention gains widespread adoption, the provisions of the Liens Convention will clearly be out of date. It has indeed been suggested that the Liens Convention is ripe for revision.¹¹³

¹¹² Convention on Limitation of the Liability of Owners of Sea-Going Vessels, Brussels, 1957. For texts see 6 *BENEDICT* 399 (English text of draft convention); [1957] *D.M.F.* 383; Schadée, *Quelques notes marginales a la Convention sur les privilèges* (texts). See also Comment, 68 *YALE L.J.* 1676 (1959).

Chauveau, *Patrimoine ou Fortune de Mer*, [1962] *D.M.F.* 511, notes that the 1957 Convention's provisions are radically different from the domestic law of France and other civil law countries where the owner has the right to limit his liability by abandonment of the vessel, freight, and accessories. Under the 1957 Convention, the owner's other assets are vulnerable, not only the vessel with respect to which the claim arose.

¹¹³ Legendre, *La Conférence d'Athènes du Comité Maritime International*, [1962] *D.M.F.* 383; Schadée, *Quelques notes marginales a la Convention sur les privilèges et hypothèques maritimes*, [1959] *D.M.F.* 252. See also French Maritime Law Association, *Report on Harmonization of the 1957 Conventions on Limitation of Liability and 1926 Convention on Maritime Liens and Mortgages*, XXVth CONFERENCE MINUTES 284.