

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

JOHN M. KRIZ†

## SUMMARY OF PART ONE\*

IN PART ONE of this article, the author examined the provisions of the Brussels Convention of 1926 for the Unification of Certain Rules of Law Relating to Mortgages and Liens. Although its provisions are not in effect in either the United States or Great Britain, the 1926 Convention has helped to reduce conflicts of law by specifying what types of maritime claims give rise to liens or privileges and by fixing the relative priority of these liens and of ship mortgages. It has also furthered the cause of recognition of ship mortgages on foreign flag vessels.

PART TWO considers the 1952 Brussels Arrest Convention and the relationship of the 1952 Convention to the 1926 Liens Convention. Maritime jurisdictional concepts in the civil law countries, particularly France, are contrasted with the jurisdiction of American admiralty courts, and conflict of laws problems raised by the two Brussels conventions are examined.

## PART TWO

### I

#### THE 1952 BRUSSELS CONVENTION ON THE ARREST OF SEA-GOING VESSELS

The 1952 Brussels Arrest Convention<sup>1</sup> has complemented the

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† A.B. 1958, Princeton University; LL.B. 1961, Harvard University. Member, New York Bar; associated with Kramer, Marx, Greenlee & Backus, New York, New York.

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<sup>1</sup> 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 6 BENEDICT, ADMIRALTY 9 (7th ed. 1958) [hereinafter cited as BENEDICT] (English text with notes on signatories); [1952] DROIT MARITIME FRANÇAIS 582 [hereinafter cited as D.M.F.] (French text); INTERNATIONAL MARITIME COMMITTEE, MINUTES OF XXVTH CONFERENCE, ATHENS, 1962, at 118 [hereinafter cited as XXVTH CONFERENCE MINUTES] (French and English texts). For a general

1926 Liens Convention<sup>2</sup> which left open the crucial question of enforcement of the substantive rights of lienors and mortgagees. There was great diversity between the laws of the various nations on the right of a creditor, particularly a foreign one, to seize or arrest a vessel. In the United States, any claimant possessing a maritime lien was entitled to enforce that lien by arresting the vessel in a libel in rem proceeding; in addition, American law recognized the right to attach a vessel in a libel in personam action where the underlying claim was not a maritime lien and the respondent could not be found within the district. In Great Britain, the right of arrest was more limited than in the United States.<sup>4</sup> On the continent and in Latin America, where the theory of the in rem proceeding was unknown, the law placed strict limitations upon the right to seize a vessel prior to the adjudication of a claim. For example, article 215 of the French Code of Commerce prohibited arrest of vessels "ready to sail" or stopping at a port to load or unload freight.<sup>5</sup> Such rules were designed to protect the interests of cargo

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discussion, see Ripert, *Les Conventions de Bruxelles du 10 Mai 1952 sur l'Unification du Droit Maritime*, [1952] D.M.F. 343, 353-59.

For countries which have either ratified or adhered to the 1952 Arrest Convention, see Kriz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952*, 1963 DUKE L.J. 671, 674-75.

<sup>2</sup>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) [hereinafter cited as REV. DOR] (edited by Leopold Dor). For English translations see 6 BENEDICT 382; 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 XXVTH CONFERENCE MINUTES 78. This volume contains, *inter alia*, texts of all Brussels conventions on maritime law, ratifications and accessions, and minutes and resolutions of 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).

For a list of nations which have either ratified or adhered to the 1926 Liens Convention, see Kriz, *supra* note 1, at 674-75.

<sup>3</sup>GEN. ADM. R. 2, 5, 36; 2 BENEDICT 345-55 (6th ed. 1940). See also note 41 *infra*.

<sup>4</sup>The Administration of Justice Act, 1956, 4 & 5 Eliz. 2, c. 46, which harmonized English domestic law with the Arrest Conv., extended the jurisdiction of the admiralty courts over foreign vessels and made it possible for the first time in England to arrest either the vessel in respect to which the claim arose or any other ship in the same ownership. See Hardy-Ivamy, *Arrest of a Ship in an Action for Necessaries*, 110 L.J. 134 (1960). For the text of this act, see 6 BENEDICT 14-33.

<sup>5</sup>Art. 215, Code of Commerce, expressly prohibits arrest in order to obtain execu-

owners and to promote freedom of navigation. Nevertheless, these restrictions failed to give sufficient consideration to the claims of mortgagees and other creditors. In 1949, at the instigation of the American delegation, the Comité Maritime International considered the question of drafting an arrest convention, a question which had been discussed prior to World War II.<sup>6</sup> The convention adopted in 1952 has strengthened the rights of maritime creditors by making the provisional remedy of arrest more widely available.

The convention, in brief, permits certain types of maritime claimants,<sup>7</sup> as defined in article 1 (1),<sup>8</sup> to obtain arrest of a vessel in order to enforce such claims. A claimant must present such a request to competent judicial authorities of a contracting state.<sup>9</sup> Op-

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tion of a judgment when a vessel is "ready to sail," which means when the master is possessed of his clearance papers. By judicial decision, article 215 applies to the provisional remedy of arrest as well. See, e.g., *Sté. Marocaine de Participation Industrielle v. Armement Daney*, Cour d'Appel, Rennes, July 6, 1961, [1962] D.M.F. 467 (fishing vessel calling at port to unload cargo immune from arrest); *Cie. des Messageries Maritimes v. Administrations des Douanes et Regies d'Indochine*, Saigon, Indochina, Sept. 10, 1952, [1953] D.M.F. 580 (order of arrest obtained by customs authorities was vacated); *Vve. Lasry v. Cie. Bordelaise des Produits Chimiques*, Cour de Cassation (Ch. civ., sect. comm.), May 7, 1952, [1952] D.M.F. 465 (foreign vessels as well as domestic are immune); *Leblanc v. Hargreaves*, Trib. Civ., Nice, June 24, 1883, [1884] JOURNAL DU DROIT INTERNATIONAL PRIVÉ 69 [hereinafter cited as CLUNET], *aff'd*, Cour d'Appel, Aix, Nov. 28, 1883, [1884] CLUNET 297 (English yacht about to set sail for Southampton was immune from attachment by Nice tradesman who had sold goods to owner); PRICE 200; 1 RIPERT, TRAITÉ DE DROIT MARITIME 765 (4th ed. 3 vols. 1950-1953) [hereinafter cited as RIPERT]. Similar restrictions are found in countries where French Code of Commerce was influential, e.g., art. 870, Argentine Code of Commerce. See *The Aracaju*, Fed. Ct. App., Bahia Blanca, Sept. 23, 1937, 38 REV. DOR 58 (1939).

<sup>6</sup> Note, *Conférence d'Amsterdam, Sept. 11-24, 1949*, [1949] D.M.F. 452.

<sup>7</sup> "Claimant" under the Arrest Conv. is defined as a "person who alleges that a maritime claim exists in his favor." Under American admiralty parlance, the "claimant" is the shipowner who responds to the libel of his vessel, i.e., the defendant. GILMORE & BLACK, ADMIRALTY 33 (1957) [hereinafter cited as GILMORE & BLACK]. In this article, the word "claimant" is used in the sense in which it is defined in the convention.

<sup>8</sup> Arrest Conv., art. 1(1), note 12 *infra*.

<sup>9</sup> *Id.*, art. 4.

<sup>10</sup> *Id.*, art. 5: "The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, (o) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest.

"In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof.

"The request to release the ship against such security shall not be construed as

portunity is afforded to the owner of a vessel to obtain release of the vessel by posting bond or other security.<sup>10</sup> An important consideration under the arrest convention is whether the court has jurisdiction over the merits of the action or is competent merely to order arrest of the vessel until bond or other security to obtain the release of the vessel has been provided. This problem arises because in certain countries, such as the United States, arrest of the vessel may give the court jurisdiction to proceed on the merits without obtaining jurisdiction over the person of the defendant, whereas in continental civil law countries, the mere arrest of a vessel does not give the court such jurisdiction. These conflicting jurisdictional theories were compromised under article 7 of the convention, which provides that in certain cases a court must entertain jurisdiction over the merits after the vessel has been arrested.<sup>11</sup>

The following aspects of the convention will be examined: the types of claims justifying arrest; vessels which may be arrested; the procedure for obtaining arrest and the rights of the defendant; and jurisdiction over the arrest as distinguished from jurisdiction over the merits.

#### A. Types of Claims Justifying Arrest

Under article 2 of the 1952 Convention, it is provided that "a ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States *in respect of any maritime claim, but in respect of no other claim . . .*" (Italics added.) Some seventeen types of "maritime claims" justifying arrest are enumerated in article 1 (1), including claims for collision, personal injury, salvage, cargo damage, general average, supply and repairs, wages, mortgages, and claims relating to disputed ownership of a vessel, charter parties, and carriage of goods.<sup>12</sup> The concept of

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an acknowledgment of liability or as a waiver of the benefit of the legal limitations of liability of the owner of the ship."

<sup>10</sup> *Id.*, art. 7, note 40 *infra*.

<sup>12</sup> *Id.*, art. 1(1): "In this Convention the following words shall have the meanings hereby assigned to them:

"(1) 'Maritime Claim' means a claim arising out of one or more of the following: (a) damage caused by any ship either in collision or otherwise; (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship; (c) salvage; (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise; (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise; (f) loss of or damage to goods including baggage carried in any ship; (g) general average; (h) bottomry; (i) towage; (j) pilotage; (k) goods or materials wherever supplied to a ship for her operation or maintenance; (l) construction, repair or equipment of any ship or dock charges and dues; (m) wages of Masters, Officers, or crew; (n) Master's disbursements, including disburse-

"maritime claim" for purposes of the arrest convention is extremely broad and encompasses virtually all claims of a maritime nature, whether or not they give rise to a maritime lien or privilege under the 1926 Convention. It should be noted, in particular, that a supply or other claimant whose privilege or lien under the 1926 Convention has been extinguished by reason of the period of limitations is not prevented for that reason from obtaining arrest of the vessel with respect to which the claim arose.<sup>13</sup>

### B. Vessels Subject to Arrest

In determining whether a particular vessel which is lying in the port of a contracting state (*e.g.*, France) may be arrested, it is first necessary to ascertain to what vessels the 1952 Convention is applicable and to what persons its provisions are available. First of all, a distinction is made between vessels of contracting states and those of noncontracting states. The convention is applicable in any contracting state to all vessels flying the flag of a contracting state.<sup>14</sup> However, in a purely domestic situation with no international aspect, such as the case of a French creditor seeking to arrest a French flag vessel, the domestic law of the forum and not the convention is applicable.<sup>15</sup> A vessel of a contracting state may be arrested only in respect to one of the types of claims enumerated in article 1.<sup>16</sup> If a vessel flying the flag of a noncontracting state is involved, it may be arrested either in support of one of the claims enumerated in article 1 (1) of the 1952 Convention or if the arrest would be permitted under the domestic law of the forum.<sup>17</sup>

The personal status of the claimant is also important. A foreign claimant who is not a national of a contracting state may encounter some difficulty in obtaining arrest of a vessel, unless arrest would

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ments made by shippers, charterers or agents on behalf of a ship or her owner; (o) disputes as to the title to or ownership of any ship; (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship; (q) the mortgage or hypothecation of any ship."

<sup>13</sup> See *Boyer v. Sté. Entreprise Villani*, Cour de Cassation (Ch. civ., sect. comm.), Feb. 19, 1958, [1958] D.M.F. 326; 1 RIPERT 797.

<sup>14</sup> Arrest Conv., art. 8(1).

<sup>15</sup> *Id.*, art. 8(4): "Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State."

<sup>16</sup> *Id.*, art. 8(1).

<sup>17</sup> *Id.*, art. 8(2): "A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest."

otherwise be available under the domestic law of the forum. This is because a court may exclude a claimant from the benefits of this convention if the claimant is not a resident or does not have its permanent residential or business establishment in one of the contracting states.<sup>18</sup> Assignment of the claim to an organization having its principal establishment in the country where it is desired to arrest a vessel will not be recognized if its purpose is to thwart the above provisions.<sup>19</sup>

Assuming that the convention is applicable (as, for example, in the case of a French creditor seeking to arrest an Italian flag vessel), the rights of the creditor are broader than they would otherwise be in a purely domestic situation (as in the case of a French creditor seeking to arrest a French vessel in France). Thus in the former case, article 3 of the convention,<sup>20</sup> which provides that a vessel may be arrested even though it be "ready to sail," would be applicable; this provision would supersede article 215 of the French Code of Commerce, which prohibits arrest of a vessel "ready to sail."<sup>21</sup>

The right of arrest exists not only with respect to the vessel upon which a lien exists or with respect to which the claim arose, but it also extends in many cases to "any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship . . ."<sup>22</sup> Under the broad definition of

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<sup>18</sup> *Id.*, art. 8(3): "Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this Convention any government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States."

<sup>19</sup> *Id.*, art. 8(5): "When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or otherwise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant."

<sup>20</sup> *Id.*, art. 3 (1), note 22 *infra*.

<sup>21</sup> See note 5 *supra*. In the case of *Vve. Lasry v. Cie. Bordelaise des Produits Chimiques*, Cour de Cassation (Ch. civ., sect. comm.), May 7, 1952, [1952] D.M.F. 465, the French Court of Cassation held that article 215 applies to protection of foreign vessels from arrest as well as to French vessels. The claimant in that case, the owner of the cargo, was held to be entitled to damages from a supply creditor who had arrested the Italian vessel, about to set sail, whose captain had secured his clearance papers. The creditor who had supplied the vessel on an earlier voyage had arrested the vessel in Algiers where it stopped en route to Bordeaux. This rule will continue to be applicable unless the creditor obtaining arrest is a national of a contracting state.

<sup>22</sup> Arrest Conv., art. 3(1): "Subject to the provisions of para (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q)."

ownership in article 3 (2), it would appear that a creditor having a maritime claim against vessel *X* owned by corporation *A* would be entitled to enforce his claim by arresting vessel *Y* owned by corporation *B* if the shares of *A* and *B* corporations were all owned by the same individual or corporation.<sup>23</sup> This rule under which a creditor may compel the appearance of a shipowner by arresting any vessel of his fleet, even if owned by another corporation, is subject to three important qualifications. First, in the case of ship mortgages and disputes as to ownership or between co-owners of a ship, only the particular vessel upon which the claim arose may be arrested.<sup>24</sup> Secondly, if a vessel has been chartered under a demise or bareboat charter, under which the control of the vessel is in the hands of the charterer, a creditor of the charterer may still arrest such vessel or other vessels of the charterer, but no other vessels of the same owner may be arrested.<sup>25</sup> Thirdly, if the claimant chooses to arrest some vessel in the same ownership, he cannot seek to enforce his claim by arresting the vessel with respect to which the claim originally arose unless the first vessel arrested or the security posted for its release has been discharged.<sup>26</sup>

### C. Arrest Procedure and Rights of the Defendant

Except that it requires the arrest to be obtained under judicial supervision,<sup>27</sup> the convention does not purport to specify the proce-

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<sup>23</sup> *Id.*, art. 3(2): "Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons."

<sup>24</sup> *Id.*, art. 3(1), note 22 *supra*.

<sup>25</sup> *Id.*, art. 3 (4): "When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship."

<sup>26</sup> *Id.*, art. 3(3): "A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest."

<sup>27</sup> *Id.*, art. 4.

ture to be followed; this is left to the law of the forum.<sup>28</sup> Thus, for example, a creditor wishing to arrest a vessel lying in a French port should turn to French domestic law to determine the applicable procedure. Arrest of a vessel in France requires an order from the president of the tribunal of commerce of the port where the vessel is lying.<sup>29</sup> Upon receipt of a petition for arrest, the president will scrutinize the petition to ascertain that good faith grounds exist for such action. The owner or his representative may of course move to deny the arrest, if, for example, the claim is not one of those specified in article 1 (1)<sup>30</sup> or the plaintiff is not a national of a contracting state.<sup>31</sup> After the arrest has been granted, the defendant may move to have the vessel released by posting sufficient bond or other security from which a judgment could be satisfied.<sup>32</sup>

Except in cases involving the title or the right to possession of the vessel, the court must grant such a release upon the provision of bond, for it has no discretion in the matter.<sup>33</sup> In the absence of an agreement by the parties regarding the amount of bond, the amount

<sup>28</sup> *Id.*, art. 6, para. 2

<sup>29</sup> It is beyond the scope of this article to discuss the intricacies of the jurisdiction and venue of French courts. However, as a general rule, maritime claims are enforced in tribunals of commerce before lay judges. Special admiralty courts were abolished in 1791, during the French Revolution, and their jurisdiction was transferred to the commercial courts, provided that the claim involved a so-called "acte de commerce." See art. 633, Code of Commerce; 1 RIFERT 780-91. The commercial courts' jurisdiction over provisional arrest of vessels is based upon article 417 of the Code of Civil Procedure. The ordinary civil tribunals will have jurisdiction in cases between non-merchants not involving a so-called "act of commerce," such as actions for personal injuries brought by a passenger of a vessel. An action to foreclose a ship mortgage will generally be brought in the civil tribunals. See CHAUVEAU, TRAITÉ DE DROIT MARITIME 160 (1958) [hereinafter cited as CHAUVEAU]. However, in cases where the mortgage secures the claim of a shipbuilder, the commercial tribunals have occasionally been held to be competent because construction of a vessel is deemed to be an "act of commerce" and the mortgage is "an accessory" thereof. CHAUVEAU 160. Actions for collision generally are brought in the civil tribunals. CHAUVEAU 401.

For a comparative analysis of the maritime jurisdiction of the French, American, and English courts, see Stinson, *Admiralty and Maritime Jurisdiction of the Courts of Great Britain, France and the United States*, 16 ILL. L. REV. 1 (1921).

<sup>30</sup> See note 12 *supra*.

<sup>31</sup> See note 18 *supra*.

<sup>32</sup> Arrest Conv., art. 5, note 10 *supra*. See, e.g., Gerardi v. Société les Marocains, Cour d'Appel, Rabat, Morocco, March 6, 1957, [1959] D.M.F. 57; Sté. Franco-Tunisienne d'Armement v. Sté. J. A. Goldschmidt et Cie., Trib. Comm., Cherbourg, March 13, 1958, [1958] D.M.F. 541; The Commodore Grant: (North Eastern Freighters, Ltd. v. Cia. Española 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.

<sup>33</sup> Arrest Conv., art. 5, note 10 *supra*; *id.*, art. 1(1) (o) & (p), note 12 *supra*.

will be set by the court according to the rules of the forum.<sup>34</sup> In cases where the court is not competent to adjudicate the merits of the case, the bond will be designated as security for a judgment rendered by any court which may have jurisdiction.<sup>35</sup>

In order to avoid abuse of the remedy of arrest, some countries require the plaintiff to post a bond to indemnify the shipowner or other defendant if the arrest is unjustified.<sup>36</sup> Under the 1952 Convention, the question of whether or not a bond must be posted by the plaintiff in order to obtain an order of arrest is determined by the law of the forum.<sup>37</sup> In France, the party seeking arrest generally has no such obligation, although the court may in its discretion require security from the plaintiff.<sup>38</sup> If the arrest was not justified, however, the defendant has a cause of action against the plaintiff for damages caused by the wrongful arrest.<sup>39</sup>

#### D. Jurisdiction Over Arrest Distinguished From Jurisdiction Over the Merits

Article 7 of the convention,<sup>40</sup> under which the courts of a country

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<sup>34</sup> *Id.*, art. 5, note 10 *supra*. The amount of the bail in France cannot exceed the value of the vessel, even though the claim is for a greater amount. 1 RИPERT 803; Marais, *De la saisie conservatoire des navires en France*, 6 REV. DOR 22, 30 (1924). In Belgium, courts may set bail equal to the amount of the claim, even if it exceeds the value of the vessel. Smeesters, *De la saisie conservatoire des navires en Belgique*, 7 REV. DOR 54, 59 (1924).

<sup>35</sup> *Id.*, art. 7(2), note 40 *infra*.

<sup>36</sup> *E.g.*, Belgium. Smeesters, *supra* note 34, at 57. For the United States practice, see GEN. ADM. R. 24; 2 BENEDICT 568-77 (6th ed. 1940).

<sup>37</sup> Arrest Conv., art. 6, para. 1.

<sup>38</sup> CHAUVEAU 168; Legendre, *La Conférence de Naples du Comité Maritime International*, [1951] D.M.F. 575, 578.

<sup>39</sup> See, *e.g.*, Petit Frère et Gabrielle v. Tercy, Trib. Comm., Seine, May 16, 1955, [1956] D.M.F. 496; Bittar Frères v. Aminthe, Cour de Cassation (Ch. civ., sect. comm.), Nov. 28, 1951, [1952] D.M.F. 139; 1 RИPERT 804-05. In the United States, a party is not generally entitled to recover damages resulting from the seizure of his vessel under lawful process issued out of an admiralty court, even though the suit was dismissed. 2 BENEDICT 393-94 (6th ed. 1940).

<sup>40</sup> Arrest Conv., art. 7: "(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely: (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made; (b) if the claim arose in the country in which the arrest was made; (c) if the claim concerns the voyage of the ship during which the arrest was made; (d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910; (e) if the claim is for salvage; (f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with Article

in which a vessel has been arrested may decline jurisdiction over the merits of the action, can best be understood by contrasting the different concepts of jurisdiction prevailing in the United States with those in the continental civil law countries.

In the United States, a maritime lien is enforced by libeling a vessel in an in rem proceeding, which involves obtaining a warrant ordering a federal marshal to arrest the vessel upon which the lien exists.<sup>41</sup> The maritime lien, an important substantive right, is tied so closely to the in rem proceeding, the procedure for its enforcement, that it can truly be said that the two are one. Substance cannot be separated from procedure.<sup>42</sup>

Under the United States theory of jurisdiction in rem, the ship is considered a separate personality and is liable as such. In the civil law countries, such as France, a maritime claim giving rise to a maritime privilege is recognized as having the nature of a "right in the property" (*droit réel*).<sup>43</sup> However, this characterization of a maritime privilege has not been translated into a procedure for suing the ship as distinguished from suing the underlying debtor. In France and other civil law countries, all actions are in personam.<sup>44</sup>

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5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security."

<sup>41</sup> See GEN. ADM. R. 9-12, 37; 2 BENEDICT 366-93 (6th ed. 1940). The libel in rem is the right to proceed against the vessel itself. The maritime lienor, in addition, possesses the right to bring a libel in personam against the person liable on the claim. In order to recover a personal judgment in excess of the value of the property, a libel in rem and libel in personam may be joined. See GEN. ADM. R. 13 (remedies for seamen wages, materialmen); GEN. ADM. R. 16 (remedies for ship mortgages); GILMORE & BLACK 31. A libel in personam may also be commenced by attachment of property, including any vessels of the person liable, where the defendant cannot be found or does not do business within the jurisdiction. This is known as "libel in personam with clause of foreign attachment." See, e.g., *McGahern v. Koppers Coal Co.*, 108 F.2d 652 (3d Cir. 1940); GEN. ADM. R. 5, 36; 2 BENEDICT 345-64 (6th ed. 1940).

<sup>42</sup> "In American jurisprudence the existence of a maritime lien is synonymous with the availability of a libel in rem." GILMORE & BLACK 510; PRICE 12.

<sup>43</sup> CHAUVEAU 126-27.

<sup>44</sup> See Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323 (1961).

If it is desired to enforce a maritime privilege, it is possible to arrest a vessel pursuant to the 1952 Brussels Convention. However, the word "arrest" in this convention is used in the American sense of "attachment." Its purpose is to compel the appearance of the owner in an action in personam and to cause him to furnish security as a condition for release of the vessel, pending determination of the merits of the controversy. Hence, arrest under the 1952 Convention is not synonymous, as in the admiralty parlance of the United States, with commencement of an in rem proceeding. Rather, arrest under the convention is analogous to the provisional remedy of attachment, which is available in American courts in libels in personam.

Under American admiralty law, which recognizes jurisdiction in rem and quasi in rem, it is taken for granted that a court ordering arrest of a vessel thereby obtains jurisdiction to adjudicate the merits of the claims against the owner, at least up to the value of the vessel or other property seized, even if the debtor is not within the territorial jurisdiction of the court.<sup>45</sup> The same American admiralty court has the power, if necessary, to order the sale of a vessel to satisfy the liens against it.

Under the law of France and certain other civil law countries, the questions of jurisdiction to arrest a vessel and of jurisdiction to adjudicate the merits of the action and order sale of the vessel are two separate matters.<sup>46</sup> This is because there is no action analogous to the American action in rem.<sup>47</sup> Arrest of the vessel itself does not give the court jurisdiction or competence, to use civil law terminology. The competence of a court to adjudicate a claim depends upon (1) the nature of the claim and (2) personal status, *i.e.*, the nationality or residence of the parties.<sup>48</sup> Thus a lien holder wishing to

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<sup>45</sup> The traditional American rule is that judgment in an action in rem cannot be for more than the value of the ship and freight. The owner must be joined in an action in personam before there can be a judgment for a greater amount. GILMORE & BLACK 511, 652-54. *But see* The Fairisle, 76 F. Supp. 27 (D. Md. 1947), *aff'd sub nom.* Waterman S.S. Corp. v. Dean, 171 F.2d 408 (4th Cir. 1948), where the libel was in rem but judgment was entered for \$45,100, although the vessel was released on stipulation for \$25,000.

<sup>46</sup> CHAUVEAU 166; 1 RIPERT 791, 797, 800, 806-08; Ripert, *supra* note 1, at 358.

<sup>47</sup> However, in the following civil law countries courts do recognize jurisdiction *forum arresti* in certain maritime cases, even though it is not strictly analogous to the American in rem proceeding: Germany, The Netherlands, Portugal, and Belgium. See 1 RIPERT 791.

<sup>48</sup> As a general rule in civil law countries, actions involving persons and movables must be brought in the courts of defendant's domicile. See Weser, *supra* note 44, at 328. If defendant is a foreigner, however, certain extraordinary rules of jurisdiction may apply pursuant to which the nationality of the plaintiff will determine the forum.

execute a maritime lien must bring an action in personam against the debtor in a competent court. If the defendant is a nonresident shipowner and the plaintiff is a foreign creditor, there may not be any competent court within the territorial limits of the country in which it is desired to arrest the vessel.<sup>49</sup>

Suppose, for example, that a United States supplyman having a lien on a Panamanian vessel lying in a French port wished to foreclose that lien in France, and no French parties were involved in the controversy. The court would not be competent to decide the merits. However, the tribunal of commerce in the French port would be competent to order provisional arrest of the vessel and to take other types of protective measures.<sup>50</sup> Under the terms of the 1952 Arrest Convention, the tribunal of commerce which had ordered the arrest of the vessel would be competent to consider objections of the shipowner to the arrest<sup>51</sup> and to entertain requests that the vessel be released upon bond. However, the tribunal of commerce would then be obliged to transfer the action to a court competent to adjudicate the merits, which might be a court in France, a court in a foreign country, or an arbitration panel.<sup>52</sup> If proceedings were not commenced within a time set therefor, the tribunal of commerce would be competent to consider a request

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For example, under arts. 14-15, Civil Code, a French national may sue a foreigner or be sued in a French court even upon obligations contracted outside of France. *Weser, supra* at 324-27.

<sup>49</sup> While French courts are competent to entertain actions between foreigners, there must be some connection between the parties and the forum, for instance, a contract made there. See *BATIFFOL, TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* 774-79 (3d ed. 1959). Thus, in the case of a collision on the high seas between two foreign vessels in which no French interests are involved, French courts are incompetent over the merits, although they may be competent to order arrest. See note 50 *infra*. See also *Stinson, supra* note 29, at 14-15.

The United States Supreme Court has held that the retention of jurisdiction of a suit between two foreigners is within the discretion of a district court and that the exercise of this discretion may not be disturbed. *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930). In that case jurisdiction was refused by the district court "under all the circumstances," and it was held error for the Second Circuit to overrule that exercise of discretion. See also *The Belgenland*, 114 U.S. 355, 358 (1885); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 457 (1870).

<sup>50</sup> The French cases hold that a foreigner may obtain arrest of a foreign vessel in France, even though no French court would be competent to adjudicate the merits. *E.g., Petrico v. Rogenaes*, Cour d'Appel, Alger, Feb. 13, 1923, 2 *REV. DOR* 518 (1923) (following a collision on the Danube between a Norwegian vessel and the *Muntenia*, another foreign flag vessel, the Norwegian owner obtained an order of arrest of the *Muntenia* from the commercial court in Bougie, Algeria); 1 *RIPERT* 797.

<sup>51</sup> See *Arrest Conv.*, art. 7(2), note 40 *supra*.

<sup>52</sup> *Id.*, art. 7(3), note 40 *supra*.

that the arrest be vacated and the security posted by defendant be released.<sup>53</sup>

In countries which have subscribed to the 1952 Convention but which do not recognize jurisdiction based on arrest of a vessel, there is one possible exception to the rule that a court ordering arrest will not be competent to consider also the merits of the action. That exception is article 7 (1) of the convention,<sup>54</sup> which provides that in certain enumerated types of claims, including mortgage claims, the courts of the country in which the arrest was made shall have jurisdiction over the merits. However, this article, being a benefit of the convention,<sup>55</sup> will apply only if both plaintiff and defendant are from contracting states. No cases have been found where a claimant of a contracting state has invoked this article in a French court and urged that the court was required to assume jurisdiction over the merits. Presumably, however, if a mortgagee of a contracting state (*e.g.*, Belgium) arrested a vessel in France, another contracting state, the mortgagee would be entitled by virtue of the conventions to require the French courts to entertain the merits of the action.

## II

### THE BRUSSELS CONVENTIONS AND THE CONFLICT OF LAWS

The subject matter of the 1926 Liens Conventions and the 1952 Arrest Convention may best be correlated by applying the provisions of these two conventions to the resolution of hypothetical cases. In the first four illustrations which follow, it is assumed that a vessel has been arrested in the port of a state which has adopted both conventions, and in view of the earlier discussion, let us assume that this country is France. In the fifth illustration, it is assumed that a foreign flag vessel has been libeled in a United States port, that creditors from states contracting to the 1926 Convention have intervened in the proceeding, and that a United States court applying modern choice of law rules would apply the provisions of the 1926 Brussels Convention.

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<sup>53</sup> *Id.*, art. 7(4), note 40 *supra*.

<sup>54</sup> *Id.*, art. 7, note 40 *supra*. It should be noted that the Arrest Conv. was adopted by Costa Rica subject to reservation that it "does not recognize the obligations of subsections (a), (b), (c), (d), (e), and (f) of paragraph 1st of Article 7, as according to the laws of the Republic the only courts competent to hear actions relating to maritime liens are those of the domicile of the plaintiff, unless the case concerns the cases contemplated by letters (o), (p) and (q) of subsection (1) of Article 1st. . . ." 6 BENEDICT 14.

<sup>55</sup> *Id.*, art. 8(3), note 18 *supra*.

## A. First Illustration

Let us suppose that a vessel flying the flag of a signatory to the 1926 Convention (e.g., Norway) is furnished with supplies in the port of another contracting state (e.g., France) and that this vessel is subject to a ship mortgage duly executed under the law of Norway.

First of all, can the French supplyman arrest the vessel? Yes, for under the 1952 Arrest Convention (to which France but not Norway is a party), a creditor may arrest a vessel for any one of the seventeen types of claims enumerated in article 1, regardless of whether such claim is privileged, or for any other claim permitted by the domestic law of the forum.<sup>56</sup>

On these facts, a French court would have jurisdiction both to order arrest and to consider the merits of the case.<sup>57</sup> The question of whether the supply claim was entitled to the status of a lien or privilege would be tested under the 1926 Convention, since both the claimant and shipowner are nationals of contracting states.<sup>58</sup> A valid supply privilege would exist if the supplies were delivered away from the home port and were "necessary for the preservation of the vessel" or "continuation of the voyage" and if the claim were exercised within the proper limitation period of six months.<sup>59</sup> If the time period had run, the owner would continue to be responsible on the underlying debt, but the plaintiff would rank only as an unsecured creditor.

If the shipowner were not financially able to pay the supply lien in order to obtain release of the vessel, the mortgagee would undoubtedly wish to intervene in this proceeding. Members of the crew would file wage claims. Under article 1 of the 1926 Convention,<sup>60</sup> the French court would be compelled to recognize the validity of the mortgage if it were properly executed according to the law

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<sup>56</sup> *Id.*, art. 8(2), note 17 *supra*.

<sup>57</sup> *Id.*, art. 7(1)(a), note 40 *supra*.

<sup>58</sup> 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."

<sup>59</sup> *Id.*, 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."

<sup>60</sup> 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."

of Norway. If, as is usually the case in ship foreclosures, the proceeds from the sale of the vessel were insufficient to satisfy all creditors, there should in theory be no conflict between the order of priority of the liens and the mortgage in France and in Norway, since priority is settled under the convention.<sup>61</sup> This is a more satisfactory solution to the priority problem than the traditional conflicts rule that the order of priority is governed by the law of the forum because it is procedural rather than substantive<sup>62</sup> or because it is a matter of local public order.<sup>63</sup>

### B. Second Illustration

If, in the first illustration, a vessel of the United States, which is not a party to either the 1926 or 1952 conventions, were supplied in France, it could likewise be arrested by a French supplyman in France or in a port of some other state adhering to the 1952 Arrest Convention.<sup>64</sup>

Although the right of a French supplyman to a privilege under these facts would not be governed by the 1926 Convention, since the United States is not a party, this would not make a substantial difference; the French municipal law, the Law of February 19, 1949,<sup>65</sup> was modeled upon the 1926 Liens Convention and is similar to it in most respects. If the vessel were subject to a preferred ship mortgage created under United States law, the mortgage would be enforceable in France, provided that the mortgagee could prove that it was validly created under United States law.<sup>66</sup> A supplyman's

<sup>61</sup> At least there would be no major conflicts. There continue to be minor differences between the convention and the various domestic laws of the signatories.

<sup>62</sup> See note 85 *infra*.

<sup>63</sup> See 2 RIBERT 110-11; note 84 *infra*.

<sup>64</sup> Arrest Conv., art. 8(2), note 17 *supra*. Even a creditor from a noncontracting state may arrest a foreign vessel in France on a cause of action arising elsewhere. See also 1 RIBERT 797; note 50 *supra*.

<sup>65</sup> 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 the Law of 1949, see Ripert, *La réforme des privilèges maritimes par la loi du 19 février 1949*, [1949] D.M.F. 223, 226. This law was made applicable to French overseas territories and to the then trusteeship territories of Togo and Camerouns by Decree No. 50-1047, Aug. 19, 1950, J.O. 9199, Aug. 27, 1950.

<sup>66</sup> Although Liens Conv., art. 1, note 60 *supra*, would not be applicable, since the U. S. is not a party to the convention, a mortgage validly executed under United

claim would prevail over the mortgage if the goods furnished were "necessary for the preservation of the vessel or continuation of the voyage"<sup>67</sup> and the claim were less than six months old,<sup>68</sup> even though the opposite order of ranking lien and mortgage would have prevailed if the vessel had been libeled in the United States.

### C. Third Illustration

Assume that the Norwegian vessel in the first illustration had received emergency repairs in an American shipyard and that the American creditor wished to arrest the vessel in a French port. This illustration differs from the first in that it involves nationals of different countries in litigation in the court of a third country which has little or no connection with the underlying transaction.

First of all, could the United States repairman arrest a Norwegian vessel in a French port? Neither Norway nor the United States is a party to the 1952 Arrest Convention which renders inapplicable article 215 of the French Code of Commerce, the provision prohibiting arrest of vessels "ready to sail" or in the course of a "voyage."<sup>69</sup> Although no recent French cases have been found where a foreign creditor's request for arrest of a foreign vessel was denied on the ground that article 215 would be violated, this remains a basis for denying the petition for arrest of a lienor from a state not a party to the 1952 Convention.

Assuming that an order of arrest were obtained on these facts, the French court would probably not assume jurisdiction over the

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States law would be recognized under general choice of law principles. See, e.g., *The Wang Importer*: (Sté. Algérienne des Pétroles Mory, République Fédérale des États Unis v. Sté. Emerson S.S. Corp., État Français), Cour d'Appel, Rennes, Feb. 6, 1962, [1962] D.M.F. 475, where the Cour d'Appel of Rennes appointed three American lawyers as experts to determine whether a preferred ship mortgage executed in New York on an American flag vessel was valid under American law.

<sup>67</sup> Code of Commerce, art. 191(6), as amended by Law of Feb. 19, 1949, the equivalent of Liens Conv., art. 2(5).

<sup>68</sup> Code of Commerce, art. 194, the equivalent of Liens Conv., art. 9(1), note 59 *supra*. Under these provisions it would make no difference if the supply were made prior or subsequent to the date of execution of the mortgage or of its endorsement upon the vessel's document. Cf. Preferred Ship Mortgage Act of 1920, § 30(M), 41 Stat. 1004 (1920), 46 U.S.C. § 953 (1958).

<sup>69</sup> For material on art. 215, French Code of Commerce, see notes 5, 21 *supra*. If a vessel is not "ready to sail," a foreign creditor may obtain arrest, even if the vessel is foreign and the cause of action has no relationship with France. See note 50 *supra*.

The right to arrest a foreign vessel even though it is "ready to sail" could be considered a benefit of the arrest convention. Article 8(3) of the convention, note 18 *supra*, permits denial of so-called benefits of the convention to claimants of a noncontracting state.

merits in this type of case.<sup>70</sup> Rather, under article 7 of the Arrest Convention,<sup>71</sup> jurisdiction would probably be remitted to a forum more closely connected with the litigation, after bail had been set and the vessel released.

#### D. Fourth Illustration

Assume that an Italian vessel hypothecated to an Italian bank has been arrested in France by a French shipyard which has made necessary repairs to the vessel. The owners being insolvent, other creditors intervene, including suppliers from Great Britain, the United States, Italy, and Spain. Crew members and officers file claims for wages. The Italian mortgagee also intervenes. Since a French claimant is involved, the French courts would be competent both to order arrest of the vessel under the 1952 Arrest Convention and to assume jurisdiction over the merits.<sup>72</sup> If the vessel were sold, the court would then consider, under the liens convention, whether certain of the claims were privileged, and then, as between the privileged claims, the order of their relative priority.

The validity of the mortgage or *hypothèque* would be determined by Italian law, the law of the flag.<sup>73</sup> The repair and supply claims of Italian, French, and Spanish creditors, as well as the wage claims of Italian crew and officers, would be governed by the uniform provisions of the liens convention applicable in France, Italy, and Spain. What law, however, would govern the validity and relative rank of the purported liens of supply creditors from nonsignatory states such as Great Britain and the United States? The 1926 Convention provides no guidance for the resolution of conflicts between its uniform provisions and the laws of nonsignatory states; the court would therefore have to apply its own rules of conflict of laws.

While it is generally accepted conflict of laws doctrine that the lien status of seamen's and officers' wage claims is determined by the law of the flag<sup>74</sup> and that the lien status of tort claims (e.g., personal

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<sup>70</sup> See notes 49, 50 *supra*.

<sup>71</sup> See note 40 *supra*.

<sup>72</sup> Arrest Conv., art. 7(1), note 40 *supra*; Weser, *supra* note 44, at 324-27; note 48 *supra*.

<sup>73</sup> Liens Conv., art. 1, note 60 *supra*.

<sup>74</sup> 4 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 117 (1958) [hereinafter cited as RABEL]. Cf. The Graf Klot Trautvetter, 8 Fed. 833 (D.S.C. 1881) (master of German vessel libeled in United States had no lien for wages, even though lien would have existed under German law); The Tagus, [1903] P. 44 (C.A.) (Argentine law of flag

injury, collision, etc.) is governed by the law of the territorial waters in which the wrong was committed (the *lex loci delicti*),<sup>75</sup> there are at least three different conflict of laws rules which may be applied to supply and repair claims. The lien status of a person furnishing supplies or repairs may be governed by (1) the law of the place where the supplies or repairs were furnished, the *lex loci contractus*;<sup>76</sup> (2) the law of the forum, the *lex fori*;<sup>77</sup> or (3) the law of the flag.<sup>78</sup>

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applied, but privilege of master extended by English law of forum from wages of last voyage to all back wages).

<sup>75</sup> 4 RABEL, 118.

<sup>76</sup> The *lex loci contractus* is most often followed by courts in the United States. See, e.g., *The City of Atlanta*, 17 F.2d 311 (S.D. Ga. 1927) (U.S. vessel supplied in Cuba; libel dismissed for failure to plead or prove law of Cuba); *The Northern Star*, 1925 Am. Mar. Cas. 1135 (E.D.N.Y. 1925) (U.S. vessel subject to preferred ship mortgage; failure of Brazilian supplier to prove lien under Brazilian law); *The Woudrichem*, 278 Fed. 568 (E.D.N.Y. 1921) (claim of Dutch supplyman dismissed for failure to prove Dutch law); *The Kaiser Wilhelm II*, 230 Fed. 717 (D.N.J. 1916) (German vessel supplied in England; libel dismissed because subjects of two belligerent nations involved, with dictum that law of England, place of supply, would govern); *The Scotia*, 35 Fed. 907 (S.D.N.Y. 1888) (where British vessel supplied in U.S. and Haiti, lien status determined under U.S. and Haitian law).

Apparently, the *lex loci contractus* is also applied in Canada and Germany. See decisions cited in 4 RABEL 115-16.

<sup>77</sup> The *lex fori* is applied because of the difficulties inherent in ascertaining the domestic lien law of the *loci contractus* or by virtue of public policy considerations in assuring equality between creditors in insolvency situations. See notes 82, 83 *infra*.

<sup>78</sup> Eminent writers have advocated the law of the flag as a means of assuring uniform treatment of in rem claims against a particular vessel, including mortgages and liens arising by operation of law. BATIFFOL, *op. cit. supra* note 49, at 548, 564; 2 RIFERT 111-12.

In Italy the courts have with some consistency applied the law of the flag to determine whether a lien exists upon a foreign vessel, even to the detriment of local creditors who would have enjoyed a lien under Italian municipal law. See PRICE 216-17. They have also applied the law of the flag to determine the order of priority of claims against proceeds from the sale of a foreign vessel. 4 RABEL 116. See *The Mediterranean Star*: (*Barclay Bank [sic] v. Barabino*), Genoa, Aug. 9, 1923, 25 IL DIRITTO MARITTIMO 466 (1923), 7 REV. DOR 404 (1924) (French translation and excellent note).

American courts, in considering whether the delivery of supplies in Italy gave rise to a lien, have looked to Italian law as the *lex loci contractus*, and then, in view of the Italian practice of applying the law of the flag to conflict of laws cases involving foreign flag vessels, they have employed the principle of renvoi. Thus, in *The Coastwise*, 291 Fed. 166 (D. Mass. 1923), involving supply of bunkers in Italy to an American flag vessel, the U. S. Maritime Lien Act of 1910 was applied. See also *Brandon v. S.S. Denton*, 302 F.2d 404 (5th Cir. 1962); *The R. C. Rickmers*, 1924 Am. Mar. Cas. 971 (S.D.N.Y. 1924) (Italian supplier of German vessel not entitled to a maritime lien because under German law if a supplier has reason to know he is dealing with charterer and not owner, no lien attaches).

French courts apply the law of the flag with respect to privileges that may have arisen against French flag vessels in other countries on the theory that since arts. 190-96, Code of Commerce make no territorial distinctions, they must be presumed to apply to French vessels everywhere. 2 RIFERT 109.

In the present illustration, how should a French court treat the claim of an American supplyman in a proceeding also involving claims of British, French, Spanish, and Italian creditors of the same class? Suppose, for example, that under the particular facts there were a real conflict between the federal maritime law of the United States and the 1926 Liens Convention on the question of whether a supply claim gave rise to a lien or privilege; such a conflict would exist if more than six months had elapsed since the supplies were furnished in the United States. Under these circumstances, the supplyman might still have a valid lien if he had arrested the vessel in a United States port, since the more flexible doctrine of laches rather than a fixed period of limitations governs in the United States admiralty courts; the claim would probably not be entitled to lien or privilege status under the 1926 Convention.<sup>79</sup>

Such a case presents a difficult conflict of laws problem. Certainly if a United States supplyman extended credit to a vessel in New York, his normal expectation would be that a lien would arise under the Federal Maritime Lien Act.<sup>80</sup> This expectation deserves protection, no matter in what country the vessel happens to be arrested and sold, and for this reason the *lex loci contractus* should be applied. In practice, however, the *lex loci contractus* has not been uniformly applied because of the difficulties arising where claimants of many different countries seek to prove preferred claims against a vessel.<sup>81</sup> For what are termed public policy reasons, a French court considering the facts of the above illustration would find it very difficult to determine that the claim of the United States supplyman was valid, under one standard, and then, under another standard, to reject the more recent claims of French, Italian, and Spanish supplymen relating to the very same vessel.<sup>82</sup> The conflicts rule of

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<sup>79</sup> See Liens Conv., art. 9(1), note 59 *supra*.

<sup>80</sup> § 30 P, 41 Stat. 1005 (1920), 46 U.S.C. § 971 (1958), expressly provides that any person furnishing necessities "to any vessel, whether foreign or domestic . . ." shall have a maritime lien. (Emphasis added.)

<sup>81</sup> See notes 77, 78 *supra*; notes 82-85 *infra*.

<sup>82</sup> See, e.g., *The Wang Importer*, Cour d'Appel, Rennes, Feb. 6, 1962, [1962] D.M.F. 475, which involved claims of French, Egyptian, and American supplymen against a U.S. flag vessel sold by a French court. The court appears to have applied the *lex fori* on the ground that no further exceptions to the fundamental principle of equality among creditors should be made except those required under the *lex fori*. Cf., 4 RABEL 120-21: "A Dutch judge cannot be forced to recognize privileges of enforcement not existent in our country to the detriment of our own subjects."

Thus, when there are multiple claimants with similar type claims (e.g., oil companies which have bunkered the same vessel in the forum state and in various

*lex fori* is more easily administered than *lex loci contractus*, and the courts in France,<sup>83</sup> Great Britain,<sup>84</sup> and elsewhere,<sup>85</sup> have favored the former. Even in the United States where many cases state the rule that the lien status of supply claims is governed by the *lex loci contractus*, the statements are often only dictum; the courts usually apply the *lex fori* because of failure to plead or prove the foreign law.<sup>86</sup>

Thus, in the above illustration, a French court would most probably determine the validity and ranking of all supply liens according to the *lex fori*, the 1926 Convention or its domestic law equivalent. Under the priority rules of the 1926 Convention, the law costs, wage claims, and the supply and repair liens of less than six months would prime the Italian mortgage.

#### E. Fifth Illustration

Let us assume that a Panamanian vessel mortgaged to a Norwegian creditor is libeled in the United States by the mortgagee. Intervening libels are filed by members of the crew asserting a lien for wages and by supplymen from Egypt, France, and Spain. Although the United States is not a signatory to the 1926 Convention,

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other countries), it becomes difficult, as a practical matter, to permit some claimants a privileged position, thereby exhausting the sale proceeds, and leaving other claimants with similar type claims without anything.

<sup>83</sup> The general rule applied by French courts with respect to foreign vessels is that only claims privileged under the *lex fori* will be recognized and they will rank in the order enumerated under French law. See, e.g., *The Wang Importer*, *supra* note 82; *Fouquet et Cie. v. Capitaine et Armateurs du Vanchelis*, Trib. Civ., Tarascon, March 27, 1931, 9 REVUE DE DROIT MARITIME COMPARÉ: SUPPLEMENT BIMENSUEL DE DROIT MARITIME FRANÇAIS [hereinafter cited as DOR. SUPP.] 214 (1931); *Sté. Correia Leit Santos & Cie. v. Chaume*, Cour d'Appel, Bordeaux, June 23, 1930, 9 DOR. SUPP. 184 (1931); *Claverie v. Ordre Malveira*, Trib. Civ., Montpellier, April 20, 1923, 1 DOR SUPP. 281 (1923); *État Major du Kolyma v. Ferrat*, Cour d'Appel, Alger, Jan. 24, 1923, 1 DOR SUPP. 423 (1923); 2 RIPERT 113.

<sup>84</sup> English cases consider both the existence of a lien and the priority accorded it to be procedural rather than substantive matters. See *The Tagus*, [1903] P. 44 (C.A.); *The Milford*, Swab. 362, 166 Eng. Rep. 1167 (A.C. 1858); PRICE 207-10.

<sup>85</sup> E.g., Belgium: *Rotterdamsche Scheepshypoteekbank v. Hertha*, Arbitral Trib., Antwerp, Nov. 26, 1929, 22 Rev. Dor 175 (1930) (*lex fori* applied to questions of existence of privileges and rank on German flag vessel); Holland: *The Fleiss*, Rotterdam, March 22, 1935, *Weekblad van het Recht*, No. 12,985, 33 Rev. Dor. 400 (1936) (where creditors were of multiple nationality, Dutch law applied to question of validity of privileges). See also Schadée, *Resumé de Jurisprudence Néerlandaise 1957, 1958, 1959*, [1960] D.M.F. 309.

<sup>86</sup> See, e.g., *The Hoxie*, 291 Fed. 599 (D. Md. 1923), *aff'd*, 297 Fed. 189 (4th Cir.), *cert. denied*, 266 U.S. 608 (1924) (U.S. vessel supplied in Denmark by Danish subsidiary of American corporation; U.S. law applied); *The Snetind*, 276 Fed. 139 (D. Me. 1921). See also cases cited at note 76 *supra*.

the foreign ship mortgage would now be recognized as within the admiralty jurisdiction and therefore a valid lien by virtue of the Foreign Ship Mortgage Act of 1954,<sup>87</sup> provided that it was a valid mortgage under the law of Panama.

Assuming that no United States supply or repairmen were involved, what law should govern the question of whether valid wage or supply liens were created? The present factual situation presents a particularly apt occasion for application of the rule that the lien status of a supply or repair claim should be governed by the law of the place of the transaction.<sup>88</sup> The *lex loci contractus* in the case of claimants from France, Norway, Spain, and Egypt is the 1926 Liens Convention, to which all these countries are signatories.

Suppose, for example, that the Egyptian supply lien were eighteen months old, the French lien twelve months old, and the Spanish lien five months old. Under American law, the twelve month and five month claims might well be valid, while the eighteen month claim would probably be barred by laches unless the claimant could produce satisfactory reasons excusing its delay in prosecuting the claim. However, under the 1926 Convention in effect in Egypt, Spain, and France, the Egyptian and French claimants would be deemed to have lost their liens by virtue of the six month limitation.<sup>89</sup> The limitation period, which is a fundamental characteristic of a privilege or lien under the 1926 Convention, should be considered as substantive and not a matter of procedure governed by the law of the forum.<sup>90</sup>

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<sup>87</sup> 68 Stat. 323 (1954), 46 U.S.C. § 951 (1958). In *The Aruba: (Rederiaktierbolaget v. Compania de Navegacion Anne, S.A.)*, 139 F. Supp. 327 (D.C.Z. 1955), a case involving a Panamanian vessel, a Swiss company holding a ship mortgage executed according to the laws of Panama was permitted to intervene pursuant to the Preferred Foreign Ship Mortgage Act of 1954. The court rejected the contentions of the original libellant, suing for charter hire, that the 1954 act was intended to protect only American nationals having mortgages upon foreign flag vessels.

<sup>88</sup> See note 76 *supra*.

<sup>89</sup> Liens Conv., art. 9(1), note 59 *supra*.

<sup>90</sup> Under the general rules of conflict of laws in the United States, procedure will be determined by the law of the forum, and statutes of limitation are generally considered procedural. RESTATEMENT, CONFLICT OF LAWS § 585 (1934). Hence the courts will permit a foreign lienor to recover even though his claim would be barred under the statute of limitations in the place where it arose. For a discussion of conflicting statutes of limitation and maritime liens, see GILMORE & BLACK 633-37.

In *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955), the plaintiff, a Panamanian seaman employed on a Panamanian vessel, brought an action for wages based upon the Panama Labor Code, which provided a one year period of limitations. The action was brought in New York more than two years after accruing, and the

Suppose further that the Panamanian vessel were chartered to an English company and that the charter agreement contained a clause providing that the charterer was without authority to bind the vessel. Under United States law such a clause could prevent the creation of maritime liens for supplies,<sup>91</sup> but under the liens convention in effect in Norway, Spain, Egypt, and France, such a provision would not be given legal effect so as to deprive a supplier of his lien.<sup>92</sup>

Regarding the claims of the seamen, the American court should apply the law of the flag, Panamanian law, in determining whether certain fringe benefits payable under the contract of service are entitled to a lien;<sup>93</sup> the rule applicable in cases involving American vessels under which vacation and pension claims do not give rise to a maritime lien should not be carried over to situations involving foreign vessels.

Having determined what claims give rise to a lien, how should the American court determine the order of priority in which the liens should be satisfied? If claims of United States nationals and those of nationals of other countries having a different rule arise in the same case, the only practical solution is often to apply the rule of the forum to resolve the priority question.<sup>94</sup> However, if all the

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defense of laches was raised. The district court held that although the New York statute of limitations in contract actions was six years, New York's borrowing statute required that when a cause of action accrues outside of New York in favor of a nonresident, the action will be barred by the shorter of the New York or the foreign statute. 117 F. Supp. 864 (S.D.N.Y. 1954). This decision was reversed by the Second Circuit. *Cf. Baez-Geigel v. American Foreign S.S. Corp.*, 171 F. Supp. 359 (S.D.N.Y. 1959), where in an action by a Puerto Rican longshoreman for injury suffered in Puerto Rico, the court considered the Puerto Rican statute of limitations of one year, the New York borrowing statute and the Puerto Rican tolling statute as tolling the period of limitations during a period when defendant was not amenable to suit in Puerto Rico.

<sup>91</sup> 46 U.S.C. § 973 (1958). The circumstances under which a supplyman will be put on 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), *aff'd*, 297 Fed. 189 (4th Cir.), *cert. denied*, 266 U.S. 608 (1924); GILMORE & BLACK 219, 558-68.

<sup>92</sup> 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."

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.

<sup>93</sup> See note 74 *supra*.

<sup>94</sup> *The Oconee*, 280 Fed. 927 (E.D. Va. 1922); *The Scotia*, 35 Fed. 907, 910-11

liens arose by virtue of the law of the same foreign country or, as in the present example, if the laws of several foreign countries involved are identical, the law of the forum would not be a good choice. If all parties similarly situated belong to countries subscribing to the 1926 Convention, a United States court should properly apply the priority rules of the convention rather than federal legislation having no substantial connection to the litigation.<sup>95</sup> Accordingly, on the facts as stated, if the rules of the 1926 Convention were applied, the order of priority between the liens and the mortgage should be (1) law costs; (2) seamen's wages; (3) the five month old supply lien; and (4) the mortgage. The twelve and eighteen month old supply claims would be deemed to have lost their right to preference and would share only in what remained of the sale proceeds after satisfaction of the liens.

If supply or repairmen who had furnished their services to the vessel in the United States were involved in the present example, they would be entitled to a preference over the Norwegian mortgage by virtue of the last clause of the Foreign Ship Mortgage Act of 1954. It should be noted, however, that the effect of this statutory preference for American materialmen, under these facts, is to give them the same priority over a foreign ship mortgage that a supplyman or repairman who enforces his claim within six months is entitled to have under the 1926 Brussels Convention.

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(S.D.N.Y. 1888). In the first case, an American flag vessel was involved, and the court rejected the libellant's contention that because supplies had been furnished to the vessel in Germany, the supply lien arising under German law should prevail over a prior United States preferred ship mortgage. Although such priority would have been accorded under German law, it was held that priority was governed by the law of the forum. Since the available fund was exhausted by the mortgage, the court did not reach the question of whether the supplyman's lien arose under German or United States law. In any event, a lien on these facts would arise under the laws of both countries. See 4 RABEL 119-22 and German, Canadian, Scottish, Danish, and Dutch cases there cited.

Rabel quite rightly argues that it is an untenable assertion that priority is procedural; rather the law of the forum is applied by virtue of the emergency nature of ship foreclosure proceedings. It follows, he continues, that whenever the laws of the places most closely connected with the underlying transactions "produce identical results of rank, they should prevail over the *lex fori*. In fact, such an exception has been made by the Dutch district court of Rotterdam. . . . When the laws governing the competing claims, such as a mortgage contracted in Norway and an English lien for supply, agree on their rank, the *lex fori* is disregarded. Thus, the emergency function of the domestic law of the court is perceived and adequately limited." *Id.* at 121-22.

<sup>95</sup> *Id.* at 121-22.

## III

## CONCLUSION

In view of the international nature of shipping and the widespread international participation in ship financing, there is a real need for uniformity on questions relating to the enforceability of security interests in ships. The two Brussels conventions have helped to reduce the number of conflicts between the laws of the maritime nations, and they have served as models for legislation in some of the newly independent ones. It is idle, however, to pretend that the success of these conventions is anything like what it might have been with the adherence of the United States.<sup>96</sup>

There has been some discussion about revising the 1926 Liens Convention.<sup>97</sup> If this were done, the United States should take an active role in reducing conflicts arising between the various national laws dealing with liens and mortgages. United States opposition to the 1926 Convention was in part based upon constitutional grounds, but this objection was overcome in *The Thomas Barlum*,<sup>98</sup> where the United States Supreme Court upheld the right of Congress to legislate on matters of admiralty jurisdiction. The question of enforcement of foreign ship mortgages might perhaps be made the subject of a separate convention, for there is greater international accord on this than on the troublesome questions of liens and their priority.<sup>99</sup> However, the question of mortgages is so intimately tied to the question of the priority of mortgages and liens that it would be better not to diminish the coverage of the 1926 Convention. By and large, the same liens are recognized under both Anglo-American law and the convention. The order of priority is not too different, with the exception of the relative positions of mortgages and materialmen's liens. Under the 1926 Convention, the supplyman prevails over the mortgagee, but only if he acts within the very short

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<sup>96</sup> Comment, 64 YALE L.J. 878, 893 (1955).

<sup>97</sup> See, e.g., Schadée, *Quelques Notes Marginales à la convention sur les privilèges et hypothèques maritimes*, [1959] D.M.F. 252, where it is suggested: (1) that the Liens Conv. be harmonized with 1957 Conv. on Limitation of Liability; (2) that article 2(5), providing a lien for supply and repairmen, is no longer necessary because these people extend credit to the owner or his agents, not to the master, and they could arrange for other forms of security, such as a bond; (3) that article 8, which provides a *droit de suite*, fails to mention freight or accessories; and (4) that classification of liens by voyage is meaningless today.

<sup>98</sup> 293 U.S. 21 (1934). See also GILMORE & BLACK 571-74.

<sup>99</sup> See Comment, *supra* note 96, at 905.

period of six months. Under American law, the mortgagee prevails over subsequent supply claims, but suppliers are not so arbitrarily precluded nor is the home port limitation present. In essence, each system seeks to balance the rights of mortgagees and suppliers, and there is no reason why some international agreement cannot be reached on what should be the balancing factors.

With respect to the 1952 Arrest Convention, the right to arrest a vessel in the United States is much broader than in any of the countries which have adopted the convention. The only advantage to the United States in adhering to this convention would be the guarantee to United States litigants in the courts of convention states that they would enjoy the benefits of the convention, including the right not to have domestic law restrictions upon the right to arrest a vessel about to sail applied against them.<sup>100</sup>

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<sup>100</sup> See notes 5, 21 *supra*.