

Some Thoughts on the Special Maritime Privilege under Maltese law and in a Comparative Context

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(1) Ships and the Maritime Privilege or Lien

Under the provisions of the Merchant Shipping Act of Malta⁴²⁷ ships and other vessels are deemed to be a special type or class of movable property, being separate and distinct assets within the estate of their owners.⁴²⁸ The main reason for this ‘ring-fencing’ appears to be the protection of those creditors of the owners who have claims relating to such ships and other vessels. The law in fact states that this is ‘for security of actions and claims to which the vessel is subject.’⁴²⁹ Even in the case of the owner’s bankruptcy all actions and claims to which the ship may be subject have preference on such ship over all other debts of the owner’s estate.⁴³⁰ It is submitted that these provisions apply to all ships and other vessels, and not simply to those that may have Maltese nationality. It may however be presumed that they do not apply to ships and other vessels that enjoy immunity from civil process.

One of the ways in which a ship may constitute security for a debt or other obligation is by a special privilege created upon it by operation of law.⁴³¹ The debts secured by a special privilege upon a ship (the law actually speaks of a ‘vessel’ in this context) are those set out in article 50 of the MSA. The language of this provision seems to imply that it constitutes a *lex specialis* and that no other debt may be secured by a special maritime privilege upon

⁴²⁷ Chapter 234 of the Laws of Malta - hereinafter the “MSA”.

⁴²⁸ Article 37A(1) of the MSA.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Article 37B(1) and (2)(c) of the MSA.

a ship.⁴³² However the law recognizes that separate items upon a ship may themselves be subject to special privileges under the Civil Code.⁴³³

Article 50 of the MSA also recognizes the special privilege granted to the seller under article 2009(d) of the Civil Code⁴³⁴ to secure a claim for any part of the price of the vessel that remains unpaid, provided that such privilege is registered, in so far as a Maltese ship is concerned in its register and in the case of other vessels in the Public Registry, within two days from the date of sale.⁴³⁵

Although it is not entirely clear whether special privileges other than these may be created over ships and other vessels it would appear that the general and special privileges over movables contemplated in the Civil Code may, at least in theory, be applicable also to ship and other vessels.⁴³⁶ It may also be recalled that as a rule under the Civil Code general privileges and special privileges over movables are not subject to registration.⁴³⁷

(2) The Nature of the Special Maritime Privilege

At the very simplest level the special maritime privilege⁴³⁸ is a *privileged claim or right of preference on maritime property* which the nature of the claim (or debt) confers upon a creditor over other creditors.

⁴³² This also appears to be confirmed by article 1997(2) of the Civil Code which provides that the provisions of Title XXIII [Of Privileges and Hypothecs] of the Civil Code do not apply to ships or to debts to which ships may be subject, except so far as they are consistent with the provisions of the MSA.

⁴³³ Article 37B(3) of the MSA. See also article 40(1)(a) of the MSA.

⁴³⁴ Article 50(p) of the MSA. In terms of article 2009(d) of the Civil Code the debt due in respect of the price of a thing, whether the sale has been effected with a stipulation as to credit or not, gives rise to a special privilege over the particular thing.

⁴³⁵ See article 52 of the MSA.

⁴³⁶ See article 37D(2) of the MSA.

⁴³⁷ Article 2032 of the Civil Code.

⁴³⁸ In jurisdictions influenced by the Anglo-Saxon common law system this is usually referred to as a lien, which means a charge over property for the purpose of securing an underlying claim.

Maritime property should include the ship or vessel to which the claim relates. More generally, in many jurisdictions, it also includes all the ship's appurtenances (equipment that forms an integral part of, or is otherwise essential to, the ship) that are on board the ship and that belong to the owner of the ship (in other words, those that are not leased to the owner or otherwise owned by third parties). However exceptionally under English law and the law of some other States all such appurtenances, even those that are not owned by the ship-owner, may be attached by a salvage lien. Bunkers are also included within the meaning of the term 'appurtenances' and are subject to the same considerations.

Our law does not appear to draw some of these 'finer' distinctions in so far as maritime privileges and mortgages are concerned. In the first place article 37A(2) of the MSA simply provides that a 'ship' includes 'together with the hull, all equipment, machinery and other appurtenances as accessories belonging to the ship, which are on board or which have been temporarily removed therefrom.' This may suggest that the ownership of the 'appurtenances' may be irrelevant, but the expression 'belonging to the ship' may be construed as meaning that for 'appurtenances' to fall within the meaning of the expression 'ship' and therefore to be *inter alia* subject to a special maritime privilege they must belong to the person or persons who own the ship. Moreover, in terms of article 50 of the MSA the special privileges contemplated therein attach to the 'vessel' and to 'any proceeds from any indemnity arising from collisions and other mishaps as well as any insurance proceeds.'

In some jurisdictions freight that is being earned at the time when the privilege (or lien) arises may also be covered by a maritime privilege (or lien) over maritime property. Special rules may apply in this regard depending on the type and origin of the privilege (or lien) - *vide* also in this regard the relative provisions in the applicable international conventions.⁴³⁹ This does not appear to be the case under Maltese law.

⁴³⁹ See in particular, Articles 2 and 4 of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 (adopted in Brussels on April 10, 1926) – hereinafter the "1926 Convention". The other international conventions of

Moreover in theory cargo may also be maritime property and may therefore be attached by a privilege (or lien). It should however be noted that the carrier's privilege (or lien) against cargo for unpaid freight is an application of the principle of *ius retentionis* or, in other words a possessory privilege (or lien); and therefore once the carrier loses possession of the cargo the privilege (or lien) is extinguished.

Maritime property may also include the wreck of a ship attached by a privilege (or lien). This hypothesis does not appear to be excluded under Maltese law. Generally also included are the proceeds of a judicial sale of a ship attached by a privilege (or lien), and any security put up by the owner thereof (directly or indirectly, for instance, through his Protection and Indemnity Club) to prevent the arrest of such ship or the release of such ship if it is arrested (in such cases the privilege or lien is effectively transferred to the funds).

In most jurisdictions the following are not considered to be maritime property, but they are deemed so under the provisions of the applicable international conventions, in particular those of the 1926 Convention:

- (i) any salvage remuneration payable to a ship attached by a privilege or lien; and
- (ii) any general average contribution payable to a ship attached by a privilege or lien; and
- (iii) insurance proceeds payable in respect of loss of, or damage to, a ship attached by a privilege or lien.

It may be recalled that the latter item is expressly referred to in article 50 of the Merchant Shipping Act.

relevance are the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967 (adopted in Brussels on May 27, 1967) and the International Convention on Maritime Liens and Mortgages 1993 (adopted in Geneva on May 6, 1993). The latter two conventions are not yet in force.

(3) Types of Maritime Privileges or Liens

In civil law countries there are generally two types of privileges that attach to maritime property:

- (a) the special (or statutory) maritime privilege; and
- (b) the possessory privilege (an application of the general principle of *ius retentionis*) that is based on a right of possession of property pending the discharge of any outstanding obligations incurred in relation to such property (for example, in the context of ship repair) – once possession is lost the right under the possessory privilege is also lost.

In the common law system there are various types of liens that may apply in a maritime context. For example in the United Kingdom the liens that apply to maritime property are:

- (a) the maritime lien proper that owes its origin to the general maritime law;
- (b) the so-called statutory lien that owes its origin to statute (in the main part set out in section 20 of the Supreme Court Act);
- (c) the possessory lien – the same principles described above also apply here; and
- (d) the equitable lien (that arises in equity through a relationship or contract between the parties where it is otherwise impossible to establish another type of lien; this lien is extinguished when the property attached thereby is acquired by a *bona fide* purchaser for value without notice thereof).

(4) Some Characteristics of Maritime Privilege or Liens

The following are some characteristics of maritime privileges (or liens). They apply generally to maritime privileges and liens indiscriminately. Some nuances of meaning may however apply in distinguishing the maritime privileges recognized in civil law countries from the maritime lien recognized under the common law system.

a) *It arises by operation of (substantive) law in a number of circumstances defined by statute or by the general maritime law (or, at times, by general principles of law or by the common law) – usually for services rendered in respect of such property or for damage caused through the instrumentality of such property.*

The creation of the maritime privilege or lien does not pre-suppose the responsibility or liability of the ship for the underlying debt which it secures. As a matter of fact the theory of the personification of the ship is now largely discredited in most jurisdictions. The justification for the creation of the maritime privilege or lien (as with all other privileges and liens) is that an asset belonging to the person liable for the claim (directly or indirectly) is made available as a security in the interests of the person who holds the claim. The ship herself is not responsible, nor can she be held liable, for any such claim as she lacks the necessary legal personality. At most the ship is recognized as having some form of judicial or quasi-judicial personality, in other words the ability to stand as defendant (and, perhaps, as plaintiff) in judicial proceedings.

b) *It is created automatically, without the need for any declaration or registration or other formality or special condition of proof.*⁴⁴⁰

⁴⁴⁰ See Article 11 of the 1926 Convention: 'Subject to the provisions of this Convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.'

If the conditions required by law for the creation of a privilege or lien over a ship subsist, the owner of such ship can not prevent such creation or accrual except if he satisfies the underlying claim or debt or provides an indemnity for its satisfaction (in which case the privilege or lien may be seen as being transferred to the alternative security, if any, furnished by the owner by way of indemnity for the claim or debt). It should be recalled that the effect of a non-lien clause (usually in charterparty agreements, in ship sale agreements and in ship mortgage or ship *hypothèque* agreements) is simply that of obliging one of the parties (the charterer or the seller or the mortgagor or debtor) to indemnify the other (the owner or the purchaser or the mortgagee or hypothecary creditor) in the event that a privilege or lien accrues during the former's possession (etc) of the property in question.

c) *Generally the maritime privilege or lien accrues from the moment of the event or other circumstances out of which it arises.*

Under English law a distinction is drawn between statutory liens or rights of action *in rem* and the historical maritime liens. The former are deemed to come into existence from the moment in time when the claim in admiralty is commenced, in other words when the *in rem* claim form is filed. On the other hand the maritime lien, albeit inchoate, is deemed to come into existence (in a sense retrospectively and only after the claim is commenced or brought as an action *in rem*) from the point in time when the underlying event or other circumstance arose. This distinction is largely due to historical reasons, and is nowadays dictated by procedural expediency. It does not apply under Maltese law.

d) *It is in the nature of an accessory or ancillary right based (and therefore largely dependent) upon an underlying (personal) claim against the proper debtor or defendant, but otherwise having 'a life of its own'.*

The privilege or lien is an accessory or ancillary (security) right. This means that the existence of a privilege or lien necessarily presupposes the existence of an underlying (*in personam*) claim

that the holder of such privilege or lien has either against the owner (*prima facie*) of the property in respect of which the privilege or lien is created or against another person who is liable for such claim instead of the owner (*pro hac vice*). The following considerations follow:

(i) The *only* purpose of the lien or privilege is to confer a privileged security right over the property to which it attaches. The privilege or lien is, at most, co-extensive with the value of the property to which it attaches. However it does not necessarily extend to the value of the underlying claim.

(ii) In a sense the rights conferred by the privilege or lien may be exercised by the holder thereof independently of the pursuit of any action against the person liable for the underlying claim.

(iii) However if the underlying claim is for any reason extinguished the privilege or lien is usually also automatically extinguished.

(iv) The privilege or lien presupposes that the person who at the time of the relative cause of action (giving rise to the privilege or lien) is 'personally' liable for the underlying claim, was either the owner of the property subject thereto or any other person acting *pro hac vice* (in other words, legally representing or acting instead of) the owner in relation to such property. The latter concept would presumably include the demise charterer and, in most jurisdictions, the time charterer. In some jurisdictions it could also include the voyage charterer. This matter does not appear to be addressed directly and unequivocally under Maltese law. Clearly the owner's liability will be adequately established if he is legally vicariously liable for the underlying claim (for instance, if the ship causes damage to third party property whilst under the control of the master employed by the owner or even whilst under the control of a pilot).

(v) If an action is brought on the basis of the privilege or lien the claimant's potential satisfaction is, at least *prima facie*, limited by reference to the privilege or lien. Accordingly if the owner of the

attached property fails to appear in proceedings commenced *in rem* (in other words, directly against the property attached by the privilege or lien) the plaintiff's remedy will be limited to the value of the property attached by the privilege or lien.

(vi) In the civil law system this will normally be the case whenever the property in question has been transferred to third parties after the privilege has accrued. In such cases the proceedings are indirectly brought against the property's new owner who will either lose the property (that will be sold under the authority of the court - judicial sale) or prevent this and retain the property by paying the privileged creditor the value of the property at the time of its arrest or seizure. Otherwise, if the property is still held by the person liable for the underlying claim, the proceedings must be brought against such person but may be (and are normally) anticipated by a precautionary seizure of the property attached by the privilege (on the basis of the real rights attaching thereto). In such case, if the defendant fails to appear or if there is no other property pertaining to him over which judgment may be executed, the plaintiff's remedy will still be limited by reference to the value of the privilege.

(vii) The above considerations will therefore also apply in both the civil and common law systems if the owner (or any other person interested in the property) sets up a fund to release the property. In such case the fund set up shall be equal to the value of the property subject to the privilege or lien if such value is less than, or equal to, that of the underlying claim, or shall be equal to the value of the underlying claim if such value is less than that of the property attached.

(viii) Nevertheless, in all cases, if the person liable for the underlying claim appears in the proceedings to defend or otherwise oppose such proceedings he will thereby expose himself to liability for the full value of the underlying claim. In the common law this submission to jurisdiction effectively converts the proceedings into hybrid proceedings: partly *in rem* and partly *in personam*.

(ix) Furthermore, if for any reason (as explained above) the claimant fails to obtain full satisfaction from proceedings brought in terms of the lien or privilege, his rights in terms of the underlying claim will be preserved up to the value of the unsatisfied balance (because the extinguishment of the privilege or lien does not necessarily extinguish the underlying claim).

(x) It should be remembered that the privilege or lien is both a substantive right and a procedural remedy.

e) t is a real right (a ius in rem) over the property in respect of which it is created.

This means that the privilege or lien attaches to, and follows, the property even if it is acquired by third parties in good faith. It also suggests that the privileged creditor's rights are rights in the property and therefore, by inference, preferred rights.⁴⁴¹

f) It entitles the holder of the privilege or lien (the privileged creditor or lienor) to security and priority in respect of the property in question against other creditors of the owner of such property.

All the property of a debtor is the common guarantee of his creditors, all of whom have an equal right over such property, unless there exist between them lawful causes of preference.⁴⁴² A privilege is a 'lawful cause of preference.'⁴⁴³ A special maritime privilege is such a lawful cause of preference that affects only a ship or other vessel belonging to the debtor. The debt covered by the special maritime privilege is secured by the privilege over the ship, and the creditor who holds the privilege will see his claim satisfied out of the proceeds of sale of the ship in preference to other unsecured creditors of the same debtor.

⁴⁴¹ See paragraph (f) below.

⁴⁴² Article 1995 of the Civil Code.

⁴⁴³ See article 1999 of the Civil Code.

g) *It is enforceable either by an action against the owner of the property or, in some jurisdictions, by an action against the property itself (the action in rem) – the right of the privileged creditor or lienor is to have the property subject to the privilege or lien seized or arrested and sold under the authority of a competent court, and to have his claim satisfied out of the proceeds of such sale.*

This in itself suggests that the existence of a maritime privilege or lien presupposes a right of arrest or detention or seizure by judicial process of the property attached by the privilege or lien. The means of enforcement of the right in the privilege or lien are purely procedural matters that are determined only by reference to the law of the place where the action is made (the *lex fori*).⁴⁴⁴ In the ultimate analysis however the privileged creditor always has the right to request the sale of the property subject to the privilege or lien and to have his claim satisfied (in preference to other unsecured or less secured creditors of the same debtor) out of the proceeds of such sale.

h) *It is (generally) enforceable even against innocent purchasers of the property for value because it travels with, or follows, the property secretly and unconditionally.*

The maritime privilege or lien is not usually registered or subject to a system of registration. It therefore attaches to a ship secretly and unconditionally, and remains so attached in latent form. Although an innocent purchaser may have no means of finding out the existence of the privilege at the time of the purchase the law prefers to protect the creditor secured by the privilege or lien.⁴⁴⁵

(5) The Special Maritime Privileges under Article 50 of the MSA

The debts referred to in article 50 of the MSA are the following:

⁴⁴⁴ See the illustrations at paragraph (d) above.

⁴⁴⁵ See Article 8 of the 1926 Convention: 'Claims secured by a lien follow the vessel into whatever hands it may pass.'

- (a) Judicial costs incurred in respect of the sale of a ship and the distribution of the proceeds of such sale.
- (b) Fees and other charges due to the Registrar of Ships under the MSA.
- (c) Tonnage dues.
- (d) Wages and expenses for assistance, recovery or salvage, and for pilotage.
- (e) Wages of watchmen and other expenses of watching a ship from the time of entry into port up to the time of sale (custodia legis).
- (f) Rent of the warehouses in which the ship's tackle and apparel are stored.
- (g) The expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port.
- (h) Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.
- (i) Damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman.
- (j) Moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage ('necessaries'), but only if the debt has been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner. This formula appears to exclude any such debts incurred by a demise or time charterer of the ship. It may be noted that under Article 13 of the 1926 Convention the provisions thereof 'apply to vessels under

the management of a person who operates them without owning them or to the principal charterer, except in cases where the owner has been dispossessed by an illegal act or where the claimant is not a *bona fide* claimant.’

(k) Ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying any other privilege, though in any case for a sum in the aggregate not in excess of four thousand units.⁴⁴⁶

(l) Moneys lent to the master for the necessary expenses of the vessel during her last voyage, and the reimbursement of the price of the goods sold by him for the same purpose.

(m) Moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage, but only if the debt has been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner. This again appears to exclude any such debts incurred by a demise or time charterer of the ship.

(n) Damages and interest due to the freighters (in other words, shippers and/or consignees) for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master of the crew.

(o) Damages and interest due to another vessel or to her cargo in cases of collision of vessels.

(p) The debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a ship.

The debts giving rise to maritime liens under the 1926 Convention are the following:

⁴⁴⁶ This is equivalent to Lm4,000.

(i) Law costs due to the State, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbour dues, and other public taxes and charges of the same character; pilotage dues, the cost of watching and preservation from the time of entry of the vessel into the last port.

(ii) Claims arising out of the contract of engagement of the master, crew, and other persons hired on board.

(iii) Remuneration for assistance and salvage, and the contribution of the vessel in general average.

(iv) Indemnities for collisions or other accidents of navigation, as also for damage caused to works forming part of harbours, docks, and navigable ways; indemnities for personal injury to passengers or crew; indemnities for loss of or damage to cargo or baggage.

(v) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its 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 the ship chandler, repairers, lenders, or other contractual creditors.

(6) Extinguishment of the Special Maritime Privilege

As with all other privileges, the special maritime privilege may be extinguished by extinguishment of the principal or underlying debt or obligation (including prescription thereof), by the creditor's renunciation and by the prescription of the right of action relating to the privilege itself.⁴⁴⁷

⁴⁴⁷ See also, article 2084 of the Civil Code.

Moreover, as a rule a special privilege over a movable (such as a ship) ceases to exist if the property subject thereto passes into the hands of a third party.⁴⁴⁸ Article 37D(2) of the MSA similarly provides that a privilege (whether general or special) to which a ship may be subject under the provisions of the Civil Code shall not continue to attach to it when the vessel is transferred to third parties.

However the special maritime privileges specified in article 50 of the MSA are also extinguished (unless an action for recovery of the claim secured by a privilege is previously brought before a competent court) upon the expiry of a period of one year from the date of the registration in the register of the ship in question of the voluntary sale of that ship, or upon the expiry of one year from the date of closure of the register of the ship in question if the same was closed after the voluntary sale of the ship.⁴⁴⁹ The special maritime privileges are also extinguished by the sale of the vessel made pursuant to an order or with the approval of a competent court according to the forms prescribed by law.⁴⁵⁰

Under the provisions of the 1926 Convention the liens cease to exist (apart from the other cases provided for by national laws) at the expiration of one year.⁴⁵¹ The necessities and disbursements lien is however extinguished upon the lapse of six months.⁴⁵²

In principle the loss or destruction of a ship or other vessel does not extinguish the special maritime privilege that may have previously accrued over it. The privilege survives on the wreck if there is a wreck. However if the ship is totally destroyed or lost without a trace then it is impossible for the privilege to remain in existence.

⁴⁴⁸ Article 2002(1) of the Civil Code.

⁴⁴⁹ Article 37D(3) of the MSA.

⁴⁵⁰ *Ibid.* Article 9 of the 1926 Convention speaks of the need for ‘formalities of publicity which shall be laid down by the national laws.’

⁴⁵¹ Article 9 of the 1926 Convention.

⁴⁵² *Ibid.*

(7) Duty of Disclosure and ‘Indemnity’

Whenever a vessel is sold the seller is bound by law to inform the purchaser of all privileged debts on the vessel and to furnish to the latter a list of such debts signed by him.⁴⁵³ If the seller either fails to furnish such list or omits to mention any privileged debt in the list the purchaser may (in the event he sustains damages as a result of such failure or omission) exercise all rights competent to him against the seller ‘with all such means as the law provides against debtors committing fraud in contracting debts.’⁴⁵⁴ This has an impact on the type of damages that may be recovered by the purchaser by including the possibility of recovering damages that are not foreseeable at the time of the seller’s omission.

(8) The Possessory Lien or Privilege

The law also grants a (specific/statutory) possessory lien over a ship in favour of a ship repairer, builder or other creditor into whose care and authority the ship is placed for the execution of works or for any other (lawful) purpose.⁴⁵⁵

This lien entitles the privileged creditor to retain possession of the ship in question until he is paid the debt due to him.⁴⁵⁶ Consequently, apart from the other causes that extinguish privileges or liens, this lien is extinguished when the creditor voluntarily releases the ship from his custody,⁴⁵⁷ but it is not extinguished if the ship is released pursuant to a court order or following a judicial sale of the ship.⁴⁵⁸ In the latter case the privileged creditor still enjoys priority over the proceeds of the sale.⁴⁵⁹

⁴⁵³ Article 53(1) of the MSA.

⁴⁵⁴ Article 53(2) of the MSA.

⁴⁵⁵ Article 54(1) of the MSA.

⁴⁵⁶ Article 54(2) of the MSA.

⁴⁵⁷ Article 54(3) of the MSA.

⁴⁵⁸ Article 54(4) of the MSA.

⁴⁵⁹ *Ibid.*

(9) Ranking

Ranking (or priority) is a purely procedural matter that ought to be regulated exclusively by reference to the *lex fori*.⁴⁶⁰ Ranking is an exercise in ‘relativism’ it involves the ascertainment, ‘comparison’ and actual ‘pigeon-holing’ of the various, particular secured claims over the (passive) subject of the enforcement proceedings.

In so far as special maritime liens are concerned our law adopts the ‘last-voyage’ rule.⁴⁶¹ Accordingly the debts contracted on the occasion of a ‘subsequent arrival or return’ at the same port have preference over those contracted on the occasion of a ‘former arrival or return.’⁴⁶²

Subject to the ‘last-voyage’ rule, article 54A(1) of the MSA provides that the debts specified in article 50 of the same statute rank in the order set out and in preference to other hypothecary and privileged claims.⁴⁶³ The possessory lien or privilege always ranks before the debts specified in article 50(*k*) to (*p*), and it ranks after the debts specified in article 50(*c*) to (*j*) only if such debts are created prior to that secured by the possessory lien or privilege, otherwise it always ranks before such debts but after those specified in article 50(*a*) and (*b*).⁴⁶⁴

A debt secured by a mortgage registered under the MSA or by a foreign mortgage recognized under the provisions of the MSA

⁴⁶⁰ See Part (10) below.

⁴⁶¹ See Article 6 of the 1926 Convention: ‘Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyages. Provided that claims arising on one and the same contract of engagement extending over several voyages all rank with claims attaching to the last voyage.’

⁴⁶² Article 51 of the MSA.

⁴⁶³ This is also the position under Article 5 of the 1926 Convention: ‘Claims secured by a lien and relating to the same voyage rank in the order in which they are set out in Article 2.’ However it is also provided there that ‘the claims mentioned under nrs 3 [salvage and general average] and 5 [necessaries and disbursements] in that Article rank, in each of the two categories, in the inverse order of the dates on which they came into existence.’ For such purpose, claims arising from one and the same occurrence are deemed to have come into existence at the same time (Article 5).

⁴⁶⁴ Article 54A(2) of the MSA.

always ranks after the possessory lien or privilege and the debts specified in article 50(a) to (k), but before the debts specified in article 50(l) to (p) and all other hypothecary and privileged claims.⁴⁶⁵

In all cases competing creditors under the same heading (or type of debt or privilege) rank rateably (*pro rata*), subject to the ‘last-voyage’ rule and irrespective of the actual date of creation of the competing debts, if the proceeds are insufficient to satisfy all claimants in full.⁴⁶⁶

(10) Conflict of laws

A distinction must be drawn between the procedural side of the maritime privilege or lien and the substantive side. A maritime privilege (like all privileges) is a product of substantive law and gives rise to substantive rights (including real rights). It is therefore submitted that all issues pertaining to the substantive rights in the privilege or lien must be determined by reference to the law that regulates the creation of the privilege or lien.

It should also be recalled that the maritime privilege or lien is an accessory or ancillary right,⁴⁶⁷ and as such, at least in principle, the law that regulates the creation and application of the underlying obligation ought to regulate the creation and application of the maritime privilege or lien. This means that in order to determine whether a maritime privilege or lien is created on a particular ship one must, in the first place, look to the law regulating the underlying obligation giving rise to the debt that is purportedly

⁴⁶⁵ Article 54A(3) of the MSA. This is not entirely consistent with Article 3 of the 1926 Convention that provides as follows: ‘The mortgages, hypothecations, and other charges on vessels referred to in Article 1 rank immediately after the secured claims referred to in the preceding Article. National laws may grant a lien in respect of claims other than those referred to in the said last-mentioned Article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.’

⁴⁶⁶ Article 54A(4) of the MSA. See also Article 5 of the 1926 Convention: ‘Claims included under any one heading share concurrently and rateably in the event of the fund available being insufficient to pay the claims in full.’

⁴⁶⁷ See paragraph (d) in Part (4) above.

secured by the said privilege or lien. If the governing law of the underlying obligation provides for the creation of the maritime privilege or lien then it may be reasonable to assume that such privilege or lien does in fact apply and exists. This is however only the first limb of the test.

Frequently the (security) rights conferred by the privilege or lien are exercised in a jurisdiction other than that the law whereof governs the creation of the privilege or lien as aforesaid. In such hypothesis if the enforcement is to be allowed in such jurisdiction the laws applicable there must also recognize the possibility of having a maritime privilege or lien on the ship or vessel in question in the particular circumstances of the debt which is sought to be secured. This is the second limb of the test. If this test fails the enforcement rights inherent in the maritime privilege or lien must be brought elsewhere.

All matters of procedure, including ranking, should be determined exclusively by reference to the *lex fori*.⁴⁶⁸

(11) Some Concluding Thoughts

In concluding, it would appear that some aspects of the law on maritime privileges may need some fine-tuning. The following issues in particular appear to call out for the legislator's attention:

(1) The sometimes inconsistent use of terminology (for instance the 'ship'/'vessel' dichotomy) in the applicable provisions may need to be ironed-out to avoid possible ambiguity in interpretation.

(2) Establishing a clear and unequivocal *numerus clausus* of privileges attaching to ships and other maritime property may be a plus, in that ship owners and operators would know in advance the bases on which an arrest of their ships may be made under the laws of Malta where applicable.

⁴⁶⁸ See Part (9) above.

(3) Such a process may perhaps also warrant a revision of the debts secured by a special maritime privilege. Some of the debts may perhaps not merit or justify security in the form of a maritime privilege.

(4) Some clarity may perhaps also be introduced in relation to debts contracted by a demise charterer or by a bareboat charterer or even by a time charterer of a vessel.

(5) There may also be a revision of the rules concerning the ranking of privileged claims, perhaps making them more consistent with those applicable in other States, in particular those that adhere to the provisions of the 1926 Convention.

(6) The definition of the subject-matter of the maritime privilege (or 'maritime property') may also have to be revised. As the situation currently stands it is neither entirely consistent nor entirely inconsistent with the provisions of the 1926 Convention.

(7) There is a total dearth of guidance on conflict of law issues.

It is believed that these matters may be addressed by the legislator to ensure consistent application of judicial pronouncements in disputes on this subject.

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