

4-1-1985

Priority of Maritime Liens in the Western Hemisphere: How Secure Is Your Claim?

Ivon d'Almeida Pires-Filho

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Recommended Citation

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PRIORITY OF MARITIME LIENS IN THE WESTERN HEMISPHERE: HOW SECURE IS YOUR CLAIM?*

IVON D'ALMEIDA PIRES-FILHO**

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* Revision of this manuscript was supported by the William H. Donner Foundation, the Pew Memorial Trust, the Johnson Endowment, and the Woods Hole Oceanographic Institution's Marine Policy and Ocean Management Center (W.H.O.I. Contribution No.5784). The author would like to thank comments and suggestions from Dr. Frank L. Wiswall, Jr., Proctor and Advocate in Admiralty; Dr. Isidoro Zanotti, General Rapporteur of the Inter-American Bar Association; and Mr. Dean E. Cycon, Marine Policy Fellow, Woods Hole Oceanographic Institution. Any shortcomings in the views expressed in this paper, however, are the author's responsibility.

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I. INTRODUCTION

The primary function of a maritime lien is to ensure that credit is given to a vessel so that she can be adequately furnished to proceed on her voyage, while concurrently providing security to the suppliers of services and materials. The unsettled issue is the security of these liens when the vessel leaves port and enters the jurisdiction of other countries. Will these claims have the same status whether or not they are recognized as liens abroad? If so, what priority will they receive?

The Western Hemisphere's maritime practices offer a micro-cosmic view of the complex legal web that affects international navigation. National legal systems deriving from different legal families vary structurally and procedurally and this paper seeks to explore how this systemic variation may lead to results that defeat the uniformity of rules desired in maritime commerce. Maritime liens and their priority will be viewed from this comparative perspective. An analysis of every national legal system is not necessary to show the peculiarities of the two supranational *legal families* in existence on the American continent: the Anglo-American common law system, exemplified by Canada and the United States; and the Latin-American civil law system, exemplified by Argentina, Brazil, Mexico, Panama and Venezuela. These five Latin-American countries represent the five largest merchant marine fleets in the region and, as a group, account for over 90 percent of the regional tonnage.¹

1. Merchant Shipping Fleets, [1981] 1 U.N. STATISTICAL Y.B. 1012 (merchant marine tonnage: Panama 24,191,000; Brazil 4,534,000; Argentina 2,546,000; Mexico 1,006,000; Vene-

As a standard for comparison, the maritime law terminology throughout this article is primarily that of U.S. admiralty law. The reader should be aware that the maritime and admiralty terms in Latin-American jurisdictions, such as *privilegios marítimos* (maritime privileges), *hipoteca naval* (naval hypothecations) and *embargo* (attachment), which in U.S. admiralty law correspond to maritime liens, ship mortgage and arrest, respectively, are not totally synonymous to the American terms in concept or procedure.

II. PERSONIFICATION OF THE VESSEL

Since maritime liens are privileged claims upon a maritime property or *res* for service done to it or injury caused by it, they are a right acquired by one over a thing belonging to another— a *jus in re aliena*, a subtraction from the absolute property of the owner.² A maritime *res* can be the vessel, the cargo, or its freight.³ For a maritime lien to exist in the United States, the vessel must be engaged in a maritime venture or transaction and be within admiralty jurisdiction of the federal courts.⁴ In order for admiralty jurisdiction to exist over a maritime claim against a vessel, the vessel must be under navigation in interstate or international waters,⁵ or be capable of navigation if temporarily out of water in drydock. A shipbuilding mortgage, for example, is not considered to be a maritime transaction, and therefore, is not subject to the admiralty jurisdiction of United States courts.⁶ Under United States law, a structure does not become a ship, in the legal sense, until it is completed and launched.

Under the personification of the vessel theory, the vessel herself becomes a jural person whose liability is independent of the liability of her owner. In fact, the U.S. rule is that personal liability

zuela 848,000. The total tonnage in 1980 for Latin America was 33,125,000.

2. See Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381, 382 (1930); See, e.g., G. PRICE, *LAW OF MARITIME LIENS* 1 (1940) [hereinafter cited as PRICE].

3. These have been defined as *freight* being the sum of money paid for the carriage of the cargo; *cargo* concerning the goods carried by the vessel; and *vessel* referring to practically any floating object capable of being propelled for the purpose of carriage of goods, including all equipment and appurtenances aboard her, even if not belonging to her owner. Longenecker, *Developments in the Law of Maritime Liens*, 45 TUL. L. REV. 574, 574 (1971).

4. Burke, *Maritime Liens: An American View*, 1978 LLOYD'S MAR. COM. L. Q. 269, 270 (1978).

5. In the U.S. Merchant Shipping Act of 1920, 46 U.S.C. §788 (1976), vessels operated by states for public noncommercial services were excluded.

6. See *North Pacific S.S. Co. v. Hall Bros. Co.*, 249 U.S. 119 (1919); 1 BENEDICT, *ADMIRALTY* 162 (7th ed. 1981).

of the owner is not essential to the existence of a lien against his vessel.⁷ The vessel can be liable for damages caused by the negligence of a crew employed by a bareboat charterer,⁸ or by negligence of a compulsory pilot even when the shipowner was not at fault.⁹

Civil law countries in Latin America do not recognize the fiction of personification of the vessel, and therefore, are not troubled by the distinctive, substantive, and procedural features it creates. In these countries, a maritime lien or privilege is a right in the property, a *jus in re*, but this real right¹⁰ does not disassociate the vessel from her owner. The privilege is essentially against the owner as a debtor and, for this reason, does not impede the existence of liens on unborn ships for shipbuilding contracts and mortgages.¹¹

Despite this fundamental difference in the legal status of the vessel, maritime liens or privileges enjoy similar characteristics in both systems. The terms themselves are *sui generis* in both common law and civil law, as Mr. Justice Story states so well:

It is certainly true, that by the common law a lien imports, that the party, who claims it, is in possession of the thing, and his lien is neither more nor less than a right to detain it, until his claim is satisfied. So that, where there is no possession, actual or constructive, there can be no lien.

[T]he doctrine of lien, founded on and accompanying the possession of the thing, cannot be applicable to claims, which neither presuppose, nor originate in possession. Indeed, such claims are not, in strict sense, liens, though that term is commonly used in our law to express, by way of analogy, the nature of such claims. Language is in this way perpetually deflected

7. *The Barnstable*, 181 U.S. 464 (1901). *But see* 46 U.S.C. § 972 (1976) (no person unlawfully in possession of a vessel may bind her). For a discussion of the personification theory, see Grayson, *Maritime Arrest and Rule C: A Historical Perspective*, 6 MAR. LAW. 265 (1981).

8. *The Barnstable*, 181 U.S. 464 (1901).

9. *The China*, 74 U.S. (7 Wall.) 53 (1868).

10. *Real* is used here in the civil-law terminology, as relating to a movable or immovable thing, as distinguished from a person.

11. Ley de la Navegación, Law No. 20.094, art. 490, January 15, 1973, *Anales de Legislación Argentina* [1973] C *Anales* (Argentina); Código Civil Brasileiro, Law No. 3.071, art. 825, January 1, 1916, *Coleção das Leis, Atos do Poder Legislativo, Coleção 1* (Brazil); Decree No. 15.788, arts. 2, 11, November 8, 1922, *Coleção* (Brazil); Ley de Navegación y Comercio Marítimo art. 104, January 10, 1963, *Diario Oficial D.O.* (Mexico); Código Comercial, art. 1518, (Panama); Ley de Privilegios e Hipotecas Navales, art. 24, August 9, 1983, (Venezuela).

from its original meaning, and applied to things, which have a strong similitude but not a perfect identity.

Now a lien by the maritime law is not strictly a Roman hypothecation, though it resembles it, and is often called a tacit hypothecation. . . . It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors . . . this privilege was strictly personal, and gave only a preference against simple contract creditors, and has no effect against those who were secured by express hypothecations. . . .¹²

This semantic debate leads to the essence of the law of maritime liens—that such claims do not include or require possession, but instead, attach to the *res* and travel with it, even in the hands of a bona fide purchaser.¹³ This is a very important point. While a common law lien is simply a right to retain, the maritime lien is analogous to a proprietary interest in the vessel,¹⁴ giving a right to proceed against her to recover that interest. The same holds true under codified civil law in Latin America, whether it is termed a tacit hypothecation or a maritime privilege.

As indicated above, a maritime lien is not only nonpossessory, but indelible and nonconsensual as well. It attaches to the vessel and travels with her, even if the vessel is sold and the new purchaser is unaware of the lien.¹⁵ Secrecy is yet another feature of the maritime lien, except in the cases of a ship mortgage and a few other Latin American liens, such as the shipbuilding contract in Argentina and Brazil, which must be recorded at the National Vessel Register or the Commercial Register, respectively, before they are considered a maritime privilege.¹⁶

12. *The Nestor*, 18 F. Cas. 9 (1831).

13. *The John G. Stevens*, 170 U.S. 113 (1898).

14. A ship's lien against the cargo, however, is similar to the common law possessory lien, since it disappears with delivery. See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 641 (2d ed. 1975). A shipbuilding contract in Argentina is also a possessory lien. *Ley de la Navegación*, Law No. 20.094, art. 490, January 15, 1973, C Anales (Argentina).

15. *The John G. Stevens*, 170 U.S. 113 (1898); *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867); *The Floridian*, 389 F. Supp. 25 (E.D.Va. 1974). *Ley de la Navegación*, Law No. 20.094, arts. 484, §c, 491, January 15, 1973, C Anales (Argentina); *Código Comercial Brasileiro*, Law No. 556, art. 470, June 25, 1850 (Brazil).

16. *Ley de la Navegación*, Law No. 20.094, art. 490(b), January 15, 1973, C Anales (Argentina); *Código Comercial Brasileiro*, Law No. 556, arts. 471, 472, June 25, 1850 (Brazil).

III. THE IN REM PROCEDURE

Foreclosure of a maritime lien in Canada¹⁷ and in the United States¹⁸ is reached by the peculiar in rem proceeding. In *The Resolute*, the court held that the right to proceed in rem was not a matter of procedure but a substantive right.¹⁹ The admiralty in rem jurisdiction exists to enforce the maritime lien, and the maritime lien does not exist at all except to the extent that it can be enforced in rem.²⁰ A nonadmiralty court cannot determine or extinguish a lienor's right.²¹ In the United States, therefore, the maritime lien is the foundation of the in rem proceeding in admiralty and there is no right to this proceeding unless a maritime lien exists; substance and procedure are bound as one.

The main characteristic of admiralty in rem jurisdiction is that it operates directly upon the res itself as a separate personality and as the particular respondent of the suit.²² The property is seized without judicial supervision or prior notice to the owner²³ and the suit proceeds against the thing itself, with the court as its custodian. If the claim prevails, the property is sold, the proceeds of the sale are distributed among the lienors,²⁴ and the title is transferred to the purchaser free of all liens.

This procedure was found to be unconstitutional in the United States when a court also has in personam jurisdiction over the vessel's owners. The emerging rule seemed to be that deprivations of property without prior notice, hearing, judicial intervention, or

17. Stone, *Let the Boat Buyer Beware*, 12 OSGOOD HALL L.J. 643, 647 (1974).

18. For a detailed discussion of this procedure in the U.S., see Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 TUL. L. REV. 767 (1973); McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST. L. J. 19 (1967).

19. 168 U.S. 437 (1897).

20. *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867). See Walker, *Due Process and Rule C: The Constitutionality of the Admiralty in Rem Action*, 6 MAR. LAW. 249, 251 (1981).

21. *The Nestor*, 18 F. Cas. 9 (1831); "[I]t is settled that the admiralty courts have exclusive jurisdiction over maritime liens, and that as other courts are without power to establish and enforce such liens, so they are without power to displace them." *The Philomena*, 200 F. 859, 861 (D. Mass. 1911).

22. The in rem jurisdiction is strictly geographical. It depends absolutely on the presence of the res within the geographical limits of the district in which the court exists. See Toy, *Introduction to the Law of Maritime Liens*, 47 TUL. L. REV. 559, 562 (1973); FED. R. CIV. P. SUPP. C. (2).

23. FED. R. CIV. P. SUPP. C. (3), (4).

24. Liability in the admiralty proceeding in rem is limited to the value of the vessel. See Olson, *Arrest Process: The Necessity for Swift Seizure in Admiralty*, 6 MAR. LAW. 285, 288 (1981); see also GILMORE & BLACK, *supra* note 14, at 624.

some other procedural safeguards would violate basic concepts of due process protected by the fifth amendment.²⁵ U.S. circuit courts of appeals, however, have recently upheld the constitutionality of the admiralty in rem procedure.²⁶ These decisions emphasize the historical significance of the maritime action in rem and pointed out that the procedure is not governed by the due process requirements related to land-based in personam attachments. The issue of whether traditional in rem admiralty procedures will continue to have different due process standards from those of other areas of the modern common law system remains to be tested in the Supreme Court of the United States.

In Latin American civil law countries, maritime liens have the nature of a real right; however, the procedure is in personam and does not distinguish the vessel as a separate entity from her owner. An arrest of a vessel in these countries is analogous to an in personam attachment in the United States; to compel the appearance of the owner and to cause him to furnish security as a condition for the release of his property.²⁷

IV. PRIORITY OF MARITIME LIENS IN NATIONAL SYSTEMS

The ranking and prioritization of maritime liens against a vessel are necessary whenever the proceeds from her judicial sale are insufficient to satisfy all claims.²⁸ Maritime liens are therefore grouped vertically by classes and further ranked horizontally within each class by general maritime law and specific legislation. The priority of liens within a class may be based upon their chronological occurrence, with priority going either from the first lien to the last lien or in the reverse order. In Latin American civil law jurisdictions, maritime liens are created by statutes which also de-

25. *The Acadian Valor*, 485 F. Supp. 287 (E.D. La. 1980), *overruled in*, *The General Gillespie*, 663 F. 2d 1338 (5th Cir. 1981). Two other U.S. District Courts have also held Rule C unconstitutional, *see The Susan*, 1980 A.M.C. 2062 (S.D. Fla. 1980), and *The Bay Ridge*, 509 F. Supp. 1115 (D. Alaska 1981); *contra*, *The Alexandros T*, 664 F. 2d 904 (4th Cir. 1981). For a discussion of these cases, *see Walker, supra* note 20; *see also Grayson, supra* note 7; and *Olson, supra* note 24.

26. *The Alexandros T*, 664 F.2d 904 (4th Cir. 1981); *The General Gillespie*, 663 F.2d 1338 (5th Cir. 1981). In the latter case, the Fifth Circuit Court of Appeals overruled the previous decision of the Louisiana district court in *The Acadian Valor*, 485 F. Supp. 287 (E.D. La. 1980).

27. Kriz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952, Part Two*, 1964 DUKE L. J. 70, 79 (1964).

28. Varian, *Rank and Priority of Maritime Liens*, 47 TUL. L. REV. 751, 751 (1973).

termine their priority.

A. Canada

In Canada, there are no clear statutory provisions which establish maritime liens and their order of priority, and the general principles of maritime law as applied by the Canadian courts are still nebulous and subject to various exceptions.²⁹ Nevertheless, there are six categories of claims that may attach to the ship, the cargo, and the freight: (i) costs for bringing the ship to sale;³⁰ (ii) maritime liens;³¹ (iii) possessory liens;³² (iv) ship mortgages;³³ (v) statutory liens;³⁴ and (vi) non-lien claims.³⁵

The first category refers to the costs incurred by the plaintiff resulting from the arrest and sale of the ship to bring the fund into court. These costs include the clerk's and marshal's fees and expenses, but do not include judicial costs.³⁶ Court costs are placed below ship mortgages as statutory liens.

Seamen's wages, salvage, and damages for collision constitute separate classes of maritime liens.³⁷ The lien for wages of the master and of "every person employed or engaged in any capacity

29. Shipping in Canada is almost entirely governed by the extensive Canada Shipping Act of 1970, CAN. REV. STAT. 6721, Vol. VII, C.S-9, (1970), which does not contain any chapter on maritime liens. Isolated sections refer to specific liens, such as § 198 which provides that "a seaman does not by any agreement forfeit his lien on the ship" for wages, § 214(1) which equates a master's lien for wages to that of a seaman, and § 214(2) which establishes a master's lien for disbursements. Stevedores have the right to arrest the ship for their charges for stowing or discharging the cargo, but § 702 of the Act does not say whether those charges are entitled to a lien on the ship. Leading cases on priorities appear to be *The Terry*, 1948 Can. Exch. 27 (1948); *The Astoria*, 1931 Can. Exch. 195 (1931); *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

30. *The Borzone*, 35 Can. Abridgement 464 (2d ed. 1974); PRICE, *supra* note 2, at 103.

31. See PRICE, *supra* note 2, at 103; Stone, *supra* note 17, at 643; 31 CANADIAN ENCYCLOPEDIA DIGEST title 135, §§ 181, 182, at 147 (3d ed. 1981) [hereinafter cited as CAN. ENC. DIG.].

32. See PRICE, *supra* note 2, at 103. The registered mortgage does not have priority over the possessory lien of a ship repairer or the holder of a maritime lien. See CAN. ENC. DIG., *supra* note 31, at 85, 151.

33. Mortgage claims placed above statutory liens for necessities. See *The Astoria*, 1931 Can. Exch. 195 (1931); *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980); PRICE, *supra* note 2, at 103.

34. PRICE, *supra* note 2, at 103. A statutory lien for building, equipping or repairing a ship cannot take priority over a lien for seamen's wages. See *The Aurora*, 17 Can. Exch. 203 (1914).

35. PRICE, *supra* note 2, at 103.

36. *The Lowell Thomas Explorer*, 1 Can. F. C. 339 (1980).

37. Stone, *supra* note 17, at 643; CAN. ENC. DIG., *supra* note 31, at 149.

on board of a ship" ranks the highest in this category.³⁸ However, the "lien of a master for wages cannot be preferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by the master."³⁹ The master has the same lien for disbursements or liabilities that he incurred on behalf of the vessel as for the recovery of his wages.⁴⁰ A collision lien as a claim *ex delicto*, usually outranks all contractual claims since it is desirable to prevent careless navigation. It is doubtful, however, whether damages would rank before wages, principally wages accruing subsequent to the claim for damages; and salvage is certainly considered prior to earlier collision damages, for the salvors have preserved the res for the benefit of all interested parties.⁴¹ Contractual liens of the same class, as a general rule, rank in the inverse order of accrual, while delictual liens of the same class share *pro rata* in the proceeds available to that class.⁴²

A common law possessory lien on a vessel usually arises from repairs and lasts for as long as the vessel remains in the repairman's possession.⁴³ The shipowner has possessory liens on the cargo for unpaid freight, general average contributions, and for expenses incurred protecting the cargo.⁴⁴ Statutory liens rank immediately after ship mortgages in priority and are preferred to non-lien claims. Unlike maritime liens, statutory liens do "not constitute a charge on the ship until 'in rem' proceedings are instituted, and such proceedings are not sustainable unless the person who incurred the debt was owner of the ship at that time and remains so at the time the proceedings are instituted."⁴⁵ These claims do not affect bona fide purchasers. Ship construction, repairs that are not possessory, supplies and other necessities, personal injuries, damage to cargo, and court costs are included in this category. Statutory repair liens have no preference over claim categories (i)

38. A seaman's lien for wages comes from the general maritime law. He has "a right to cling to the last plank of his ship in satisfaction of his wages." *The Aurora*, 17 Can. Exch. 203 (1914). Canada Shipping Act of 1970, 214(1), CAN. REV. STAT. 6721, Vol. VII, C.S.-9 (1970). "The master of the ship, so far as the case permits, has the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom." See *The Lowell Thomas Explorer*, 1 Can. F. C. 339 (1980).

39. *The Rochepoint*, 21 Can. Exch. 143, 144 (1921).

40. Canada Shipping Act of 1979, § 214(2), CAN. REV. STAT. 6721, Vol. VII C.S.-9 (1970); *The Terry*, 1948 Can. Exch. 27 (1948).

41. PRICE, *supra* note 2, at 104-06.

42. *Id.*

43. *Hackett v. Coghill*, 2 ONT. L. R. 1077 (1903), *aff'd* 3 ONT. L. R. 827 (1904).

44. CAN. ENC. DIG., *supra* note 31, at 151.

45. Stone, *supra* note 17, at 644 n.6.

to (iv) above, even when they increase the market value of the ship.⁴⁶

When a foreign vessel is arrested in Canadian ports for maritime liens of any origin, Canadian courts apply foreign law to substantively recognize liens on the res. The order of priority, however, is determined by the *lex fori*.⁴⁷ In any case, a maritime lien cannot be enforced against a vessel owned or operated by a foreign state for public purposes.⁴⁸

B. *The United States of America*

No clear-cut statute has established an order of priority for maritime liens on vessels in the United States. Independent district and circuit court decisions, without much guidance from the Supreme Court, have established a complex system of priorities under the general maritime law, which has caused confusion and lack of precision in the classification of liens. Moreover, maritime liens and their priority are subject to a variety of limitation statutes. At present, however, the following general order of preference seems to be commonly supported by the courts: (i) court expenses while the vessel is in *custodia legis*; (ii) seamen's wages; (iii) salvage and general average;⁴⁹ (iv) tort claims;⁵⁰ (v) ship mortgages;⁵¹ (vi) repairs, supplies, necessities, and other contract claims;⁵² (vii) state-created liens of maritime nature; (viii) tax liens; (ix) nonmaritime liens; and (x) non-lien maritime claims.

Court costs, seamen's wages, salvage, general average, and tort claims outrank a ship mortgage whether arising before or after the

46. See *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

47. "[R]ecognized and applied the maritime lien for necessities given by American law though it was unknown to Canadian law. I have no doubt that the converse must be equally true, viz., that the court will refuse to enforce a maritime lien not given by American law though valid under Canadian law." *The Terry*, 1948 Can. Exch. 27 (1948); "It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered . . . the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libelled and sold." *The Astoria*, 1931 Can. Exch. 195 (1931). See also, *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, 32 D. L. R. 3d 571 (1973).

48. CAN. ENC. DIG., *supra* note 31, at 151.

49. For further discussion of these liens, see Richards, *Maritime Liens in Tort, General Average, and Salvage*, 47 TUL. L. REV. 569 (1973).

50. See *id.*

51. Smith, *Ship Mortgages*, 47 TUL. L. REV. 608 (1973), provides a useful update on the subject.

52. See Ray, *Maritime Contract Liens*, 47 TUL. L. REV. 587 (1973).

mortgage's recording.⁵³ Although maritime liens arising from charges for repairs, supplies, and other necessities⁵⁴ rank sixth in the above list, they may outrank the preferred ship mortgage if they arise before the mortgage is recorded.⁵⁵ When a ship mortgage is recorded, it operates as a dividing line for these contract claims: the ones that preceded the mortgage will become first rank security and those later in time will be under lower rank.⁵⁶ A subsequent contract claim may have its rank elevated if it is converted into a tort lien, thus establishing priority over a mortgage. Breaches of contracts of carriage, affreightment, and towage have been classified as tort liens.⁵⁷

Outside the statutory exception created by the Ship Mortgage Act, the general rule has always been that liens of the same class take precedence in the inverse order of their time of accrual, the later prevailing over the earlier. This is exactly the opposite of the common law lien rule:

[I]n this country two theories exist as the basis of this admiralty doctrine. They are, first, that each person acquires a 'jus in re', and becomes a sort of coproprietor in the 'res', and therefore subjects his claim to the next similar lien which attaches; and, second, that the last beneficial service is the one that continues the activity of the ship as long as possible, and therefore should be preferred. . . .⁵⁸

Under the proprietary interest rule a maritime lienor becomes a part-owner and must bear, to the extent of his lien, the risk of any loss that may follow.⁵⁹ Failure to arrest the vessel and satisfy his lien stops him from asserting that his charge against the vessel should receive priority over a lien of a later date. The beneficial service rule takes into consideration that subsequent additions will not deprive the earlier lienors of any interests which they would have had if no such services had been rendered.⁶⁰ Later liens are preferred because they have kept the vessel in operation, thus ben-

53. 46 U.S.C. §§ 953, 974 (1976).

54. 46 U.S.C. § 971 (1976).

55. *The Eastern Shore*, 24 F.2d 443, 1940 A.M.C. 388 (D. Md. 1940).

56. *The Home*, 65 F. Supp. 94, 1946 A.M.C. 585 (W.D. Wash. 1946).

57. *The Faith*, 252 F. Supp. 54, 1966 A.M.C. 71 (N.D. Ohio 1965). See Varian, *supra* note 28, at 757.

58. *The William Leishear*, 21 F.2d 862, 863, 1927 A.M.C. 1770, 1772 (D. Md. 1927).

59. *The John G. Stevens*, 170 U.S. 113 (1898); *The Young Mechanic*, 30 F. Cas. 872 (C.C.D. Me. 1855).

60. *The William Leishear*, 21 F.2d 862, 1927 A.M.C. 1770 (D. Md. 1927).

efitting prior lienors. This theory has greater support when considering contract liens. For practical reasons, however, this rule of the last in time being the first in right is limited in its application to certain time periods; otherwise lien holders would be constantly suing the vessel not to risk losing their priority the next day. These time periods may vary according to local needs and specific conditions. In general, all claims of the same rank within the specified time period are treated equally, share *pro rata* with and are preferred to claims of equal rank from an earlier time period. Illustrative cases are: the voyage rule applying to overseas voyages,⁶¹ the season rule on the Great Lakes,⁶² the calendar rule,⁶³ the New York Harbor 40-day rule,⁶⁴ and the 90-day rule for vessels making daily or weekly trips to and from the Seattle harbor.⁶⁵ Although some courts may adhere to some of these rules, their application is not rigid and may differ from one case to another within the same court. These periods should be sufficiently long "to permit the owners of vessels to make all reasonable arrangements and adjustments with relation to the earnings in their business, but which would also afford a reasonable safety to persons extending credit to the vessels."⁶⁶ These rules can fundamentally change the priority of equally ranked liens and liens that are in different classes.

Foreclosure of maritime liens against a foreign vessel seized in the United States proceeds in the same manner as in Canada. Thus the applicable order of priority is determined in accordance with U.S. admiralty law and not the law of the nationality of the vessel.⁶⁷

C. *Argentina*

In Argentina, the 1973 Law of Navigation⁶⁸ has restructured

61. *Todd Shipyards Corp. v. The City of Athens*, 1949 A.M.C. 572 (D. Md. 1949).

62. *The Oswego No. 2*, 23 F. Supp. 311, 1938 A.M.C. 980 (W.D.N.Y. 1938); *The City of Tawas*, 3 F. Supp. 170 (E.D. Mich. 1880).

63. *The Home*, 65 F. Supp. 94 (W.D. Wash. 1946). *The Penobscot*, 1940 A.M.C. 1217 (D. Mass. 1940).

64. "[T]hose liens accruing within 40 days of libel filed take priority by analogy to the theory of voyages; and all claims of the same class (as these are) beyond the 40-day period must share 'pro rata'." *The Oregon*, 1925 A.M.C. 1271, 1273 (2d Cir. 1925).

65. *The Edith*, 217 F. Supp. 300 (W.D. Wash. 1914).

66. *Id.* at 302.

67. "The recognition of liens, and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*." *The Trenton*, 4 F. Supp. 657, 664 (1880).

68. Ley de la Navegación, Law No. 20.094, art. 1-630, January 15, 1973, C Anales (Ar-

the system of maritime liens taking into account existing international conventions, particularly the 1967 Brussels Convention on Maritime Liens and Mortgages.⁶⁹ This approach has certainly been a step forward and may set the pattern for other Latin American countries to create their own comprehensive maritime statutes,⁷⁰ separate from the often outdated commercial codes, and to enact more uniform maritime lien legislation.

Maritime liens are explicitly given priority over any other claim that attaches to a vessel (even if undergoing construction), the freight and the cargo.⁷¹ Liens on the freight must arise during the same voyage on which the freight is due.

There are two groups of liens on the vessel. The first order consists of: (i) judicial costs incurred in the common interest of the creditor; (ii) master's and crew's wages; (iii) taxes and dues arising from the commercial operation of the vessel; (iv) maritime personal tort; (v) maritime property tort; and (vi) salvage, wreck removal, and general average. Ship mortgages receive a lower priority than the above listed types of liens, as well as any liens that attach to the unborn vessel.⁷² Ranked below ship mortgages, is a second set of liens with the following order of priority: (vii) cargo damages; (viii) contracts; (ix) supplies and necessities; (x) expenditures incurred by the master for equipment and dry dock; (xi) expenditures incurred by the master, carrier, charterer, or ship's husband on behalf of the vessel or her owner; and (xii) the price for the acquisition of the vessel, plus interest.

There is no longer a maritime lien for repairs, but the contractor that provides such services has the right to retain possession

gentina). No amendments have been made to this law as of January 1984. Personal communication with Mr. Jose Domingo Ray, Asociación Argentina de Derecho Marítimo, Buenos Aires (Argen.), (Feb. 7, 1984) [hereinafter cited as J. D. Ray].

69. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels), May 27, 1967, text reproduced in 6A BENEDICT, ADMIRALTY doc. 8-3 (7th ed. 1981) [hereinafter cited as the 1967 Brussels Convention]. This convention has not yet entered into force. 1980-81 I.M.C. 8E*Y.B. 104.

70. The Argentinian Law of Navigation is divided in five parts and is comprised of 630 articles. Title I defines general maritime terminology. Title II deals with administrative regulations. Title III includes the bulk of the previous law, with a full chapter on maritime liens or privileges. Titles IV and V take care of procedural and conflict of jurisdiction matters, respectively.

71. Ley de la Navegación, Law No. 20.094, arts. 471, 476, 478, 490, 494 January 15, 1973, C Anales (Argentina).

72. *Id.*, art. 511.

over the vessel as security, until payment is made.⁷³ In this sense, the repairman's right to retain possession of the vessel is similar to a common law lien, which also disappears if possession is lost. First-degree liens cannot be prejudiced by this right of retention which, nonetheless, is given priority over ship mortgages.

Liens from later voyages have preference over those which arose during previous voyages,⁷⁴ even when liens from previous voyages are of a higher rank. The order of priority listed above is applicable to liens that occur along the same voyage. Liens of the same class share *pro rata*, except items (vi), (viii), (ix), and (x), which follow the inverse order of accrual.⁷⁵ A general one-year limitation period limits the effect of the voyage rule, since maritime liens lose their preferential priority after the limitation period.⁷⁶

There are only two liens which may attach to an unborn vessel: (i) court costs; and (ii) the credit due its builder, as long as the contract has been recorded at the National Vessel Register.⁷⁷ The shipbuilder surrenders his lien by delivering the vessel to the owner.⁷⁸

Liens on the cargo⁷⁹ are also few in number: (i) customs duties; (ii) court costs; (iii) salvage and general average; (iv) freight and other contractual costs related to the cargo; and (v) principal plus interest from loans taken out by the master on the cargo. Classes (iii) and (v) are preferred according to the inverse time of accrual, while the remaining ones share *pro rata* following the port rule.⁸⁰ In any case, liens on cargo have a limited period during which they may be enforced since action must be brought within 30 days of the date the cargo was unloaded and prior to the transfer of title to third parties.⁸¹

Arrest of a foreign vessel to satisfy maritime liens and non-lien claims for credit extended to a vessel may occur in Argentina independently of whether the transaction took place there.⁸² The claimant may seek to have the vessel arrested under the jurisdic-

73. *Id.*, art. 486.

74. *Id.*, art. 482.

75. *Id.*, art. 480.

76. *Id.*, art. 484, §§ a-c.

77. *Id.*, art. 490, §§ a-b.

78. *Id.*, art. 492.

79. *Id.*, art. 494, §§ a-e.

80. *Id.*, art. 496.

81. *Id.*, art. 498.

82. *Id.*, art. 532, §§ a-c.

tion of any port where the vessel is found. The order of priority in these cases will follow that of the vessel's nationality.⁸³

D. *Brazil*

The priority of maritime liens in Brazil can only be understood by separately comparing commercial and civil law legislation. First, the Brazilian Commercial Code of 1850, still in force today, lists the following order of priority: (i) fees for service rendered to the ship, including salvage and pilotage; (ii) wharfage and navigation duties; (iii) custodian's fees and necessary expenses for her keep, including warehouse rent to store her fittings and equipment; (iv) all maintenance expenses after her last voyage and while in *custodia legis*; (v) wages of master, officers, and crew earned on her last voyage; (vi) bottomry and *respondentia* loans from her last voyage; (vii) master's disbursements for repairs and supplies during her last voyage; (viii) general average; (ix) debt originating from the shipbuilding contract, that are within three years of the end of construction; (x) expenses originating from ship and equipment repair, that are within two years of when the repair was completed; and (xi) debt from vessel acquisition, that are within three years of the acquisition.⁸⁴

Although some of these liens may be secret, the ones listed under items (iv), (vi), (vii), (ix), (x) and (xi) must be recorded at the Commercial Register, within fifteen weekdays of their occurrence,⁸⁵ to be considered privileged credits.⁸⁶ Liens of the same nature will be given priority in the inverse order of accrual only if contracted in different ports; otherwise they should share *pro rata*.⁸⁷

Secondly, the preferred status of ship mortgages originated under civil law with the enactment of the Civil Code of 1916.⁸⁸ Subsequently, the Maritime Mortgage Statute of 1922⁸⁹ significantly altered the order of priority established by the Commercial

83. J.D. Ray, *supra* note 68.

84. Código Comercial Brasileiro, Law. No. 556, arts. 470, §§ I-IX; 471, §§ I-II; 474, June 25, 1850 (Brazil).

85. *Id.*, art. 10, § 2.

86. *Id.*, arts. 472, 474.

87. *Id.*, art. 473.

88. Código Civil Brasileiro, Law No. 3.071, arts. 810, § VII, 825, January 1, 1916, *Coleção 1* (Brazil).

89. Decree No. 15.788, art. 20, Nov. 8, 1922, *Coleção* (Brazil).

Code. The statute placed ship mortgages above all liens, with the exception of court costs and expenses, and federal taxes; seamen's wages, including the master's; salvage and general average; repairs, supplies, and necessities contracted by the master outside the vessel's home port; and collision and torts.

Finally, in 1966, the National Tax Code⁹⁰ placed federal, state, and municipal taxes, in that order, above claims of any nature or time of accrual, except those created by labor legislation. The priority of court costs and expenses, however, was not affected by this uniform ranking for tax credits.⁹¹ As costs of the procedure itself, they are satisfied prior to any amount distributed to creditors. Tax credits, therefore, rank third in the above list of priorities.

Another order of priority exists since Brazil ratified the 1926 Brussels Convention on Maritime Liens and Mortgages⁹² (as discussed below). This lien order of priority does not differ much from the one above and only applies to ships whose flag states are parties to the convention.⁹³

E. *Mexico*

Maritime liens are concisely regulated by the 1963 Mexican Law of Navigation and Maritime Commerce⁹⁴ and consist of (i) labor credits; (ii) taxes; (iii) salvage; (iv) general average; (v) torts; (vi) repairs, supplies, and necessities; and (vii) insurance premiums.⁹⁵

Liens which attached during the vessel's latest voyage will receive preference over those from earlier voyages.⁹⁶ There is no last voyage limitation, nor any mention of a port rule for *pro rata* shar-

90. Law No. 5.172, arts. 186, 187, October 25, 1966, Coleção (Brazil).

91. Law No. 6.355, September 8, 1976, Coleção (Brazil).

92. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels), April 10, 1926, 120 L.N.T.S. 187 [hereinafter cited as The 1926 Brussels Convention].

93. Decree No. 351, Oct. 1, 1935, Coleção (Brazil).

94. Ley de Navegación y Comercio Marítimo, January 10, 1963 [1963] D.O. (Mexico), as amended by Decreto de Reformas y Adiciones a la Ley de Navegación y Comercio Marítimo, December 15, 1982. This recent amendment created a section (arts. 121 to 126) on ship mortgages and removed them from the maritime lien category, thus lowering its status one class below the previous order. Ship mortgages used to have priority over insurance premiums.

95. Ley de Navegación y Comercio Marítimo, art. 116, §§ I-VII, January 10, 1963, D.O. (Mexico).

96. *Id.*, art. 117.

ing among liens within the same class. Priority within each class will be given in the inverse order of accrual. Maritime liens do not disappear in the event of a change in ownership.⁹⁷

Although ships are considered movable property, rules related to the sale of immovables and mortgages apply to them.⁹⁸ Ship mortgages receive a priority immediately below maritime liens and are limited to a three-year foreclosure period.⁹⁹ A mortgage contract for ship construction is permitted.¹⁰⁰

In general, all maritime liens are limited to the value of the ship,¹⁰¹ but wages and taxes seem to be clearly exempt from this limitation. Vessels can only be seized as a result of maritime claims and not for any personal debt of the owner.¹⁰² A suit to foreclose a maritime lien against a vessel must be brought at her port of registry.¹⁰³ Foreign vessels may also be arrested in Mexico for maritime liens, including liens originating elsewhere. The choice of Mexican jurisdiction also implies the application of its national legislation to determine the priority of maritime liens.¹⁰⁴

F. Panama

The Panamanian Commercial Code of 1916¹⁰⁵ classifies ship mortgages as liens and determines that the civil law regulation of mortgages could also be applied to ship mortgages as long as it did not conflict with the rules of commercial law.¹⁰⁶ The Panamanian Code is *sui generis* for its time because it provided for the creation of shipbuilding mortgages.¹⁰⁷ It also declared maritime liens to be

97. *Id.*, art. 118.

98. *Id.*, arts. 106, 111, 121-26.

99. *Id.*, art. 126.

100. *Id.*, art. 104.

101. *Id.*, art. 134, §§ I-VIII.

102. *Id.*, art. 131.

103. *Id.*, art. 120.

104. Personal communication with Mr. Ignacio L. Melo, Melo & Melo Abogados, Mexico City, Mexico, (Feb. 20, 1984).

105. Promulgated by Law No. 2, August 22, 1916 (Panama) and Decree No. 95 [1917] (Panama). U.S. District Court jurisdiction over the Canal Zone has returned to Panama since September 1982. A special maritime jurisdiction was created by Law No. 8 of March 8, 1982, which seems to have significantly departed from the traditional Panamanian civil procedure in an effort to expedite the adjudication of maritime cases. Foreclosure of ship mortgages, originally within the jurisdiction of the civil courts, is now heard by the new Maritime Court. This court also enforces maritime liens.

106. Código Comercial, art. 1512 (Panama).

107. *Id.*, art. 1518.

superior to any other claims,¹⁰⁸ that they would be preferred by class, and that within the same class, later liens would outrank earlier ones.¹⁰⁹

Liens on the vessel have the following order of priority: (i) court costs incurred in the common interest of the creditors; (ii) salvage from the last voyage; (iii) master's and crew's wages from the last voyage; (iv) stevedores' wages; (v) torts; (vi) general average; (vii) ship mortgages; (viii) repairs, supplies, and necessities; (ix) bottomry loans; (x) pilotage, custodial fees, and maintenance costs after the last voyage; (xi) indemnification owed to shippers and passengers for loss or damage to cargo during the last voyage, caused by fault of master or crew; and (xii) the price of the last acquisition of the vessel, plus interest, within the last two years.¹¹⁰

The order of priority for liens on a vessel's freight¹¹¹ is (i) court costs in the common interest of the creditors; (ii) salvage from the last voyage; (iii) master's and crew's wages from the trip that originated the freight; (iv) general average; (v) bottomry loans on the freight; (vi) insurance premiums; (vii) principal plus interest due to obligations contracted by the master on the freight; (viii) indemnification owed to shippers for loss or damage to cargo during the last voyage, caused by fault of master or crew; and (ix) any other lien due to loan or ship mortgage on the freight, if it is duly registered.

Finally, the priority of liens on a vessel's cargo¹¹² consist of: (i) court costs in the common interest of the creditors; (ii) salvage from the last voyage; (iii) taxes on the cargo at the port of destination; (iv) transportation and cargo costs; (v) storage of the cargo; (vi) general average; (vii) *respondentia* loans and insurance premiums; (viii) principal plus interest due to obligations contracted by the master on the cargo; and (ix) any other loan with a lien on the cargo.

Vessels of any nationality, with or without cargo, can be seized at the request of a maritime creditor.¹¹³ Panamanian law does not require the claim to be a lien to execute the arrest, nor that it have any connection to an ongoing voyage, only that it be related to

108. *Id.*, art. 1502.

109. *Id.*, art. 1505.

110. *Id.*, art. 1507, §§ 1-12.

111. *Id.*, art. 1510, §§ 1-9.

112. *Id.*, art. 1511, §§ 1-9.

113. *Id.*, art. 1527, 1529.

maritime commerce.

G. *Venezuela*

Inspired by the 1967 Brussels Convention and the 1973 Argentinian Law of Navigation, Venezuela has recently enacted a new law concerning maritime liens and ship mortgages.¹¹⁴ Venezuela's 1983 law brought substantial modifications to the priority of maritime liens previously established by the Code of Commerce. It created two groups of liens and, for the first time, recognized mortgage of ships.¹¹⁵

The first group of Venezuelan maritime liens is composed of liens for: (i) master's and crew's wages; (ii) obligations to the National Treasury arising from the operation of the vessel, port charges, and pilotage dues; (iii) maritime personal tort; (iv) maritime property tort; and (v) salvage, wreck removal, and contributions in general average.¹¹⁶ These liens are followed by a "right of retention" for repairs,¹¹⁷ similar to the common law possessory lien for repairs in Canada. If not lost by the delivery of the vessel to the owner, this right of retention prevails over a ship mortgage and the second group of liens, which include liens arising from the construction of the vessel, supplies and necessities, and other privileged credits.¹¹⁸

Ship mortgages rank above this second group of liens.¹¹⁹ Vessels of national registry and navigation accessories may be mortgaged. Vessels and accessories under construction may also be mortgaged. Under the new law, the mortgagee may "assert his rights over the vessel although it may have passed to the hands of

114. Ley de Privilegios e Hipotecas Navales, August 9, 1983 (Venezuela). This law revoked the pertinent provisions previously regulated by the Commercial Code of Dec. 19, 1919, as modified by the Law of Partial Reform of July 26, 1955 (Venezuela).

115. Ship mortgages were not foreseen by either the commercial or the civil code. Mortgages in the latter (art. 1,881) were strictly applied to *immovables* while ships were considered to be movable or personal property. The ship mortgage was essentially treated as a pledge, thus the pledgee did not have any *real right* in the property and could not pursue it into the hands of a new purchaser. A naval pledge ranked last in the previous lien order of priority as other liens on the ship.

116. Ley de Privilegios e Hipotecas Navales, art. 4, §§ 1-5, August 9, 1983 (Venezuela).

117. *Id.*, art. 14. Personal communication with Mr. Luis Cova Arria, Luis Cova Arria & Asociados, Caracas Venezuela, Jan. 10, 1984 [hereinafter cited as Arria].

118. Ley de Privilegios e Hipotecas Navales, art. 5, August 9, 1983, (Venezuela).

119. *Id.*, arts. 16, §§ 1-3, 24.

third parties,"¹²⁰ and fraud against the rights of a mortgagee is punishable by imprisonment from one to five years.¹²¹ Ship mortgages must be registered at the Real Estate Register in the jurisdiction of the vessel's home port, and subsequently filed at the Port Captaincy of the port of registry within 30 consecutive days after registration.¹²²

Maritime liens and ship mortgages are preferred over all non-maritime liens or other claims against the vessel's owner.¹²³ Maritime liens of the same class share in proportion to their value,¹²⁴ except for salvage and general average which follow the inverse order of accrual and have preference over all earlier liens.

According to the new law, foreign vessels can be seized in Venezuela for any debt, lien or non-lien, and whether or not the credit creating the claim against the vessel originated there.¹²⁵ It is unclear in these cases, which order of priority (e.g. Venezuelan law, law of the flag, etc.) would be applied by Venezuelan courts.

V. APPLICABLE INTERNATIONAL CONVENTIONS

A. *The Brussels Convention of 1926*

Although Argentina,¹²⁶ Brazil,¹²⁷ and Uruguay,¹²⁸ are the only countries in this hemisphere that have accepted the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, this convention has caused a significant impact in numerous national legal systems on the American continent. It has limited the number of maritime liens or privileges, furthered uniform recognition of ship mortgages or hypothecations, provided uniform rules on priority questions, and

120. *Id.*, art. 27.

121. *Id.*, art. 33.

122. *Ley de Privilegios e Hipotecas Navales*, art. 20, August 9, 1983, (Venezuela). "[Mortgages take effect as of the date of their registration. . . . If various mortgages are registered on the same day, the one first presented shall have priority." *Id.*, arts. 21, 22.

123. *Código Comercial*, art. 619 (Venezuela).

124. For most liens, the new law kept the proportionality rule of the revoked article 615 *in fine* of the Commercial Code. *Ley de Privilegios e Hipotecas Navales*, art. 9, August 9, 1983, (Venezuela).

125. Arria, *supra* note 117.

126. Accession on April 19, 1961.

127. Ratification on April 23, 1931.

128. Accession on September 15, 1970.

to a great extent, reduced the differences between the types of liens under common law and civil law systems.¹²⁹

The convention created two categories of liens. The first category includes: (i) legal costs and other expenses incurred for the preservation of the vessel, tonnage, port and pilotage dues, and other charges from the time of the entry of the vessel into the last port; (ii) wages of master and crew; (iii) salvage and general average; (iv) collision, damage to harbors and canals, personal injury to passengers or crew, loss or damage to cargo or baggage; and (v) repairs, supplies, and other master's expenditures.¹³⁰ Ship mortgages rank immediately after these five classes and are superior to liens of the second category,¹³¹ which consists of liens created by domestic legislation governing the contracting parties and not necessarily entitled to international recognition.

Article 8 of the Convention explicitly extends to any claim secured by a lien, which includes ship mortgages, the right to follow the vessel and to assert the lien against her into whatever hands she may pass, including a bona fide purchaser. Claims secured by a lien and related to the same voyage rank in the order set out above. Otherwise, those from the last voyage have priority over the ones attaching to previous voyages, even liens that rank in a higher class.¹³² Liens of the same class and voyage share ratably in the event that the fund available is not sufficient to pay the claims in full, except salvage, general average, repair and supply, which rank inversely to the order in which they arose.

B. *The Bustamante Code*

The 1928 Convention on Private International Law, or, as it is

129. See Kriz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952, Part One*, 1963 DUKE L. REV. 671, 674 (1963). In Argentina, prior to the enactment of the most recent Law of Navigation, the Ship Mortgage Statute of 1958 (Decree No. 3.115, March 20, 1958) drastically modified the hierarchy of liens established by the 1889 Commercial Code to conform with the order of the 1926 Brussels Convention. Amendments to the Brazilian Commercial Code, introduced by the Maritime Mortgage Statute of 1922, *supra* note 89, also exemplify the trend toward some degree of uniformity in this area. Statutory and case law in both Canada and the United States have produced results analogous to the priority of liens set in the convention, even though neither country is a party to it.

130. The 1926 Brussels Convention, *supra* note 92, art. 2.

131. *Id.*, art. 3 at 1-2.

132. *Id.*, arts. 5, 6.

more widely known, the Bustamante Code,¹³³ was widely ratified by almost all American nations at the time of its passage except Argentina, Colombia, Mexico, Paraguay, Uruguay, and the United States.¹³⁴ Although Argentina is not a member of this treaty, identical provisions were incorporated into its recent law of navigation.¹³⁵

The treaty basically sets two standards by which to resolve conflict of jurisdiction problems in international maritime law. It gives extraterritorial application to the law of the nation where the vessel was registered to determine what liens and mortgages can be claimed against the vessel.¹³⁶ It also provides for the law of the ship's nationality to regulate change of ownership, creditors' rights on the vessel after her sale, and laches or limitation periods.¹³⁷ The procedure for arresting the ship is controlled by the law of the court's jurisdiction where the vessel is arrested.¹³⁸

C. *Conflict of Laws*

There are three basic steps to be followed to determine the correct choice of law to apply in a maritime lien case. First, if the countries of the litigants are signatories to the 1926 Brussels Convention, the court should apply the rules of the Convention for lien recognition and priority. Second, if instead of belonging to the Brussels Convention, the litigants are parties to the Bustamante Convention on Private International Law, then the principles of the Bustamante Code will control what substantive and procedural laws will be used by the court. Normally, the law of the ship's nationality will determine what liens attach to her, and the law of the forum will provide for the procedural remedy. Finally, for cases in the American admiralty courts, because the United States is not a signatory to either of these conventions, the law most closely connected with the transaction or occurrence is applied to lien recognition, either the *lex loci contractus* or the *lex loci delictus*. The

133. 86 L.N.T.S. 111 [hereinafter cited as The Bustamante Code]. For background on the Bustamante Code, see A. GOLBERT & Y. NUN, *LATIN AMERICAN LAWS AND INSTITUTIONS* 408-18 (1983).

134. Information provided by the U.S.D.O.S. (November 1981).

135. Ley de la Navegación, Law No. 20.094, arts. 598, 611, January 15, 1973, C Anales (Argentina).

136. The Bustamante Code, *supra* note 133, art. 278.

137. *Id.*, arts. 275, 277.

138. *Id.*, art. 176.

law of the flag applies on the high seas. The legal remedy in all these cases, which includes the priority of the claims, is provided by the *lex fori*.¹³⁹

Canadian courts have also adopted the same principle.¹⁴⁰ In the *Marquis v. The Ship Astoria* the court held that:

It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered. . . . [T]he creation of liens for service on the high seas, as for seamen's wages, is on the same theory, governed by the law of the ship's flag. But though international comity requires that the creation of a lien by a foreign flag be recognized, the priority which it will be given in the distribution of the proceeds is adjusted by the law of the forum at which the vessel is libelled and sold.¹⁴¹

A similar result was reached in the *Todd Shipyards Corp. v. Altema Compañía Marítima. S.A.*:

It must . . . be remembered that it is the right, and not the remedy, which is regulated by the *lex loci* . . . but the further question to be determined in this case is whether that lien takes precedence over the respondent's mortgage claim, and in my view this question must be determined according to the law of Canada [i.e., the '*lex fori*'].¹⁴²

VI. INTERNATIONAL MARITIME LIENS COMPARED

A comparison of the ranking of maritime liens and ship mortgages within the above national legal systems vis-a-vis the 1926 Brussels Convention is presented in this section.¹⁴³ Table 1 summarizes the information contained in the following discussion,

139. "Priorities among maritime liens have traditionally been regarded as governed by the law of the forum." *Payne v. S.S. The Tropic Breeze*, 423 F.2d 236 (C.A. Puerto Rico 1970).

140. See, e.g., *The Acrux*, 1 Lloyd's List L. R. 405 (1962); "[T]he holder of a maritime lien against a ship under the law of the United States of America in respect of the costs of necessary repairs to the ship effected in that country is entitled to enforce the lien in Canada, and according to Canadian law takes priority over a mortgagee of the ship." *Todd Shipyards Corp. v. Altema Compañía Marítima S.A.* D.L.R. 3d 571 (1973).

141. 1931 Can. Exch. 195 (1931).

142. 32 D.L.R. 3d 571 (1973).

143. Even though the 1967 Brussels Convention has influenced recent developments of the law on maritime liens in Argentina and Venezuela, this convention is not applicable in this hemisphere. No American state has yet ratified or acceded to it. Information provided by the U.S.D.O.S. Foreign Treaty Office (Mar. 28, 1984).

which focuses on liens of first ranking and the ship mortgage.

Legal Systems	Priority of Liens	Judicial costs and other expenses	TABLE 1				
			Seaman's Wages	Salvage and General Average	Tort	Repairs Supplies and Necessaries	Ship Mortgage
ANGLO-AMERICAN	Canada	1(a)	2	3(b)	4	5(c)	6
	United States	1	2	3	4	5(d)	6
	Argentina	1	2	6(e)	4,5(f)	8,9(g)	7
LATIN-AMERICAN	Brazil	1	2	4(h)	6	5	7
	Mexico	—	1	3,4(i)	5	6	8(j)
	Panama	1	3(k)	2,6(l)	5	8	7
	Venezuela	—	1	5(m)	3,4	6(n)	7
1926 Brussels Convention		1(o)	2	3	4	5	6

Order of priority of maritime liens and ship mortgages within national systems in relation to liens of first order as set out in the 1926 Brussel Convention.

- (a) Clerk's and marshal's fees only.
- (b) General average ranks below salvage, as a common law possessory lien.
- (c) Common law possessory lien for repairs only.
- (d) These liens must arise prior to the ship mortgage.
- (e) Tax liens and navigation dues rank third.
- (f) Personal and property tort, respectively.
- (g) Contracts for repairs have priority over supplies and necessities.
- (h) Tax liens rank third.
- (i) Salvage and general average, respectively. Tax liens rank second.
- (j) Insurance premiums rank seventh.
- (k) Stevedores' wages rank fourth.
- (l) Salvage and general average, respectively.
- (m) Tax liens, port charges, and pilotage dues rank second.
- (n) Right of retention for repairs only, similar to a possessory lien.
- (o) Tonnage dues, harbor dues, pilotage dues, and other public taxes and charges are included.

A. Judicial Costs and Other Expenses

Although not a maritime lien *stricto sensu*, foremost priority is given to the judicial costs and other expenses incurred by the parties to arrest the vessel and to preserve her while in *custodia*

legis. Generally, no lien can arise while a vessel is held in custody of the court in the United States,¹⁴⁴ but the courts have the power to create rights of reimbursement from the general fund for costs and administrative expenses. As a rule, services performed for the common benefit of all concerned parties are taxable as costs.¹⁴⁵ Canada places only the registrar's and marshal's fees and expenses above maritime liens; court costs per se are ranked below ship mortgages.¹⁴⁶

Under the Brussels Convention of 1926, a wider range of expenses were included in the court costs category, comprised not only of "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," but also "tonnage dues, light or harbour dues, and other public taxes and charges of the same character; pilotage dues, the costs of watching and preservation from the time of the entry of the vessel into the last port,"¹⁴⁷ some of which would have occurred prior to the actual seizure of the vessel. Such detailed expansion of the notion of judicial costs and expenses has not been followed by national legislation in Latin America. Argentina, Brazil, and Panama have limited this category to actual costs of the judicial procedure, whereas Mexico and Venezuela have disregarded these costs as maritime liens.

B. *Seamen's Wages*

Seamen's wages have historically been considered a sacred lien by the General Maritime Law. This class includes "claims arising out of the contract of engagement of the master, crew, and other persons hired on board."¹⁴⁸ Masters in the United States were not entitled to a maritime lien for their wages until 1968 on the premise that they were agents of the shipowner and not seamen.¹⁴⁹

144. GILMORE & BLACK, *supra*, note 14, § 9-11 at 497.

145. *N.Y. Dry Dock Co. v. The Steam Ship Poznan*, 274 U.S. 117 (1927).

146. *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

147. The new Brussels Convention of 1967 eliminates the class of legal costs and other expenses altogether, ranking wages as the most privileged claim upon the vessel. Port, canal, and other waterway dues and pilotage dues immediately follow in rank. Brussels Convention, art. 4, § 1 (i)-(ii) (1967).

148. The 1926 Brussels Convention, *supra* note 92, art. 2, § 2. Panama limits this lien to be exercised only by the master and the crew for wages earned on the last voyage, *supra* note 110. Stevedores' wages rank fourth in Panamanian law, *id.*

149. "The master of a vessel documented, registered, enrolled, or licensed under the

Now, temporary help, longshoremen, bartenders, waitresses, and even entertainers have a lien for wages.

Wages rank second highest in priority in the Brussels Convention of 1926¹⁵⁰ and in the national laws compared in this article,¹⁵¹ except in Mexico and Venezuela where they rank first, and in Panama where they rank third. In some circumstances, salvage may precede wages earned prior to the time of the salvage operation. The basis for the high priority enjoyed by salvage liens is the salvor's close connection with the preservation of the vessel or cargo. In the United States, a salvage lien may also "outrank all prior wage liens where, but for the service, the security of the seamen might have been lost."¹⁵² However, in *The Rainbow Line*,¹⁵³ a more recent case, the court held that salvage takes priority over all liens except for wages.¹⁵⁴

C. *Salvage and General Average*

Success is a key element for a salvage lien to exist, whether performed voluntarily or under contract, "no lien attaches for attempted salvage where the services rendered produce no result and in no way contribute to the subsequent saving of the boat."¹⁵⁵ Additionally, the owner of the vessel or cargo cannot be held liable in personam for voluntary salvage unless he claims the property. He can completely avoid personal liability by simply abandoning the property.¹⁵⁶

Ranking with equal priority, general average has become one

laws of the United States shall have the same lien for wages against such vessel and the same priority as any other seaman serving on such vessel." 46 U.S.C. 606 (1976).

150. The preferred hierarchy of wages under the 1926 Brussels Convention is cosmetic only, since the first class, legal costs and expenses, is comprised of other categories with lower ranking in several countries.

151. In the reclassification of maritime liens that took place in Argentina, seaman's wages were raised from seventh place, which was the priority set forth in the Commercial Code of 1889, to second place. See Código Comercio, Law No. 2.637, art. 1.377, § 7, October 9, 1889, (Argentina); Ley de la Navegacion, Law No. 20.094, January 15, 1973, C Anales (Argentina). See *supra* notes 70, 71.

152. *The Nika*, 1923 A.M.C. 409 (W.D. Wash. 1923); *The Athenian*, 3 F. Supp 248 (E.D. Mich. 1877).

153. *Rainbow Line, Inc. v. M/V Tequila*, 341 F.Supp. 459, *aff'd*, 480 F.2d 1024, 1972 A.M.C. 1540 (S.D.N.Y. 1972).

154. Compare 2 BENEDICT, *supra* note 19, at § 51 L. 23: "Fault subordinates wage to collision lien."

155. *The Mike Corry*, 19 Can. Exch. 61 (1917).

156. *United States v. Cornell Steamboat Co.*, 202 U.S. 184 (1906).

of the least litigated areas of admiralty, primarily because the highly technical work in this area has been ably performed by general average adjusters and marine surveyors.¹⁵⁷

The Brussels Convention of 1926 and the law in the United States rank salvage and general average liens equally giving them third priority, but tax liens and dues related to the commercial operation of the vessel have received priority over them in Argentina, Brazil, Mexico, and Venezuela. In Argentina and Venezuela, the status of salvage and general average liens in the new laws has fallen below liens originating from personal and property torts. Like possessory liens in Canada, general average liens rank below the superior maritime salvage lien. Panama also gives general average a lower ranking, in great contrast to the preferential position afforded to salvage, which are classified above wage liens.

D. *Tort*

A new pattern of raising the priority and separating tort liens into personal and property torts, in that order, is under way in civil law jurisdictions. Personal and property tort liens have already been given priority over salvage and general average in the 1973 Argentinian Law of Navigation and in the 1983 Venezuelan Law of Maritime Liens and Ship Mortgages,¹⁵⁸ which indicates the impact of the model set forth by the 1967 Brussels Convention.¹⁵⁹ These liens are further preferred over those for repairs, supplies, and necessities in Argentina, Mexico, Panama, and Venezuela, as well as in Canada and the United States.

The maritime tort lien resulting from a collision is not absolute in Canada. "The foundation of the lien is the negligence of the owners or their servants at the time of the collision and, if that is not proved, no lien comes into existence and the ship is not liable."¹⁶⁰ In the United States the personification of the vessel theory has caused the liability of a vessel to be considered separate from that of her owner, "the offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the

157. *Cia. Atlantica Pacifica v. Humble Oil & Refining Co.*, 274 F. Supp. 884, 1967 A.M.C. 1474 (D. Md. 1967).

158. *Ley de la Navegación*, Law No. 20.094, art. 476, §§ d-e, January 15, 1973, C. Anales (Argentina); *Ley de Privilegios e Hipotecas Navales*, art. 4, §§ 3-5, August 9, 1983, (Venezuela).

159. *Supra* note 69, art. 4, §§ 1 (iii)-(iv).

160. CAN. ENC. DIG., *supra* note 31, at 149.

wrong done,"¹⁶¹ "the ship itself is to be treated in some sense as principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer."¹⁶²

Collision claims against the vessel may take priority over pre-existing tort and salvage liens, and even the wage liens of the seamen of the vessel.¹⁶³ The rule that only collision and personal injury could give rise to a maritime tort lien has been rejected in *The Bournemouth*,¹⁶⁴ in which a broader test was substituted (i.e., whether the vessel was the offending thing). In this decision, the vessel was held subject to a maritime lien in favor of the State of California by virtue of having discharged oil while moored at Long Beach. Latin-based law extends the vessel's liability to any accident of navigation as well, including loss or damage to cargo or baggage. Personal injury or loss of life in Argentina, as in the United States, gives rise to a claim whether occurring on land, on board the vessel, or in the water, if the injury is directly related to the operation of the ship.¹⁶⁵

E. *Repairs, Supplies, and Necessaries*

These claims result from contracts that are necessary for the preservation of the vessel or the continuation of the voyage, usually made by the master while away from the vessel's home port. The home port doctrine adopted by the Brussels Convention of 1926 is still in force in Brazil,¹⁶⁶ but it was abrogated in the United States in 1910, when Congress passed the Federal Maritime Lien Act that superseded all state statutes on this subject. This Act provides that "any person furnishing repairs, supplies, towage, use of dry dock or marine railway or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner or a person authorized by the owner shall have a maritime lien upon the vessel."¹⁶⁷ Prior to the Maritime Lien Act, general maritime

161. *The John G. Stevens*, 170 U.S. 113, 122 (1898).

162. *The Barnstable*, 181 U.S. 464, 467 (1901); 46 U.S.C. 972 (1976).

163. *The Daisy Day*, 40 F. Supp. 538 (W.D. Mich. 1889).

164. 307 F. Supp. 922 (C.D. Cal. 1969).

165. Ley de la Navegación, Law No. 20.094, art. 476, § d, January 15, 1973, C Anales (Argentina); *The Scow Joan R.*, 294 F.2d 272, 1960 A.M.C. 419 (S.D.N.Y. 1959).

166. Decree No. 15.788/22, art. 20, § d, Coleção (Brazil).

167. 46 U.S.C. 971 (1983). Shipowners, therefore, have the right to prevent charterers and other persons from creating consensual liens against the vessel, by including an express prohibition of lien clause in the contract. This has no effect whatsoever on delictual obligations, such as maritime torts. See e.g., *The Lucie Schulte*, 343 F.2d 897 (2d Cir. 1965).

law provided maritime liens for repairs, supplies, and necessities furnished to the vessel in a foreign port,¹⁶⁸ but not if the vessel was in her home port.¹⁶⁹ This distinction was based on the premise that while the vessel was in her port of registry, the owner's credit was being extended and not that of the vessel.¹⁷⁰

Under Canadian law repairs to a vessel create a possessory lien, which is lost when the lien holder loses possession of the vessel. Providing supplies and necessities to a vessel in Canada creates a mere statutory lien, which ranks below mortgages.¹⁷¹ In the United States these contractual liens rank higher than a subsequent ship mortgage lien. The preferred ship mortgage, however, is superior to later liens for repairs, supplies, and necessities. A small dosage of protectionism in the Act provides for American repairmen's liens to be considered above those of preferred foreign ship mortgages.¹⁷²

The United States Maritime Lien Act seems to create a presumption that practically any services or supplies furnished on the credit of the vessel, even when requested by the shipowner in the vessel's home port, are entitled to a lien, except material furnished for the construction of the ship.¹⁷³ These liens do not extend to contracts that do not aid the vessel, such as insurance contracts, which are made for the personal benefit of her owner.¹⁷⁴

This test is more stringent in Latin American-based systems. Providers of supplies and repairmen must prove that the supplies and repairs were indeed necessary for the preservation of the vessel or the continuation of her voyage. This class of lien does not include breach of affreightment contract or charter-party, pilotage,

168. *The Nestor*, 18 F. Cas. 9 (1831). "Foreign port" is any port located in a state which is not the vessel's port of registration.

169. *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819).

170. *The Lottawana*, 88 U.S. (21 Wall.) 558 (1875); *The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409 (1824).

171. *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, 32 D.L.R. 3d 571 (1973); *The Terry*, 1948 Can. Exch. 27 (1948); *The Lowell Thomas Explorer*, 1 Can. F.C. 339 (1980).

172. *The Glenrock*, 268 F. Supp. 7, 1968 A.M.C. 507 (S.D. Fla. 1968). The Foreign Ship Mortgage Act, 46 U.S.C. 951 (1976), provides that "such preferred mortgage lien in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of dry dock or marine railway, or other necessities, performed or supplied in the United States."

173. Hebert, *supra* note 2, at 399.

174. Virtually every state has enacted statutes protecting this lien, which is enforced by Admiralty courts. Longenecker, *supra* note 3, at 599.

or insurance premiums, which often have specific lower priorities.

Under Brazilian and Mexican law and the Brussels Convention of 1926, liens for repairs, supplies, and necessities rank above ship mortgages. In Venezuela, only the right of retention for repairs, which is equivalent to a possessory lien in common law, would be preferred to the ship mortgage, while other contractual liens for repairs, supplies, and necessities receive an inferior classification.

VII. SHIP MORTGAGES

The 1926 Brussels Convention provides for the uniform recognition of ship mortgages or hypothecations, whereby the validity of a ship mortgage is determined by the law of the flag, rather than the *lex fori*. This convention has also elevated the status of mortgages with respect to maritime liens, placing them above liens created by national laws not included in the preferential category of the convention.¹⁷⁶ In Canada, the United States, Argentina, Panama, and Venezuela, ship mortgages may receive a higher priority than the ascribed priority in the 1926 Convention for repairs, supplies, and necessities which are considered to be inferior liens. Only the preferred maritime liens¹⁷⁶ and court costs outrank the preferred ship mortgage in the United States.

A mortgage *stricto sensu* is not a maritime contract, which explains its nonexistence under the general maritime law. A lien based on a ship mortgage is wholly a creation of statute.¹⁷⁷ Unlike maritime liens, which are secret and nonconsensual, the ship mortgage must be formally contracted and recorded¹⁷⁸ in order to affect

175. The 1926 Brussels Convention, *supra* note 92, art. 3.

176. "[T]he term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average and or salvage, including contract salvage. . . . [T]he preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court." 46 U.S.C. 953 (1976).

177. Prior to the enactment of the Ship Mortgage Act of 1920, an Admiralty court had no jurisdiction over a suit to foreclose a mortgage on a vessel. *See* The Thomas Barlum, 293 U.S. 21 (1934).

178. The U.S. preferred Ship Mortgage is recorded in the office of the U.S. Coast Guard at the vessel's home port, 46 U.S.C. 921 (1976); in Argentina, it must be recorded at the National Vessel Register, Ley de la Navegación, Law No. 20.094, art. 501, January 15, 1973, C. Anales (Argentina); in Brazil, at the Maritime Register, Decree No. 15.788/22, art. 21

the rights of third parties. In Latin America, ship mortgages are regulated either by civil codes, commercial codes or by special statutes. Since the personification of the vessel theory is not acknowledged, Latin-based law allows the hypothecation of a ship undergoing construction.

VIII. CONCLUSION

How secure is your claim? Since the security of a maritime lien concerns not only whether a claim for credit to a vessel will be recognized by foreign courts but also what priority will be given to it, this article shows that your claim would be permeated and threatened by uncertainty. Although the 1926 and the 1967 Brussels Conventions created a uniform system for lien recognition and priority, their formal application in the Western Hemisphere is insignificant since only three American States have ratified the earlier international convention, while none has accepted the latter. Indirectly, these conventions have helped reduce extreme differences in consideration of types of liens, ship mortgages, and lien priorities within national legal systems. Overall uniformity, nevertheless, is far from being accomplished.

Without wide acceptance of an international convention on the subject, both lien recognition and lien priority will be significantly affected by the law that would govern them based on a determination by national courts (i.e. the *lex loci*) the law of the ship's flag, the *lex fori*, or any combination of the three. Principles of international comity have established that the recognition of a maritime credit as lien or non-lien must be governed by the law with the greatest contact to the transaction. If the transaction occurred in a jurisdiction other than the one in which the litigation is taking place, then the law from the place of the transaction, the *lex loci*, or the law of the flag would apply. The law of the ship's flag is generally applied for liens arising on the high seas. Lien holders, therefore, should not encounter any difficulty in having their credits recognized as liens in other countries, even in jurisdictions where those credits are not considered to be liens.

The unequal priority granted to these liens by various national courts and statutes, however, complicates this arrangement. The

(Brazil); and in Venezuela, at the Real Estate Register and the Port Captaincy, Ley de Privilegios e Hipotecas Navales, arts. 20, 22, August 9, 1983 (Venezuela).

application of Panamanian law, for example, would place a salvage lien as second in priority, while lien classification in Argentina would give the same lien an inferior position, namely, sixth. Should the priority be governed by the *lex loci*; what preference would the national courts give to liens that originated from transactions which took place within different national jurisdictions, following different orders of priority? Similarly, if the priority is given according to the *lex fori*, the security of a maritime lien would have very little value since the lien holder would not be able to predict where the vessel's arrest would occur in order to determine the priority of his credit in the future.

Modern choice of law rules employed by admiralty courts in common law jurisdictions have established that foreign law may determine the right, while national law dictates the remedy, to solve conflicts of transnational nature. Under this test, a maritime lien will be recognized by common law national courts if its existence is also recognized by foreign law, but its priority in relation to other liens will follow the order of the national law. This right-remedy test is equivalent to the substance-procedure test used by civil law courts. But the apparent equity of this simple solution is shattered when one realizes that the above legal systems do not equate remedy and procedure. In the common law jurisdictions, remedy includes the priority given to a recognized lien, while procedure in the civil law jurisdictions is usually limited to the arrest and sale of the vessel and the distribution of the proceeds. Consequently, in civil law jurisdictions, priority belongs to the substance and not the procedure of the case. In states that have ratified the Bustamante Code or that have modified their laws accordingly, the national courts would apply the order of priority provided by the law of the vessel's flag.

If one considers that the status of a lien in relation to other liens is as much a part of the creditor's original expectation as is his right to the lien itself, neither the *lex loci* nor the *lex fori*, independently or combined, offers equitable results. Equity can nonetheless be achieved by applying the law of the ship's flag to determine what liens would attach to the vessel and in which priority they should be paid. In the event of litigation anywhere in the world, creditors would know their standing beforehand, thus eliminating the unpredictability associated with the other schemes. International comity, in this manner, would reach beyond the differ-

ences between national and foreign laws to provide a mechanism that would be consistent in different legal systems.