Harmonisation of certain rules relating to the mortgages and maritime liens in Slovakia with international standards

Matej Dostal

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HARMONISATION OF CERTAIN RULES RELATING TO THE MORTGAGES AND MARITIME LIENS IN SLOVAKIA WITH INTERNATIONAL STANDARDS

By

MATEJ DOSTAL
Slovakia

A dissertation submitted to the World Maritime University in partial fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE
in

GENERAL MARITIME ADMINISTRATION & ENVIRONMENT PROTECTION
(Commercial)
1997

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DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature)

10 October 1987

Supervised by:
Professor: Patrick Donner
Office: Shipping Management
Organisation: World Maritime University

Assessed by:
Professor: Glen Plant
Office: Maritime Safety Administration
Organisation: World Maritime University

Co-assessed by:
Professor: Mr Jerzy Mlynarczyk
Organisation: Gdansk Manager Training Foundation
Gdansk, Poland
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Abstract

Title of dissertation: Harmonisation of certain rules relating to the mortgages and maritime liens in Slovakia with international standards

Degree: MSc

The dissertation is a study of ship mortgages as a means of ship financing and maritime liens being closely linked with and affecting this banking security. It is based on investigation of legislation governing maritime liens and mortgages in legal systems of different developed maritime nations and three international conventions dealing with these matters.

The first part of the second chapter briefly outlines the possibilities of ship financing, showing that mortgage loans are still broadly used and very much preferred.

The second part compares the differences between mortgages in the common law system and hypothecs in the civil law system, namely in the United Kingdom, the United States and France.

The third part examines three conventions on maritime liens and mortgages from the point of view of their developments through the years in connection with the number of maritime liens, their enforcement and relation with mortgages.

The third chapter aims to demonstrate and evaluate the strengths and weaknesses of the 1952 Shipping Act, which governs the shipping industry in Slovakia and is still in force. The same applies for the new Shipping Act, currently being drafted and completed to be passed by the parliament. Furthermore, it tries to disclose all deficiencies of the legislation and position of mortgages and maritime liens within its scope.
Based on this analysis, the concluding chapter proposes and draws rules for statutory mortgages, recommends the basic requirements that should be included in the legislation, governing their execution or extinction as well as main clauses that appear in the deed of covenants. The same importance is granted to the consideration of adopting the latest convention on maritime liens and mortgages, making it part of the Slovakian law.
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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1 Introduction

For many years shipping as an international industry has tried to be regulated by certain sets of rules, based on different legal systems in different corners of the world. Mortgages and maritime liens as an integral part of shipping activities have evolved in a very broad category of rules and regulations. In an attempt to simplify them and make them uniform, the international community has tried to create international law in the form of international conventions that would govern procedures of execution and extinction of mortgages and to limit the number and set up the ranking of claims secured by maritime liens in a clear and uniform manner. Slovakia operating a few ships on the high seas and wishing to expand its fleet has to adopt its own legislation and make it compatible with regulations and rules laid down in international conventions. Therefore, this dissertation, having the title “Harmonisation of certain rules relating to the mortgages and maritime liens in Slovakia with international standards”, tries to highlight and discuss problems faced by the administration preparing legislation dealing with this issue in a land-locked country.

Since the early fifties shipping activities have been part of the Czechoslovakian economy, and after the split up of the common republic, the Slovakian economy. Therefore, the legal system which rules this type of industry reflects the political situation of those times. The 1952 Shipping Act, which is still in force, does not provide for acquisition of ships by way of bank loans secured by mortgages or any other means. In order to overcome this impediment, it is crucial that the new shipping act currently being formulated and drafted would encompass all relevant and important provisions as regards mortgages, to get a compact piece of legislation
compatible with international law based on international conventions. The same applies for claims and maritime liens as they are very closely linked with and affecting the position of mortgages.

Thus, the goal of this paper is to analyse the differences and similarities of legal systems in different developed maritime nations and their relation to the international conventions on maritime liens and mortgages. Based on this analysis, an equally important part is to suggest steps that need to be taken and formulation of concrete provisions that have to be included in the Slovakian law with the aim to make it updated and transparent. Achieving these objectives, would allow for easier funding of shipping, which should be a priority of every modern society wishing to make use of all means of transport contributing to its development.
2 Legal framework of maritime liens and mortgages

2.1 Financing of ships

In the shipping industry there are some principal sources of finance, such as financing through borrowing from funding sources or equity, which has come from within the shipping industry. Both types of financing can be used either for acquisition of a second hand vessel or a newbuilding.

Most lending secured on a second hand ship is by way of a term loan. It means the lender will lend to the shipowner a fixed amount, repayable over a set period. The amount will be repayable in equal instalments over the duration of the term together with interest, usually fixed by reference to the London Inter-bank Offered Rate. The loan will be available either in a single drawing, which should assist the borrower to purchase a vessel or in a way of multiple drawings to enable him to buy more than one vessel.

For companies which buy and sell ships on a regular basis the revolving facilities are particularly appropriate. The amount which is repaid is available for reborrowing and thus enabling the shipowner to purchase new tonnage.

As ships' values have risen, it has become increasingly common that banks wish to share lending obligations with others. In a syndicated loan a group of banks will each provide part of the loan. One bank, appointed as an agent, will administer the facility on behalf of the syndicate and will deal with fixing interest rates, receiving repayments and accounting to the other syndicate members.

The equity finance has traditionally come from within the shipping industry, principally from vessel operations and retained profits on ship sales.
Another possible form is by way of increased share capital. As private companies are not allowed to advertise shares to the public, the main source of additional share capital needs to come from the existing share holders. Some efforts to attract equity from outside the shipping industry has been made through setting up funds listed on a suitable stock exchange. The great attraction is the advantage of beneficial depreciation rules and tax allowances.

As an “off balance sheet” financing leasing can be considered. The idea is to get someone else to buy the vessel and then to lease it from the purchaser on a bare boat charter basis. Leasing often has the advantage of being very tax efficient since the lease payments, which include interest and amortisation, normally can be accounted as costs in full.

Another option is sale and lease back. The idea is to sell an existing vessel to a financing source and then lease it back. This provides capital to the company which retains the vessel and pays the lease requirements. It also has tax advantages.

In shipping mezzanine finance can sometimes occur. This is a form of debt which is subordinated to the owner’s principal bank borrowing. For taking the higher risk involved in being postponed to the senior debt when it comes to repayment, the lender will demand a higher interest margin.

For a buyer, wishing to buy a newbuilding, there are two principal options. Either it is bank finance or purchase based on payment terms with credit provided by the builder. The building contract will give the buyer the option to pay cash on delivery or to take yard credit.

In the case of the yard credit the buyer is required to pay 20% of the contract price from his own resources, usually in instalments during the building period whilst the balance is advanced from the yard. This amount is repayable at regular intervals with interest in almost the same manner as a normal commercial loan. The yard will
require security for the yard credit, which can be made by way of a mortgage and coupled with an assignment of insurances, earnings etc.

If the buyer wishes to use buyer's credit, 30% of the contract price has to be financed by his own resources whilst the balance is covered by a bank borrowing advanced on normal commercial terms. Again a bank will need a form of security which can be a mortgage or assignment of the benefit of the shipbuilding contract itself (as e.g. in the UK, where under English law, a registered mortgage over a ship under construction is an impossibility).

A very important form of ship finance and support of shipyards in the OECD countries has been export credit. It provides to foreign shipowners a loan, which can reach up to 80% of the contract price with an interest rate not less than 8% with repayments over 8.5 years from delivery in semi-annual instalments.

A possible risk from the viewpoint of an investor providing equity capital

The private persons who wish to invest in the shipping industry can do so by buying shares. From their viewpoints, they take the risk of losing money if the company does not perform well and the value of the shares decreases. They also have to take into account the possibility of dividends not being paid due to poor profitability of a company, even though it was promised they will be paid every year at a certain level. Therefore, the rates of return could be lower as was anticipated.

A possible risk from the viewpoint of a bank providing finance via a loan

The lending bank also faces some risks connected with lending as there is no government guarantee on the loan. Therefore, it has to sort out this problem and to find out its own security. This is usually done by way of a mortgage. To offset the risk, interest rates are significantly higher than the relevant market interest
rates. To minimise the risk, banks rely very much on the shipowner's performance records. Banks are willing to lend money on more favourable terms to a well established shipowner with a good record of loan repayment, whilst the unknown shipowner or one ship company has to count with more strict conditions and shorter periods of repayment and less favourable terms.

2.2 Securities provided to the creditors

2.2.1 Mortgages

As can be seen, the ship mortgage remains the most important form of security required by a lender, despite a trend by lenders to look for an even greater range of security. In order for this security to pay off, a mortgagee should seek certain basic rights and forms of enforcement procedures.

Although there are some differences in jurisdictions of individual countries as regards type of mortgages, their execution or ranking, there are some basic principles which have to be applied in order to obtain funding secured by a mortgage.

First of all, a mortgagee will require the right to take possession of a vessel to enable him to sail the vessel to an amenable jurisdiction where he will be able to arrest her to provide security for the mortgagee's claim for the unpaid indebtedness (Harwood, 1991, p.74). This can be done either by actual or constructive possession. The former means dismissing the master and crew and appointment of a new master and crew by the mortgagee while the latter entitles the mortgagee to indicate an intention to assume the rights of ownership or to give notice to the owner or any charterer. In fact, in practice this right is exercised very seldom because the mortgagee, apart from the benefits he can gain, would be responsible for all expenses of operating the vessel which may exceed the earnings. In addition, a mortgagee in possession will potentially be liable to the owner for any
losses arising from the mortgagee's imprudent use of the vessel, though a mortgagee, who has taken possession of a vessel, is under no implied duty to sell the vessel.

The second right is the right of sale. This right is often given to a mortgagee by a statute and governed by an agreement in the mortgage or deed of covenants. It should provide mortgagee with two options of selling the vessel. Either at auction with or without judicial supervision or by a private treaty. The sale at auction is more favourable for both the mortgagee and the buyer. For the former, a judicial sale has the benefit of removing any requirement for any warranties to be given by the selling mortgagee and avoids the possibility of a claim by the former owner for damages for breach of his obligations to obtain the best price reasonably obtainable, and to exercise his power of sale as a reasonable man would behave in realisation of his own property, so that the mortgagor may receive credit for the value of the property sold (Harwood, 1991, p75).

The latter has an indisputable advantage of buying a vessel through the auction, as this judicial sale will give the purchaser a clean title to the vessel free of encumbrances. It will also clear off all maritime liens, which would be attached to the proceeds of sale, and he could deal with the ship without the fear to be challenged.

Another right required by a mortgagee is to appoint a receiver of the mortgaged vessel, to enable him to take possession of the vessel and receive income through a professional agent. Even though this right is used rather seldom, it may be a useful opportunity in some cases.

In some jurisdictions the mortgagee may apply for foreclosure and thus acquire a title to a vessel. This remedy is not used very often because it is difficult and very complex. The mortgagee would normally prefer arrest of a ship. Despite that, this procedure should be included in the basic mortgagee's rights.

Arrest of a vessel by a mortgagee is the essential way of satisfying his claim. It is commonly accepted in almost all jurisdictions. An arresting party will be able to
apply for the vessel to be sold and for the proceeds of sale to be held by the court and distributed to the various claimants. Because of certain risks for a mortgagee to sell a ship without the assistance of a court as described above, this is the method of enforcement preferred by most mortgagees.

All these rights and perhaps more which the mortgagee would be able to exercise in a default situation should be included in the mortgage or deed of covenants.

2.2.1.1 Mortgages in the United Kingdom

The ship mortgage in the UK was derived from the common law and therefore the Admiralty Court did not have jurisdiction over them. As a result neither the Admiralty writ in rem nor the Admiralty writ in personam could be used to enforce the mortgage. This situation changed by the Admiralty Court Act 1840 and was modified again by the Supreme Court Act 1981. It provides complete jurisdiction over any claim in respect of a mortgage of or charge on a ship or any share therein (Tetley, 1985, p.207).

There are two types of mortgages available: the legal or statutory mortgage and the equitable mortgage. The legal mortgage complies with the statutory requirements firstly laid down in the Merchant Shipping Act, 1894 and later in the Merchant Shipping Act 1988. According to these requirements a legal mortgage can only be on a registered ship and a “British” ship. A ship which is foreign owned, or which is British owned but not registered, or which is under construction and therefore not capable of being registered, cannot be the object of a legal mortgage. However, a mortgage on such a ship is valid though ranks only as an equitable mortgage (Tetley, 1985, p.208).
With respect to the ranking of mortgages, another problem may arise if there is a future advance made, secured by a mortgage. Revolving credit mortgages are known as open account mortgages and are clearly valid. The terms of the mortgage are set out in the collateral agreement and include the maximum amount that may be outstanding at any time. The issue is whether the security on later advances ranks ahead of an intervening registered second mortgage of which the first mortgagee has notice. It seems that the principle has been established that a ship mortgage securing future advances will only have priority as of the date of each advance.

Had the mortgagee had an actual notice of the intervening encumbrance before making his advance, the court is likely to find that the advance ranks behind the intervening encumbrance (Tetley, 1985, p.232).

The instrument which creates the legal mortgage must be in the form prescribed by the statute. There are two forms: account current form and principal sum and interest form that can be used by a mortgagee. However, the former, because of its flexibility is much more popular.

In order for the mortgage to get priority it must be registered by the registrar of the ship's port of registry. Failure to register the mortgage does not invalidate it. However, it will only be an equitable mortgage and will rank after subsequently registered mortgages.

Before such a registration can be carried out as regards a principle sum and interest mortgage, a debt must exist. In the case of an account current mortgage the mortgagor is required to recite that an account current exists between him and mortgagee (Donner, 1997, p.75). Such a mortgage may be registered and would be enforceable provided, that the document pursuant to which the damages are expressed to be payable is specified in the mortgage as being the document relating to the account current.
Both types of mortgages are registered upon filing the mortgage in the prescribed form, duly executed by the mortgagor.

The mortgagor, in the course of paying a mortgage, has all the powers of ownership. That means he is free to operate the vessel in any way it suits him and enter into any contract in respect of the ship so long as the contract does not imperil the mortgagee's security. In the case of default by the mortgagor in paying, the mortgagee has the right of taking possession of the ship. Once in possession, the mortgagee, as owner is entitled to all the freights except the unpaid freights, which were due prior to the date of taking possession (Tetley, 1985, p.211). A mortgagee in possession will be liable for all expenses incurred in operating the ship and has the duty to use the ship as a prudent owner would use her, as well as the duty on any sale to achieve the best price reasonably obtainable (Harwood, 1991, p.75).

Under English law priority of foreign maritime liens is determined solely according to English law - the law of the flag of the vessel is irrelevant. The only exception is in respect of mortgages of a foreign flag vessel where, the priority of mortgages is determined according to the law of the flag of the vessel. (Donner, 1997, p.20). Thus the claim by the mortgagee ranks after claimants with maritime liens. A possessory lien also ranks ahead of the mortgage. If a repairman has retained possession of a ship, the mortgagee must pay off the repairman's claim before he can take possession.

Amongst themselves, registered mortgages rank according to the date of registration unless there exists an equity which justifies giving priority to a subsequent mortgage. Equitable mortgages rank after registered mortgages. They will, however, rank ahead of a necessariesman who brings an action in rem after the date of the mortgage.

As the term necessariesman has a different meaning in each jurisdiction, it is essential to explain what it actually does mean and how to use it.
Necessaries may be defined as supplies, repairs and equipment and in some jurisdictions other goods or services, ordered on the credit of the ship and which are generally beneficial to the ship, so that she may carry out the common venture (Tetley, 1985, p.233).

To enforce his claim, the necessariesman has a maritime lien in some jurisdictions and in others a statutory right in rem.

In the UK instead of the word necessariesman in the Supreme Court Act, the words “goods or materials supplied” as well as the words “construction, repair or equipment” are to be found.

Because necessariesman is also creditor to a ship, he needs some powers to enforce his claim in default situations. He is given only a right to arrest a ship, i.e. he has a statutory right in rem. Thus, the necessariesman is nothing more than an ordinary creditor unless he has issued his writ in rem against the ship to which the necessaries were supplied. All claims for necessaries rank under English law after mortgages.

If a maritime lienholder exercises an action in rem against a sister ship, he then only has a statutory right in rem and his claim should rank after that of the mortgage of the sister ship (Tetley, 1985, p.212).

2.2.1.2 Mortgages in the United States

The ship mortgage in the United States finds its origin in the English common law and therefore, ship mortgages were held not to come within Admiralty jurisdiction. Consequently, the mortgagee could not rely on proceedings in rem and in personam to enforce his rights. Thus the mortgage was a very unattractive form of security. This has changed by passing the Ship Mortgage Act, 1920. According to this Act a mortgage is recognised in Admiralty and is given a preferred status, which ranks it ahead of maritime liens held by US necessariesmen.
It is noteworthy, however, that the Ship Mortgage Act, 1920 does not define a ship mortgage nor specify what law governs the validity of a mortgage per se (Tetley, 1985, p. 217).

In 1954 the amendment to the Ship Mortgage Act was passed in order to give preferred status not only to mortgages on a US vessel but also to mortgagees on a foreign flag ship, provided that the mortgage was validly executed and duly registered in accordance with the law of that ship’s flag. Contrary to a preferred mortgage on a US ship, the preferred mortgage on a foreign flag ship ranks after the liens of American necessariesmen (Tetley, 1985, p.218).

There are different types of mortgages in the US, such as mortgage on the whole vessel, vessel’s equipment, fleet mortgages or future advance mortgages.

The most commonly used is the mortgage on the whole vessel which gives the mortgagee a preferred status. It of course covers the freight earned and the mortgagee may in the mortgage agreement require that the freight be paid directly to him.

The preferred mortgage lien does not cover equipment acquired after the mortgage, if that equipment does not become an essential part of the vessel. If it does, the mortgage will extend to such subsequently acquired property and the lien will be attached to the equipment if its title has been transferred to the mortgagor.

A mortgage can cover more than one ship. It will have the status of a preferred mortgage regardless of whether the provision for the separate discharge of individual ships will or will not appear in the mortgage. If a mortgage includes both a vessel and a non-maritime property, the mortgage will not have a preferred status unless there is a provision for the separate discharge of the non-maritime property (Tetley, 1985, p.219).

Revolving credit mortgages known either as future advances or open-end mortgages are valid and recognised, even though the Ship Mortgage Act, 1920 does not provide for this type of mortgage. Neither does it provide for any guidance with respect to...
the problem of ranking. If there is an uncertainty, the court in deciding the case will look to other sources for an answer.

One source which is usually at hand is ranking of non-maritime mortgages. There are two types of future advances: obligatory and optional. Where the mortgage agreement provides for an obligatory future advances a court will hold that the security ranks from the date of recording. Where the mortgage provides for the optional future advances, a majority of the American jurisdictions would follow the rule that an optional advance should rank after intervening charges, if the mortgagee had an actual notice before making his advance (Tetley, 1985, p.231).

In order to get a preferred status for a mortgage, it has to be valid. As the Ship Mortgage Act, 1920 does not say what makes it valid one must presumably refer to state law. However, it says that prior to the execution of the mortgage, the mortgagor must disclose to the mortgagee the existence of any maritime lien, prior mortgage or liability upon the ship which is known to him. The mortgage in the US may be executed only in the form of principal sum and interest, i.e. for a specified amount (Donner, 1997, p.17). A debt or other obligation of the mortgagor to the mortgagee must exists at the time of recording of the mortgage. This is done by a mortgage deed, which states the mortgagor’s interest in the vessel and the interest mortgaged. The mortgage deed must be recorded in the office of collector of customs of the port of documentation of such vessel, which is carried out by the US Coast Guard. After recording, it must be endorsed upon the ship’s documents by the same authority. If these formalities are not strictly complied with, the mortgage will not have preferred status. Such a mortgage will be a mere non-maritime common law mortgage and will consequently rank after all maritime liens.

Normally a preferred mortgage constitutes a maritime lien. However, it is submitted that the preferred mortgage lien is not a true maritime lien. It is a statutory lien with a statutorily defined ranking.
2.2.1.3. Hypothecs in France

The contemporary form of maritime hypothecs has evolved from the bottomry bonds that were to be found in the Ordonance de la Marine of 1681. It stipulated that he who lent on the assurance of the master ranked seventh, while he who lent directly to the shipowner ranked ninth. The debt and its security were lost if the ship was lost. This was an insufficient form of security for modern commercial purposes. Therefore, the Law of December 10, 1874 established the maritime hypothec. A subsequent amendment by the Law of July 10, 1885 resulted in the modern maritime hypothec which is found in the Law of January 3, 1967. The maritime hypothec has almost the same characteristics as the common law mortgage. However, there are two significant differences.

First, whereas the common law ship mortgage allows the mortgagee to simply take possession and even sell the ship without further judicial proceedings, the hypothecary creditor only has a right of preference and he can only draw some benefit from this right upon the arrest and judicial sale of the ship.

The second difference is that the maritime hypothec does not extend to the freight earned by the ship (Tetley, 1985, p.228).

A maritime hypothec can cover either a seagoing ship or a vessel under construction. It is recorded in a special register for mortgages, which is separated from the general register of vessels. It can be executed only in the form of a hypothec. No account current or principal sum and interest forms are allowed. It is a condition for registration of a mortgage that it refers to a fixed amount. In the case of a loan agreement, money must have been drawn prior to or simultaneously with the registration. To register a mortgage, the mortgagee must present the original mortgage contract and a schedule of payment to the registrar.

Under French law the ranking of several mortgages on a ship is determined by the date of their registration. If several hypothecs are registered on the same day, they
will share the priority and will obtain equal rank even if registered at different times of the day.

The ranking and given priority to the hypothecs in respect of other maritime liens is set up by Article 2 of the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926, as France is the contracting state to this Convention. Therefore, she is bound to respect maritime liens created in accordance with the Convention in other contracting states and give them the same priority as French liens. On the other hand, France will not recognise other foreign maritime liens.

2.3 International conventions

2.3.1 Conflict of laws of maritime liens

With respect to the recognition of maritime liens and their ranking in individual jurisdiction, the conflict of maritime lien laws should be considered. The conflict concern primarily maritime contract liens and mortgages. Tort liens have few if any conflict problems because all jurisdictions give them a high ranking as traditional maritime liens.

The three basic problems which create disparities in individual jurisdictions are the choice of law, choice of the forum and recognition of foreign judgements. It is obvious that in settling any dispute the court will always use the law of the state. A conflict of laws problem arises when a party attempts to apply a foreign law and that foreign law conflicts with a local law. Therefore, it has to be decided which rules of conflict of laws will be applied in solving the conflicts problem. Without no doubt, the courts of all nations will almost always apply their own rules of conflicts of law.
After the choice of one’s own conflict of law rules, what type of problem is involved should be determined and characterised, i.e. the study of special directives, the search for and study of connecting factors and decision concerning public order and public policy, procedure and substance and attempts to evade the law. It is noteworthy that characterisation done under the laws and rules of the forum. (Tetley, 1985, p. 526).

When the rule of conflicts of the forum refers to the law of a foreign state, it refers to the law applicable to the subject matter and not to the foreign states rules governing conflicts of law (Tetley, 1985, p.526).

On the other hand, it is a general principle of the choice of laws to recognise foreign law if it is the law where the contract was entered into. Another principle of international law, particularly maritime law is that a local law should not be applied to foreigners, foreign events, or foreign transactions other than by exception. However, there are some exceptions that may be taken into account which lead to failure to recognise foreign law. Public policy or public order may very well be employed by courts so that they may refuse to apply the foreign law of the contract because that foreign law violates a basic concept of the local law.

The local law will recognise only substantive foreign law, while foreign procedural law will not be recognised. This principle is broadly admitted and declared in Private International Law:

One of the eternal verities of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the forum law (Tetley, 1985, p.530).

With respect to maritime liens, the lien or the right would seem to be substantive and the ranking or priority, procedural. However, also here dispute is very likely to
arise as somebody may say that it is the law of the forum which determines what is substantive and what is procedural. Moreover the argument goes on that the fundamental premise which underprints the choice of the forum of law as the proper law of maritime liens is the assertion that a maritime lien is a matter of procedure and not substantive. A maritime lien is conceived not as a substantive right in itself but only as a means by which a substantive right may be enforced. Thus whereas a claimant’s rights under a contract are substantive and governed by the proper law of the contract any further claim by a claimant to the benefit of a maritime lien is procedural and therefore governed by the law of the forum (Thomas, 1980, p.321).

Nevertheless, the rationale behind both approaches of distinction between substance and procedure, and the rule that procedural matters are governed by the law of the forum is to use the law the court is familiar with instead of the law of a particular country.

2.3.1.1 United Kingdom

The general approach of English maritime law is to treat the existence of a maritime lien as governed by the law of the forum. As a result the only maritime liens recognised by the Admiralty Court are those which accrue under English maritime law (Thomas, 1980, p.321).

The question of priorities as between competing claims, together with such other matters appertaining to the enforcement of a claim, as periods of limitation, are considered purely procedural and governed by the law of the forum. Therefore, the ranking of maritime liens is governed exclusively by English law and no foreign system of law can be introduced to alter the established order of priority (Thomas, 1980, p.329).
2.3.1.2 United States

American courts have not been consistent in their approach to choice of law with respect to contract liens. However, US courts now apply the law of the place of the contract to define the type of lien and then apply the law of the forum to fix the priorities. Despite this fact, in the US there is no rule that the law governing the creation of either tort or contract liens is not the law of the place, the forum or the flag except as to mortgages. The court evaluates all of the points of contract between the owner and/or charterer and the vessel, and the transaction or event and two or more nations with differing lien laws.

An American supplier will, nonetheless, always have a maritime lien for necessaries furnished in the US even to a foreign flag vessel and even where the contract was entered into in a foreign country.

An action in rem may be brought in a US court to enforce maritime lien created under the laws of another nation. If the court has by the application of choice of law rules identified a certain foreign law as governing, it must then determine whether there is a true maritime lien under that law (Tetley, 1985, p.622).

2.3.1.3 France

The conflicts of maritime liens in France stem from the notion of the civil law as a right to every Frenchman. This principle of nationality has ever since been a cornerstone of French conflict of laws rules, yet the law of the flag of the ship has not been adopted by France as the basic determinant in respect of maritime lien conflicts. Rather there have been various theories, most of them leading to the conclusion that the law of the forum should apply. On the other hand, France adopted the Liens and Mortgages Convention 1926, so it has more justification than
non-signatory nations in imposing its own law because that law is the international convention (Tetley, 1985, p.551).

2.3.2 Comparison of the 1926, 1967 and 1993 Conventions

Since the beginning of this century the maritime community has been trying to introduce some kind of uniform rules for dealing with legal questions that could arise in connection with shipping activities. As was discussed in previous subchapters, very often the legal questions tackle the issue of securities for financing of newbuildings and of shipping activities. The same applies for ranking and weight of claims that can arise in respect of shipping.

In 1926 an international conference was held in Brussels, where the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages was adopted. It came into force on June 2, 1931. Its purpose was to resolve the basic discrepancies among the nations as the ranking of maritime liens was concerned. This objective has not been fulfilled as the attitudes towards this Convention have been rather adverse. Among the developed maritime nations it was ratified only by France. Norway, Sweden, Denmark and Finland also ratified it but later renounced it and ratified 1967 Convention instead.

In 1967 another international conference was convened in Brussels which led to adoption of a new convention known as the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967. It has never come into force. However, it was considered as a good basis for negotiation and development of a draft for a new convention. Thus the latest attempt of the world community to make this part of maritime law uniform all around the world was made at the international conference in Brussels in 1993.
The main purpose of the 1926 Convention was to unify the law on maritime liens and to reduce their number in order to encourage ship financing by granting a better priority to the holders of mortgages and hypothecs. The Convention adopted mostly rules based on civil law systems and recognised an excessive number of maritime liens. For these reasons it was ratified almost exclusively by civil law countries.

The 1967 Convention aimed to reduce the number of maritime liens and to decrease influence of the continental system of ranking. This was the reason, why in this case civil law countries did not ratify it.

Therefore, the 1993 Convention has tried to remove all these deficiencies and provides for:

- long-term financing as essential means for the development of merchant shipping;
- uniform rules, for ship financing is becoming more and more international;
- essential features of a satisfactory security such as:
  - the possibility of enforcement wherever the vessel may be found, and to this effect the security must be recognised in as many countries as possible through an international convention;
  - the possibility of sale of a vessel at the market price;
  - the possibility of recovering the outstanding portion of the loan from the proceeds of the forced sale, and to this effect the claim of the lender must be granted the highest possible priority (Berlingieri, 1995, p.57).

Apart from disparities in the recognition of maritime liens further differences may exist, even in relation to a maritime lien of common acceptances, as to the nature and survival of the lien or as to the range of property capable of being encumbranced by a lien or as to the priority enjoyed by maritime liens.
2.3.2.1. Conflict of laws

Article 2 of the 1993 Convention tries to solve the problem of rules of conflict laws. It says that "the ranking of registered mortgages and hypothecs as between themselves and their effect in regard to third parties shall be determined by the law of the state of registration and all matters relating to the procedure of enforcement shall be regulated by the law of the state where enforcement takes place." This implies that the nature of maritime liens is considered as substantive and therefore, all matters pertaining to the recognition of maritime liens should be governed by the law of the contract. The second part indicates that enforcement relates to procedural aspects. However, there is no such conflict of law rule in respect of maritime liens. The 1926 Convention does not stipulate this basic but essential rule.

As the 1967 Convention also the 1993 Convention lays down three conditions that have to be met. Firstly, it is the recognition and the enforcement of mortgages, hypothecs and other charges. In order to do so they have to be effected and registered in accordance with the law of the state in which the vessel is registered. The second condition is that such a register or instruments required to be deposited with the registrar are open to public inspection. Contrary to the newer conventions the 1926 Convention says nothing about accessibility to the public. Thirdly, it is the condition that certain particulars, such as the name and address of the person in whose favour the mortgage has been effected, the maxim amount secured, the date and other particulars must be specified either in the register or instruments required to be deposited. The maximum amount secured has replaced the amount secured as is mentioned in the 1967 Convention. The main reason is that such a reference to the amount secured prevented recognition and enforcement of open current account mortgages and hypothecs. On the other hand, the need for such information is required by some civil law countries, as it is part of their national law (Berlingieri, 1995, p.61).
In order to secure favourable position of creditors and thus to allow for easier shipping industry financing, the mortgages, hypothecs and other charges rank immediately after a limited number of claims secured by maritime liens. However, to satisfy different needs of individual State Parties to this Convention, they may grant other liens or rights of retention to secure claims exceeding the number of claims given by this Convention. Such liens should rank after registered mortgages, hypothecs and charges and should not prejudice the enforcement of maritime liens and registered mortgages. To grant such a lien as e.g. possessory lien or other maritime liens they should have the same characteristics as the maritime liens named in the Convention and be subject to extinction both by the lapse of time and the forced sale of a vessel. If a vessel to which a maritime lien is attached, is sold to a bona fide purchaser, the lien should be extinguished after a period of 60 days of registration of the vessel (the 1967 Convention says nothing about it).

The number of maritime liens given by the 1993 Convention has been limited to:

a) claims for 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;

b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

c) claims for reward for salvage of the vessel;

d) claims for port, canal and other waterway dues and pilotage dues;

e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers’ effects carried on the vessel.
Although, the maritime lien for wages and other sums due to the master, officers and members of the vessel’s crew significantly affects the security of mortgages, hypothecs and charges, it was included in this group of liens, because it contributes to the safe and efficient operation of the vessel (Berlingieri, 1995, p.63). The same applies to the social insurance contributions and the cost of repatriation, payable on behalf of the master, officers and other members of the vessel’s crew.

Claims in respect of loss of life or personal injury should not, in fact, affect the security of the holder of a mortgage or hypothec if the owner insures his vessel on the basis of ordinary terms of a hull and machinery policy and also covers his liability against third parties. Therefore, even if this lien does not contribute to the safe and efficient operation of the ship, it has been preserved and has been given a higher priority in the ranking by the 1993 Convention.

As far as a claim for salvage is concerned, there is a general consensus that this claim does not prejudice the security of the holders of mortgages, hypothecs or charges provided that adequate provisions for the insurance of the vessel have been inserted in the covenants and that the lien for salvage contributes to the safety of vessels in danger, for it encourages salvors to render salvage services. This maritime lien is granted by all three conventions, however with different ranking. Whilst in the 1926 Convention it had third rank, the 1967 Convention gave it only fifth priority. The 1993 Convention reviewed its position and upgraded it to the third rank again. This however, may be of relatively little importance since a lien for a salvage claims always ranks higher than liens that have arisen earlier.

The lien in respect of claims for general average was granted under the 1926 and 1967 Conventions, but has been completely removed from the provisions of the 1993 Convention. The lien for wreck removal, which enjoyed the same ranking as the contribution for general average in the previous Convention, has also been removed...
from the list of maritime liens of Article 4, 1993 Convention. However, this Convention still provides for it under Article 12, subparagraph 3.

2.3.2.2 Special legislative rights

The 1993 Convention also brought some changes to the public dues also called special legislative rights and their ranking. In comparison with the 1967 Convention their ranking has been downgraded from the second to the fourth rank. The maritime lien in respect of claims for port, canal and other waterway dues and pilotage dues may adversely affect the security of the holder of a mortgage or hypothec and does not contribute to the safe and efficient operation of a ship. However, due to the public policy of individual governments wishing to preserve their rights in having priority on the proceeds from the forced sale of a ship in paying claims, this claim remains in the Convention as a maritime lien with a priority over registered mortgages and hypothecs although its ranking has been changed.

2.3.2.3 Priority of maritime liens

The 1993 Convention stipulates in Article 5(2) that the maritime liens must rank in the order given by this Convention provided however, that maritime liens that have attached to a ship prior to a salvage operation are subordinated to the claim for salvage, which secured the ship and made it available as a security for their enforcement. If the vessel was lost, liens would have been extinguished and all prior lienors would have lost all means of recovering their money. The same rule is laid down also by the 1926 Convention, which also says, that salvage lien should rank in the inverse order of the dates in which they have come into existence. The same is provided by Article 5(4) of the 1967 Convention.
and Article 5(4) of the 1993 Convention. Other maritime liens in the same category according to the these Articles should rank pari passu as between themselves. All three conventions clearly stipulate that maritime liens listed therein take priority over mortgages, hypothechs and other charges, except those which are granted by each contracting state to secure claims other than those listed in these conventions.

The relationship between convention maritime liens and convention mortgages and the right of retention of the shipbuilder and the shiprepairer is regulated in Article 7 of the 1993 Convention. If national law grants any other liens or right of retention, they should not prejudice the enforcement of convention maritime liens and mortgages. Ranking of other maritime liens in the 1993 Convention is governed by subparagraph c, Article 6, which stipulates that they should rank after the maritime liens set out in Article 4 and also after registered mortgages, hypothechs or charges which comply with the provisions of Article 1. Rights of retention in respect of a vessel in possession, stipulated in Article 7 are granted only of either:

a) a shipbuilder, to secure claims for the building of the vessel; or
b) a shiprepairer, to secure claims for repair, including reconstruction of the vessel, effected during such possession.

However, if at the time of forced sale the vessel is in the possession of a shipbuilder or shiprepairer, according to subparagraph 4, Article 12 he must surrender possession of the vessel to the purchaser, but is entitled to obtain satisfaction of his claim out of the proceeds of sale after the satisfaction of the claims of holders of maritime liens.
The 1967 Convention deals with this matter as well. In Article 6 it stipulates that each contracting state may grant liens or rights of retention to secure claims other than listed in this Convention. Such lien should rank after all convention maritime liens and mortgages. The right of retention is granted to a shipbuilder or shiprepairer and its ranking should be subordinated to all maritime liens. However, it may be preferred to registered mortgages.

This provision, however, does not give the holder any priority, but only the right to refuse to release possession until satisfaction of the claim in respect of which right of retention is granted.

On the other hand, the 1926 Convention does not provide for any possessory lien. Nevertheless, in Article 3 it stipulates that national laws may as well grant a lien in respect of claims other than those referred in this Convention. However, they must not modify the ranking of claims secured by mortgages or by the liens which take precedent thereof.

An exception to the absolute priority of convention maritime liens, mortgages, hypothecs and charges granted by Article 12(3) in 1993 Convention refers to the case where the vessel after sinking or stranding is removed by a public authority, and according to the law of the state party where the vessel is sold in a forced sale the costs of such removal have to be paid first out of the proceeds of sale. The right of a public authority who has removed the vessel differs, however, from that of holders of maritime liens, because it is enforceable only at the time of the forced sale and while having remained in the possession of such an authority after removal, until the time of the forced sale. This right has therefore, the nature of a predeductible cost (Berlingieri, 1995, p.68).
2.3.2.4 Ranking of maritime liens

One of the major problems of shipping nations in respect of maritime claims is their ranking. The only one convention that has entered into force, the 1926 Convention, aimed to clarify this problem in Article 2, which is read as follows:

The following give rise to maritime liens on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage:

1. 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;

2. Claims arising out of the contract of engagement of the master, crew, and other persons hired on board;

3. Remuneration for assistance and salvage, and the contribution of the vessel in general average;

4. Indemnities for collision or other accidents of navigation, as also for damage caused to works forming part of harbours, docks and navigable ways; indemnities for loss of or damage to cargo or baggage;

5. 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 ship-chandlers, repairers, lenders, or other contractual creditors.

In order to satisfy different demands of different nations Article 3 of this convention provides for:

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, hypothecation, and other similar charges, or by the liens taking precedence thereof.

This provision enables different states to add a number of other maritime claims enforced by the action in rem and thus to create a more comprehensive list of liens.

To make the question of ranking even more complicated the equity, laches and marshalling have to be taken into account. In certain circumstances, the rules of ranking may result in a solution which seems so unfair that the court will modify the result. This is usually called the exercise of "discretion" or "equity" (Tetley, 1985, p.392). However, it would be quite inconceivable to use this rule today in order to modify what has been firmly established in a statute and general maritime law.

Apart from a time bar, which determines the period of time after which a lien is extinguished another time bar, called laches can be involved, which affects ranking. Laches is an equitable doctrine and is an essential sanction because delay can affect the rights of all parties concerned. The voyage rule of the 1926 Convention and the various 40-day, 90-day and season rules of American practise are examples of laches being solidified into rules affecting priorities.
Marshalling is the equitable process whereby the marshall or the court orders a creditor to exercise his right on the security in a manner which will be in the best interest of all creditors. The marshall or court must also take into consideration the best interest of third parties and even of the debtor. Thus, the purpose of marshalling is to protect all creditors and at the same time to recognise the valid priority of maritime lienholders. Marshalling was often used in respect of bottomry bonds.

In civil law, collocation is the fixing of the order of payment of creditors under law. Thus, collocation is much more limited than marshalling because civil law courts are not given the same discretionary powers as the courts of Admiralty of the common law jurisdictions (Tetley, 1985, p.394).

To see the principal differences in ranking of maritime claims in different jurisdictions this dissertation will be looking at the maritime law of the United Kingdom, the United States and France.

2.3.2.4.1 United Kingdom

The United Kingdom has not ratified any of these three conventions. However, the provisions of the subparagraphs 1 and 4 of Article 2 of the 1926 Convention, which grant governmental authorities first rights for dock, harbour and canal dues and damages, for wreck removal and for the removal of polluting ships, have been incorporated in the law of the United Kingdom. These rights which governments were given themselves by statute may be called “special legislative rights” (Tetley, 1985, p.42)
They reflect the needs of governments for their self interest and protection for increased undertaking to provide modernised and safer ports, channels and waterways. They have been adopted around the world. Yet, there are some differences in attitudes towards these rights among countries as they are towards this Convention.

In the legislation of the United Kingdom these special rights according to the Harbours, Docks and Piers Clauses Act 1847 were given the highest priority. The ranking of maritime liens in the United Kingdom depends for the most part on the general maritime law with only slight reference to statute law. During the nineteenth century, equity had a considerable part to play in the development of liens. It survived until today and is being used in question of ranking. Equitable ground is used for a later salvor who is always preferred to the earlier, because the later salvor made it possible for the earlier salvor to get paid. In addition to that, even though all Admiralty claims are subject either to specific limitation periods or to the general provisions of the Limitation Act 1980, the equitable doctrine of laches is still applicable to maritime liens. Thus a claim may be barred on the grounds of laches even if the limitation period has not yet expired. However, a plaintiff whose action has been dismissed for want of prosecution before the expiry of the limitation period is entitled to renew the writ and the equitable jurisdiction shall dismiss an action for want of prosecution or laches should not be exercised within the limitation period. The only case where the plaintiff’s writ will not be renewed within the limitation is where his default has been intentional (Tetley, 1985, p.406).

Even though the ranking of maritime liens in the United Kingdom is not fixed by rigid rules, certain general rules have been accepted. In particular that liens ex delicto usually rank ahead of contractual liens. Thus after the already mentioned
special legislative rights, rank the costs of arrest and the cost of rendering a fund available by sale of vessel.

The next in the ranking is the possessory lien. A ship repairer has a right to detain the vessel, but the lien attached to such a ship does not give him a right of sale and is lost when the ship is voluntarily given up. The possessory lien has priority over all claims subsequent to possession but not over those which arose before possession. Thus the possessory lien enjoys a very high priority.

Traditional maritime liens such as salvage, damage liens, seamen’s and master’s wages, master’s disbursement and bottomry rank after the special legislative rights and possessory liens. Out of them the highest ranking is given to a salvage lien on a property. However, the lien for life salvage ranks ahead of it.

Damage liens, being ex delicto, rank ahead of contract liens.

Seamen’s and master’s wages come next in order, although wages incurred after salvage take precedence over salvage. Next come master’s disbursement and bottomry. They are still included in the list of maritime liens despite the fact that they almost lost their practical meaning.

Registered British mortgages rank after special legislative rights and traditional maritime liens. They have priority over all unregistered mortgages no matter of what date.

The last in the ranking are claims which are not in the nature of maritime liens but are enforceable in rem. They subsist as statutory rights of action in rem (Thomas, 1980, p.5). Included amongst the United Kingdom statutory rights in rem are:

- necessaries
- repairmen’s liens
- towage liens
- general average
- pilotage
- charterer’s liens against the ship (Supreme Court Act, 1981).
2.3.2.4.2 The United States

As mentioned before the US like the UK did not ratify any of the three conventions regarding maritime liens and mortgages. These matters are governed by the *Maritime Lien Act 1920*, 46 US Code and the *Ship Mortgage Act 1920*, 46 US Code under the US law. Although based on and developed from the English maritime law, the extent of maritime claims which can give rise to maritime liens is rather expansive with many differences as for special legislative rights, preferred maritime liens, ship mortgages and their ranking and priorities as well.

It has already been pointed out that the US Courts have been unsympathetic to special legislative rights under US law. There is however, one exception, which is for wreck removal. It is granted by to the Secretary of the Army empowering him to remove and sell any sunken craft obstructing a navigable waterway (Tetley, 1985, p.45). For that reason the US government services for wharfage, dock charges, canal charges and watchmen have been treated as necessaries. All these necessaries are preferred maritime liens and rank ahead of ship mortgages. So do expenses, fees and costs of justice and other preferred maritime liens such as:

- wages of the crew and the master
- salvage and general average
- maritime torts, including personal injury, property damage and cargo torts liens
- longshoremen for their wages when directly employed by the shipowner or his agent.

After the preferred ship mortgages on US vessels rank all contract maritime liens accruing after the recording of a preferred ship mortgage, foreign ship mortgages, contract cargo damage liens, contract charter’s liens and unregistered mortgages and other non-preferred claims.
The ranking of all contract liens is given by the statute, while all traditional maritime liens and preferred ship mortgages are recognised by the US non-statutory general maritime law.

The US law, as to the ranking of maritime liens, has always been in a state of some confusion. One established principle is however that under US rules of conflict of laws, the ranking and priorities of maritime liens are determined by the law of the forum, be it a US or a foreign court.

Another principle is that once the court has determined that a foreign claim gives rise to a true maritime lien, that lien (other than a mortgage in certain instances) will be treated on a priority with US liens of the same class.

Any maritime property can be the subject of a lien and therefore of an action in rem to enforce it. The res is usually a vessel (other than a sovereign vessel) but may be cargo or even an intangible like freights. The lien is independent of possession (except with respect to cargo or freights). In fact, possessory liens and "rights of retention" play virtually no part in the US maritime law (Tetley, 1985, p.620).

2.3.2.4.3 France

France ratified the 1926 Liens and Mortgages Convention and introduced it into its own national law. As a consequence, the ranking of liens and mortgages follows the order of ranking in the 1926 Convention. France used the right of establishing a special legislative right and has done it for wreck removal.

According to this Convention the highest ranking is enjoyed by law costs incurred to procure the sale of the vessel and the distribution of the proceeds of sale. Next come liens for tonnage dues, harbour dues and other public taxes, pilotage dues and the cost of watching and preserving the vessel from the time of her entry into the last port. In this category are also included liens for wreck removal.
After these claims secured by the maritime liens, rank claims arising out of the contract of engagement of the master and crew, remuneration for assistance and salvage, general average, indemnities for collision or other accidents of navigation, indemnities for damage caused to waterworks and contractual claims. All these claims rank ahead of maritime hypothecs (Tetley, 1985, p.418).

In civil law countries, equity does not play as important a role as in common law jurisdiction, because there is much less left to the discretion of the courts as the civil law is codified. However, the discretion is used by the courts in deciding whether or not some act has interrupted or suspended the running of a statutory time to bring suit.

France as a civil law country has a system of prescription for maritime liens. It means, that there is a specific prescriptive period for different categories of liens. Maritime liens for court costs, custodia legis, seamen’s wages, salvage and collision are prescribed, if the vessel is not arrested after one year while necessaries away from the home port are prescribed after six months. On the other hand, the claim or right itself has its own prescriptive delay. Thus, a collision or salvage claimant will lose his lien after one year but not his right in personam which exists for two years. Similarly, a supplier will lose his lien after six months, but the claim itself will only be prescribed after one year. In other words, after the prescription of the lien, the claimant becomes an ordinary creditor.

Ordinary prescription may be either interrupted or suspended. Once the period of interruption is over, the whole prescriptive period will begin to run again. After a suspension, the time will simply continue to run, and as a result, the debtor will not lose the benefit of the time elapsed prior to the suspension. On the other hand, a lapse of time is not subject to either interruption or suspension except by the bringing of suit (Tetley, 1985, p.419).
2.3.2.5 Characteristics of maritime liens

The 1967 Convention, Article 7 sets out two characteristics of maritime liens. The first is that they arise irrespective of whether the claim secured thereby is against the owner, the demise or other charterer, the manager or operator of the vessel. The second is that the maritime lien follow the vessel regardless of change of ownership or registration. These two characteristics have remained and also appears in the 1993 Convention, however in different Articles. On the other hand, in the 1926 Convention the first condition is not spelled out, while the second is given by Article 8, stipulating that claims secured by a lien follow the vessel in whatever hands it may pass.

2.3.2.6 Extinction of maritime liens

There is no difference among the Conventions as regards extinction of maritime liens. The one-year extinction period already existed under the 1926 and 1967 Conventions as it does under the 1993 Convention. According to the latter two, maritime liens should be extinguished after a period of one year from the time when the claims secured thereby arose. These two Conventions do not differentiate the extinguishing period of time for individual maritime liens and treat them on the same basis. However, the 1926 Convention stipulates that the liens cease to exist at the expiration of one year, while liens for supplies shall continue in force for not more than six months. This period nonetheless, may be extended by national law to three years in cases where it has not been possible to arrest the vessel in the territorial waters of the state in which the claimant has his domicile or his principle place of business.
The 1967 Convention modified this rule and states that the remaining of the one-year extinction period is prevented only by the arrest or the seizure of the vessel, provided such arrest or seizure leads to forced sale. The reason for this provision is that maritime liens are secret charges and, if the extinction period were prevented from running by the mere commencement of proceedings against the person liable for the claim secured by the lien, third parties would not know that extinction has been prevented. Therefore, it is essential for the protection of third parties and, in particular, of prospective mortgagees or holders of hypothecs or charges and for the protection of prospective buyers, that the continued existence of liens securing claims arising over one year before a given date be clearly known to the public at large. This result is achieved if the vessel is arrested or seized, provided it remains arrested or seized until it is sold in a forced sale (Berlingieri, 1995, p.69.)

2.3.2.7 Contractual claims

One of the more significant changes brought by the 1967 Convention was to abolish the maritime lien in respect of contractual claims for loss of or damage to cargo and for supplies and to restrict the lien in respect of loss or damage to property to claims based on tort. In order to exclude claims in respect of loss of or damage to cargo carried on board the vessel, the claims could be described as based on tort and not capable of being based on contract.

The same idea is pursued in the 1993 Convention where claims based on tort have been accorded the lowest priority, however, ranking ahead of mortgages and other charges.
2.3.2.8 Notice of forced sale

Before a forced sale of a vessel takes place the competent authority should notify the interested parties. According to Article 9 of the 1926 Convention such a notice of forced sale should be given in a form and within such time as the national laws prescribe to the authority charged with keeping the registers.

The 1967 Convention in Article 10 modified this provision by introducing the clause that the notice has to be given at least thirty days prior the forced sale of a vessel to:

- all holders of registered mortgages and hypothecs which have not been issued to bearer;
- such holders of registered mortgages and hypothecs issued to bearer and to such holders of maritime liens whose claim has been notified to the said authority;
- the registrar of the register in which the vessel is registered.

The 1993 Convention in Article 11 sets out a list of the persons to whom advance notice of forced sale must be given. Comparing it with the provisions of the 1926 Convention no differences are found. However, the 1993 Convention makes distinction in particulars which should be known to interested parties. According to subparagraph 2 of Article 11 such notice should be provided at least thirty days prior to the forced sale and should contain the time and place of it. If the time and place of the forced sale cannot be determined with certainty, such notice should contain approximate time and anticipated place of the forced sale. This notice has to be followed by an additional notice of the actual time and place of the forced sale, but not later than seven days prior the event.

To meet requirements of modern means of communication the 1993 Convention enables to give a notice by electronic means provided there is confirmation of receipt.
2.3.2.9 Effects of forced sale

The matter of forced sale of a ship is dealt with in Article 11 of the 1967 Convention and in Article 12 of the 1993 Convention. The first one provides that all mortgages and hypothecs, all liens and other encumbrances, thus including convention maritime liens, national maritime liens and any other maritime liens should cease to attach to the vessel if the vessel was sold by a forced sale. Exception is given to the mortgages and hypothecs assumed by a purchaser. However, complete extinction of liens, mortgages, hypothecs and charges does not take place at the time of forced sale. When the vessel is cleared of all encumbrances, these claims attach to the fund of the proceeds of sale. Thus all mortgagees and lienholders have the right to participate in the distribution of the proceeds in accordance with the priority that is accorded to each of the claims. Complete extinction occurs when the distribution of the proceeds of sale takes place, whether the claims are satisfied or not.

In order for such a forced sale to be valid, two conditions have to be met. First, that at the time of the sale the vessel has to be in the area of the jurisdiction of a contracting state. Secondly, the sale of the arrested vessel has to be effected in accordance with the law of the said state and provision of the Convention. These two conditions are found in the 1967 Convention and 1993 Convention respectively.

In Article 11 of the 1967 Convention the rule of distributing of the proceeds of the sale is set. It says that first of all the costs awarded by the court and arising out of the arrest and subsequent sale of the vessel have to be paid out of the proceeds of such a sale. The balance should be distributed among the holders of maritime liens, liens, rights of retention, mortgages and hypothecs in accordance with the provision of this convention to the extent necessary to satisfy their claims.
Because there is a period of time between arresting of a ship and her sale, during which such a ship lays idle and needs maintenance, expenses connected with this activity also have to be covered. In order to avoid any misunderstanding as to who should pay for it, Article 12 of the 1993 Convention stipulates that the costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel including the costs incurred for the upkeep of the vessel shall be paid first out of the proceeds of sale. The same applies for the wages and costs of the crew.
Shipping activities in Slovakia are ruled by the 61/1952 Shipping Navigation Act, which came into force on January 1, 1953. This Act reflects the political situation of those times when possession of assets intended for creation of values was common and it was impossible to own them privately. Therefore, it does not allow for acquiring ships by the means of private financing to be secured by the mortgage or other types of security. After the political changes that took place in 1989 there was a need for a new shipping act which would promote shipping and allow for its development. Such an act is currently being prepared and should be passed by the Parliament in the near future. To see the differences it is worth to discuss the 1952 Shipping Act, the draft of the new Shipping Act and to compare them with the international law from the viewpoint of mortgages as well as maritime liens.

As was already mentioned, the 1952 Act does not provide for mortgages as a way of ship funding. The new Act aims to promote shipping as such and therefore, includes some provisions related to the ownership and mortgages. However, due to the lack of experience and no existing legislation regarding mortgages or hypothecs, this Act is to a certain extent confusing, lacks clarity and does not contain clear provisions assuring creditors of their rights.

Article 14, paragraph 1 of the new Shipping Act reads:

Unless stipulated otherwise in the Act, the provisions of the Civil Code and Commercial Code on ownership and mortgage of movable properties shall apply
with respect to ownership or mortgage of the ship or of individual owners' shares.

Because this new Shipping Act does not stipulate otherwise it is necessary to consider the provisions relating to the mortgages in the Civil Code. The Civil Code, in paragraph 119 subparagraph 2, defines two categories of properties, movable and immovable. However, in accordance with Act 265/1992 it is only possible to register an ownership in the latter category by using the written form. The act determines that immovables are lots and buildings connected with the ground by rigid foundations. Therefore, other res which do not have features of immovables are necessary to consider as movable property. The term building is not defined by the Civil Code and therefore, it is not legally an integral part of the lot. Based on these facts, it is reasonable to conclude that creation of the Ship Mortgage Register for registration of mortgages over ships under construction, regarded as movables, is possible only after amending the Civil Code and the laws relating to registration of immovable properties. Having done this, it would be possible to initiate legislative amendments for determining the scope and functions of the Ship Mortgage Register.

This, of course, will take some time to accomplish. Therefore, it would be feasible to find other way for ship funding. It seems, that such a prospective possibility, at least for acquiring completed ships, has emerged through the introduction of "hypothecs" similar to the ordinary hypothecs set out in the amended 58/1996 Banking Law. This amendment enables to secure by issued hypothecs credits, which do not exceed 60% of the value of the hypothecated immovable property. The value is determined by the hypothecary bank. However, to determine it, the bank may take into account only durable features of immovables and profit, which such an asset by prudent using may generate to its owner in the long-term.

In this context the hypothec means:
- a long term credit with a repayment period of at least five years;
- secured by a lien on the immovable property;
- for the purpose of purchasing, building, reconstruction and maintenance of the immovable property
- financed by issuing and selling of hypothec bonds.

Hypothec bonds are promissory notes into which category falls also ship mortgages used e.g. in the Netherlands or Germany. The only difference between a hypothec bond and an ordinary promissory note is that it has to be secured at least by 90% of the value of immovables and the remaining 10% by state promissory notes and cash of the bank. Thus, hypothec bonds are issued only by hypothec banks, i.e. creditors who need to be indemnified. Such an indemnity is secured by making an entry in the register of immovable properties. In the case of maritime hypothecs (mortgages), the authority who can register them is the Ship Mortgage Register, during the construction of a ship, and the Shipping Register, while the ship is in operation.

Nevertheless, under current conditions, which prevail in the banking business, it cannot be expected that ship funding by maritime hypothecs will take place in the next four to five years. Nowadays, it is possible to do it only by way of ordinary banking loans.

As far as registration of ships under construction is concerned the reality appears rather confusing. Paragraph 5 of Article 9 states:

A vessel in the process of construction can also be registered in the Shipping Register on the basis of the owner's proposal. The Maritime Office will register the unfinished ship in the Shipping Register. The owner has to prove his ownership and to attach documents on the state of construction of the ship to his application form. The Maritime Office will issue the certificate for the owner that
the unfinished vessel was registered in the Shipping Register. The owner has to apply for registration of the finished vessel in the Shipping Register again.

In order to get a loan for building of a ship secured by a mortgage, such mortgage would have to be registered in the Ship Mortgage Register according to the provisions of the Civil Code. Because such a Register does not exist and its creation depends upon amendments of the provisions of the Civil Code it would be almost impossible to achieve it. The main reason is that there is no legal connection with the private law on which basis it could be executed and enforced. The same applies for the execution of the mortgage in the Shipping Register. No mortgagee would advance any money if he is not secured by having a right to take possession of the ship under construction in the case of failure of a shipyard or a shipowner. However, this Act does not provide for such a possibility. As long as the ship under construction is not financed by way of mortgage, the money advanced has to be secured by other assets of the owner. Therefore, to register a vessel under construction in the Shipping Register does not make too much sense, because it does not provide for any securities or advantages. In addition, once the ship has been completed, she has to be re-registered in the Shipping Register as a finished vessel.

Paragraph 2 of Article 14 says the following:

A maritime hypothec has to be in the written form.

It is a very short statement and rather inadequate. It says nothing, as well as the rest of Article 14 on maritime mortgages, about who should execute the maritime mortgage, whether it is the mortgagor or the mortgagee and in the case, it is the mortgagor, whether a signature of the mortgagee is also needed. It is assumed that such a maritime hypothec should be executed in the prescribed form in order to have priority over other equitable mortgages. But this Act does not provide for a
statutory form of the maritime hypothec. Neither does it say whether a debt must exist prior to the creation of the mortgage. Furthermore, another basic feature is not stipulated in the missing statutory form, namely whether it is a principal sum and interest mortgage or the account current mortgage.

The third paragraph of Article 14 claims:

The consent of the mortgagee to transfer the title of the mortgaged ship is required.

The mortgagee, although not treated as a shipowner has to have a right to express his consent or rejection of transferring the title of a mortgaged ship to another transferor (mortgagor). Such a transfer may take place by an agreement or by operation of law (Meeson, 1989, p.35). In the first case such a transfer should be carried out on the production of the instrument effecting the transfer to the registrar who should record it by entering in the register the name of the new owner and also the date and time of the entry in the register.

Property in a ship can pass by operation of law. This will usually be upon the death or insolvency of registered owner, and will be subject to the general law relating to inheritance and bankruptcy.

Finally Article 14 in paragraph 5 provides:

In case of the entry of several mortgages a mortgage entered earlier has priority over a mortgage entered later.

Because it makes no distinction between statutory mortgage and registered mortgage it is not clear whether the registered mortgage executed earlier will have priority over statutory mortgage registered later, or will ranks only as an equitable charge. Neither does it say anything about future advance mortgages.
The whole Article 14 does not make any reference to the ranking of mortgages in respect of maritime liens. It is rather surprising because every prospective mortgagee looks very cautiously at what is the position of preferred mortgages and what types and how many maritime liens rank ahead of it. Of great interest to them is also the fact whether the national law makes a difference between national and foreign mortgages. In the case of dispute, the law of the flag in which jurisdiction the mortgage is being executed prevails and, therefore, the mortgagee has to be sure in advance what it provides for and what his rights are. Because these basic but crucial facts are missing in the new Navigation Act, it would almost certainly discourage any mortgagee to invest money in shipping if it were passed by the Parliament and enacted.

As far as maritime liens and their ranking are concerned, the situation is much brighter, as their existence has already been recognised under the provisions of the 1952 Act. It was because of the reality that ships sail international waters and enter territorial waters of different states whose laws provide for maritime liens. Apart from this, maritime liens are an integral part of international law and operators of ships flying the Czechoslovakian flag have had to take them into account if they wanted to provide shipping services. In addition, it is also to the benefit of every ship operator. Nevertheless, the former Czechoslovakia did not ratify or accede to either convention relating to maritime liens.

The 1952 Act, which is still in force in Article 62 lays down that

Claims that have arisen out of collision or from assistance rendered to a ship during the voyage, have to be paid from the price of a ship, freight and passenger fares and to be satisfied in the following order:

1. claims for master’s and crew’s wages, claims for social security and damages in compensation of injury or death;
2. claims for port dues and costs for the services rendered to a ship at the ports;
3. claims for salvage and contribution in general average for a ship;
4. claims for compensation for damage caused by the operation of the ship;
5. claims arising from master’s legal acts made within the scope of his statutory authority.

The wording of these provisions is almost identical with the provisions of Article 2 of the 1926 Convention. The same applies for the ranking of individual claims and their ranking. Even though the special legislative rights do not appear among preferred claims, they are stipulated and their ranking is laid down in Article 64 which establishes:

Law costs due to the state, including expenses incurred in the common interest of creditors in order to preserve the vessel or to procure its sale should be satisfied first and to take priority over claims stated in Article 62.

Thus, the law costs were given the highest priority. The same priority was not granted to port dues and fees for services, as they were extracted out of the special legislative rights with the slightly lower ranking after claims for master’s and crew’s wages.

While the 1926 Convention says that preferred maritime claims have a lien on a vessel, on the freight and on the accessories of the vessel, the 1952 Act makes a distinction between liens for freight and rights for retention and sale of goods.

Article 63 of the 1952 Act lays down:
The following claims have to be paid from the value of retained goods, compensation for damage to goods and from the contribution in general average in the following order:

1. claims for port dues regarding cargo and services rendered in the port;
2. claims for assistance rendered to a ship and contribution in general average for cargo;
3. claims arising from master's legal acts made within the scope of his statutory authority;
4. claims for freight.

This provision grants ship operators more power than is usual in some jurisdictions. Furthermore, neither of the Conventions related to liens provides for such a privilege.

For example, under English common law the possessory lien only gives the carrier the right to retain goods until the freight is paid, without granting him the power to sell the goods so as to recover the amount owing. The shipowner must look after the goods and discharge them at destination into a safe place to a wharfinger accompanied by written notice that the goods are subject to a lien for freight. However, the shipowner retains constructive possession over goods after discharge, thereby maintaining the shipowner's possessory lien for freight. The wharfinger is allowed to publicly auction goods placed in his custody if, after 90 days, the lien has not been discharged. Expenses incurred in preserving a lien (for example warehousing) are not covered by the possessory lien, but covered by statute. However, there may be a contractual agreement, whereby such expenses are subject to a lien (Tetley, 1985, p.340).

On the other hand, in France the Law of June 18, 1996 “On Maritime Contracts of Charter and Carriage” grants a privilege on cargo for charter hire and a privilege for freight as well. Therefore, under the terms of charter hire, if the shipowner is not
paid at the time of discharge of the goods, he may not keep them in his ship but may consign them to a third party and then have them sold unless the charterer provides a security bond.

If the goods are shipped under a bill of lading and they have not been claimed, or in cases of dispute regarding the delivery or payment of freights, the master may by court order:

- have the goods sold to pay for the freight, if the consignee does not want to put up security;
- have the surplus deposited.

If the proceeds are insufficient, the carrier retains his recourse against the shipper for the recovery of freight (Tetley, 1985, p. 355).

Enabling the shipowner to have goods sold indicates that the provisions of the 1952 Act are based more on the civil law system rather than common law. It is not a great surprise, because former Czechoslovakia, and subsequently Slovakia, has belonged to the countries using the civil law system.

When it comes to the determination of priorities of claims for a voyage, claims for salvage and distribution of proceeds of sale, Article 65 of the 1952 Act, in accordance with the provisions of the 1926 Convention, states that:

1. claims shall be satisfied in the order set out in Article 62;
2. in the event the funds available being insufficient to pay the claims in full, claims share concurrently and rateably;
3. claims set out in subparagraph 3 and 5 of Article 62 shall be satisfied in the inverse order of the dates on which they came into existence.

The order of satisfying claims for several voyages is given in Article 66. It states:
Claims listed in Article 62 and 63 and secured by a lien and attaching to the last voyage have priority over those attaching to previous voyages. Claims set out in subparagraph 1, Article 62, relating to several voyages rank pari passu with the same claims attaching to the last voyage.

The first part of this statement is in line with the 1926 Convention, but the second one slightly deviates. According to Article 6 of this Convention, claims rank with claims attaching to the last voyage provided that they have arisen on one and the same contract of engagement extending over several voyages. There is no distinction made between claims secured by maritime liens listed in Article 2 (1926 Convention) and claims arising out of the contract of the master and crew. Further, they all have to arise on the same contract of engagement. However, the 1952 Act stipulates that only the master and crew have privileged right to have a maritime lien on a vessel for claims for their wages. All other claims, if they were not extinguished by lapse of time, will have lower priority than claims attaching to the ship for the last voyage.

The rule for enforcement of liens on freight is dealt with in Article 67 of the 1952 Act almost in the same manner as is prescribed in the 1926 Convention. However, apart from freight also passenger fares and compensation for assistance are included.

Article 67 lays down:

A lien on freight and passenger fares and compensation for assistance rendered and belonging to an owner may be enforced so long as the freight is still in the hands of the master or the agent of the owner.
Extinguishing of liens under the provisions of the 1952 Act has much the same means as is provided by the 1926 Convention. So, in Article 68 the following rule is to be found:

Lien on a vessel or freight cease to exist by a judiciary sale of the vessel or cargo as well as by expiration of one year for liens set out in paragraphs 1 to 4, article 62 and in paragraphs 1, 2 and 4 of Article 63. Liens set out in paragraphs 5 of Article 62 and 3, Article 63 shall continue to be in force for not more than six months. The period for which the lien remains in force runs from the day the claim originated.

Thus the 1952 Act statutorily defines time limitations for extinguishing of liens. But at the same time it provides for a doctrine of laches to be used if the lienee does not file a suit within the defined time limit.

In this regard Article 69 of the 1952 Act stipulates:

Prescriptive period is one year:
- claims arising out of contracts concluded by a master of the ship within the scope of his statutory authority in accordance with articles 38 to 41;
- claims for damages in compensation of injury or death, according to Article 48, paragraph 2;
- claims arising out of transport contracts.

Prescriptive period is two years for:
- claims for compensation for damage caused by a collision;
- claims arising from rendering of assistance;
- claims for contribution in general average.
As was already pointed out mortgages do not appear in the 1952 Act for obvious reasons given above. Therefore, there is no reference made as to their ranking in respect of maritime liens.

3.1.1 The new Shipping Act

The future situation does not particularly encouraging either. The draft of the new Shipping Act to be passed by the Parliament seems to be even more incomplete and confusing. While the 1952 Act was mostly based on provisions of the 1926 Convention the new one tries to correspond with the provisions of the 1993 Convention. However, it is only a partial attempt, without making any effort to either incorporate its rules into national law by ratifying it or by simply using it as a guideline for drafting the relevant law in compliance with international standards with the prospect of accession to it, if it proves to be suitable and will encourage financing of ships. The contrary seems to be the effect.

One of the few positive features of this draft is that claims secured by maritime liens and their number is in line with Article 4 of the 1993 Convention.

The new Shipping Act in Article 36 paragraph 4 says:

The following claims shall be secured by a maritime lien on the vessel:

1. claims for wages due to the master and crew, including costs of repatriation and social security benefits;
2. claims in respect of loss of life or injury in direct connection with the operation of a ship;
3. claims for reward for salvage of the vessel or other property;
4. claims for port, canals and other charges and pilotage dues;
5. claims for damage caused by the operation of the vessel other than damage to cargo, containers and personal belongings of passengers on board a ship.

However, it does not specify whether claims listed in subparas 2. and 5., which may arise as a consequence of injury or damage caused by the carriage of oil or other hazardous or noxious substances, give the right to a maritime lien on the vessel and compensations payable to the claimant. In Article 35 of the new Shipping Act is laid down that limitation of liability and limits of damages to be paid are governed by the valid international law. Because there is no indication as to which international law should be applied and Slovakia has not ratified any convention dealing with claims for oil pollution, it could be argued that such claims fall within the scope of the new Shipping Act. Therefore, it would be appropriate to include provisions on excluding maritime liens on a vessel in connection with the damage caused by oil pollution or hazardous or radioactive materials in this Act, as is stipulated in paragraph 2, Article 4 of the 1993 Convention.

Article 6 of the 1993 Convention allows each state party under its national law to grant maritime liens on a vessel to secure claims, other than those referred to in Article 4. The same right has been included in the new Shipping Act, which in paragraph 3, Article 36 lays down:

The maritime lien has priority over other liens.

Whether it is by a mistake or by an omission, no other reference to other maritime liens is made either in this or any other article of the new Shipping Act. Therefore, it is not clear what other liens should be attached to a vessel to secure claims and what their ranking is as among themselves. Because it is a prevailing rule, that the existence of liens is a matter of substance and may be governed by the law of the contract, while ranking of liens is a matter of procedure and therefore determined
by the lex fori. In the case of dispute, each court which would turn to the new Shipping Act seeking explanation whether such a lien is granted by the national law or not, would find no answer. Thus the prospective lienee may conceivably lose his lien. In this context, the right for other liens granted by the new Shipping Act does not have any sense.

As far as ranking is concerned it is not clear whether claims listed in Article 36, paragraph 4 will be satisfied in the exact order as they appear. Provided it is so, claims for reward for salvage of the vessel would have rather lower priority and would have to be satisfied after master’s and crew’s wages claims and claims for compensation for death or personal injury. Moreover, if the vessel had been lost there would have been no security for satisfying claims for salvage or any other claims which rank ahead of it.

There is neither any provision stipulating in which order liens for salvage should be satisfied nor has any provision been drawn as to the ranking of maritime liens of the same category.

As already mentioned, the new Shipping Act contains certain provisions on maritime mortgages, but there is no reference made to their ranking in respect of other maritime liens whatsoever.

Paragraph 5, Article 36 of the Shipping Act stipulates that:

The term of prescription for claims set out in paragraph 4 is one year.

Thus the time bar seems to be in line with the one year time bar stipulated by the 1993 Convention. But paragraph 8, Article 35 makes this straightforward rule a bit more tricky. It states:

The term of prescription for claims is two years. In the case of a bigger amount of money needed for compensation of claims in respect of loss of life or serious
injury, the term of prescription is one year. The court can prolong the term of prescription in the case that during the period there was no sufficient opportunity to arrest the vessel.

First of all, there appears to be two time bars for the same category of maritime liens which openly set two different periods for their extinguishing. According to these provisions any lienee may arrest the ship within the period of one to two years depending on the conditions that suits him. Secondly, by stipulating that the court can prolong the term of prescription the doctrine of laches has been introduced. On this basis the lienee is entitled to take an action in rem and to arrest the ship within the unlimited period of time by proving that there was no possibility to arrest the vessel within the prescribed time bar.

Because among the claims listed in paragraph 4 of Article 36 is also claim for a reward for salvage of a ship, it would be assumed that the time bar stipulated in paragraph 5, Article 36 applies to it as well. But in the paragraph 6 of Article 33 appears another time bar for discharging claims for salvage. It states:

Claim for salvage reward becomes statutorily barred two years after the event. The court can prolong this term in justified cases.

It means that in one set of rules dealing with extinguishing of maritime liens three time bars are laid down in three different articles, although two of them provide for the same prescriptive period.

The remaining two paragraphs of Article 36 on maritime liens stipulate that a maritime lien is a privileged claim against the res and may be enforced notwithstanding any change of ownership. There is no difference in comparison with the wording of the provisions laid down in the 1993 Convention.
3.2 Needs of harmonisation of the legislation with international standards

When examining the question of the need for harmonisation of the present Slovakian legislation dealing with maritime liens and mortgages with international standards it may be desirable to take into account advantages that such a uniform legislation brings to the individual states.

Without any doubts, uniformity of law as the first advantage simplifies the law for interested parties in all states, including the legal practitioners and the courts. Uniformity in the law is also useful in eliminating or minimising the practice of forum shopping by which claimants and defendants seek to bring disputes into particular jurisdiction solely because they believe that the laws in such jurisdictions will be more favourable to their cause.

Certainty of law is assisted by an international convention by establishing a uniform norm and helps to avoid the conflict of different national laws. This enables interested parties to identify more easily and clearly what their rights and obligations are likely to be, regardless of where the claim may arise or where the issue will be decided.

An international convention can also promote justice by establishing in a clear and fair way rights and obligations for all parties which have an interest in the subject matter, including shippers, shipowners, ship operators, mortgagees and suppliers of services for shipping.

Another advantage of a convention is that to achieve these aims, it does not cause serious administrative difficulties for governments or operational problems for the parties who may be affected by it. In particular, the implementation of such a convention should not impose on the administration the obligation to take unnecessary measures, nor should it result in inordinate expense for shipowners and operators or uncertainties to claimants and the courts.
As shipping is by nature an international industry, various parties involved in the trade of shipping may find themselves placed at an economic disadvantage, either by choice in rendering services or credit, or not by choice by being put at a disadvantage by the shipowner. Which of these parties a legal system considers worthy of being given a legal economic advantage in relation to competing creditors is very much a matter of policy depending upon politico-socio-economic considerations. Deciding which claims should rank as maritime lien claims has always been a matter of some considerable controversy and what list of claims is devised will be necessarily arbitrary.

Therefore, the regime on maritime liens and mortgages must contain a careful balance between the concerns of holders of maritime liens, the holders of mortgages and other liens, and shipowners.

The 1993 Convention recognises only such high-ranking securities, which outrank mortgages and which are deemed to be indispensable on economic and social grounds. At the same time, it keeps these high ranking securities to a minimum with a view to strengthen the international position of mortgages.

The issue as to the ranking accorded to the various charges or securities is another main issue of the scheme of differentiating and discriminating against competing creditors. In a system geared to discriminating against and preferring types of claimant a doctrine of priorities is an essential component. Even if preferential and discriminatory treatment were based purely on the types of securities granted to claimants so that a particular type of security was inherently labelled as of certain ranking, a doctrine of priorities would still be required to discriminate among claimants holding the same security (TD/B/C.4/AC.8/2, p.l2).

In establishing an order of ranking, the 1993 Convention clearly states, that contracting states are not entitled to alter the order of priorities as specified in it. Enabling or allowing states to alter the order in their own national systems would disturb international uniformity.
The 1993 Convention regulates problems that arise under a conflict of laws in respect of mortgages, which is quite satisfactory and proper. As far as maritime and other liens not listed in the Convention are concerned, there is no need for a conflict of law rule. These rank after the maritime liens specified in the Convention and among themselves are ranked according to the national law. Similarly there is no need for a conflict of law rule in the Convention for possessory liens and maritime claims which rank after mortgages.

The existing convention sets out only minimum standards respecting registration of mortgages and hypothecs at the national level, and establishes conditions under which such charges obtain international recognition on the terms and to the extent set out in the Convention. This is true of both the 1926 and 1967 Conventions and the same approach has been retained in the 1993 Convention. Apart from the requirements on registration, the characteristics of a mortgage or hypothec are left to be determined by the national law. This approach, therefore, permits some variation in the characteristics of the securities which may be recognised at the national level, but which may not be considered sufficiently important or appropriate for international recognition.

In this connection in particular the question relating to ships under construction has been left to be regulated by national law. Mainly, because of the fact that such a ship does not move out of the jurisdiction of the state concerned. However, in the case the registration of vessels under construction and the registration of rights relating to such vessels were to be left for regulation by national law, it possibly should be ensured that national law will facilitate the quick and efficient transfer of a registered right on a vessel under construction into the register in which the vessel is to be inscribed after delivery. It also has to be ensured that registration in the national register after completion will not result in any loss of ranking by a right which was registered in respect of the vessel when it was under construction.
The 1993 Convention tries to formulate and create a balanced compromise between the interests of those who need the special protection afforded by a maritime lien and those who provide finance for shipping. Keeping the number of maritime liens, having priority over registered mortgages to the minimum, but at the same time making it possible to grant other liens under national laws should encourage investors to advance funds for fleet developments and to protect their position to the greatest possible extent.

Therefore, to have legislation governing mortgages, in line with the provisions of the 1993 Convention as regards minimum requirements for their registration and execution and in compliance with the international standards as far as clarity, and completeness of mortgage procedures and regulations are concerned, would create favourable conditions for investors and possibly remove any major impediments to the acquisition of ship mortgage loans or other appropriate financing for ships. This suggests that to improve the status of mortgages, a complete reformulation of existing terminology, regulations, laws and attitudes has to take place as soon as possible and to upgrade them to the level of standards recognised world-wide in the shipping community.

Even though there are many considerations of a commercial, political and legal nature which affect the decision whether or not to advance finance for ship acquisition, the international uniformity enables national systems to achieve their national shipping goals more readily. In effect, greater uniformity enables a lender to make reasonable estimate as to the nature and number of maritime claims which would have priority over his own security.

The 1993 Convention recognises these facts as well as the reality that registered mortgages continue to be the principal means of ship financing. Therefore, it tries to strengthen the international position of the mortgages and thus improving the conditions for ship financing at the international level.
The Convention has an advantage of encouraging greater international uniformity in the whole area of maritime securities and claims enforcement. It offers a regime whereby the registered mortgage is afforded a high ranking within the list of priorities and regime governing the entire life of a vessel from the moment of being built or contracted.
4 Recommendations

4.1 Statutory mortgage form and related legislation

Because a mortgage is still the most used security for ship financing, its form and the rights which are given to the mortgagee have to have a certain form which suits potential creditors and encourages them to advance funds. There is no doubt that the current legislation of Slovakia does not provide for such a form. Therefore, its rules and provisions need to be amended to meet all the criteria required by lenders, if it does want to attract international funds.

The statutory mortgage form and its provisions have to be more elaborate, concrete, reflect the wishes of mortgagees and be clearly written so in case of dispute, such a dispute could be settled in an amicable way. It is absolutely crucial that the new Shipping Act to be passed by the Parliament should provide for a comprehensive, exact and international standards meeting a form which would encompass all the important clauses and facilitate mortgage execution, transfer or discharge.

In order for such a mortgage to be effective it has to be registered in the Slovak Shipping Register for completed vessels or in the Mortgage Shipping Register for vessels under construction. This, however, can only be done after some legislative amendments have been passed and enacted in the Commercial Code and the Civil Code.

Because there are differences between mortgagees in the common law system and mortgages in civil law, known as hypothecs, choosing the right kind of mortgage
should be based on careful consideration taking into account the civil law judiciary system in Slovakia. The hypothec differs from the mortgage mainly in the way of enforcement of the mortgagor’s debt. While a hypothec according to French law, confers a preferred right on the proceeds of sale of a vessel but not a proprietary right over her, the mortgagee under the common law may take possession under the mortgage whenever the mortgagor is in default of payment. Whatever will be the decision in respect of choosing either a hypothec or mortgage, it has to be clearly stated in the section dealing with mortgages in the new Shipping Act what kind of security is granted to the prospective creditors.

The mortgage form has to be defined by the law of the flag state and designed in such a way that would appeal to the creditors.

At the same time it has to be decided whether only one mortgaged form will be used or a deed of covenants as a supplement will also be an integral part of the mortgage instrument. However, it could be proposed that, to keep the mortgage as simple as possible, the statutory form should be supplemented by the deeds of covenants expressing certain mandatory or desirable requirements. In such a case the statutory form should contain a reference to the collateral deed.

As far as the registration form is concerned it should start with recitals giving the full name of the individual or the corporate body with their principal place of business as a mortgagor and a full name and address of the mortgagee, in whose favour the mortgage has been registered.

Practice in shipping funding has shown, that creditors prefer to use an account current mortgage because of its flexibility, rather than a principal sum and interest mortgage. Therefore, the statutory form of the mortgage may recite the opening by the owner of an account current with the mortgagee. Nevertheless, the new Shipping Act may as well provide for a principal sum and interest mortgage. It is to be decided, in which languages such a mortgage may be executed. There is no doubt, that the principal language should be Slovak as the official language, but
considering the fact that the shipping business is international and for the purpose of facilitating communication with creditors, the statutory form may as well be in the English language.

A statutory mortgage could be in the form of a deed and should therefore be either signed and delivered as a deed if the mortgagor is an individual, or executed under the common seal of the company. A mortgagor may appoint an attorney to execute the mortgage on his behalf in which case the attorney must sign and deliver the mortgage as a deed as if he were an individual mortgagor (Harwood, 1991, p.75). The mortgagee is not required to execute or to sign the mortgage.

The statutory mortgage should contain important particulars of the mortgaged ship such as the name and official number, year and port of registry, means of propulsion, length, breadth and depth of the ship and tonnage and horse power of engines. Because the statutory form is rather simple there is a need for a supplement to it in the form of the deed of covenants. This form can stipulate other details of the mortgaged ship, for example fuel, stores, spare parts and so on.

On the reverse side of the statutory mortgage a form of receipt should be found. In order to discharge a registered mortgage, the receipt on the reverse of the mortgage must be executed by the mortgagee and presented to the registrar.

The deed of covenants will contain an extensive list of representations and warranties, which will range from reciting that there are no approvals, consents or registration (other than at the relevant ship’s registry) necessary and finishing with an assurance that the vessel is free from encumbrances, liens and claims (other than in favour of the mortgagee) and not under arrest.

The mortgage document and/or the mortgaged deed should contain certain positive obligations in relation to the ship, together with certain prohibitions. The most used and typical obligations that should appear in the covenants are usually
being broken down into two categories and can be found in the Annex 1 to this dissertation.

The mortgage should also list the mortgagee's rights if the mortgagor is in default of payment. In this instrument it is also possible to exclude any limits on the mortgagee's rights contained in the law of the flag. Thus the mortgagee's rights may be listed as follows:

1. the right to take possession of the vessel;
2. the right to discharge the master and crew and appoint replacements and to direct the course of the vessel;
3. the right to sell the vessel on terms dictated by the mortgagee, at auction or by private treaty, with or without the benefit of any charterparty, and with the power to make a loan to a prospective purchaser;
4. the right to repair or alter the vessel
5. the right to charter the vessel out; and
6. the right to buy the vessel in.

To be sure which default situation entitles the mortgagee to exercise his rights and to ultimately take possession of the vessel, they also have to be included in the deed of covenant.

Events of default are as follows (Goldrein, 1993, p.210):

1. Failure to pay
   The mortgagee fails to pay any sum of money payable under the security documents on the date specified for payment thereof.
2. Failure to perform or observe covenant
The mortgagee does not perform or observe any of the covenants or obligations contained in the security documents.

3. Insolvency
A petition is filed or an order is made or an effective resolution is passed for the winding up of the mortgagor or the guarantor in any jurisdiction whatsoever (otherwise than for the purpose of any reconstruction or amalgamation as shall have previously been approved in writing by the mortgagee) or a receiver is appointed over the undertaking or property of the mortgagor or guarantor or the mortgagor suspends payment or ceases to carry on its business or makes special arrangements or composition with its creditors or an effective resolution is passed except with the mortgagee’s prior written consent for the reduction in the issued share capital of the mortgagor or guarantor.

4. Total loss
The ship becomes a total loss.

5. Failure to pay earnings
Any earnings are paid otherwise than in accordance with the directions of the mortgagee.

6. Impossibility or illegality
If it becomes impossible or unlawful for the mortgagor to perform or observe any of the covenants or obligations contained in the security documents or for the mortgagee to exercise any of the rights or powers vested in it.
7. Imperil of security

Anything is done or suffered to be done by the mortgagor, whether in connection with the mortgaged property or otherwise, which in the opinion of the mortgagee may imperil the security created by the security documents.

Having drafted the statutory form of the mortgage with a deed of covenants stipulating all obligations and prohibitions, the new Shipping Act should provide rules governing all matters as regards legislation of mortgages.

First of all, it should state that a registered ship or share therein may be made a security for a loan, and the instrument creating security (mortgage) should be in the form prescribed by this Act and on the production of such instrument the registrar of the ship’s port of registry should record it in the register (Stanton, 1976, p.31).

Recording of mortgages in the register in the order they were produced is essential for their priority. Therefore, the Act should stipulate that they should be recorded by the registrar in the order in time in which they are produced to him for that purpose. There are however, circumstances where the priorities between registered mortgages do not depend upon the actual dates of registration, even though this is not stipulated in any act. If a further advance is given on the same security and a second independent mortgage has been effected and registered in the intervening period, the latter may rank ahead of any further advance on the first mortgage (Hill, 1989, p.24).

Just like the registration, the discharge of a mortgage should also be as simple as possible and governed by the Act. In doing so, the registrar should, on the production of the mortgage deed with a receipt for the mortgaged money endorsed, signed and attested, make an entry in the register to the effect that the mortgage has been discharged. Discharge in this manner returns the full rights in the mortgaged property to the mortgagor. Failure to observe this procedure means that the
Registrar has no authority to delete an entry relating to a mortgage simply because it has in fact been discharged.

Because the mortgagor is the owner of a ship and retains all rights and powers of ownership, the mortgagee should not by reason of the mortgage be deemed the owner of the ship or share, nor should the mortgagor be deemed to have ceased to be the owner, except as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt.

The power to sell the vessel, even though not given in the mortgaged deed or covenants, is conferred on every registered mortgagee. He is given absolute power to dispose of the ship or share in respect of which he is registered. However, if there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee should not sell the ship or share without the concurrence of every prior mortgagee.

The same power of sale should by the statute be given to a mortgagor because he is the registered owner of a ship. If he is desirous of disposing by way of mortgage or sale of the ship or share in respect of which he is registered, he should apply to the registrar who should enable him to do so by granting a certificate of mortgage or a certificate of sale.

A certificate of sale and power of sale should be well drafted in order to be in conformity with the provisions governing registration of ships.

It is very likely that the loan for acquisition of a ship would be given by a mortgage bank or other financial institution from abroad. Therefore, the new Shipping Act should provide for a certificate of mortgage. This instrument is specially designed for the circumstances where the owner of a vessel desires to mortgage the vessel outside the country in which the port of registry is located. Since a certificate of mortgage is in the nature of a power of attorney, it should contain:
1. the name of the person or attorney authorised to exercise the power;
2. the maximum amount of the charge to be created;
3. the place where the power is intended to be exercised, if designated, or alternatively a reference to the effect that the power may be exercised in any place;
4. a time limit for exercising the power; and
5. details of any registered mortgages in existence at the time and any certificates of mortgage.

If a ship was mortgaged under the powers granted by a certificate of mortgage, a mortgagee enjoys all the powers of a mortgagor as if the mortgage has been created in the customary manner and registered in the register. When such a mortgage is discharged, an endorsement to that effect should be noted in the certificate by a registrar or consular official, after suitable evidence of discharge has been produced. When the certificate is finally delivered to the registrar, he must enter in the book details of any unsatisfied mortgages entered into under the certificate. He must then cancel the certificate and note the fact in the book. The certificate then stands vacated (Hill, 1989, p.40).

The new Shipping Act should also provide for another right granted to a mortgagee. The mortgagee should not be affected by the bankruptcy of the mortgagor, occurring after the date of the mortgage. Where a mortgage is granted by the mortgagor who has already committed an act of bankruptcy, to a mortgagee without notice of the act of bankruptcy, the mortgagee should be protected as well.

Another equally important right that should be included in the Act, is the right of transfer of mortgages. A registered mortgage of a ship should be transferable, using the instrument prescribed by this Act, to any person. On the production of such an instrument the registrar should record it by entering in the register the name of the
transferee as mortgagee of the ship and notify on the instrument of transfer, stating the date and hour of the recording.

4.2 Maritime liens and related legislation

Having harmonised the mortgage provisions with internationally recognised mortgage legislation of developed maritime nations, the second step should be redrafting of the legislation dealing with maritime liens. Based on previous discussions and analysis it is fair to conclude that the new Shipping Act needs some changes and amendments to be carried out in order to get a comprehensive and updated piece of legislation. At the same time, however, it is necessary to point out that the Shipping Act already being drafted has ambitions to be in line with the 1993 Convention on Maritime Liens and Mortgages. This convention aims to be a balanced part of the international law that would satisfy each party interested in shipping, whether it is a mortgagee or a holder of maritime lien. Therefore, the provisions of the 1993 Convention should be taken into account and should be made part of the Slovakian law governing shipping.

In this context, the new Shipping Act provides for the same number of maritime liens and their ranking as the 1993 Convention. However, the provisions relating to this matter do not specify, whether other liens and rights of retention could be granted under the Slovak national law. If the clauses that would make it possible should appear in the Act, they would have to state what liens are granted and to give the right of retention to a shiprepairer and a shipbuilder only. Because in such a case they would be only statutory liens, and they would rank behind maritime liens and mortgages, thus not affecting their position.

Of great importance is to introduce in the Shipping Act a uniform regime governing the time bar. It is necessary to avoid ambiguous provisions and to stick to a one
year time bar for maritime liens as set out in the 1993 Convention. Exception should be given only to maritime liens granted by the national law. In such case they should be extinguished after a period of six months, from the time when the claims arose.

As the new Shipping Act does not determine the ranking of mortgages in respect of maritime liens, corrections have to be made. In the article stipulating ranking and priorities of maritime liens the position of mortgages has to be set up. They have to rank immediately after maritime liens but ahead of statutory rights of action in rem. Thus it leaves room for individual countries to rank maritime liens not listed in the Convention according to their applicable national law.

The 1993 Convention contains a conflict of law rule in respect of mortgages and hypothecs only. Until today there have been no court proceedings in Slovakia on the conflict of law problems for maritime liens. The courts of Slovakia, as a land-locked country, have had no possibility and will probably never have the occasion to attach a seagoing vessel and to make a choice of law on a lien question. As a general rule, which should be adopted by the legislative body, the substantive matters of maritime liens should be governed by the law of the flag, while the right in rem is governed by the law of the country where a movable object is situated. In case of execution the applicable law may therefore be the law of the forum. If for a Slovakian vessel, the proceeds of an auction should be distributed in Slovakia among holders of a mortgage and creditors with a maritime lien, a court could also apply the law of the flag, because generally the law of the country of registration governs mortgages.
5 Conclusion

The issue of maritime liens and mortgages is of great importance to every maritime nation as it is an integral part of everyday shipping practice. Moreover, a ship as a movable property plies the high seas and enters countries of different jurisdictions. Therefore, to use it as a security for enforcement of maritime liens and mortgages requires to have in place a uniform and internationally recognised regime governing this area.

Unfortunately, there is at present no uniform and international approach to these problems. Although three international conventions have resulted from conferences convened to discuss these problems, they have not gained widespread acceptance. The International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, signed in Brussels, on 10 April 1926 and the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, signed in Brussels on 27 May, 1967 have not been ratified by the major maritime nations in the world. The last attempt to achieve such a uniform regime was made by the International Convention for the Unification of Certain Rules of Law relating to Maritime Mortgages and Liens in Brussels in 1993. However, the number of ratifications is still not enough to make it mandatory.

Slovakia as a country with a considerably short history of shipping and a very small fleet wishing to expand it, should act very quickly and take all measures to ensure that its legislation in the form of the new Shipping Act will reach standards prescribed in the 1993 Convention, though still not in force. It is desirable also from
the viewpoint of a system of maritime mortgages, which would facilitate ship financing. Introduction of such a piece of legislation would possibly remove major obstacles and introduce clarity and a degree of certainty as to the scope, validity or ranking of mortgages and maritime claims respectively. It is expected that such a legal structure would remove a weakness of enforcement element and would be an incentive in arranging finance.

Finally, if Slovakia ratifies the 1993 Convention, it would contribute to the introduction of a uniform international legal regime governing this area with the aim to give greater security to financiers for ship purchases and ship building and to achieve a higher level of international uniformity.
Bibliography


*Shipping Act, 1952*. Czechoslovak Republic.

*New Shipping Act*. Slovak Republic.

Geneva

Geneva

Geneva

Appendix 1

The mortgagor further covenants with the mortgagee and undertakes as follows:

1. Registration.
   To keep the vessel registered under the approved flag (flag of the Slovak Republic) and to do nothing whereby such registration may be forfeited or imperilled.

2. To keep the vessel seaworthy
   To keep the ship at all times in a good and seaworthy state of repair and in all respects in good operating condition, and to maintain, service repair or overhaul the ship and make such alternations, modifications and improvements as may be required so as to maintain her present class and so as to comply with the provisions of the Acts and Regulations made thereunder and all other regulations and requirements (statutory or otherwise) from time to time applicable to the ship under flag of the Slovak Republic or of any other jurisdiction into which the ship may come and so as not to diminish the value of the ship other than in the normal course of operation.

3. Insurance
   a) To insure and keep the ship and her earnings insured at the mortgagor's expense with such underwriters or insurers and through such brokers as the mortgagee shall have approved in writing and for such sum or sums and against such risk of whatever nature and upon such terms as the mortgagee shall from time to time require.
b) To take steps to renew all such insurances on the due date at least 14 days before the expiry of cover and to procure that the brokers shall promptly confirm in writing to the mortgagee as and when such renewal is effected.

c) To pay punctually all premiums, calls, contributions or other sums payable in respect of such insurances and if so required by the mortgagee, to produce all receipts in respect thereof.

d) To arrange for the execution of such guarantees or other documents as may from time to time be required by any underwriters or insurers for or for the continuance of cover.

e) To procure that the interest of the mortgagee and the loss payable clause set out below shall be duly endorsed upon all ships, cover notes, policies, certificates of entry or other instruments of insurance issued in connection with the insurances effected and that the said instruments be deposited with the approved brokers, or should the mortgagee so direct, with the mortgagee.

**Loss payable clause**

It is hereby noted that (name and address of the mortgagee) is interested in the (name, registration of ship) as mortgagee under (date of mortgage) and in the event of payment of any moneys due including laid-up returns or settlement of any claim arising under these insurances, no payments are to be made to the Owners direct unless written instructions to the contrary have previously been received from the mortgagee. Underwriters will give 14 days telegraphic notice before cancelling or varying this policy.

f) To procure that the protection and indemnity and/or war risk insurers shall (if so required by the mortgagee) provide to the mortgagee a letter or letters of undertaking in such form as may be required by the mortgagee.

g) Not to employ the ship or suffer the ship to be employed otherwise than in conformity with the terms of the instruments of insurance (including any express
or implied warranties therein) nor do or fail to do anything in connection with the ship whereby cover may be withdrawn, cancelled, imperilled or prejudiced in any way whatsoever unless the consent of the insurer has first been obtained and any requirements as to extra premium or otherwise as the insurers may require have been complied with.

h) To apply all such sums as are paid to the mortgagee in accordance with the provisions of the mortgage and of this deed for the purpose of making good the loss and fully repairing all damage in respect of which such sums have been received.

4. Inspection
To permit the mortgagee or its servants or agents to board the ship at all reasonable times for the purpose of inspecting the condition thereof or for satisfying themselves as regards proposed or executed repairs and to afford all necessary and proper facilities for such inspections.

5. Debts
Punctually to pay and discharge all debts, damages, and liabilities whatsoever which the mortgagor shall have been called upon to pay, discharge or secure which have given or may give rise to liens on or claims enforceable against the mortgaged property or any part thereof whether by legal process or in exercise or purported exercise of any such lien or claim to procure the release of the same forthwith upon receiving notice of such arrest or detention.

6. Information
Promptly to furnish the mortgagee as and when requested with any information whatsoever regarding the mortgaged property or any part thereof as the mortgagee shall request.
7. Notification

To notify the mortgagee forthwith of the following:

a) any accident to the ship involving repairs the cost of which will or is likely to exceed (amount) or the equivalent in any other currency;

b) any occurrence in consequence whereof the ship has become or is likely to become a total loss;

c) any requirement or recommendation made by any insurer, classification society or authority which is not complied with within any time limit specified thereof;

d) any arrest or detention of the mortgaged property or any part thereof or the exercise or purported exercise of any lien thereon;

e) any petition or notice of any meeting to consider any resolution to wind up the mortgagor (or the guarantor) or any event analogous thereto in any jurisdiction whatsoever.

8. Outgoings

Promptly to pay all tolls dues and other outgoings whatsoever in respect of the ship and to keep proper books of account in respect of the ship and the earnings thereof and to furnish satisfactory evidence that the wages, allotments, insurance and pension contributions in respect of the master and crew, are being paid regularly and that they have no claims for wages beyond the ordinary arrears and that the master has no claim for disbursements other than those incurred by him in the ordinary course of trading on the voyage than is in progress.

9. Notice of mortgage

To place and at all times during the security period to retain on board the vessel with ship’s papers a properly certified copy of this mortgage and to cause the same to be exhibited to all persons having business with the ship which might give rise to any lien on the ship and to place and keep the following notice in a prominent position in the Chart room and in the Master’s cabin:
Notice of mortgage:
This vessel is the subject of a first preferred mortgage in favour of (name of mortgagee). Under the terms of the said mortgage neither the shipowner nor any charterer nor the master of this vessel nor any other person has any right power or authority to create incur or permit to be imposed upon this ship any lien whatsoever except of crew’s wages and salvage.

10. Mortgagee’s expenses in protecting security
To pay to the mortgagee on demand all moneys whatsoever which the mortgagee shall expend, be put to or become liable for in or about the protection, maintenance or enforcement of the security hereby created or in or about the exercise by the mortgagee of any of the powers vested in it and to pay interest thereon from the date such expense or liability was incurred until the date of payment at the default rate before and after judgement.

11. Mortgagee’s legal expenses
To pay on demand all the mortgagee’s legal costs, expenses and disbursements of whatsoever nature and any other charges incurred by the mortgagee in connection with the preparation, completion and registration of the security documents.

Mortgagor’s negative covenants:

1. Illegal trades
Not to employ the ship or suffer her employment in any part of the world in any trade or business or for any purpose which is not covered by the insurances or which is forbidden by any applicable law or is otherwise illicit or in carrying illicit or prohibited goods or in any manner whatsoever as may render her or
them liable to condemnation in a Prize Court or to destruction, seizure or confiscation or which is contrary to any insurance which is taken out in respect of her or them and in the event of hostilities in any part of the world (whether war be declared or not) not to employ the ship or suffer her employment in carrying any contraband goods or to enter or remain in any area after it has been declared a war zone by any government or by the war risk insurers unless the mortgagee has previously given its consent in writing and there is in force such special or additional insurance cover as the mortgagee may require.

2. Not to encumbrance

Not without the prior written consent of the mortgagee to mortgage, charge or otherwise dispose of the mortgaged property or any part thereof or agree or purport to do any such thing.

3. Not to enter into certain charters

Not without the prior written consent of the mortgagee to let the ship:

a) on demise charter for any period;

b) by any time or consecutive voyage charter for a term which exceeds or by virtue of any optional extensions contain therein is likely to exceed time (period required);

c) on terms whereby more than (number) months hire or equivalent is payable in advance;

d) below the market rate then prevailing at the time of the fixture.

4. Not to enter into earnings sharing agreement

Not without the prior written consent of the mortgagee to enter into any agreement or arrangement whereby the earnings of the ship may be shared with any other person.
5. Not to give possession to repairer

Not without the prior written consent of the mortgagee to put the ship into the possession of any person for the purpose of work being carried out in an amount which exceeds or which is likely to exceed (state amount) unless such person shall have first provided to the mortgagee a written undertaking, in a form satisfactory to the mortgagee, not to exercise any lien in respect of such work.

6. Not to appoint a manager

Not without the prior written consent of the mortgagee to appoint a manager of the ship or a manager other than named.

7. Not to pledge the credit of the mortgagee

Not to represent that the mortgagee is in any way concerned in the operation of the ship, the carriage of passengers or goods therein, or any other use to which the ship may be put and not to pledge the credit of the mortgagee for any purpose whatsoever.

Source: