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Maritime liens and their enforcement from international perspectives and lessons for Vietnam

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MARITIME LIENS AND THEIR ENFORCEMENT FROM INTERNATIONAL PERSPECTIVES AND LESSONS FOR VIETNAM

By

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Vietnam

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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): 

(Date): 20 September 2021

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Abstract

Title of Dissertation: **Maritime liens and their enforcement from international perspectives and lessons for Vietnam**

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This Dissertation is a study of maritime liens and their enforcement from international law in order to take a comparative helicopter view with Vietnamese law. The author primarily concentrates on the legal regulations and issues of maritime liens and their enforcement in the light of Vietnamese law in comparison with international relevant conventions and several typical legal systems from both common law and civil law branches.

The author asserts that maritime liens and their enforcement are very complicated matters not because the issues related to these two institutions are not identified but because of their unique feature that involves global shipping practice but varies different from state to state. The international community has made tremendous endeavours in order to build up a unified framework of maritime liens and their enforcement, however, received little support so far. While international law is standing by, maritime liens and their enforcement are transforming into a new trend rapidly that directly impacts many aspects from regulations to public policy. National law in particular and international law, in general, have to catch up with this tendency in order to effectively and comprehensively govern the issues concerned.

Vietnam as a developing country aiming to increase the volume of the maritime economy in national GDP is on the way to form and perfect domestic law in order to both comprehensively governs maritime commercial practices and be in line with international modern practice. Maritime liens and their enforcement are no exception, especially in the context Vietnam has not conducted papers on these matters so far. The study of this topic from an international perspective, therefore, is vital to Vietnam. Via comparative approach, the author expects to draw an overview of maritime liens and their enforcement in the eye of foreign states and conventions, point out existing issues of these institutions in Vietnamese law, then render lessons and solutions for Vietnam.

KEYWORDS: Liens, maritime Lines, enforcement procedure, admiralty court, ship arrest.

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List of Abbreviations

1924 Limitation Convention	International Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels, 1924
1926 Brussels Convention	International Convention for the unification of certain rules relating to maritime liens and mortgages done at Brussels 10 April 1926
1952 Arrest Convention	International Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships, 1952
1957 Limitation Convention	International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957
1967 Brussels Convention	International Convention for the unification of certain rules relating to maritime liens and mortgages done at Brussels 17 May 1967
1990 Maritime Code	Maritime Code No. 42-LCT/HDNN8 dated 30 June 1990 of the National Assembly of Vietnam, and effective from 01 January 1991 to 01 January 2006
1993 Geneva Convention	International Convention on maritime liens and mortgages, done at Geneva 06 May 1993
1999 Arrest Convention	International Convention for Arrest of Ship, 1999
2001 Bunker Oil Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
2005 Maritime Code	Maritime Code No. 40/2005/QH11 dated 14 June 2005 of the National Assembly of Vietnam, and effective from 01 January 2006 to 01 July 2017.

2015 Civil Procedure Code	Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015 of the National Assembly of Vietnam, and effective as of 01 July 2016
2015 Maritime Code	Maritime Code No. 96/2015/QH13 dated 25 November 2015 of the National Assembly of Vietnam, and effective as of 01 July 2017
Decree 57	Decree No. 57/2010/ND-CP detailing and guiding the implementation of the Ordinance on Procedures for the Arrest of Seagoing ships dated 25 May 2010 of the Government of Vietnam, and effective as of 09 July 2010.
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche—German Introductory Act to the Civil Code
GDP	Gross domestic product
HGB	Handelsgesetzbuch or German Commercial Code
Ordinance 05	Ordinance No. 05/2008/UBTVQH12 on Procedure for the Arrest of Seagoing Ships dated 27 August 2008 of the Standing Committee of the National Assembly of Vietnam, and effective as of 01 July 2009
PCR	English Civil Procedure Rule.
PMLC	Code of Private Maritime Law of Greece
Rule B	Rule B - In Personam Actions: Attachment and Garnishment from Federal Rules of Civil Procedure
Rule C	Rule C - In Rem Actions: Special Provisions from Federal Rules of Civil Procedure

Rule E	Rule E - Actions in Rem and Quasi in Rem: General Provisions from Federal Rules of Civil Procedure
SCA 1981	English Senior Court Act 1981

Chapter 1. Introduction

1.1. Background and problem statement

From ancient times, the sea was known as a driving force of early international trade through its bridging role among continents. Thanks to integration and globalization, seaborne trade has been continuously developed and expected to be the key factor of the whole development of global trade. However, the maritime sector is typically characterized by conflicting claims due to its complex operation with the involvement of plenty of stakeholders. For the sustainable equilibrium, significant consideration needs to be attributed to secure such conflict claims arising out of shipping practices. Deriving from that, maritime liens have been constituted in order to merit greater protection in terms of the existence and enforcement of their claims.

The maritime lien is considered as one of the first backbone institutions which represents important striking features of contemporary maritime law (Thomas, D. R., 1980). Nowadays, maritime liens are incorporated into national legal systems via legislation or precedents. Despite the diverse and complicated fluctuation of global maritime activities, the significance of maritime liens has remained steady. The reason for this phenomenon lies in the unique character of the maritime liens which is related to the advanced protection of the secured claims. Accordingly, the claims secured with a lien are privileged over other claims and can be exercised on the vessel, irrespective of a prospective transfer of the ownership of the vessel. They are enforced by the arrest of a ship and rank before ship mortgage (Tetley, W., 1993). Hence, the application of maritime liens triggers many vital legal consequences such as ship arrest for the enforcement of a lien or judicial sale of a ship that directly impacts stakeholders. These characteristics of maritime liens are the main reasons why maritime liens certainly attract legal attention in admiralty law (Force, R., 20058).

In addition, under most jurisdictions, maritime liens do not follow any scheme of registration that attributes a secret characteristic to maritime liens because the creditor

shall not be able to recognize the underlying liens the first time (Jackson, D., 2000). This feature may lead to jeopardizing the interests of creditors, as the existence of a maritime lien is bound to change the ranking and enforcement of the various claims related to the ship. For instance, when a shipping company and the bank enter into a credit agreement including the provision of ship mortgage as a security of the underlying claim, the formation of a potential maritime lien may eventually prevent the bank from satisfying the full amount of the claim in case of a judicial sale of the ship, because the ranking of maritime liens is higher than ship mortgage.

Furthermore, the legal issues, nevertheless, are more complicated when maritime liens are coupled with private international law (Triskogiannis, A., 2019). The characteristic of the maritime liens as a substantive right or procedural remedy has been becoming a hot topic of many legal pieces of literature and precedents because of the contrasting divergent consequences of the perception of each legal system concerning the procedural and substantive theory (Triskogiannis, A., 2019).

Moreover, international attempts to come up with a worldwide unification of a list of maritime liens and their features seem to be continuously failed which is evidenced by the low rate of ratifications of the International Convention for the unification of certain rules relating to maritime liens and mortgages done at Brussels 10 April 1926 (1926 Brussel Convention), the International Convention for the unification of certain rules relating to maritime liens and mortgages done at Brussels 17 May 1967 (1967 Brussel Convention) and the International Convention on maritime liens and mortgages, done at Geneva 06 May 1993 (1993 Geneva Convention). The 1926 Brussel Convention entered into force on 2 June 1931 with 28 ratifications in total, however, none of them are from common law countries. Later on, the appearance of the 1967 Brussel Convention was expected to fill the loopholes of the 1926 Brussel Convention especially in terms of the recognition and enforcement of maritime liens. Unfortunately, the 1967 Brussel Convention was disabled due to a lack of sufficient ratifications. After that, the 1993 Geneva Convention which was introduced and known as the model law for several states, however, humbly had 19 parties so far.

Regarding the enforcement of maritime liens, the law of ship arrest deserves to be certainly discussed because ship arrest has a connected relationship with the subject of maritime liens. Accordingly, ship arrest is understood as a process confined to courts with jurisdiction over identified maritime claims (Thomas, R., 2019). Among such maritime claims enforced by ship arrest are claims protected by maritime liens. In other words, maritime liens reflect a distinct source of the power to arrest. So far, the international community has introduced the 1952 International Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships (1952 Arrest Convention) and the 1999 International Convention for Arrest of Ship (1999 Arrest Convention). It is further noted that these two arrest conventions do not additionally create maritime liens[1] but play a role as a global frame on which a maritime lien shall be enforced. Hence, Article 3.1(e) of the 1999 Arrest Convention further emphasizes that the power of arrest in association with claims in the nature of maritime liens. At this moment, the 1952 Arrest Convention has become a significant influence on the development of international law of ship arrest with 71 ratifications while the 1999 Arrest Convention, in contrast, has received minimal support from the international community.

Referring to Vietnam, the study of maritime law in general and maritime liens, in particular, has just developed since 1986 (Nguyen, T. N. M., 2004). Thanks to the implication of Doi Moi policy of the Vietnamese Party, the economy has increased dramatically leading to the rapid change of the Vietnamese maritime laws. Concerning the governance of maritime liens and their enforcement, Vietnam has so far issued three maritime codes, namely the Maritime Code No. 42-LCT/HDNN 8 dated 30 June 1990 (1990 Maritime Code), the Maritime Code No. 40/2005/QH11 dated 14 June 2005 (2005 Maritime Code) and the Maritime Code No. 96/2015/QH13 dated 25 November 2015 (2015 Maritime Code) with the incorporation of a certain number of provisions from the 1993 Geneva Convention and the 1999 Arrest Convention though Vietnam has not ratified two of them. However, the implementation process of

[1] Article 9 of the 1952 Arrest Convention and Article 9 of the 1999 Arrest Convention.

maritime liens and their enforcement in Vietnam have not been organized in a centralized manner. Accordingly, there are few seminars on maritime liens for experience discussion taken place among competent authorities. Different views still exist among levels of court when resolving the request of ship arrest to secure the enforcement of a maritime claim.

In addition, Resolution No. 36-NQ/TW dated 22 October 2018 of the 8th Conference of the 12th Party Executive Committee on Vietnam's strategy for sustainable maritime economic development to 2030, with a vision to 2045 (Resolution 36) has addressed the economy of 28 coastal provinces that are expected to contribute 60 - 70 percent to national GDP. Resolution 36 further has emphasized the importance of perfection and evolution of the legal system in harmonization with global standards in order to provide a sustainable corridor for international transactions. Deriving from that maritime liens significantly needs to be researched, built, and completed to ensure the legitimate rights and interests of stakeholders from the private economic sector, and enhancing the competitiveness of Vietnamese seagoing vessels, thereby further expanding opportunities for deep international integration of global seaborne trade.

Last but not least, the study of Vietnam's maritime lien institution must be put in the movement of the international community because maritime conventions are considered as sources of Vietnam's legal system. Therefore, taking an in-depth analysis of maritime liens at a comparative basis is essential.

1.2. Aims and objectives

The first aim of this study is to highlight legislative and law enforcement experiences regarding maritime liens of representatives from both common law and civil law systems. The selection of countries for taking a comparative analysis is based on three following criteria: (i) the long-lasting history and development of maritime liens of the country; (ii) the significant impact of the country on the formation and movement of internationally unified rules on maritime liens; and (iii) the noticeable impact of the country on the global shipping industry. Deriving from that, English and US laws as

representatives of common law systems and Greek and German laws as representatives of civil law system shall be selected.

In addition, the second aim is to draw lessons that can be applied to Vietnamese competent authorities in legislative, executive, and judicial activities, Vietnamese enterprises in international maritime operations, and research and teaching activities.

Based on these aims, the objectives of this study will primarily focus on the following tasks:

First, to assess international provisions regarding maritime lien;

Second, to interpret and generalize experiences of legislative and law implementation in typical countries from both civil and common law systems regarding maritime lien;

Third, to analyze, assess, and interpret the current legal provisions on and issues of maritime lien and its implementation;

Fourth, to propose solutions for the perfection of Vietnamese maritime lien institution based on international experience and the current situation of Vietnam.

Finally, to propose recommendations for Vietnamese enterprises when applying maritime lien or being subjected to a maritime lien.

1.3. Research questions and hypotheses

The study seeks to answer the research following questions:

(i) What are the core legal issues of maritime liens in international conventions?

(ii) How different is maritime lien governed and implemented in common law and civil law countries?

(iii) How is maritime lien governed and implemented in Vietnam?

(iv) How does ship arrest contribute to the enforcement of maritime liens?

(v) How is ship arrest governed and implemented in international law?

(vi) How is ship arrest governed and implemented in Vietnamese law?

(vii) What are the hopes or practical solutions for the uniformity of maritime liens and ship arrest in international law?

(viii) What are solutions for the perfection of maritime lien legislation and its enforcement in Vietnam?

1.4. Research methodology and scope of research

In order to implement this study, the author primarily applied legal research, qualitative research via cases and precedents study, and comparative law research methodologies. Particularly, international conventions and national legislations shall be analysed in order to identify the core issues of maritime liens and their enforcement. Relevant precedents shall be cited for further elaboration of the issues of maritime liens. Then, the issue shall be crossed evaluated through its respective implementation in the context of English, US, German and Greek laws and Vietnamese law. In addition, the three aforementioned conventions on maritime liens shall be interpreted independently from the national laws of England, the USA, Greece, and German law because none of them are member states of these conventions. It should be further noted that this Dissertation shall not pay more attention to the 1926 Brussel Convention and the 1967 Brussel Convention because they both were failed to gain tremendous support from the international community, not to mention the fact that the latter were never effective. In lieu of that, this Dissertation shall leave more room for the 1993 Geneva Convention because the 2015 Maritime Code of Vietnam was inspired by this Convention. In addition, the 1952 and 1999 Arrest Conventions shall be also interpreted in order to further elaborate the enforcement of maritime liens. Hence, the result of the above process shall be compared in order to figure out both the similarities and differences between two legal systems, through which the author shall come up with new hopes and/or solutions for the unified application of maritime at an international level. After that, the lessons learnt from the international practices, especially from states in principle of the same civil law system, shall be carefully assessed in the particular context of Vietnam for future application to its competent authorities and enterprises.

Within the scope of a Master's dissertation, this work will primarily concentrate on the legal regulations and issues of maritime liens and ship arrest as the enforcement of maritime liens in light of the English, US, German, Greek laws, international conventions on maritime liens, and ship arrest, and Vietnamese law. This dissertation will not discuss such issues of maritime liens in association with other institutions of law such as insolvency, judicial sale of a ship, limitation of liability, or limited role of maritime liens on seafarers' protection.

Chapter 2. History, nature, and characteristics of maritime liens

This Chapter shall respectively reveal the origins of maritime liens, evaluate the nature of maritime liens in comparison with other regimes, and assess various considerations as a basis for maritime liens securing different types of maritime claims.

2.1. History of maritime liens

Digging deep into the history of any branch of law always plays an important role in forming an accurate understanding of the law's spirit because history puts legal terminologies into context and transfers them into practical perspectives (Potter, G. S, 1902). With respect to maritime law, a classical metaphor has pointed out that "*a study of admiralty law without allusion to its historical antecedents would be as a deficient as a treatise on equity without consideration of the role of the chancellor*" (Bensing, R.C and Friedman, H.E., 1959). Therefore, in order to understand the essence of maritime liens, it is vital to trace back to history. Accordingly, maritime liens are commonly considered as one of the ancient roots closely attaching to the whole development of maritime law (Staniland, H., 1999). On the same view, another scholar further stressed that "*maritime liens are the product of the evolution of custom, statute and judicial decision. To understand them, one must understand the history of maritime law*" (Tetley, W., 1998).

2.1.1. Civil law approach

It is said that contemporary maritime law derives from the long process of development of Rhodian, Roman, and Greek law (McCabe, A., 2012) then continued by the Consulate of the Sea, the Laws of Oleron, and the Hanse League (Pineus, K., 1955).

With respect to Rhodian law, it used to exist one assumption that present-day maritime law took the root in Rhodian law (Pineus, K., 1955), therefore, this source shall probably crack open the origin of maritime liens. It is said that provisions of maritime liens and ship mortgages appeared in the Rhodian Sea-Law in the 7th or 8th century A.D. (Tetley, W., 1994).

With respect to Roman law, it is surprisingly proved that Roman law mostly learned from Rhodian law in order to regulate maritime matters (Sanborn, F. R., 1930). This conclusion may reasonably invoke a belief that maritime liens did not exist in Roman law because this regime was absent in Rhodian law. However, several pieces of research have proved that the robust development of commercial activities in Rome has contributed to the appearance of some primitive forms of maritime liens (Price, G., 1940). Accordingly, several maritime claims regarding collision or salvage were found in Roman law though there was no direct provision of maritime liens provided.

In short, several ancient categories of maritime liens can be discovered in early maritime law. In essence, they are not absolutely identical to such maritime liens being applied and recognised at this moment, however, they render some clues about the formation and development of maritime liens.

With respect to Greek law, Sanborn was of the view that "maritime loan" which was found in the case of "*Zanothemis v. Demon*" was similar to a maritime lien (Sanborn, R. F., 1930). In this case, a ship had borne a "maritime loan" from several Athenian capitalists for the security of her' hull and armament. Later on, when the ship sailed back to Athens, the creditor took over the ship and prevented the cargo beneficiary from collecting the assets on board. So far, though the result of this case remained

unknown, it was well-established that the maritime loan represented the primary forms of maritime liens (Huang, D., 2015).

2.1.2. Common law approach

Though England is a common law country, history illustrates that civil law had a certain impact on English admiralty law (Dingjing, H., 2015). English admiralty jurisdiction was established primarily by two sources, namely, the Roles of Oleron and Roman law (Ryan, F. E., 1968). In the 17th to 18th centuries, there was the co-existence of admiralty jurisdiction and common law jurisdiction that caused a "competition" between two branches. As a response to the restriction of exercising jurisdiction over individuals imposed by common law courts upon admiralty court, admiralty court used maritime liens and *action in rem* as an alternative (Thomas, D. R., 1980). Thanks to the said competition between the two jurisdictions coupled with the innovation of other civil concepts, "maritime liens" eventually appeared in court precedents. In 1851, *The Bold Buccleugh* case remarked itself in English admiralty history by introducing the concept of maritime liens (Ryan, F. E., 1968). This case concerned the collision between The William and The Bold Buccleugh in Scotland. After that, the owner of The William initiated a lawsuit against the owner of The Bold Buccleugh for collision damage compensation. The Bold Buccleugh was arrested by the court and just released upon security. During the process of ship arrest running, the ship was transferred to another owner and sailed to the port of Hull. Consequently, another lawsuit was triggered before the High Court of England which once again arrested the Bold Buccleugh. In the judgment, Lord John Jervis mentioned the concept of a maritime lien as "*a claim or privilege upon a thing to be carried into effect by legal proceeding in rem. This claim or privilege travels with the thing into whosoever possession it may come*" as well as established its typical feature of non-extinction despite the change of ownership of the vessel by stating that "*a mere change of property does not exonerate ship from the liability of being sued; neither can a sale of a vessel after a collision*

produces any such effect"[2]. The case was then appealed by the new owner of the Bold Buccleugh, however, the final result remained. Thus, the Judge endorsed as follow:

"*This was well understood in the Civil Law, by which there might be pledge with possession, and hypothecation without possession […]. A maritime lien is defined a claim or privilege upon a thing to be carried into effect by legal process. A maritime lien is the foundation of the proceeding in rem […]*"[3].

From these aforementioned statements, three key points regarding maritime liens have been made. First, a maritime lien is recognized taking its root in civil law and bears a singular nature in respect to common law. Second, a maritime lien exists regardless of the change of ownership of the ship. Third, a maritime lien arises from a collision. Fourth, the concept of a maritime lien is closely connected with *in rem* proceedings. It can be seen from this precedent that the 1851 concept primarily reflects maritime liens as it is today.

In the United States of America, maritime liens existed since it obtained its independence from the British Empire, therefore, the legal concept initially found in the US law is supposed to originate from English law. (Göretzlehner, E., 2019). The US maritime liens were introduced for the first time in 1910 under the Federal Maritime Lien Act. At the present moment, maritime liens are regulated under Chapter 313, Title 46 of the United States Code. In the US law, a maritime lien is understood as nonpossessory security created by the operation of law to secure a claim while allowing a ship to keep continuing her journey to earn the freight or hire to pay off the claim (Force, R. and Yiannopoulos, A. N., 2001). A short manifestation of maritime lien found in this legal system is as below: "*A maritime lien is a secured right peculiar to maritime law. A lien is a charge on property for the payment of a debt, and a maritime lien is a special property right in a vessel given to a creditor by law as security for a debt or claim arising from some service rendered to the ship to facilitate*

[2] *Daniel Harmer v William Errington Bell (The Bold Buccleugh)* (1851) 7 Moo. P.C. 267, 13 ER 884.
[3] *Daniel Harmer v William Errington Bell (The Bold Buccleugh)* (1851) 7 Moo. P.C. 267, 13 ER 890.

her use in navigation from an injury caused by the vessel in navigable waters." (Force, R. and Yiannopoulos, A. N., 2001).

2.1.3. Vietnamese law

Different from the aforementioned countries where the formation and evolution of maritime liens is an autochthonous movement, Vietnam's laws on maritime liens are mainly influenced by international law. In other words, Vietnam's maritime law is a result of a long process of studying international law and selectively applying it in line with internal conditions.

Since 1986, thanks to Doi Moi Policy, Vietnam has gradually established and developed a legal system for the integration of global trade. In 1990, Vietnam issued the 1990 Maritime Code officially recognizing the institution of maritime liens for the first time. Later on, Vietnam issued the 2005 and 2015 Maritime Codes that maintained the notion of maritime liens. These two codes have updated entirely all provisions regarding maritime liens compared to the former code, in order to ensure both the accurate nature of maritime lien and the conformity with international laws and practices. In addition, other subordinate legal documents were issued with detailed guidance on the implementation of Vietnamese Maritime Codes. Directly concerning with maritime liens and their enforcement, other notable documents include Decree No. 57/2010/ND-CP detailing and guiding the implementation of the Ordinance on Procedures for the Arrest of Seagoing ships dated 25 May 2010 of the Government of Vietnam, and effective as of 09 July 2010 (Decree 57) and Ordinance No. 05/2008/UBTVQH12 on Procedure for the Arrest of Seagoing Ships dated 27 August 2008 of the Standing Committee of the National Assembly of Vietnam, and effective as of 01 July 2009 (Ordinance 05). These statutes reflected the provisions concerning (i) nature and characteristics of maritime liens, (ii) claims on which maritime liens may arise, (iii) the enforcement of maritime liens via ship arrest which was inherently inspired by the 1993 Geneva Convention and the 1999 Arrest Convention. The table below will display the significant impact of these two Conventions in national law of

Vietnam regarding maritime liens and their enforcement though Vietnam has not ratified any of them (see Table 1).

Table 1: Maritime liens and ship arrest in conventional and Vietnamese laws

No.	Issue	Provisions in Vietnamese law	Corresponding provisions in conventional law
1	Maritime lien claims	Article 41 of Vietnam Maritime Code 2015 Article 02 of Ordinance 05	Article 2 of the 1999 Arrest Convention; Article 4 of the 1993 Geneva Convention
2	Characteristics of maritime liens	Article 40 of Vietnam Maritime Code 2015	Article 8 of the 1993 Geneva Convention
3	Ranking and priority of maritime claims	Article 42 of Vietnam Maritime Code 2015	Article 5 of the 1993 Geneva Convention Article 6 of the 1926 Brussel Convention
4	Exercise of the right of ship arrest	Article 13 of Ordinance 05	Article 3 of the 1999 Arrest Convention
5	Right of rearrest and multiple arrest	Article 12 of Ordinance 05	Article 5 of the 1999 Arrest Convention
6	Release from arrest	Article 14 of Ordinance 05	Article 4 of the 1999 Arrest Convention

Source: Author, 2021

2.1.4. Conclusion

In conclusion, the maritime lien is a concept born as a response to the development of shipping practice. Maritime liens primarily take their roots in Ancient Rhodian,

Roman, and Greek laws which was evidenced via the discovery of identical institutions such as bottomry. The concept of maritime liens, later on, appeared in English law. In the 17th-18th century, maritime liens were first used by the English admiralty court as a "weapon" to compete with the common court. Later on, a comprehensive concept of maritime was introduced by The *Bold Buccleugh* that is found close to what a maritime lien is today. Referring to Vietnam, the formation and evolution of maritime liens and their enforcement is the result of selectively applying the 1993 Brussel Convention and the 1999 Arrest Convention in line with internal conditions.

2.2. Nature and characteristics of maritime liens

2.2.1. Civil law approach

With respect to the nature of maritime liens, it should be first and foremost noted that such major maritime states in the civil law system as France, Italy, Belgium, and Spain have ratified the uniform rules of the International Convention on Liens and Mortgages. However, both Germany and Greece are not members of these Conventions. Instead of that, they apply national rules of conflict to deal with the issue of recognition of maritime liens.

Germany applies the *lex causae* to determine the existence of maritime liens and *lex fori* to determine the ranking[4]. The aim of the *lex causae* is to provide legal certainty for the creditor of seagoing vessels. Accordingly, the creditors can easily predict how their maritime-lien-secured claim is treated in German law by considering the law of the country where the contract was formed or the tort occurred (Schmidt-Vollmer, B., 2003). The result of this principle is that Germany may accept such foreign maritime liens that are out of the conclusive list provided under Article 596(1) of Handelsgesetzbuch (German Commercial Code or HGB) as long as the *lex causae* confers them. For instance, maritime liens for necessaries under US law may be recognized by the German courts though German law does not allow this type of lien.

[4] Einführungsgesetz zum Bürgerlichen Gesetzbuche, Artikel 45(2). (Introductory to the Civil Code, Article 45(2)). The English translation of the EGBGB was provided by Federal Ministry of Justice and Consumer Protection at: https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.pdf

The deviation from the conclusive list of German maritime liens was severely criticized because the acceptance of foreign maritime liens, especially for necessaries, by German courts caused German suppliers to suffer from a competitive disadvantage (Schmidt-Vollmer, B., 2003). When the German maritime law was reformed in 2012, the legislator did not solve the debate surrounding Article 45(2) because they neither excluded maritime lien for necessaries from recognition nor provided a lien for domestic bunker suppliers to erase the disadvantage. With respect to ranking, if the foreign lien is not found equivalent to any of the liens prescribed in German law, that lien shall rank after mortgages.

Under Greek law, Article 9 of the Code of Private Maritime Law (CPML), the law governing property right upon the vessel are governed by the *lex navis*. The court shall accept the foreign maritime liens if they are conferred by the law of the flag. However, their ranking is a procedural matter, therefore, subjected to the *lex fori*. In general, the reasoning behind the application of *lex navis* is that it is connected to the situs of the vessel (Athanassiou, L., 2018). To a certain extent, nevertheless, this approach is criticized because the flag of the ship does not always indicate the genuine link of the vessel to the jurisdiction. Parties can easily participate in flag shopping as forum shopping.

With respect to the characteristics, it identically appears in German and Greek law that a maritime lien is a privileged right attached to the ship in order to secure a conclusive statutory list of maritime claims. Maritime liens do not need registration to establish their validity. Maritime liens travel secretly with the ship maritime liens and exist without connection to the possession of the property. (Sotiropoulos, P., 1987; Göretzlehner, E., 2019).

2.2.2. Common law approach

a) Nature of maritime liens

English law is of the dominant view that maritime liens constitute a procedural matter decided by the *lex fori*. (Davies, M., 2018). The result of this approach is that the existence and ranking of foreign a foreign maritime lien shall be decided by the *lex*

fori. The English law only accepts those foreign maritime liens that are found equivalent in English law (Jackson, D., 2005) Actually, this school of thought was implied in the *Bold Bucceugh* case where a maritime lien was acknowledged to be enforced via *action in rem*. Later on, the introduction of the *Halcyon Isle* accumulatively endorsed this view to be dominant in English law (Jackson, D., 2005). In this case, a British-flagged ship which registered a mortgage under English law was repaired at a shipyard in New York. Pursuant to the United States law, the ship repairers were granted a maritime lien. Later on, the ship was arrested in Singapore and subjected to judicial sale. However, the fund collected from this proceeding was not sufficient enough for the creditors. The shipowners decided to take their case back to an English court to seek a new judgment on the precedence of their rival claims against the mortgagees. The majority of the Privy Council regarded the maritime liens attached to the underlying claim as a security privilege, which was considered a procedural matter[5]. However, the *ratio decidendi* in these two cases was severely criticized for not taking into account the substantive perspective of the maritime liens reflected in the dissenting opinion of Lord Salmon and Lord Scalman[6]. This is because the maritime lien has been historically considered as a substantive right and the fact that it is enforced via *action in rem* is not persuasive enough to perceive that the maritime lien is only concerned with the procedure (Jackson, D., 2005). Inherently, the application of *lex fori* to determine both the existence and ranking of maritime liens is a straightforward solution for both the court and maritime lien holder though it is not consistently linked with the essence of maritime liens (Triskogiannis, A., 2019). Accordingly, thanks to the *lex fori*, the court can easily discover among others if the foreign maritime liens are accepted in English law through which crystallizing the jurisdiction (Mandaraka-Sheppard, A., 2001). Hence, the lienors may take advantage of this approach because, at the time of ship arrest, they possibly recognize potential competing maritime lien claims in English law (Triskogiannis, A., 2019). However,

[5] *Bankers Trust International Ltd. v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221 (PC).
[6] *Bankers Trust International Ltd. v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 243 (PC).

this approach completely excludes the involvement of international law which is considered against the whole endeavor of unifying a global legal standard for shipping practice.

In contrary to English law, though in principle a common law country, the United States takes an opposite approach when regarding a maritime lien as a substantive matter (Tetley, W., 2002). The result of this substantive theory is that the Court will apply the *lex causae* to determine the existence of a maritime lien, whilst the ranking of a claim secured by a maritime lien follows the *lex fori* rule. Though following the *lex cause* for the recognition of foreign maritime liens, the US admiralty courts' practices have revealed a different point of view in terms of selectin applicable law that totally differs in two following scenarios: (i) the lex cause as applicable law confers a maritime lien and (ii) the lex cause does not confer a maritime lien. The first scenario could be found in the *Oil Shipping v Sonmez Senizcilk*[7] in which whether a claim by a Turkish necessaries supplier would take priority over an English mortgage. The *lex causae* pointed out that the supplier is protected by a maritime lien under Turkish law[8]. It can be seen from the first overview that the US court applied foreign law to render a privilege that is not accepted in its jurisdiction but provided by the *lex causae*. However, in the second scenario, the Court was of the view applying local law to determine the existence of a maritime lien that was reflected in the *Rainbow Line*[9]. In this case, a vessel flying a Liberian flag was arrested in New York and the viral claims included (i) salvage reward in Honduras; (ii) an infringement of a time charter; and (iii) mortgage-secured credit agreement in favor of a Liberian bank. At the moment the time charter was infringed, the ship was registered under the British flag. The issue arose whether the Court recognized a maritime lien attached to the claim under the New York Produce Exchange Time Charter Party. The Court figured out that the *lex causae,* in this case, was English that did not allow this claim to be secured

[7] *Oil Shipping (Bunkering) B.V. v Sonmez Denizcilik Ve Ticaret A.S.* 10 F.3d 1015 (3d Cir. 1993)
[8] Ibid.
[9] *Rainbow Line, Inc. v. M/V Tequila,* 341 F.Supp. 459 (S.D.N.Y. 1972)

by a maritime lien. However, the Court with the corporation of the Lauritzen test[10] decided to apply its local law (US law) for recognizing a foreign maritime lien instead of denying it as British law (*lex causae*). Accordingly, in light of the Lauritzen test, the Court evaluated the correlation of the disputed legal nexus with the law of the United States via examining several factors, such as (i) where the wrongful act took place; (ii) the ship's flag; (iii) the habitual address of the injured party and the shipowner; (iv) where the contract was signed; (v) where the shipowner's business operates; (vi) the inaccessibility of the foreign forum; and (vii) the *lex fori*. After that, the Court interestingly distinguished the law applicable to the charterparty from the maritime lien. The reason behind this adventurous decision was that a maritime lien also impacts the rights of the third party, therefore, the law of the contract does not compulsory govern the maritime lien but the performance of the contract. Therefore, after realizing that the English law did not confer a lien, the Court regarded US law as the law governing maritime lien. From the aforementioned argument, it seems that the US Court tends to expand the scope of application of maritime liens, especially in such case the lex cause does not grand a lien but the US law both likely becomes the applicable law and accept that lien.

b) Characteristics of maritime liens

In English law, a maritime lien is a privilege adhering to maritime property in order to secure an underlying claim as set forth by the operation of law (Mandaraka-Sheppard, A., 2007). The unique feature of maritime liens is reflected when comparing to mortgages. Accordingly, maritime liens are created by law and valid without registration. In contrast, a mortgage is established based on mutual agreement in a form prescribed by statute and takes its effects against a third party once it is registered (Mandaraka-Sheppard, A., 2007). Hence, maritime liens exist without connection to the possession of the property. This is a feature that distinguishes maritime liens from a possessory lien that is able to be triggered only when the two following conditions

[10] *Lauritzen v. Larsen* [1953] 345 U.S. 571

are met: (i) the actual possession of the creditor and (ii) the existence of the lienee's consent (Hutton, N., 2004). A possessory lien shall be lost if either the property is transferred to a third party or the lienholder loses possession of the property even temporarily. In contrast, a maritime lien arises automatically regardless of the possession of the property falling in the hand of the lienor. A maritime lien attaches to the vessel like "a leech to human skin" (Hill, C., 2014) and shall not lose even when the vessel is sold to a *bona fide* purchaser.

Similar to English law, maritime liens in US law stay secret and could be enforced without registration (Peck, S., 2013). Note further that, there are two kinds of maritime liens in US law, namely preferred liens and necessary liens. With respect to ranking, preferred maritime liens stand before mortgage while necessary liens stand behind both preferred maritime liens and mortgage. However, case law allows one exception for this provision in which the necessary repair or services rendered to the ship is provided to maintain the value of the ship. In that case, the necessary lien shall stand before the ship mortgage though it attaches to the ship after ship registration of the mortgage[11].

2.2.3. International unification

So far, the international community has introduced three instruments regarding maritime liens and mortgages which are the 1926 Brussel Conventions, the 1967 Brussel Convention, and the 1993 Geneva Convention. In the light of three conventions on maritime liens are referred to as security for preferred claims against a ship due to the services given to her or damage done by her which could be found in Article 2 of the 1926 Brussel Convention or Article 4 of the 1993 Geneva Convention. Maritime liens stand before ship mortgages that were prescribed in Article 3 of the 1926 Brussel Convention and Article 5 of the 1993 Geneva Convention.

2.2.4. Vietnamese law approach

[11] *N.Y. Dock Co. v. S.S. Poznan* [1927] AMC 727.

Regarding the nature of maritime liens, it seems that Vietnam takes a similar approach to US law in terms of distinguishing the law governing the disputed relationship from the maritime liens. Accordingly, the rules applied in order to determine applicable law to the disputed relationship are provided under Article 3 of the 2015 Maritime Code based on several factors that are found analogous to the *Lauritzen test* in US law. Regarding the recognition of maritime liens, Vietnam follows the *lex fori* principle. Pursuant to section 1 Article 13 of Ordinance No. 05/2008/UBTVQH12 on the procedure for the arrest of seagoing ships (Ordinance 05), one of the conditions for the arrest of a ship is the existence of at least one statutory maritime claim. In other words, court jurisdiction is determined based on the existence of maritime claims. If the maritime claim (including maritime-lien-secured claims) does not fall within the scope of Vietnamese law, the court will not accept the enforcement request.

In addition, notable characteristics of maritime liens in Vietnamese law are identical to those prescribed in common law, civil law, and international conventions. Article 40 of Vietnam Maritime Code 2015 provides that maritime liens are privileges that secure maritime claims arising in connection with the vessel and take priority over other forms of security, including ship mortgages. In addition, this privileged nature of maritime liens is not shaken by the sale of a ship to a third party because they also take priority over the interest of a bona fide purchaser without notice. Unlike ship mortgage establishing effectiveness through registration, maritime liens take effect without formality.

2.2.5. Conclusion

It is commonly accepted among national laws and conventional law about characteristics of maritime liens. A maritime lien is a privileged right attached to the ship secretly in order to secure certain maritime claims. Maritime liens do not need to register in order to establish their validity. However, with respect to the nature of maritime liens, there are two schools of thought among common law and civil law countries. Though in principle of common law system, England treats maritime liens as a procedural aspect while US law regards maritime liens as a substantive matter.

Germany and Greece also follow the substantive theory in recognition of foreign maritime liens. Referring to Vietnam, Vietnam is resembling English's approach in terms of determining the existence of foreign maritime liens by the application of the *lex fori*.

2.3. Claims to which maritime liens may attach

2.3.1. Civil law approach

Regarding German law, section 596(1) of HCG contains a conclusive list of claims that gives rise to maritime liens, namely: (i) wages due to the master and seafarers (ii) public charges such as vessel dues, port, canal, and other waterway dues; and pilotage dues; (iii) compensation for loss of life, personal injury, or loss of or physical damage to property; (iv) salvage reward, special compensation, and the costs of salvage, claims against the owner of the ship and the creditor of the freight for contribution in general average; claims for wreck removal; (v) claims of the social security authorities against the shipowner of the ship and the creditor of the freight for contribution in general average, wreck removal; (vi) claims to the social security authorities the shipowner, including unemployment insurance claims. It should be noted that this list is fixed which does not allow the creation of any maritime liens either by another statute or contract (Schmidt, K., 2014).

Regarding Greek law, Article 205 of the PMLC prescribes four groups of maritime claims as follows: legal costs incurred in the common interest of the creditors, dues, and charges on the ship, taxes in connection with navigation, and the costs of supervision and preservation from the time the ship enters the last port; claims arising out of the contracts of employment of the master and crew, and also charges of Seamen's Pension Fund consequent upon their engagement; expenses and remuneration due on account of assistance at sea, salvage and refloating; compensation owed to ships, passengers and cargo because of collision of ships. Last but not least, Greek law does not accept maritime liens for necessaries (Sotiropoulos, P., 1987).

2.3.2. Common law approach

It is English precedents and customs, not maritime law that has built up five claims to which maritime liens may attach (Jackson, 2005; Schmidt-Vollmer, 2003) which are: (i) claim regarding damage resulting from a collision[12]; (ii) bottomry and respondentia; (iii) salvage claim[13]; (iv) claim of seafarers' wages[14] and master's disbursement (Hill, C., 2014). With respect to maritime liens for bottomry, it has been no longer presented before Admiralty Court for many years. With respect to the wages of the ordinary crew and the master, these two claims were dealt with separately and their merger came only in 1995 when the wages of crew and master were codified as the only maritime liens in section 41 of the Merchant Shipping Act 1995. Last but not least, English law does not accept necessary liens[15].

With respect to US law, maritime liens are provided under Chapter 3, Title 46 of the United States Code. US maritime law separates two categories of maritime liens, namely preferred maritime liens and maritime liens for necessaries. The preferred maritime liens are provided under 46 U.S.C. § 31301 (5) in the form of a conclusive list like German or Greek law, including (i) damage arising out of the maritime port; (ii) wages of a stevedore when employed directly by the owner, the master, the vessel manager or an officer or agent appointed by the owner, charter, an owner *pro hac vice* or an agreed buyer in possession of the vessel; (iii) wages of the crew of the vessel; (iv) for general average; and (v) salvage, including contract salvage. It should be noted further that, the US Admiralty courts are entitled to "*recognize new forms of maritime liens as circumstances warrant*" (Tetley, W. 1998) which used to be established in the case of *Exxon Corp. v. Central Gulf Lines Inc* in which the Supreme Court declared that advances made by the ship's agent could be subject to a maritime lien[16]. With respect to maritime liens for necessaries, the history of this class of liens can be traced back to the Federal Maritime Lien Act 1910 that provided a general definition of maritime liens inherently allowing the Court to broaden the scope of maritime liens

[12] *Berliner Bank AG v Czarnikow Sugar Ltd* (The Rama) [1996] 2 Lloyd's Rep. 281.
[13] *The Two Friends* [1862] 167 E. R. 249.
[14] *Berliner Bank AG v Czarnikow Sugar Ltd* (The Rama) [1996] 2 Lloyd's Rep. 281.
[15] *Northcote v Owners of the Heinrich Bjorn* (The Heinrich Bjorn) [1885] 10 P. D. 44; *Bankers Trust International v Todd Shipyards Corp* (The Halcyon Isle) [1980] 3 All E. R. 197.
[16] *Exxon Corp. v. Central Gulf Lines, Inc*. [1991] 500 U.S. 603.

(Hayden, R., & Leland, K, 2005). The contractual maritime liens for necessaries under 46 U.S.C. § 31301 (4) with four manners, namely "*repairs, supplies, towage, and the use of a dry dock or marine railway*". According to 46 U.S.C. § 31342(a), the maritime liens for necessaries are "*provided to a vessel*". This requirement causes legal problems when it comes to container leasing, which is considered as necessary for vessels (Schmidt-Vollmer, 2003). This is because the delivered containers are seldomly assigned to just one specific container vessel which leads the courts to deny the fulfillment of the requirement of "provided to vessel".

2.3.3. International unification

To begin with, in light of the 1926 Brussel Convention, maritime liens are divided into two categories. The first category as set forth in Article 2 is composed of five classes of liens that must be accepted before the court of any contracting states, including (i) legal costs and expenses of preserving the vessel during the period in which she is in the custody of the court; (ii) wages of master and crew; (iii) salvage, general average; claims for collision and damage to harbours and canals, personal injury and damage to cargo; (iv) and supplies, repairs and master's disbursements (necessary liens). The lienors in this category shall enjoy two priorities over any ordinary creditors which are the right to chase the vessel and exercise the maritime lien against the vessel though it is passed into the hands of another purchaser and the preference right over mortgagees. In addition, Article 3 of the 1926 Brussel Convention provided that priority among such first category maritime liens is in line with the order as set forth in Article 2. This demonstrates that, for instance, maritime liens on salvage and bottomry stay at the highest position in five categories prescribed in Article 2. If the fund of the ship sale process is not sufficient enough to cover all claims, the lienors shall receive compensation with order enumerated in Article 2, and with respect to such lien on the same group, the lienors shall receive compensation at *pari passu* basic. The second category as set forth in Article 3 of the 1926 Brussel Convention shall include any other liens than those listed in the first category prescribed by national law of contracting states. However, those maritime liens shall stay behind the registered mortgage.

Thus, the 1967 Brussel Convention provided five similar groups of maritime liens compared to the 1926 Brussel Convention except for the removal of maritime liens for necessaries or master's disbursements. The ranking and principle to distribute maritime-lien-secured claims were inherited from the 1926 Brussel Convention. It can be seen that the 1967 Brussel Convention was formed based on a failed model while its ambition was to revise and update that failed model. That was probably perceived as the reason why the 1967 Brussel Convention never took into effect.

The 1993 Geneva Convention was introduced as a result of the endless endeavor of the international community in terms of unifying international law for the maritime sector, especially, ranking of claims (Pellergino, F. 2017). Accordingly, Article 4 of this Convention acknowledges five types of claims including (i) claims for wages; (ii) claims for loss of life or personal injury; (iii) claims for reward for the salvage of the vessel; (iv) claims for port, canal, and other waterway dues and pilotage dues; (v) claims based on tort arising out of physical loss or damage.

Compared to the 1926 Brussel Convention, such claims prescribed under Article 2 section 1 of this Convention were excluded from the 1993 Geneva Convention. The reason for this approach is that the later Convention aimed to facilitate the traditional main source of ship financing (ship mortgage) (Berlingieri, 2011).

Compared to the 1967 Brussel Convention, claims regarding wages have been expanded to include the cost of the repatriation and social insurance contribution. The repatriation cost was supplemented to tackle the problem of abandonment of seafarers when the shipowners or operators go bankrupt.

Unlike the 1926 and the 1967 Brussel Conventions, the 1993 Geneva Convention does not accept claims for necessaries contracted by the master as a maritime lien claim which is probably reasoned via two grounds. First, it is truly difficult to determine and secure the necessity of that transaction to the preservation and operation of the ship, especially when the ship is at a foreign port. Second, the shipowners nowadays can directly enter into the contract which they find essential to their ships thanks to the development of technology and the internet.

In addition, the claims on wreck, removal, and general average have been excluded because they are now obsolete. Obviously, these practices were common in ancient times when technology was less developed, therefore, ships might be easily sunken at sea due to heavy storms. In modern time, these accidents have become rare. However, the 1993 Geneva Convention leaves room for national laws to regulate this matter. In that case, this type of claim shall prevail over such maritime lien claims set out in Article 4.

Moreover, Article 6 of the 1993 Geneva Convention allows each contracting state to regulate other national maritime liens, however, they will be extinguished after six months unless the ship is arrested leading to a forced sale of that ship. Compared to the 1926 Brussel Convention, the period of national maritime liens is 6 months.

Last but not least, Article 5.2 of the 1993 Geneva Convention tends to protect salvage practice by acknowledging that claims on salvage shall take priority over all other maritime liens happening prior to the salvage operation.

2.3.4. Vietnamese law approach

In Vietnamese law, Article 41 of the Maritime Code 2015 provides the types of maritime claims that give rise to maritime liens, namely: (i) claims for wages, repatriation cost, social insurance contributions, and other amounts due to master, officers, and other members in a seagoing ship's complement; (ii) claims for indemnity for loss of life, personal injuries, other health damage directly related to seagoing ship's operation; (iii) claims for tonnage dues, maritime safety assurance dues and other port dues and charges; (iv) claims for salvage remuneration; and (v) claims based on tort arising out of property loss and damage directly caused by the operation of seagoing ships[17]. It can be seen that Article 41 is the resemblance of Article 4 of the 1993 Geneva Convention.

Article 42.1 of Vietnam Maritime Code 2015 states that priority among five categories of maritime liens is in line with the order set forth in Article 41 above. This means

[17] Official English translation provided by Vietnam News Agency.

that, for instance, seafarers-related claims stay at top of priority. Probably there are two reasons behind the fact that Vietnamese laws choose to favor seafarers. The first is to ensure social stability especially important in the context of two crowded population states in which a seafarer is considered as a major force. The second stems from the role in the preservation of the ship that seafarers have.

2.3.5. Conclusion

To sum up, it seems that each country shall have its rationale regulating claims on which maritime liens arise and the priority among them. However, there is one similar feature among these countries which is the maritime liens for wages, salvage with their range is nearly analogous. England, Germany, Greece, and Vietnam are on the same page of providing a conclusive list of claims that give rise to maritime liens. Extra maritime liens shall not be able to be supplemented by other statutes or agreed by contract. Hence, these four countries do not allow liens for necessaries. This approach can be found in the 1993 Geneva Convention as well. In contrast, US law takes a different approach when accepting maritime liens for necessaries.

2.4. Property to which maritime liens may attach

2.4.1. Civil law approach

With respect to German law, Section 598 of HGB considers maritime lien as non-possessory liens on the ship and its accessories. This provision actively demonstrates that ship and its accessories are the property to which a maritime lien may attach.

With respect to Greek law, Article 205 of PMLC provides that maritime liens attach to both ships and the outstanding gross freight of the voyage during which the lien arose. The Greek maritime liens secure not only the principal amount of the claim but also interest and legal cost paid by the claimant for the purpose of claim enforcement.

2.4.2. Common law approach

With respect to English law, Section 21.3 of the Supreme Court Act 1981 acknowledges “ship” and “other property” including cargo and freight as properties subjected to maritime liens by providing as follows:

"*In any case in which there is a maritime lien or other charges on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property*."

Regarding "ship", under Section 24(1) of the Supreme Court Act 1981, a ship "*includes any description of vessel used in navigation*". The verb "includes" coupled with the fact that Section 24(1) only defines a "ship" without defining a "vessel" imply that another definition of a ship shall be found in other concerned laws, for instance, the Merchant Shipping Act 1894 (Berlingier, F., 2015). However, it seems that the definition of a ship once again became a vicious circle when section 742 of the Merchant Shipping Act 1894 was structured in the manner of vessel referring to ship and vice versa (Sheppard, M., 2007). The notable characteristic of a ship in this definition is "used in navigation" which was narrowly interpreted as free and ordered movement from one place to another and transporting persons or property by water to an intended destination (Gauci, M. G., 2016).

Regarding US law, the understanding of maritime liens provided in *The Halcyon Isle* is commonly accepted in US law because Chapter 313, Title 46 of the United States Code fails to manifest a proper definition of maritime liens. Accordingly, a maritime lien is illustrated as " *right of property in a ship adhering to it whether it may go, vesting a right in the person who claims is thereby secured*, […]"[18]. From this definition, it can be seen that ship is the property that US maritime liens attach to.

2.4.3. International unification

Article 2 of the 1926 Brussel Convention provided that maritime liens shall attach to a vessel other than warship or State-owned ships, the freight for the voyage during which the claim giving rise to the lien arises, the accessories of the vessel and the freight accrued since the commencement of the voyage. This provision actively demonstrated that, in the context of the 1926 Brussel Convention, maritime lienors receive more protection than mortgagors leading to the fact that this Convention was

[18] *Bankers Trust International v Todd Shipyards Corp* (The Halcyon Isle) [1980] 3 All E. R. 197.

adopted by a few States and the international community had to prepare another revised treaty.

According to Article 13(1) of the 1993 Geneva Convention, maritime liens attach to the sea-going vessel. So far, this concept has been incorporated in many international treaties in the maritime domain such as the 1924 Limitation Convention, the 1957 Limitation Convention, or the 2001 Bunker Oil Convention.

2.4.4. Vietnamese law

Different from English law and Greek law, Vietnam Maritime Code 2015 only recognises sea-going ships as property subjected to maritime liens which are determined via Articles 4.1 and 13. Accordingly, the notion of a sea-going ship is determined via its type, design, specific purpose, and location of operation. With respect to type and design, a ship can be built to either transport above or under the water with or without the assistance of the engine. Hence, the ship must be specially designed for its operation at sea. Last but not the least, a sea-going ship is entirely commercial-related meaning that any military ships, official duty ships, fishing ships, inland watercraft, submarines, hydroplanes, floating storages, and offloading units, movable offshore units, and floating docks shall not be attached to Vietnamese maritime liens.

2.4.5. Conclusion

To sum up, there is not too much difference in the view of national law regarding property subject to maritime liens. Inherently, a ship is recognised by many countries as the property on which maritime liens attach. Besides ships, maritime liens can attach to other properties such as cargo and freight in English law or only freight in Greek law or ship's accessories in German law.

The determination of property on which maritime liens may enforce is a crucial matter because this task directly impacts the legitimate rights of related entities. In addition, the determination of property subjected to maritime liens shall obviously answer which and how property shall be enforced once maritime claims are not satisfied. Of note, each state has its own approach to regulate this matter depending on its corresponding

public policy. English law tended to provide a circular definition of ships subjected to maritime liens and mostly relies on precedents in order to identify the objects of maritime liens. Vietnam shares a similar approach of governing ship which is also found as the spirit of the 1993 Geneva Convention.

Chapter 3. Enforcement of maritime liens

In general, it is concluded that there are three aspects related to the enforcement of maritime claims, namely the interim remedy aspect, the jurisdictional aspect, and the security aspect (Jackson, D. C., 2005). In essence, certain types of maritime claims trigger maritime liens, therefore, these three aspects will obviously apply to a maritime lien as well. However, for the purpose of this Dissertation, this Chapter shall only focus on the jurisdiction aspect which refers to the enforcement of a maritime lien. In theory, a party seeking action in order to vindicate a maritime claim can resort to the following actions.

3.1. *Action in rem*

3.1.1. Procedural theory of *action in rem*

The procedural theory of an action in rem in English admiralty law could be traced back to the eighteenth century when an action in rem was regarded as a means of enforcement in order to either summon the defendant's presence or to seize the defendant's ship if the defendant's satisfaction was not available (Jackson, 2005). In light of case laws, Lord Jeune J. marked the procedural view in *the Dictator*[19] which later on was strongly supported by the courts. After that, the procedural theory was officially acknowledged in English law which was provided in section 21(3) of the SCA1981 as below:

"*In any case in which there is a maritime lien or other charges on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property*."

[19] The Dictator [1892] P. D. 304.

To a certain extent, the procedural view is not fully consistent with the figures of maritime liens especially from an enforcement perspective because this theory fails to answer why a maritime lien can be enforced against a bona fide purchaser without notice via *action in rem* (Göretzlehner, E., 2019). Despite this wonder, the English courts still uphold procedural theory as a guiding principle (Jackson, 2005).

Theoretically, an *action in rem* in English law composes of two phases, including the service of a claim form and the execution of the service via arrest of the ship identified in the in rem form. It is noted that, based on Part 61.3 of the English Civil Procedure Rule (PCR), the claimant shall submit his/her in rem claim in the statutory form within 12 months after the date of issue. Part 61.3 requires brief details of the claim to be provided in the section "Particulars of Claim" or this section may be attached or produced later. With respect to the execution of in rem form, Part 61.5 of the PCR states that the arrest of the vessel is conducted via the issuance of the warrant of arrest on the named ship by the Admiralty Marshal or his/her substitute. The form of ship arrest is set forth in Admiralty Form ADM 9 and valid in 12 months. In association with the application to arrest, a Declaration as set out in Admiralty Form AD5 must be attached to identify the ship to be arrested concerning if it is a sister ship, beneficial ownership, and the amount of security the claim.

From the procedural theory perspective, an *action in rem* has seven features that were characterised in the Indian Grace case (No.2) and fully explained by S. C. Derrington as follows (Derrington, S. C., 2007): First, transfer of ship shall be stopped once the claim form has been issued; Second, unless the law explicitly otherwise permits, an *action in rem* is only brought against the vessel in connection with which a claim arises; Third, when the shipowner appears before court to defend the ship against the *action in rem*, the action shall proceed as if *in personam*. This approach actively demonstrates that at the time of enforcement, if the value of the ship is not sufficient, other available property of the shipowner shall be enforced to fully pay the maritime lienholder; Fourth, *action in rem* proceeding reasonably balances rights and interest of involved parties by allowing mortgagees to participate in the proceeding; Fifth, an arrest order of a ship shall be issued either before or after the judgment as long as the

claimant pays financial security for that request; Sixth, the ultimate consequence of an *action in rem* is the forced sale of a ship, then the fund collected shall be paid to any outstanding maritime lienor in accordance with statutory priority; Seventh, *action in rem* judgment is independent from *action in personam* judgment. That feature is consistent with English law that distinguishes procedural matters (action against the res) from substantive matters (merit of the case solved by *action in personam*).

3.1.2. Personification theory of *action in rem*

The personification theory concerning the nature of an *action in rem* is a cornerstone of the United States admiralty practice (Corcione C., 2013). In the light of this theory, the *res* is treated as the defendant (Wiswall, F. L., 1970) even when the shipowner appears, he/she is still not considered as the defendant (Price, G., 1940). The *action in rem* in the light of this theory is taken "*against a ship irrespective of her present ownership and irrespective of any link with liability in personam on the part of the owner of the ship at the time the claim is brought*" (Meeson, N., 2003). This theory can be traced back to *The Little Charles*[20] case in which Chief Justice Marshall concluded that the vessel committed the offence.

Frank Wiswall is one of the American scholars who strongly supports the personification theory because of two reasons: First, *action in rem* is an enforcement regime of a maritime lien, therefore, the approach of this regime must logically and consistently be linked to the nature of maritime lien; Second, a maritime lien travels with and imposes upon the ship (the res) even if the shipowner does not bear responsibility at the time the maritime lien was established. It is the ship, not the shipowner, that becomes the final destination of the claim holders (Corcinone, C., 2013). Another interesting feature of this theory is that the ship is possibly enforced for various types of claims, not only maritime liens but also mortgages, claims for forfeiture, to claims to possession (Corcione, C., 2013).

[20] *United States v. The Little Charles*, 26 G. Cas. 982, 1 Brock. 380 (1819).

The personification theory is the biggest difference between US law and English law in terms of enforcement of maritime liens though the former did take root from the latter. At the present moment, only the USA as a major jurisdiction still adheres to the personification theory that directly opens the way for enforcement of a maritime lien against the ship (Davies, M., 2001). The personification theory is regarded as the justification why a maritime lien does not extinguish if the ship is sold out of court resulting in the fact that the lienholder is allowed to request the enforcement against the new purchaser of the ship (van de Biezenbos, K., 2015).

To a certain extent, this theory has its own rationale in terms of approaching and solving issues of maritime lien enforcement, especially based on the unique nature of maritime lien. However, the personification theory still has certain shortcomings in terms of comprehensive protection of maritime lienholders. Accordingly, the ship is taken to be an independent entity, she will liable by herself for any compensation claimed (O'Connor, J. G., 2019). In order to avoid that, the maritime lienor must both trigger an *action in rem* against the ship and an *action in personam* against the owner at the same time. However, this is not a comprehensive solution because for obtaining compensation, the claimant has to proceed with two separate proceedings that require various burdens from proof, legal fees, and so on. Therefore, these shortcomings probably answer why the United States of America has been virtually alone way regulating *action in rem* while other states have repudiated it (Thomas, J. Schoenbaum, 2004).

3.2. *Action in personam*

Different from *action in rem, action in personam* is the proceeding used to enforce a claim by compelling an individual or legal entity to act or cease from acting (Jackson, D. C., 2005). The object of an *action in personam* is a person either natural or legal in lieu of a res in *action in rem.*

In civil law countries where the *action in rem* is not officially acknowledged, the enforceability against the shipowner is an alternative resort. The typical procedure shall consequently take place via a lawsuit against the defendant together with a writ

of ship arrest in order to obtain pre-judgment security. The notable obstacle to the claimant is when both parties are not in the same jurisdiction not to mention the fact that the ship does not tend to be anchored most of the time but move between jurisdictions (Hill, C., 2014). The legislators from civil law countries fully understand this weakness, therefore, *action in personam* is not constructed alone but accompanied with the arrest of a ship as an interim measure. However, in case the defendant appears before the court, *action in personam* certainly outweighs action in rem in terms of scope of assets to be enforced. Accordingly, other assets besides the ship of the defendant shall be brought into the civil judgment enforcement phase in order to ensure all claims are satisfied.

3.3. *Quasi action in rem*

Quasi action in rem is a result of the US admiralty practice that combines certain characteristics of both *action in rem* and *action in personam*. *Quasi action in rem* takes place via an attachment of property based on the theory of personal liability of the owner of the property in order to force the defendant to appear before the court (Force, R., 2004). According to Federal Rules of Civil Procedure, *quasi action in rem* is commenced in accordance with Rule E as a combination of Arrest proceedings set out in Rule C and Attachment proceedings set out in Rule B.

Under Rule B, a claimant may seek attachment of any property of the defendant who is not found in the district, including vessels, tangible property, bank account, and debt owed by others regardless of such property is agreed to be secured for the claims or not. Under Rule C, a maritime lien against a vessel or other property in rem must be present in the Arrest Warrant in order to request for enforcement. Any property subject to a maritime lien may be subjected to arrest, which are vessels, freight, bunkers, and vessel equipment. This provision clearly points out the difference between Rules B and C that is the governed property which as long as belongs to the defendant pursuant to Rule B, nevertheless, must be exercised against by a maritime lien in accordance with Rule C.

In case *quasi action in rem* is applied, the procedure shall be the combination of both Rules B and C which means a claimant is allowed to serve an Arrest Warrant to arrest the property (i.e. a vessel) subjected to maritime lien together with a Writ Attachment in order to attach any property of the defendant. Technically, *quasi action in rem* is a powerful tool in terms of enforcing maritime liens, however, it impacts other concerned entities especially other creditors if the framework for *quasi action in rem* is not well prepared and monitored. This is probably the reason why so far only the United States selects this regime.

3.4. Arrest of ship

Ship arrest is a process conducted by the court having jurisdiction over maritime claims that can either be specified to Admiralty court in common law countries or ordinary civil court in civil law countries. In theory, the law governing the procedure of ship arrest is the *lex fori*, and only a ship within territorial waters of a state receiving an arrest warrant is possibly arrested (Thomas, R., 2019). Ship arrest is carried out for many purposes, including enforcing a civil judgment, executing a provisional regime, and enforcing a maritime claim. However, for the purpose of this section, ship arrest shall be analyzed in the role of an enforcement regime of maritime liens.

In Vietnamese law, ship arrest as an enforcement means of maritime liens is acknowledged in Article 40.3 of Vietnam Maritime Code 2015. With respect to procedure, ship arrest is provided in Chapter 2 of Ordinance 05/2008/UBTVQH12 on the procedure for the arrest of seagoing ships dated 27 August 2008 of the Standing Committee of the National Assembly of Vietnam, and effective as of 01 July 2009 (Ordinance 05). The procedure will initiate with an application for ship arrest. The competent court is usually the court with local jurisdiction of the port where the ship is anchoring. The application for ship arrest must be presented to the court in Vietnamese together with prima facie evidence as to the maritime claim. The success of the application heavily depends on the detail and accuracy of the supported evidence. Besides submitting the application supported with evidence for a request of ship arrest, the arrestor is obliged to provide a counter-security in the form of either a

bank guarantee or an amount of money, precious metal, gem, or negotiable instrument with the value determined by the court to be equal to the loss or damage possibly caused by the wrongful arrest. Once the arrestor fully implements all legal and financial obligations, the Court shall issue the decision of ship arrest then handing to the director of the port where the ship is berthing for execution. The order of ship arrest shall be lifted after 30 days. Last but not least, Article 12 of Ordinance 05 provides that the maritime lienor can choose to arrest the particular ship of which the claims arose and any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. This provision represents the accumulative right to arrest of ships set forth in the 1999 Arrest Convention.

3.5. International unification

It is said that the law of ship arrest is intertwined with the notions of maritime liens because regardless of any form of enforcement of maritime liens the State may choose, the proceedings will end up with ship arrest. In addition, the connection between maritime liens and ship arrest is proved via the fact that the 1952 Ship Arrest Convention and the 1999 Ship Arrest Convention have recognized the exercise of ship arrest in connection with maritime lien claims. With the scope limited to ship arrest, these two Arrest Conventions have been expected to create a bridge between common law and civil law in terms of admiralty law and procedure (Thomas, R., 2019). However, these two conventions have not successfully performed that goal which shall be discussed as below.

3.5.1. 1952 Arrest Convention

The first shortcoming of the 1952 Arrest Convention lies in its scope of application. Article 2 of the 1952 Arrest Convention states that the Convention applies to ships flying the flags of State Parties, except national law in terms of the claims for which a ship may be seized. This is regarded as a protective rule in civil law, as it restricts the right of arrest to particular sorts of claims, thereby protecting shipowners. There are two exceptions to this general rule respectively provided under Article 8.(3), (4) of the Convention. Article 8(3) allows State parties to exclude from its scope of application

any person who does not, at the moment of the arrest, have his or her habitual residence or primary place of business in a State party. This provision is actually entitling the State to make an exclusion that is analogous to a reservation of the Convention (Abou-Nigm, R. V., 2007). Article 8(4) provides that pure domestics cases whereby the arrest of a ship is requested in flag State by a person who has a habitual residence or primary business address in that State shall not be subject to the application of the Convention. The technique used in Article 8.(4) inadvertently encourages State parties to maintain a double standard that directly impacts the goal of building a global rule of ship arrest (Abou-Nigm, R. V., 2007).

The second drawback of the 1952 Arrest Convention is the divergence between its autonomous interpretation and national terminology. This Convention defines ship arrest as "*any detention or restriction on removal of a ship by order of a court to secure a maritime claim*." However, neither the term "ship arrest" in English law nor "*saise conservatoire*" in French law essentially coincides with the autonomous conventional concept. Prior to the 1952 Arrest Convention, "ship arrest" in English law was limited to claims which admiralty court could exercise its jurisdiction and to such ships on which the maritime claims arose (Abou-Nigm, R. V., 2007). In contrast, the notion of "ship arrest" was not explicitly provided in civil law, instead of that, the concept of "*saise conservatoire*" was introduced (Tettenborn, A., 2018). In essence, this tool is construed to ensure the assets of the defendant to be available for civil judgment enforcement in the future. In other words, the purpose of *saise conservatoire* is to obtain pre-trial security. This approach of civil law created a common thread that ships and/or property other than those to which the maritime claims attached shall be possibly seized.

In addition, the 1952 Arrest Convention inadvertently separated ship arrest from in rem jurisdiction and claims and treated it as an independent matter (Thomas, R., 2018). From a common law perspective, this layout was not common because ship arrest is typically blended with admiralty jurisdiction and action in rem.

With respect to the determination of ships subjected to maritime claims, the 1952 Arrest Convention has provided that the lienor can choose either the particular ship or her sister ship. This provision has left a big question of how to conceptualize the common ownership between the particular ship and another ship. Article 3.2 of the 1952 Arrest Convention refers to the notion of "all the shares" in the respective ship which normally occurs in the situation in which ships are owned by different companies in a group. As a response to this provision, it emerged a new trend of companies operating a single ship (South African Law Reform Commission, 1982) which directly caused the admiralty court to lose its ship arrest power (Messon, N. and Kimbell, J. A., 2018).

3.5.2. 1999 Arrest Convention

The 1999 Arrest Convention extended the power of ship arrest which is explicitly proved via the increasing of the claim list triggering ship arrest and ship subjected to arrest order. Technically, the provision set forth in Article 3 of the 1999 Arrest Convention is clearer than those in the 1952 Convention. The 1999 Arrest Convention remains the approach of the former Convention in terms of ships subjected to arrest order which are particular ship and another ship. The main difference between the two Conventions lies in the right to choose ship to be arrested. Accordingly, Article 3 of the 1952 Arrest Convention refers to the alternative right meaning that the arrestor is only able to arrest either a particular ship or another ship. In contrast, Article 5 of the 1999 Arrest Convention refers to the accumulative right that allows the arrestor to arrest both a particular ship and any other ship.

However, the 1999 Arrest Convention represents a significant restriction on ship arrest in comparison with the 1952 Convention (Piñeiro, C. L., 2015). Accordingly, Article 3 of the 1999 Arrest Convention allows the ship to be arrested when the debtor must concurrently be the shipowner or bareboat charterer at the time when the maritime claim arises and at the time the ship arrest is requested. This provision is construed as allowing a ship to be seized no matter what the debtor's identity is and how the nexus between the debtor and the ship when the arrest takes place.

Hence, the 1999 Arrest Convention is also criticized for failing to address the matter of common ownership that inherently existed in the former Convention. The Arrest 1999 truly left a huge dissatisfaction for letting national law deal with the drift of single fleet companies (Berlingieri, F., 2011).

3.6. Conclusion

In short, depending on each state, a maritime lien shall be enforced via *action in rem*, *action in personam* with the custody of ship, *quasi action in rem*, or arrest of the ship. The international community has made tremendous efforts in unifying a rule on ship arrest, however, in return, only receive minimal support.

Chapter 4. Recommendations for Vietnamese laws on maritime liens and their enforcement

Resolution 36 regarding the evolution of the national economy with a vision to 2030 and orientation to 2045 has emphasized the significance of a legal framework for the blossom of the national maritime economy. The revision of the law on maritime liens and their enforcement is especially vital when the Vietnam Maritime Code 2015 is in the process of first phase assessment after five years it came into force. This Chapter will respectively assess the need for harmonization of national law in line with international standards, the application of such provisions in reality through which render corresponding solutions.

4.1. The significance of harmonization of national law in line with international standard

Different from other countries where the formation and evolution of maritime liens is an autochthonous movement, Vietnam's law on maritime liens and ship arrest is mainly influenced by international law. In other words, Vietnamese Maritime Law is a result of a long process of studying international law and selectively applying it in line with the internal conditions. Particularly, during the drafting process of Vietnam Maritime Code 2015, the Government via Proposal No. 254 dated 28 May 2015 addressed the importance of conventional law, especially the 1993 Geneva Convention

and the 1999 Arrest Convention as a source of maritime law of Vietnam. Though Vietnam is not a member of any maritime liens or ship arrest conventions, Vietnam has incorporated relevant provisions into its national law. To a reasonable degree, the 1993 Geneva Convention and the 1999 Arrest Convention have played a crucial role in shaping and completing Vietnamese law on maritime liens and their enforcement.

There are three reasons inducing Vietnam to harmonize its national law in accordance with international standards. First, Vietnam has to build up a globally recognised maritime legal framework besides upgrading national fleets in order to catch up and maintain the steadily developing foreign trade. Second, with the ambition of increasing the maritime economy to account for 60-70% of national GDP as set forth in Resolution 36, an attractive environment for foreign investment has to be established comprehensively including foundation as well as superstructure. In order to obtain this goal, laws, and regulations concerning foreign investment request shipping-related laws and regulations to be updated and maintained. Lastly, the international community has been attempting to unify international law and practice for the shipping industry. Undoubtedly, shipping is a global-related matter, therefore, should be governed by international instruments rather than divergent national laws. In other words, every country including Vietnam should enforce the same rules.

4.2. Status quo of international laws on maritime liens and ship arrest

Despite the huge significance of international conventions in shaping national maritime law, Vietnam is still not on set to ratify these conventions on maritime liens and ship arrest. Accordingly, the last movement of Vietnam considering to become a contracting state of the 1999 Arrest Convention was in 2013 evidenced via the Ministry-level Scheme regarding the ratification of the 1999 Arrest Convention of the Ministry of Transport of Vietnam. There are several reasons behind the standby mode of Vietnam on international convention ratification.

To begin with, maritime lien conventions have failed to gain tremendous support from international communities especially “big players” in the maritime sector such as the United States or the United Kingdom. Particularly, these maritime liens conventions

limit the number of maritime liens, especially, exclude lien for necessaries that are strongly and traditionally protected by US law (Göretzlehner, E., 2019). Hence, these maritime lien conventions rely too much on civil law that may result in a striking difference in the enforcement of maritime liens from a common law perspective (Berlingieri, 1995).

Moreover, the issue concerning the nature of a maritime lien as a procedural or substantive right still rises many debates among different national legal systems despite the endeavours of the international community to get closer to the idea of uniform law. As mentioned in section 2.1, English law proposes that maritime liens attribute to a procedural status while civil law countries follow substantive rights theory to regulate this concept.

Regarding ship arrest, it is said that the conditions and procedures for ship arrest significantly vary state by state (Jessen, H. and Theocharidis, G., 2019). This is the reason that leads to the abolishment of the goal of unifying a set of rules of both Arrest Conventions has not been completely achieved (Tetley, W., 1999).

Referring to Vietnam, the significance of the 1999 Arrest Convention to the formation and completion of national law on this matter is undeniable. Vietnam has nationalized a certain number of provisions of this Convention. However, Vietnam still reserves a restrictive approach of not allowing the forced sale of a ship as a direct consequence of ship arrest for the enforcement of maritime liens. Particularly, with respect to the ship abandoned by the shipowner and subject to an arrest order for the enforcement of maritime liens, Article 16 of Decree 57 provides two following scenarios. First is where the lienor triggers another *action in personam* and the ship shall highly be subject to judicial sale as a part of judgment enforcement. Second is where the lienor does not bring a lawsuit or the court does not accept the petition of the lienor. In that case, the ship shall be sold via auctioned and the fund collected shall be transmitted into the national budget.

To sum up, the international community is standing still in the way of forming unified rules on maritime liens and ship arrest due to divergent views on law and public policy

perspectives. Vietnam is in front of pressure to perfect and harmonize its national law in compliance with international standards. The common choice of any state in that circumstance is to ratify the international convention, however, with respect to maritime liens and ship arrest, that is not the most appropriate solution.

4.3. Actual admiralty practice in Vietnam

It should be reminded that Vietnam chooses the *lex fori* for the purpose of foreign maritime lien recognition and court jurisdiction crystallization. Accordingly, such foreign liens which are not found equivalent to national liens shall not be recognised to enforce. In other words, the jurisdiction of the court to enforce, in the light of Vietnamese law, shall be established based on the existence of the maritime lien. However, in reality, this principle is not implemented correctly.

Particularly, the court proposes that the conditions to issue a ship arrest decision to enforce a maritime lien are the existence of a dispute belonging to the jurisdiction of the court of Vietnam. This illustrates that the court was wrong at the first step for unifying the jurisdiction arresting a ship and the jurisdiction hearing the merit of the case.

In addition, the court has unified ship arrest as a means of enforcing maritime lien with ship arrest as an interim measure applied together with *action in personam*. In the light of Ordinance 05, ship arrest has three main functions, including (i) to enforce a civil judgment, (ii) to ensure the resolution of a case as a provisional measure, and (iii) to enforce maritime liens. Each function shall be conducted based on different requirements and proceedings. However, in reality, when receiving an order of ship arrest the court subjectively perceives that ship arrest only has two traditional roles as either civil judgment enforcement or provisional measure.

4.4. Recommended solutions

From the aforementioned, the author proposes the following solution corresponding to the issues of recognition of foreign maritime liens and the enforcement regime of maritime liens.

4.4.1. Recognition of foreign maritime liens

As discussed in Chapter 3, neither the 1952 Arrest Convention nor the 1999 Arrest Convention provided any practical guidance on recognition and enforcement of foreign maritime liens leading to the failure of the international community to establish a set of rules on this matter.

Referring to Vietnam, the *lex fori* is selected for the determination of foreign maritime liens. This means that maritime liens are regarded as a procedural matter in Vietnamese law. However, this approach is contradicted to the accurate nature of maritime liens as a right which is also recognised in Article 41 of the Maritime Code 2015. In addition, the existing regulations under Articles 3 and 41 of the 2015 Maritime Code prove that Vietnam is taking an analogous approach in comparison with US law when distinguishing the law governing the disputed relationship (either contractual or non-contractual) from the law governing the maritime liens. The result of this approach is that Vietnam cannot confer the legal certainty for the creditors of foreign seagoing ships which directly goes against the motto of increasing domestics maritime economy and foreign investment as set forth under Resolution 36 of Vietnam.

Therefore, it is proposed that Vietnam should apply the *lex cause* in recognising foreign maritime liens. The is because the *lex causae* is consistently in line with the nature of the substantive right of maritime lien as provided under Article 41 of the 2015 Maritime Code of Vietnam and international private law in terms of attributing to the legal safety for the creditors. In addition, the existence of a maritime lien is not subject to its own legislation but the contract or the substantive law if the claim is non-contractual. With this feature, Vietnam shall be highly considered as a “heaven forum” with a certain legal system that is pointed as one of the cornerstones to attract foreign investment. Furthermore, the aim of harmonizing Vietnamese law with the international standard may not be comprehensively achieved if Vietnam continues the application of the *lex fori*. This is because this theory totally excludes foreign maritime liens. Hence, compared to the Greek law approach, it is well-established that the flag

is not always indicatively connected with the vessel to the jurisdiction because parties may engage in flag shopping as an alternative way of enjoying the convenience of forum shopping.

Last but not least, in order to avoid the debate regarding the ranking of foreign maritime lien that may create a competitive disadvantage to the domestic enterprise as mentioned in the case of Germany, Vietnam should carefully consider the priority and ranking among foreign maritime liens and national maritime liens.

4.4.2. Maritime liens enforcement regime

As discussed in Chapter 3, Vietnam as a civil law country can enforce maritime liens via either *action in personam* or ship arrest. The difficulty of *action in personam* lies in the fact that the shipowners intend not to be present before the court in order to hide their obligations. Therefore, the lienors frequently select arrest of a ship in order to enforce their maritime liens. However, in Vietnamese law, the main purpose of the arrest of a ship is to summon the shipowner instead of obtaining the money. Nevertheless, at this moment, Vietnamese law does not provide for the situation that the shipowner appears in front of the court after the order of ship arrest is issued which impliedly assumes that the lienors have to initiate another lawsuit against the shipowners to obtain the money. To a certain extent, this approach spontaneously causes procedural burden to the lienors especially when the change to jurisdiction happens. This is because pursuant to the 2015 Maritime Code of Vietnam, the jurisdiction of the court of arresti is determined based on the locality where the ship is berthing whilst the jurisdiction of court hearing an *action in personam* as set forth in Article 39 of the 2015 Civil Procedure Code is determined based on residential or business address of either the defendant (shipowners) or the claimant (the lienor). Theoretically, these courts are not the same under all circumstances. Obviously, the lienor has to take another "long legal journey" with the burden of proof, the legal fee as well as other obligations requested by the law in order to initiate another lawsuit. From a commercial perspective, enforcement of maritime liens either by an *action in personam* or arrest of a ship should be carried out promptly because the ship not put

into operation shall rapidly reduce its value which directly affects the compensation amount of the maritime lien holders.

Therefore, the author proposes to apply the regime of English law in a way that once the shipowner appears after the order of ship arrest is issued, the procedure shall automatically convert into *action in personam*. With this approach, the lienor does not have to take another lawsuit against the shipowner that certainly saves the period of considering and accepting the petition of *action in personam*. Hence, when the procedure is *action in personam*, it is much safer for the lienor in terms of collecting the compensation, especially when the current ship's value is lower than the number of claims because other properties of the shipowners shall be enforced besides the ship.

4.5. Conclusion

To sum up, upgrading national law on maritime liens in line with international standards is essential for Vietnam. In comparison with international law, Vietnam law is silent on the recognition of foreign maritime liens and the priority among them and national liens. In considering three typical variations of theory on recognition of maritime liens, it is proposed that Vietnam should choose the *lex cause* for the recognition of foreign maritime lien and the *lex fori* for the enforcement of such liens. Hence, in the light of Vietnamese law, it appears that ship arrest is to summon the presence of the shipowner before the court. Therefore, if the shipowner appears, the lienors must take an *action personam* against the shipowner in order to sell the ship via auction for claiming compensation. To a certain extent, this loophole of law creates a burden to the lienors because they have to trigger another lawsuit. In order to simplify the procedure, the author suggests applying the approach of English admiralty in a way that once the shipowner appears before the court, the procedure of ship arrest shall automatically convert to *action in personam*. Last but not least, the existing Vietnamese law not allowing the forced sale of a ship as a direct consequence of ship arrest is considered less safe to the lienor. Therefore, the law should be modified recognizing judicial sale of a ship if the period of ship arrest is gone but the shipowner is absent or abandons the ship.

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