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The shipyards' right of retention
- An analytical study of the extent it provides security for
the repair shipyard

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Summary

A shipyard's right of retention is somewhat of a phenomenon, enabling the shipyard to retain property and secure credit accordingly. The right of retention has a character that is similar to a so-called legal lien. The current regulation in the MC governing retention has its roots in the 1967 Convention on Maritime Liens and Mortgages. There are several kinds of retention rights. The one primarily discussed in this thesis is the right of retention presented in the Swedish Maritime Code (MC) chapter 3, section 39.

The MC states the principle of *lex fori* should apply to the rules governing maritime liens and the right of retention. Maritime liens constitute a distinctive and historic feature of modern maritime law. The right of a maritime lien constitutes a full lien and is referred to as a quiet title. It ranks ahead of all other claims in the order of priority governed by the Priorities Act. The MC acknowledges the principal maritime liens, but the 1967 Convention considers other maritime liens that also are recognised by Swedish law.¹ According to the Swedish MC chapter 3, all vessels as well as vessels under construction are enforced under a maritime lien from being launched². A maritime lien must be connected to a certain maritime claim³ and cannot be established if the claim is not of a maritime character. In general possessory liens have a lower priority than maritime liens and mortgages. There is however one exception to a ship construction or repairyard's possessory lien being of a lower priority than a maritime lien but higher in priority than mortgages and enforcement liens - this is the right of retention.⁴

Retention is a right of property in the ship and the main purpose of the right is to secure a claim. The person claiming the right has a beneficial position in the priority order. The right to bring forward a claim must be persistent and is a condition for the right of retention to exist. Apart from the prerequisite of connexity, there is a condition that the claim is related to the specific object for which the right is being invoked.⁵ In terms of a ship, this means that all the ship's components and appurtenances can be retained. A prerequisite however is that the claim concerns work done at the time when retention was being exercised - therefore the ship cannot be retained for recovery of earlier debts. A temporary release of the vessel usually extinguishes the right of retention. At a shipping company's bankruptcy, the shipyard can claim the right of retention if the subject vessel is accessible.

¹ cf. MC 3:51 section 2.

² MC 42 §

³ MC 38 §

⁴ MC 3:39

⁵ See Rodhe p.402

The Swedish Priorities Act places the right of retention after all regular maritime claims in the order of priority. On the other hand, the right of retention holds advantages in relation to other maritime security privileges and competes in particular with maritime liens in certain specific situations. From a credit security perspective, there are vast inequities in respect of ship mortgages and maritime liens without any uniform international law on the subject as guidance. The right of retention in a ship only provides security for credit to a certain extent. In contrast, the right of retention despite its rare invocation better serves the purpose as being an exclusive right in respect of a shipyard's security for repair costs.

Preface

I would like to take the opportunity to express my gratitude to a few people who have guided and influenced me while completing my master thesis at the Swedish Law Programme.

Firstly, thank you to my supervisor Professor Lars-Göran Malmberg for his invaluable support throughout the entire and rather lengthy writing process. To my former tutor, Professor Emeritus Hugo Tiberg at the University of Stockholm, thank you for highlighting the subject of retention and for introducing the world of maritime law as well as the wonders of the shipping industry in such a captivating way.

My sincere thanks to Advokat Torsten Jacobsson who I consider is the primal reason for my decision of choosing a career in maritime law. You planted a seed many years ago and I am to you truly grateful.

Finally, my dearest thanks are to my mother for always shining a light. *We need all the family we can get on this “ship of fools”.*

Abbreviations

1967 Convention	International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels May 27, 1967
Act on Craftsmen's Right to Sell uncollected Goods (1985:982)	
Act on Fishery Rights (1993:787), <i>Lagen om rätt till fiske</i>	
Act on Sea Treasures (1918:163), <i>Lagen om sjöfynd</i>	
BA	Bankruptcy Act (1987:672), <i>Konkurslagen</i>
CA	Contracts Act (1915:218), <i>Avtalslagen</i>
CC	Commercial Code (1736:01232), <i>Handelsbalken</i>
EC	Enforcement Code (1981:774), <i>Utsökningsbalken</i>
ICA	Insurance Contract Act (2005:954), <i>Försäkringsavtalslagen</i>
MC	Swedish Maritime Code (1994:1009), <i>Sjölagen</i>
PA	Priorities Act (1970:979), <i>Förmånsrättslagen</i>
SL	Sales Law (1990:931), <i>Köplagen</i>

1 Introduction

1.1 Presentation of the subject

As long as there has been a monetary economy there has also been a need of providing credit in the shipping business and in respect of ships.

Consequently there has also been a demand of offering security for the provided credit. As a complement to permanent or long-term credit that primarily applies to newbuildings', rights of security on the other hand exist for temporary or more special needs. These security rights are placed in a certain priority order governed by the Swedish Priorities Act. First ranked in the order of priority are the maritime liens.

Maritime liens have in civil law been clearly defined as "maritime privileges" which rank before all other encumbrances. There is an inclination to put a claimant in an advantageous position by giving a claim the status of a maritime lien. However there has been a tendency to reduce the number of claims that can give rise to maritime liens partly because of the plethora of maritime liens would threaten the viability of ordinary commercial credit i.e. the provision of ordinary loans secured by ship mortgages. A comparison between the current rules based on the Brussels Convention 1967 and the rules based on the 1926 Convention clarify these circumstances.

In this sense the maritime lien is a peculiar singularity from the ship repairer's possessory lien. The possessory lien purely constitutes a right of retaining of another person or parties' property until the debt connected to the retained property is paid. This phenomenon forms quite a unique right for the shipyard, a right however that is easily lost should the creditor lose possession of the retained property. The right of retention has a character that is similar to a so-called legal lien. The current regulation in the Swedish Maritime Code (MC) governing retention has its roots in the 1967 Convention on Maritime Liens and Mortgages.

1.2 Purpose

There are several kinds of retention rights. The one primarily discussed in this thesis is the right of retention presented in the MC chapter 3, section 39.

What defines the right of retention from a maritime lien? To what extent will retention provide security? The MC states the principle of *lex fori* should be applied to rules governing maritime liens and the right of retention. With this said, to what extent Swedish regulations on liens and retention in contrast apply internationally considering the fact that the 1967 Convention recognises foreign liens? These are questions that might arise

when taking a closer look at the world of securities in ships from the legal perspective.

To summarise the purpose of this thesis, the main aim is to study the extraordinary relationship between maritime liens and the right of retention with an emphasis on the latter, rather complex right. Their applicability are viewed and discussed from an international perspective - furthermore I shall discuss the extent maritime liens and the right of retention provide security for credit.

1.3 Method

This thesis is structured as a combined descriptive and analytical study of Swedish maritime law. The scope is limited to a discussion only including its application to the repair-yard and for that reason leaving out newbuildings. The Swedish Maritime Code largely corresponds to the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels 1967, whereas for natural reasons the Convention is referred to throughout the thesis. Additional sources are predominantly Scandinavian court decisions but also for example Swedish and American literature.

1.4 Disposition

In the next chapter a general introduction on credit security will follow. Chapter three contains a brief presentation of the historic background of maritime liens. Thereafter the 1967 and 1993 Convention on maritime liens and mortgages are discussed enabling the reader to understand their international applicability. Moving on I will comment on the role maritime liens play in the modern shipping industry of today. The remaining part of the chapter will define the concept of maritime lien, the complex system of priorities is explained and I will answer the question to what extent maritime liens serve as security for credit.

After a short presentation of the legislative background, a verbose summary of the right of retention is outlined in chapter four, explaining the way the right is founded and maintained – the various requirements for this being described. Furthermore I will discuss under what circumstances the right of retention is extinguished or lost - common relevant problems connected to these legal issues are illustrated by a number of Swedish court decisions. The effects of legal obligations are also discussed as well as the effects of indefeasible rights. I will refer to the Swedish MC throughout the thesis.

I will discuss the special relation between the right of retention and maritime liens, describing how the peculiar retention right takes hold of the maritime legal system and breaks its uniformity. The Swedish rules on the subject are compared with international regulations throughout the chapter. In addition, I will comment on other existing retention rights and their

special position. The purpose is to provide a full overview of this particular legal area.

Chapter five is about the applicability of maritime liens and the right of retention. I will discuss their international character and the extent to which they are acknowledged in foreign legislation. The relevance of the *lex fori* principle will also be reflected on.

Finally chapter six summarises with a few closing comments the core issues of the thesis. I will present some theory reflections on what the future might hold for this specific legal area.

1.5 Terminology

In order to prevent any terminological misunderstandings I find it necessary to elaborate on a few terms that are frequently used in the thesis. The meaning of the words in this specific context might be confusing taking in to consideration that the thesis describes Swedish legal events where an English translation of the Swedish legal terms is inaccurate when translated directly in English.

When speaking of maritime liens I refer to the Swedish *sjöpanträtt* or what similarly would be defined as an *ordinary lien* in the English system.

Mortgage is not to be interpreted as the equivalent to the English meaning of a mortgage. Instead it should here be read and interpreted in accordance with the Swedish definition of *inteckning* or *skeppshypotek*. This is particularly important because a so-called Swedish mortgage in comparison to an English have diverse meanings with different legal effects.

When I in the thesis refer to a shipowner, this means not only the actual owner of the ship but also the owning operator. Shipowner in this context will in other words comprise the Swedish meaning of the word *redare*.

When speaking of the *retainer*, this refers to the person claiming the right of retention. In this context it will most often be the repair-shipyard.

2 Maritime lien

2.1 Origins of maritime liens

Maritime liens constitute a distinctive and historic feature of modern maritime law. Their roots stretch far back to the maritime law of the ancient world⁶ and particularly to the medieval European *lex maritime*, which as part of that body of customary, transnational mercantile law (the *lex mercatoria*), governed the relations of merchants who travelled by the sea with their goods in the Middle Ages.⁷ Originally purely oral, this customary sea law was gradually committed to writing in the medieval sea codes, which were generally collections of judgements rendered by merchant judges, accompanied by some loosely-formulated principles thought to be useful in future cases of the same kind.

Of these early codifications, the most important was probably the *Rôles of Oléron*, dating from the late twelfth century and composed on the Island of Oléron (off Bordeaux), then the centre of the wine trade between Aquitaine and England. The influence of the *Rôles* gradually extended along the whole Atlantic coast of Europe, southwards to Spain, northwards to England and Scotland and eastwards to the ports of Flanders and the Hanseatic League, as far as the Baltic Coast.⁸ Two other important codifications were the *Consolato del Mare*,⁹ a collection of judgements rendered by consuls who dispensed maritime justice in the Western Mediterranean, and the *Laws of Visby*, which rely heavily on the *Rôles of Oléron* and were first printed in Copenhagen in 1505. These three major Rules eventually influenced the drafting of the *Ordonnance de la Marine* of 1681 under Louis XIV, and later commercial codes of France and other civilian jurisdictions. These early sea codes contained provisions relating to what today are known as maritime liens.¹⁰

2.2 Introduction and current status

Swedish ship mortgages (skeppshypotek) provide security for credit for investments made in the property of ship. Maritime liens will serve as security for the ship's maintenance but also for temporary needs that may arise depending on the nature of the situation. The right of retention, further

⁶ Ancient maritime law (including maritime liens) can be traced back to that primitive, oral body of customary sea law known as the "Rhodian Law" of c. 800 B.C., some elements of which are recorded in Justinian's Digest. See Tetley p.7-8.

⁷ On *lex mercatoria* of the Middle Ages and its intimate relationship to the medieval *lex maritime*, see Trakman p. 8.

⁸ Tetley p. 20

⁹ The major ports concerned were Barcelona, Valencia and Marseilles. The Consolato dates from the end of the fourteenth century, but the earliest surviving text is a Catalan version 1494. See Tetley p. 21

¹⁰ Tetley p. 24-25

discussed under chapter 4, will serve both of these purposes. It is necessary that domestic existing securities of credit also be recognised internationally in order to function satisfactory in the shipping- as well as the shipbuilding industry. Various attempts by the international community have been made over the years to implement several international conventions on maritime liens and mortgages however without quite the result as originally desired.

2.3 International Conventions on maritime liens and mortgages

2.3.1 1967 Brussels Convention

One of the first international conventions acknowledging the need of international recognition of credit-security was the Brussels Convention of 1926¹¹. It has been of poor consequence in the history of law. The International Convention for the Unification of Certain Rules relating to Maritime liens and Mortgages executed in Brussels 27 May 1967 replaced the earlier Convention, but few States have acceded the 1967 Convention and it has also been less successful. Denmark, Finland, Norway and Sweden denounced the 1926 Convention¹². All the previous mentioned countries except Finland have now ratified the 1967 Convention although it is however not yet in force. In addition Norway and Sweden have made a reservation stating that they intend to legislate.

Most important with respect to recognition of domestic credit securities internationally, such as maritime liens, is that the Convention clearly addresses this specific issue. The 1967 Convention contains rules on recognition of other states mortgages and enforcement liens, enabling forced sales taking place within their territory. A requirement for this however is that the mortgage or lien is registered in the state where the vessel is registered and that the register satisfies certain minimum requirements, *inter alia*¹³ requirements for public access to the registry and to copies of the registered documents.

2.3.2 1993 Convention

At the time of writing the International Convention on Maritime liens and Mortgages, Geneva 6th May 1993, (1993 Convention) does not form a part of Swedish law. Although there appears to be no current plan to incorporate the Convention into Swedish law, a brief introduction of the same will follow should it in time be incorporated into the law of Sweden. A main aim of the Convention is to prevent ships from being transferred from one register to another without adequate warning to secured parties.¹⁴ A second

¹¹ The International Convention for the Unification of Certain Rules relating to Maritime liens and Mortgages Maritime Liens and Mortgages, Brussels April 10, 1926

¹² Sweden denounced the 1926 Convention on the 1st March 1966.

¹³ *inter alia*, (latin: "among other things").

¹⁴ Cf. 1993 Convention Art. 11-12

purpose of the Convention is to rank and preserve the maritime liens that may be registered and enforced against a vessel.¹⁵ It also envisages the rights of retention under the law of a State Party.¹⁶

The 1993 Convention is the third attempt of standardising the diverse domestic regulations in this field - as the Convention of 1967 proved being a rather unsuccessful attempt. The Convention has reduced the number of maritime liens that take priority over registered mortgages, hypothecs and charges. The reason for this is likely due to its vocation of improving the conditions for ship financing and for boosting the development of merchant fleets. On the other note it is however unlikely that the Convention ever will come into force. A probable reason for this is that the Convention authors, despite other guiding principles, did not take in to consideration the special legislative rights of other states.¹⁷ To conclude the current situation – there is a general widespread opinion that the legal and shipping community is in great need of a new and proper convention on international maritime liens and mortgages. This is probably also very much the case with respect to an international convention on conflicts of laws.

2.4 The right of maritime lien

One could say that a maritime lien is a secured right in the “*res*”, i.e. in the property of another (ordinarily the ship, but sometimes the cargo, freight and/or bunkers as well) – this deriving from the *lex maritima* and the civil law. The secured right arises with the claim without registration or other formalities. The right of maritime lien is maintained in the property, surviving the property’s conventional sale (although not its judicial sale) and remains inchoate until it is enforced by an action in *rem*. Upon enforcing such an action, the right gives the lienor’s claim priority in ranking over the most other claims and notably mortgages.¹⁸

2.4.1 Legal lien

In order to understand the relationship between ship mortgages and the various liens that may arise in law and apply to a ship that is subject to a ship mortgage, it is firstly necessary to consider the nature of a lien as a legal concept. A “legal lien” is a right given to a creditor who is in actual or constructive possession of property belonging to a person indebted or otherwise owing an obligation to the creditor, to withhold possession of that property from and against its owner - pending performance of the obligation concerned. The obligation is usually but not necessarily an obligation to pay a debt.¹⁹ A legal lien has been defined as “the right of one man to retain and

¹⁵ See 1993 Convention Art. 4

¹⁶ See 1993 Convention Art. 7 paragraph 1

¹⁷ Tetley p. 214

¹⁸ Tetley p.59-60

¹⁹ Bowtle & McGuinness, p.115

keep something in his possession which belongs to another until certain demands of him, the holder, have been satisfied.²⁰

2.4.2 Liens distinguished from mortgages

Mortgages will only be mentioned and not be discussed particularly in the thesis. However, I find it necessary to describe its distinction from liens in a few sentences. As previously explained above and in the context of this chapter, a lien is a kind of security interest in property that arises by operation of law. A mortgage is a consensual form of security e.g. based on a mutual agreement. When dealing with a legal mortgage the property in the subject matter of the mortgage is transferred to the mortgagee, subject to a right of redemption in the mortgager.²¹ In contrast a lien does not transfer and does not in any other way affect the legal title in relation to the lien – it is merely a right to retain possession, although the mortgagee may be entitled to possession.²²

2.4.3 Definition in the Swedish MC

According to the Swedish MC chapter 3 on ship mortgages and liens, all vessels as well as vessels under construction can be enforced under a maritime lien from their being launched, stated in 42 §. A maritime lien is also merged with a certain maritime claim 38 §. The right is established *ex lege*²³ by the arising claim and is so forth independent and unconditioned by possession or registration. A claim is either entirely attached with a maritime lien and in such case no specific act is necessary in order to establish a lien - other than what is required for the claim to arise. A lien can not be established if the claim is not of a maritime character.

A maritime lien continues to attach to the vessel with unchanged priority if the vessel's registry or nationality changes. The maritime lien will also suffice if it is transferred to a new owner, regardless of the new owner's knowledge or awareness of the lien's existence.²⁴

The right of a maritime lien constitutes a full lien and could be referred to as a quiet title. A maritime lien as a legal lien as such will not be established through either contract or concession. This does not however prevent agreements stating that the right of a maritime lien shall not arise from being fully effective.²⁵

Nothing will prevent a prospective maritime lien-creditor from in advance refraining from his right of the maritime lien - in which the creditor else

²⁰ Bowtle & McGuinness p. 115

²¹ Bowtle & McGuinness p.119

²² Western Bank Ltd v. Schindler (1976) 2 All E.R. 393 (C.A)

²³ *ex lege*, (Latin: "from the law").

²⁴ MC 38§

²⁵ Rune, p.152

would be entitled to. Further when a maritime lien is established, the creditor can decide to consider his lien as non-effective.²⁶

2.4.4 Maritime liens in practise

First and foremost it is the owner functioning as a principal feature and operative master of the ship that establishes a maritime lien in the ship. Modern shipping of today will however recognise various methods of operation. The owner is entitled to delegate the entire operation of the ship or specific tasks to others. It is therefore possible to transfer a significant part of the responsibilities and management to certain areas-managers and line agents. Independent shippers and stevedores can also be engaged as well as restorers and other specialists on board. The owner can charter the ship under conditions where he is deprived from all operative functions even to the extent where the charterer enters into his place as the owning operator or *redare*²⁷. A maritime lien is independently established regardless of the various methods of operation. This is highlighted in the third paragraph of section 36, where it is stated that “a maritime lien attaches even if the debtor is a non-operating vessel owner or a charterer or other person who manages the vessel for her owner”. This will very much be the case and of particular importance when the vessel owner does not function as the operator.

Under these circumstances where possession of ship will give rise to a maritime claim, there is no requirement that the debtor need abandon his right of disposition of ship (in relation to the operator) in order for a maritime lien to be established. This constitutes the main characteristic feature of non-mandatory maritime claims.

The effects of a maritime lien come in to place when for example a creditor by support of an enforcement order is entitled to payment for his claim through distraint or forced sale in the vessel.²⁸ Another possibility is that the creditor lodges his claim when the vessel is sold by forced sale in bankruptcy or under the second paragraph of chapter 1 section 10, this kind of sale has been requested and the vessel has been taken out of operation. In such a situation, the creditor will also be refunded any incurred costs for court proceedings and costs for interest.²⁹

2.4.5 Priority of maritime claims

A maritime lien ranks in priority ahead of all other claims. This is stated in the Priorities Act (PA) first paragraph of section 4 and first paragraph of section 9. The included maritime liens are those that are prescribed in the MC. Furthermore the 1967 Convention also admits other maritime liens.

²⁶ Rune, p. 152

²⁷ See terminology under 1.4

²⁸ Rune, p.153

²⁹ Cf. to 2 § Priorities Act (1970:979) and Enforcement Code (1981:774) 10:12.

Swedish law recognises these conditions³⁰ and such maritime liens are ranked after the hypothecs.

The order of priority among maritime liens is generally set by the categories listed in the MC 3:36. The main rule is that maritime liens have mutual priority to payment in the order of which they are numbered in MC 3:37. Thus a wage claim secured by a maritime lien (no. 1) must be paid in full before any payment can be made on a claim for damage to property (no. 4). Several claims arising under the same category have equal status with the effect that the creditors will receive payment in proportion to their claim.³¹ Salvage claims under no. 5 however, have a special status in the sense that they defeat older maritime claims. Amongst salvage claims, a more recent claim will have priority. For example, a maritime lien for salvage in February defeats a maritime lien for wages from January, but is defeated by a maritime lien for wages from March and likewise a maritime lien for salvage in April. The special rules on salvage claims can be explained by the fact that a salvage operation “salves” the security for holders of older maritime liens. Without the salvage effort the security would have been lost.

Possessory liens generally have a lower priority than maritime liens and mortgages. There is however one exception in that a ship construction or repair yard’s possessory lien has a lower priority than a maritime lien, but a higher priority than mortgages and enforcement liens.³² See discussion in chapter 4 below regarding the right of retention.

2.4.6 Limitation period and expiration

A maritime lien is extinguished when a claim has been fulfilled. Apart from this natural termination procedure the MC recognises two other ways of termination namely forced sale MC 3:41 and prescription MC 3:40. The latter by way that maritime liens are subject to a one-year limitation period calculated from the date the claim arose, e.g. the day the damage occurred.³³ In addition the Penal Code also recognises a way of expiration, this being forfeiture.³⁴

2.5 Extent of security for credit – conclusion

Today maritime liens, in the form of a legal instrument, do not constitute actual security for credit. Only a few of the existing maritime liens are available as security for any form of credit. In addition a creditor is in a position to acquire or take over other persons claims at credit-granting events where these claims are secured by maritime liens.

³⁰ Cf. MC 3:51 section 2.

³¹ See Priorities Act 1 §

³² MC 3:39

³³ Cf. MC 3:36

³⁴ See Penal Code 36:4

The prospects and strengths of maritime liens from a priority point of view are excellent. They suffice unconditionally for the case a private sale³⁵ takes place and they will not be extinguished through an acquisition of good faith of the ship. Maritime liens are also to a wide extent accepted abroad. In practise they do generally not exhaust the value of the ship, however all maritime lien holders' are reimbursed their costs incurred.

In contrast, maritime liens on the other hand have short durability with a limitation period of only one year. The short period of prescription as well as the restricted conditions to enable the establishing maritime liens, often result in a limited number of related claims being served. The exclusiveness of maritime liens normally result in an insensitiveness about changes of the ships value; all maritime lien holders will either way be reimbursed. The credit security also improves by the fact that the holders of maritime liens can present reimbursement claims for general average and combined liability.

Finally, the extent to which a maritime lien can be utilised as security for credit is limited to costs consisting of public fees and the similar. These costs are primarily towage and port costs but also claims due to contracts made by the master in his capacity as such.³⁶ Regardless of contracts made by the master, which are subject to depreciation, the credit provided is of a modest and rather insignificant quantity.

The factual significance of maritime liens serving the purpose of credit for the ship is no longer the liens' own value as credit security, but merely the threat they constitute towards other rights of security - primarily the security of mortgages.

³⁵ Swedish: *frivillig försäljning*

³⁶ See also regarding contracts made by the master under 4.6.3.2.

3 Right of retention (possessory lien)

3.1 The unique position of the right of retention among other securities in the ship

The general dividing of the shipowners assets, mainly a sea section inaccessible for other claim holders and a land section inaccessible for the sea creditors, leaves the question of whether legal rights in ship should be treated separately from general legal rights in property. Maritime liens as well as mortgages have their own order of priority that is higher than the general order of priority. In addition, pledges³⁷ are excluded to maintain the uniformity of the sectorial legal framework. The right of retention is somewhat of an alien element in this particular order of priority. It is neither of maritime origin nor character, despite this the right of retention can be exercised on vessels and is not excluded unlike the case with pledges. Retention constitutes a right of property in the ship and places the claimant in a beneficial position in the order of priority. This chapter will discuss the extent that the phenomenon of retention takes hold of the maritime legal system and breaks its uniformity.

The following discussions will primarily focus on the shipyards right of retention, only taking in to account repaired ships. It is first and foremost in relation to ship repair situations where the right of retention is most often encountered and exercised.

3.2 Legislative background and historical aspects

3.2.1 European perspective

Since early days Teutonic law prescribes a principal right that he who does work on another person's property is by law entitled to retain the property until payment for the service rendered or work laid down has been submitted. Two examples to illustrate this principle is German Middle Age law where shepherds had a legal lien in their herd and craftsmen having a legal lien in a repaired or improved property.³⁸ The principal of a craftsmans right to retain repaired or improved property is first mentioned in Visby Civil Act where it is clearly referred to as being of Teutonic origin.³⁹ The

³⁷ Swedish: *handpanträtt*

³⁸ Tiberg p.228

³⁹ Tiberg p. 228

same tenet is also found at a later stage in the Manufacture Statutes of 1722, 1739 and 1770.⁴⁰

The Romans knew not of any similar or corresponding rule. Instead the Roman right of retention is based on the principal that a person who suffers costs for maintenance or improvement of the another person's property can claim the principle of *exceptio doli*⁴¹, i.e. that it is unjust for the owner to retrieve the property without reimbursing the repairer, against the owners demand of vindication.

3.2.2 Swedish perspective

It is most likely the Roman principal of retention that was implemented in the Swedish Code of 1734. The chapters discussing loans and money placed on deposit state that a borrower as well as a holder of money placed on deposit have a right to retain the borrowed or deposited property as security for maintenance costs according to the Commercial Code 11:3 and 12:8. A craftsman on the other hand was only awarded the right of priority PA 17:3 but no right of retention of the property. There is however no actual refusal of the craftsman's right of retention. The particular regulations in the manufacture statutes from the 18th century instead rendered the rules of the Commercial Code redundant.⁴² The Swedish legislative authority's 19th century Civil Code proposal included a particular rule concerning a craftsman's right of retention in chapter 12 section 12, but because the proposal never became legislative, the principle is not supported by law. Despite this, it is an undisputed fact that there exists a right to retain the property under such circumstances. This elementary condition is presumed in a considerable amount of legislation, for example the Act (1985:982) on Craftsmens' Right to Sell Goods not collected.

It is this kind of right of retention for craftsmen that is intended and that applies to shipyards. It is a general opinion that the term "craftsmen" should be interpreted in a wide sense and that the concept is also to include industrial enterprises. It is furthermore not only restricted to work done on minor objects of insignificant value, but extends to also encompass vessels.⁴³

3.3 The shipyards recovery rights

3.3.1 Requirement of connexity

The main purpose of the right of retention is to secure a claim. The persistence of the right to put forward a claim is a condition for the right of retention to exist. Apart from the general prerequisite of connexity there is a

⁴⁰ Hammarskjöld, Om fraktaftet, Upps. 1886, p. 134

⁴¹ Regarding *exceptio doli*, see Sohm, Institutionen, Berlin 1949, p.707

⁴² See Undén I, p. 224

⁴³ See Tiberg p. 229

condition that the claim must apply to the specific object where the right of retention is being exercised.⁴⁴ In terms of a ship this means that all the ships components as well as appurtenances can be retained. The claim must however concern the restoration or work done at the time of retention and therefore the ship cannot be retained for recovery of earlier debts.⁴⁵

3.3.2 Requirement of agreement to claim recovery?

Generally a claim is based on an agreement. The agreement in turn is most often entered into by the ship's master or the owner. When a ship's master makes the agreement the shipyard will not only have the right of retention but will also have a maritime lien in the vessel where the conditions are such as stated in MC 3:7.

Similar to what is the case regarding maritime liens, the right of retention is established without the repair agreement needing to be made or entered into with the shipowner. Agreements made by the master in his legal capacity as such are equally legally binding for the owner and ship according to MC 6:8. A condition however is that the authorisation is not limited by certain other regulations that the shipyard was in knowledge of or should have had knowledge of at the time.⁴⁶ Such special regulations might for example aim on situations where the owner of a time chartered ship wishes to avoid the risk of ship being burdened by maritime liens or other security rights. On the other hand and with respect to what is previously said, the shipyard has no duty of investigation under Swedish law – with the purpose of certifying any potential non-apparent circumstances.⁴⁷

In a situation where a ship is under a bare-boat charter or in a matter where a person other than the owner uses the ship without authorisation, the rule laid down in MC 6:8 will not apply. In such a situation the master will not be acting on behalf of the owner and will not have the legal authority of representing the owner. The master under a bare-boat charter will however be able to attach maritime liens to the ship in accordance with the exclusive right in 3:16, although the rule cannot be interpreted as widely as to include security protection through the right of retention.⁴⁸ Despite the beforehand said the right of retention might also arise in the following situations:

The right of retention may firstly be of an extinctive character based on a principle that the shipyard acquires the ship in good faith. Swedish court decisions discuss this matter in several cases regarding car repairs. A typical example is where a hire purchaser⁴⁹ or other unauthorised person that hands

⁴⁴ See Rodhe p.402

⁴⁵ Cf. regarding car repair NJA 1924 p. 581

⁴⁶ The master's authorization is a power of attorney according to Contracts Act 10§2 and bad faith 11§1.

⁴⁷ CA 11§1

⁴⁸ See Tiberg p. 232

⁴⁹ NJA 1948 p.10

over the car for repairs⁵⁰ is considered being able to burden the property with a right of retention against the owner or hire purchase seller under the condition that the repairer was in good faith. Secondly, the right of retention may arise where a shipyard is not in good faith, an example being a situation where the performed repairs later proved being necessary. One opinion is that 11:3 and 12:8 in the Commercial Code should be widely interpreted so that not only borrowers and holders of money placed on deposit, but also parties such as bareboat charterers, have a right to retain the property until they are reimbursed any costs or expenses reasonably incurred.⁵¹ The shipyard should therefore be able to exercise the right of retention directly against the owner under the same conditions as bareboat charterers would - even so if the shipyard had the knowledge of a non-lien clause under the charter party for example.⁵²

Furthermore, it seems as an unnecessary need for the shipyard's claim to be supported by an agreement. Discussions on the subject suggest that the right of retention might arise in situations where property has been found or salvaged.⁵³ Claims may also arise according to the principal of *negotiorum-gestio* where again the right of retention may be admitted for performed repairs.⁵⁴ Should for example an abandoned sinking ship be taken to a shipyard and repaired so that it would float, the shipyard would undisputedly have a right of retention in respect of the performed repairs and even so should the conditions for salvage not exist at the time.⁵⁵

3.3.3 Cessation of the claim

The shipyard's right of retention is extinguished naturally when the claim is conceded or fulfilled due to payment. If a shipowner proves that the shipyard offered credit when exercising the latter, the shipyard is considered to have refrained from their right of retention. A concession can be implied but must however be understood as a clear and an undoubted will from the shipyard's side to abandon their right. In a decision from the Norwegian Supreme Court, ND 1922 p. 553, a shipyard's decision to insist on a claim secured by a maritime lien in the vessel was not found to constitute a concession of the right of retention and the priority associated with it.

It is questionable whether a final payment of the claim will have equal effect to the providing of security, such as a bank guarantee, for the shipyards claim. One particular rule laid down in the Sales Law 64 § 2 states that the buyer has a right of retention in respect to maintenance costs in situations where he wishes to cancel the purchase. Notable is that similar rules are also found in other legislation areas. In addition to accepting a final payment, there is nothing in Swedish legislation that suggests that a shipyard has an

⁵⁰ NJA 1942 p. 575

⁵¹ Undén, I p. 245

⁵² Undén, I p 249 Cf. 6§ (1985:982) on Craftsmen's Right to Sell Goods not Collected

⁵³ Rodhe p. 395

⁵⁴ Tiberg p. 233

⁵⁵ Tiberg p. 233

obligation accept security that further also concedes their right of retention.⁵⁶ Such a principle was dismissed in ND 1949 p. 290 where the court held that a shipyard requires a certain amount of cash flow and cannot live off guarantees. The Norwegian decision has been criticised for the reason that a shipyard's claim might be expensive and that a shipowner should not be compelled to pay such large amounts that may be distressed at a shipyard's potential bankruptcy.⁵⁷

The shipyard is however to a certain degree prevented from bringing forward costly claims. In situations where the shipyard with support of an improper claim detains a ship, there is an obvious risk of paying damages for the incorrect detention. Nowadays the procedure is usually avoided by adding a rule to the repair contract stating that the shipowner is responsible for the shipyard's final bill but where the shipyard on the other hand has an obligation to provide security for the disputed amount.⁵⁸

3.4 The requirement of possession

3.4.1 Establishing the circumstance of possession

In order to establish the right of retention there is yet another condition that further must be fulfilled in order to exercise the right. The shipyard must not only have retained the vessel – they must also have had the subject vessel in their possession. The actual implication of this criteria is however rather vague - the theories on chattels and personal property often become inapplicable when applied to vessels. Vessels can often not be brought in for repairs in the obvious way as is the situation with a car or other minor utility goods. The repairer will often in such situations be under an obligation to follow certain safety measures.⁵⁹ Analogies from other legislation on indefeasible rights provide somewhat limited guidance. Unlike the situation with a contract of a lien, there is firstly the difference that the transfer of possession under a repair agreement will not serve any other purpose than being a natural consequence of the object being repaired. For this reason the repairer will not take the same precautions towards the shipowner as he would towards the lien holder.

At the same time, the right of retention primarily appears to be a mean of exercising pressure on the debtor and the providing of security at a bankruptcy whilst on the other hand the requirement of publicity is less prominent. The right of retention can hardly be motivated by the desire to avoid the shipowner appearing as the unrestricted owner with a right to sell the vessel without the need to consider the reservation of retention. The decisive criteria of establishing possession of the vessel should be the actual

⁵⁶ Rodhe p. 409

⁵⁷ See Braekhus in Norwegian Shipping News 1951 p.67

⁵⁸ See Tiberg p. 235

⁵⁹ See Tiberg p. 236

possibility to exercise control of the vessel and only to a limited extent a shipowner's appearance as the unrestricted owner.

3.4.2 Court decisions show the way?

It has proven hard to establish to what extent general considerations from court decisions have affected the procedure of establishing the requirements for transition of possession. There have only been a few Swedish court decisions on the subject leaving little material and basic data for drawing any conclusions on the issue. There are above all two cases, both of considerably old dating, that well may suggest that the emphasis should lay on whether the retained object is located in an area disposed by the person exercising retention of the object with a right of disposal of the same.⁶⁰

In *NJA 1922 p. 360* the shipyard management did not wish to bring the subject vessel to a shipyard in Luleå due to heavy rapids in the Lule-river. The vessel was instead pulled on to a temporary dry docking platform (a slip), situated and arranged upon property that did not belong to the shipyard. The court held that the shipyard did not have possession of the vessel, which exempted them from invoking retention. The court also held that no lien was valid or could apply as a result.

In *NJA 1933 p. 632* an association operating in the log driving industry claimed the right of retention and referred to the regulations in the Act on log driving, sections 33 and 64 §§.⁶¹ The court held that the claimed retention right did not exist as such, as the logs had been kept in a storehouse rented by the log driving association.

It is however hardly reasonable that a vessel must be brought to and retained in an area legally disposed by the shipyard in order for the right of retention to be established. A smaller repair yard or a one performing particular repairs may not have the ability to keep the vessel at their premises whereas it would seem unfair that the right of retention was not to apply under such circumstances. It may be of greater significance to instead question to what extent the shipyard takes preventive measures to secure control of the vessel. This opinion is also shared by Tiberg.⁶²

A temporary release of the vessel will usually extinguish the right of retention. This was illustrated in a Norwegian court decision, *ND 1991.176 NSC Walker*, where a two-day loan of the vessel for the purpose of fetching two cranes resulted in the right of retention being lost. In a situation however where the shipowner at a later point re-stores possession of the vessel, the right of retention can be re-established if the yard acts with reasonable speed. In a classic case, the *ND 1953.750 Tercia*, a complaint regarding possession being re-established some three-and-a half months after voyage departure, was found being made to late by the court. A more

⁶⁰ Cf. concerning lien (panträtt) Undén p. 194

⁶¹ Lagen (1919:426) om flottning i allmän flottled

⁶² Cf. Tiberg p. 237

recent case on the subject is the “*Acacia*” *AC Lower Norrland T 215/96*. While the *Acacia* was in the shipyard for repairs, P chartered the vessel from the owner M. Due to solvency problems M offered to sell the vessel to P. P’s lawyer S guaranteed that in exchange of the vessel’s immediate release, payment of the repairs would be effected upon completion of the sale or else her timely return to the yard. Upon failure of the vessel sale, the *Acacia* returned to the yard on M’s orders, however due to lack of space, she was then moored off the yard area. M went bankrupt and the yard sued S on the guarantee claiming that there was an implied term the right of retention was re-established upon the vessel’s return. The court held there was no revival of the yard’s right of retention nor any implied term of such revival, the yard’s failure to ascertain the state of the law being at its own risk. Being obiter and not supported by stated reasons, the AC’s statements on the right of retention cannot be taken to conclude the law in this respect.⁶³

3.4.3 Unlawful retrieval

It is clear that the possible breach of good faith made by the shipowner in the *Tercia* case had no significance for the court. The court’s opinion was that the possession was already lost at the time when the promise was made. There are however situations where possession is considered to be established but where the shipowner unlawfully disturbs the possession. If it in such a case is held that the right of retention is to endure, the shipyard will not only have the possibility to regain possession by restitution,⁶⁴ but they will also be able to retrieve the vessel in other ways. One example for instance is in connection with a new repairment which re-establishes the right of retention. In a shipping company’s bankruptcy the shipyard can claim the right of retention if the subject vessel is accessible. In addition the shipowner might suffer criminal liability,⁶⁵ while the shipyard on the other hand might have the possibility to invoke rules of defence in an attempt to safeguard their right.⁶⁶ The right of retention is in such situations however precarious and will be extinguished by an acquisition in good faith or by a restraint of the vessel from the shipyard area.⁶⁷

It is an old conception – stemming from the Roman principle that the right of retention only constitutes an “*exceptio*” and not an “*actio*”⁶⁸ and that the right of retention in such case is extinguished. Today the opinion is - in analogy with the circumstances of liens - that such unlawful procedures do not deprive the claimant his right of retention.⁶⁹

Still it is vague whether a retention claimant is able to claim an ongoing right of retention based solely on a shipowner’s promise to return the vessel

⁶³ Developments in the Swedish Maritime Law 1997–1998, Tiberg

⁶⁴ Cf. RB 15:4

⁶⁵ Criminal Act 8:8

⁶⁶ Criminal Act 24:1

⁶⁷ See Tiberg p. 238

⁶⁸ Cf. Undén I p. 249

⁶⁹ Undén I p. 250

after for instance a test-voyage. The actual possession is most likely maintained the entire time, either so that the vessel is kept at the shipyard's premises or that the shipyard through supervision of guards or technical measures, prevent the vessel borrower from repossessing the vessel. If for example a test-voyage is carried out with yard employees onboard, the right of retention will only endure if the employees had actual control of the vessel at the time, or where the employees were deprived possession of the vessel by violence or compulsion.⁷⁰

In situations where possession is fully maintained the right of retention may however sometimes be extinguished. One example is a compulsive removal of the ship away from the shipyard. This might be the situation where the vessel is required by the government for domestic state needs⁷¹ or in cases where the vessel itself is considered a war trophy.⁷² If in the former situation, compensation is paid for the confiscated property, Swedish law considers the compensation as surrogate for the property at which the shipyard has a priority right to the amount.⁷³

3.4.4 Shipwreck of the vessel

The party claiming retention is in a similar way entitled to compensation for damages due to shipwreck caused by a third party, this whilst the ship still is in the shipyard's possession. In such a situation, the shipyard, as a holder of indefeasible rights, will have an independent right to part of the compensation amount – a part large enough to cover their claim. According to the Insurance Contract Act (ICA) 54 § the shipyard also has a right to the allotted insurance sum at a shipwreck. One however has to consider whether the work done on the vessel results in an increase of ship value that consequently will not be covered by the insurance. If the work laid down is a conversion or an entire modernisation and the value insured is only equivalent to the value of the vessel prior to the repairs, it is unlikely that the presumption rule in 54 § will support an apportionment of the insufficient compensation amongst the claimants. These circumstances do not constitute underinsurance, but the increase amount will in its total entity be regarded as an uninsured amount.

The suggested interpretation might however entail some difficulties. Suppose a vessel in a damaged condition is worth one million Swedish crowns and in a repaired condition three million. If the sum insured is one million, it is obvious the excessive costs for repairs are uninsured. If the sum insured is three million or more, again it is clear that the entire shipbuilding and repairs are insured. Hence, both the shipyard and the shipowner will be entitled to compensation in accordance with ICA 54 §. Nevertheless, what will the case be if the sum insured is two million Swedish crowns? In this

⁷⁰ Cf. Rt. 1933.367 and Tiberg p.238

⁷¹ ND 1958.181

⁷² ND 1954.199 NHR

⁷³ NJA 1942 p. 575

case, it is then to establish whether the matter concerns an over-insured wreck or an underinsured vessel.⁷⁴

3.5 Effects of legal obligations

3.5.1 The duty of care

In connection to the repair agreement there is a fundamental duty for the shipyard to exercise care for the vessel. One may question whether the situation changes and the duty of care ceases if the inquisitor refuses to pay a bill for repair work, leaving the vessel to the shipyard's discretion. According to Swedish regulations the duty as such will probably not cease.⁷⁵ The situation might however be different according to Norwegian law where a court decision from 1960 considered a shipyard being able to apply the entire duty of care on the shipowner inasmuch as the shipowner can provide for this.⁷⁶

The shipping company has an obligation to reimburse the shipyard for all necessary costs the shipyard brings upon them while exercising the right of retention. In this situation the right of retention most likely comprises the claim connected to the costs that initially give rise to the shipping company's obligation. It is probably without significance if the situation is interpreted in accordance with the Norwegian 1960's court decision where the duty of care as a result of *mora accipiendi*, passed to the shipowner.

A conclusion is therefore that compensation will be paid in situations where the shipyard at a shipowner's negligence has intervened and thereby suffered costs. The "necessity" should furthermore be viewed through a generous projection and not only assessed according to negotiorum-gestio principles.⁷⁷

3.5.2 The right of sale

In the Act of 1985 on Craftsmen's Right to Sell uncollected Goods the craftsman is under certain circumstances given the authority to sell the goods with a right to keep the compensation for his debt from the purchase price (9 §). The motives of supporting the regulations indicate that the right of sale includes industrial businesses and large budget demanding objects.⁷⁸ Due to these circumstances there is no implied reason why vessels should not be included under the Act. Another issue is that the right of sale rarely is invoked as a protection right. The right is usually less successful when used as a defence - this could for example be at a vessels distraint due to the

⁷⁴ See Tiberg p. 240

⁷⁵ See Almén p. 738-39

⁷⁶ ND 1960 p.461

⁷⁷ Tiberg p. 241

⁷⁸ See NJA 1950 p. 308.

shipping company's bankruptcy.⁷⁹ Because of the latter condition, the issue on whether the classification of craftsmen's rights concerning vessels constitute a right of retention or a legal lien, is primarily a question of terminology.⁸⁰ According to the industry custom the right is characterised as the one of retention.⁸¹

Retained objects can however not be sold straight off. A sale cannot take place until three months have passed from the time the work was completed and payment for the claim has fallen due. In addition a notification of the sale, most often held at a public auction, must have reached the inquisitor (3 §). Another requirement for invoking the right of sale is that the claim is subject to legal procedure (5 §).

Vessel sales can also take place in accordance with the Sales Act 76 § where a craftsman immediately may sell the goods if the duty of exercising due care and maintenance is made impossible save without significant expenditure or great inconvenience. Thus, the inquisitor has not considered being accessed or warned of the sale after an adequate notification. Neither are there principles excluding the right of sale due to the purchase price debt being subject to dispute.

3.6 The effects of indefeasible rights

It was earlier held that an unauthorised possessor or operator of a vessel could claim the right of retention in a vessel repair situation - which would also have an effect on the owner.⁸² This section will primarily discuss the order of priority between the shipyard and other parties that might deduce their right from the owner.

3.6.1 Acquisition of good faith

The shipyard is unlikely to be deprived of their retention right for the case vessel is subsequently acquired in good faith. The main rule is that the principle of property transfer renders such an acquisition impossible as long as the vessel remains at the shipyard's premises.⁸³ Even if the shipyard temporarily lends the vessel, an aspiring buyer is likely to be in good faith regarding the vessel's relief of retention – which also is the requirement for an extinctive acquisition. An acquisition in good faith might however come in to place where the owner unlawfully retrieves and transfers the vessel to a party in good faith, whilst being unaware of the unlawful possession. As

⁷⁹ See further discussion under "Distraint and bankruptcy".

⁸⁰ See Undén I p.228

⁸¹ Tiberg p. 242

⁸² See above 4.3.2, p.12-13

⁸³ Concerning the Principle of Property Transfer (traditionskravet) see, Traditionsprincipen – en studie av dess tillämplighet i kommersiella förhållanden, Henrik Svensson. For a buyer of chattels to be protected against the seller's creditors, it is necessary that the acquired property be transferred to the buyer. Until such a transfer has taken place the property will be unprotected and can be utilised at distress or bankruptcy to pay off the seller's debts.

previously discussed, the right of retention remains effective against the owner irrespective of the retrieval - but ceases after being transferred to a buyer in good faith.

If an extinctive acquisition takes place under circumstances such as the above, the shipyard's right of retention will as a result be extinguished. In any other situation, a vessel buyer in good faith will not be protected.

3.6.2 Priority order of holders' of mortgages and maritime liens

Conflicts with mortgagees and holders of maritime liens might arise where a lien arose *before* the right of retention but also *after* it arose. An example could for instance be a mortgage in the vessel or a salvage award claim where the vessel is salvaged and held in due care by the shipyard. In both situations the right of retention will according to Swedish law⁸⁴ rank after liens in priority. This also follows from the 1967 Convention on maritime liens and mortgages.⁸⁵

Further on maritime liens in relation to the shipyard - it is of great importance to the yard that the liens have their origin and are based on claims that either have a fixed amount or that are limited. Whereas in case of a vessel sale, the shipyard has a possibility of obtaining the surplus. A study published by *Handelshögskolan*, Göteborg University in Gothenburg shows what considerable amounts of surplus exceeding the limitation sum is received in different countries.⁸⁶

3.6.3 Distraint and bankruptcy

In a situation where a shipowner suffers a distraint or bankruptcy the shipyard may be able to claim indefeasible rights in their position as a retainer. The legal effects are identical in a situation where the vessel, according to the main rule in the Bankruptcy Act, is sold in the order governed by the Enforcement Code. Hence, the rules in the Enforcement Code governing the retainer's indefeasible rights become applicable.⁸⁷

3.6.3.1 Distraint

The regulations in the Enforcement Code affect the shipyard by way that they cannot oppose to the distraint. The shipyard is also prevented from claiming a full fee which also is a requirement for procedure to at all take place.⁸⁸ In relation to vessels this rule applies to liens as well as to the right of retention and the shipyard's position is not strengthened had the right

⁸⁴ Priorities Act 4 §, 9 §, MC 3:39

⁸⁵ International Convention for the Unification of certain rules relating to maritime liens and mortgages, Art. 5.

⁸⁶ Tiberg p. 245

⁸⁷ See Welamson p.404

⁸⁸ Tiberg p.245

otherwise been classified as a legal lien.⁸⁹ With this said, the shipyard must therefore at all times accept the fact that the ship may at any time be put at distress - subsequently imposing them to safeguard their right of priority in accordance with the PA 4 §.

As previously discussed mortgages and maritime liens are extinguished at a forced sale. As a result of this, holders of maritime liens and mortgages obtain compensation according to the order of priority before a shipyard's right of retention can come in to play. The shipyard must however expect that there often is no surplus once the holders of mortgages and maritime liens have been awarded their share of the compensation. This issue has come to light from various studies on maritime liens stipulating a burden on the mortgage security.⁹⁰ An agreement can however be made assuring the continuance of the mortgage security in the vessel against a corresponding reduction of the price.⁹¹ The shipyard has no influence as to whether such a takeover can take place. Most often the takeover will take place without any effect on the shipyard's position.

3.6.3.2 Bankruptcy

Similar to the situation concerning liens⁹² - the retainer does not need to exclusively guard his claim in a situation of bankruptcy. The forced sale that follows a bankruptcy, however takes place in accordance with the Enforcement Code-order. This results in an obligation for the retainer to guard his claim at the forced sale⁹³. Only the bankruptcy administration has the possibility to arrange an alternative execution of the forced sale in accordance with the Enforcement Code in order to take place.⁹⁴

In addition, a retainer also has the possibility of ensuring that a forced sale is executed in accordance with the Enforcement Code.⁹⁵ If the retainer agrees to an alternative sale this event can take place and be executed in accordance with the above. At this sale⁹⁶ any maritime liens attached to the vessel will persist. In practise however it has been proven that maritime liens most often will be paid for and that the maritime lien holders will be entitled to maintain the purchase price with an unchanged right of priority.⁹⁷ Mortgages are neither directly affected by a sale such as the above – unless the sale is concluded before unsecured mortgage-holders extinguish their mortgage-securities.⁹⁸ As a result a retainer will receive his share from the sale in accordance with the order of priority after the mortgage holders. An alternative sale often results in a more advantageous outcome than a forced

⁸⁹ EC 71 §

⁹⁰ Tiberg p.245

⁹¹ *Utsökningslagen* 95§

⁹² Cf. to the Bankruptcy Act 9:5 § where the retainer in case of bankruptcy generally has a position equal to liens holders.

⁹³ EC 10:5 paragraph 1

⁹⁴ BA 8:7 paragraph 1

⁹⁵ BA 8:10 paragraph 1 (KL73:1), Tiberg p. 246

⁹⁶ MC 3:11

⁹⁷ Cf. NJA 1956 p. 562

⁹⁸ BA 8:7 paragraph 1

sale – in practise the retainer rarely has a reason to insist on the latter mode of sale that often leaves him without any compensation.

The right of retention also provides a less advantageous position of priority in respect of security rights in a vessel. As a conclusion the shipyard is considerably less rewarded at the ships distraint or at the shipping company's bankruptcy than what is the case involving the retainer's claim for ordinary unfixed property. The shipyard might however have an exclusive maritime lien - most often a contract made by the master which strengthens the shipyard's position considerably.

3.7 Cessation of the right of retention

It has earlier been held that the right of retention is extinguished if the claim ceases or is withdrawn, if possession ceases, if retention of the vessel is rendered impossible due to immunity, or furthermore upon declared shipwreck. To this one might also add that a sale of the vessel could render a cessation of the right of retention.

Cessation of the right of retention rendered by a sale of the vessel comes in to force where the shipyard sells the vessel according to the Act (1985:982) on Craftsmen's Right to Sell uncollected Goods or the Sales Code 75§. In a situation where an claim is uncovered under the purchase price the shipyard's sale of the vessel will extinguish the right of retention. Therefore regardless of whether the vessel remains at the shipyard, due to completion repairs for instance, the right of retention derived from the improvement work made at the time of the sale will have ceased. At a sale executed in accordance with the priority order of the Enforcement Code the right of retention is regarded as extinguished according to 10:11 paragraph 4.

3.8 Other forms of retention rights

This chapter has primarily discussed the shipyards right of retention in relation to repair costs. Vessels may however also be burdened with other rights of retention. These are for example certain canal charges,⁹⁹ a salvor's right of retention according to MC 16:11, the right of retention of sea treasures,¹⁰⁰ also the fishing right holder's right to retain a poacher's vessel and equipment.¹⁰¹ As far as these various forms of right of retention are concerned, the first example very much concerns credit¹⁰² while this is hardly the case in respect of the salvors' right of retention¹⁰³ and

⁹⁹ Cf. Förordning om trafiken på Göta kanal (SFS 1983:744)

¹⁰⁰ Lagen om sjöfynd (1918:163)

¹⁰¹ Lagen om rätt till fiske (1993:787) 47§

¹⁰² Here the right of retention however mostly concerns penalty charges. See Tiberg p.79

¹⁰³ A salvage reward is often paid out due to a contract, but will hardly ever fall due to payment until the operation amounts to the no-cure-no-pay principle. If any exceeding credit were to be secured by the right of retention, the vessel would have to be retained during that time. See Tiberg p.248

furthermore never the case in respect of retention for sea treasures and poachers' fishing vessels. A canal's retention right is made particularly topical when invoked to secure additional charges that were previously attached to a maritime lien (the lien now being expired). The requirement of connexity is mitigated under circumstances such as above - with this said there is however hardly reason to refuse the retainer the security that comes with an indefeasible right in a situation as the above.

The various rights of retention discussed above are similar to a craftsman's (the shipyard's craftsman) right of retention placed second in priority order to mortgages. This follows from the Priorities Act 9 §. The particular order of priority is also supported by the 1967 Convention on maritime liens and mortgages where the two categories, being other forms of retention rights and mortgages, are not equally ranked. The repair yards right of retention has a higher priority and is placed before mortgages, while other rights of retention, as previously discussed, always rank after mortgages. Swedish legislation governing the order of priority are therefore in conformity with other existing regulation.

4 The applicability of legal liens and the right of retention

The Swedish rules governing maritime liens on vessels are followed and practised in accordance with the principle of *lex fori*.¹⁰⁴ This principle is always applied when the rules self-govern a right that can be brought before Swedish authorities. Furthermore the principle also applies irrespective of the nationality related to the property or the state where the property is registered. The rules on retention in MC 3:39 are practised according to the same principle when brought before Swedish authorities. MC 3:51 proclaims this specific order and corresponds to article 12.1 in the 1967 Convention on maritime liens and mortgages.

4.1 Acknowledgement of foreign liens

The previously mentioned article 12.1 also recognises other (foreign) legal liens. This possible due to applying the law of the registration state to the subject legal lien. However this right is in such a case ranked after maritime liens as well as the right of retention according to Swedish rules (MC 36 and 39 §§). Furthermore the right is not more beneficial than the corresponding Swedish legal lien. As a result, the extent this country recognises foreign legal liens is restricted to foreign registered vessels. For this reason a foreign legal lien is recognised in the former case and even so if the property is owned by Swedish interests, partly or fully.¹⁰⁵

4.2 Relevance of terminology

When foreign legal liens are compared with Swedish legal liens, it is unnecessary to contemplate whether the right appears under any other concept than *lien*. If the lien is materially equivalent it is not considered a foreign right but is assessed and managed according to Swedish law.

According to the rules in the MC a legal lien is only recognised if it is attached to property that qualifies under the concept of *vessel*, MC 3:51. The terminology and definition is governed by Swedish legislation when concerning Swedish vessels and vessels being under construction in the country, MC 3:52. When concerning foreign registered property the law of the registration state is applied. This choice of law is also suggested in the preparatory works to the Enforcement Code amendments,¹⁰⁶ which in turn affiliate to the MC amendments of 1973. Once it is established that the property is comprised by the definition of *vessel*, all of the Swedish rules in MC 3:51 will apply as stated therein.

¹⁰⁴ Rune p.170

¹⁰⁵ Rune p.170

¹⁰⁶ (See UL prop p. 45 f and 85 f.)

A somewhat intricate matter might arise where the foreign property is registered according to the rules on vessels as discussed above, but where the rules of the registration state do not recognise the property as a vessel under the said definition. This is often the situation where the registration state wishes to enable the application of maritime registration rules to seaborne equipment.¹⁰⁷ Strictly applying the Swedish rules on the establishing process of a legal lien attaching to property will result in this right not being recognised in Sweden – all in accordance with the maritime rules. The registered right in the property will instead most likely be recognised.¹⁰⁸ One way of evading this legal issue is by analogically applying the rules on Swedish legal liens intended for vessels to the property.

4.3 Alternatives to *lex fori*

Far from every country involved with shipping or seaborne trade apply *lex fori* on legal liens attached to property, i.e. vessels. Abroad “the law of the flag” is often applied to the establishment and continuance of such a lien, possibly by application of the registration states rules and occasionally by the claimed right being recognised and being subject to the principle of *lex fori*. The principle governing the origin or cause of the claim, most often *lex causae*¹⁰⁹ is another common choice of law as well as the principle of *lex rei sitae*.¹¹⁰ Having said this it is not unlikely that the Swedish rules are applied in a foreign jurisdiction despite the fact that the other state in question may favour the principle of *lex fori*.

¹⁰⁷ According to 33 § in the Norwegian MC, certain seaborne equipment can be added to the ship register irrespective of whether they amount to “skip” or not.

¹⁰⁸ See Rune p. 171

¹⁰⁹ *lex causae*, (Latin: “cause law”) is the law or laws chosen by the forum court from among the relevant legal systems to arrive at its judgement of an international or interjurisdictional case.

¹¹⁰ *Lex rei sitae* is a legal doctrine of property law. (Latin: “the law where the property is situated”). The law governing the transfer of the title to property is dependent upon, and varies with, the *lex rei sitae*.

5 Closing comments

It is an undisputed fact that the right of retention constitutes a unique right in respect to providing (credit) security in ships. In practise it is primarily the repair-shipyard that benefits from the phenomenon right. Despite the exclusive position the right brings it is rarely made topical or invoked as a security privilege. The primal reason for this is most likely due to the passive nature of the right. The main purpose of retention is firstly to enable the shipyard retaining the vessel in a safe manner. Secondly it is a tool for extending pressure on the debtor, forcing the debtors' performance in order to successfully compete with the debtor's creditors for payment out of the property.

The right of retention holds some advantages in relation to other maritime security privileges and competes especially with maritime liens in certain situations. Maritime liens for instance only attach to ships when launched, while retention can be performed as soon as there is property to retain. Furthermore, the right of retention can be exercised regardless of whether a ship is under construction or not. Therefore no difference is made between completed ships and ships being under construction.

The Swedish Priorities Act places the right of retention after all regular maritime claims in the order of priority. After this follows a rather special right concerning advance payment to the shipyard for shipbuilding's, 4 § paragraph 4. This particular right could possibly compete with the right of retention but in that case only in exceptional cases. It can therefore be held that the special and particularly beneficial maritime order of priority is sustained on behalf of the right of retention. The priority order does not appear to suffer from infringement of the retention right. Furthermore, the possibility of enforcing the latest 1993 Convention on maritime liens and mortgages will not necessarily bring any change to the current situation. Today there is a great need of new convention - there are gross inequities in respect of ship mortgages and maritime liens without any uniform international law on the subject. Similarly, there are bound to be other commercial and maritime inequities without international uniformity in conflicts of law. Legal improvements on the specific area would be a step towards international standardisation - enabling a healthy market flow.

Permanent or long-term credit is particularly relevant when assessing the needs in the shipping industry today - as well as the corporate climate surrounding the industry. The main aim and concern of permanent financing is however newbuildings and constructions of ships. Maritime liens are at the most regarded as means of short-term credit. As to their status as security and whether they at all serve the purpose as security for credit is a completely different thesis. In contrast, the right of retention better serves this purpose as an exclusive security right - especially the shipyards right of retention as security for repair costs.

Supplement A

International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages

(Brussels, 27 May 1967)

THE CONTRACTING PARTIES,

HAVING RECOGNIZED the desirability of determining by agreement certain rules relating to maritime liens and mortgages,

HAVE RESOLVED to conclude a convention for this purpose, and thereto agreed as follows:

Article 1

Mortgages and "hypothèques" on sea-going vessels shall be enforceable in Contracting States provided that:

- (a) such mortgages and "hypothèques" have been effected and registered in accordance with the law of the State where the vessel is registered;
- (b) the register and any instruments required to be deposited with the registrar in accordance with the law of the State where the vessel is registered are open to public inspection, and that extracts of the register and copies of such instruments are obtainable from the registrar, and
- (c) either the register or any instruments referred to in paragraph (b) above specifies the name and address of the person in whose favour the mortgage or "hypothèque" has been effected or that it has been issued to bearer, the amount secured and the date and other particulars which, according to the law of the State of registration, determine the rank as respects other registered mortgages and "hypothèques".

Article 2

The ranking of registered mortgages and "hypothèques" as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.

Article 3

1. Subject to the provisions of Article 11, no Contracting State shall permit the deregistration of a vessel without the written consent of all holders of registered mortgages and "hypothèques".
2. A vessel which is or has been registered in a Contracting State shall not be eligible for registration in another Contracting State, unless:
 - (a) a certificate has been issued by the former State to the effect that the vessel has been deregistered, or
 - (b) a certificate has been issued by the former State to the effect that the vessel will be deregistered on the day when such new registration is effected.

Article 4

1. The following claims shall be secured by maritime liens on the vessel:

(i) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;
(ii) port, canal and other waterway dues and pilotage dues;
(iii) claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
(iv) claims against the owner, based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the vessel;
(v) claims for salvage, wreck removal and contribution in general average. The word "owner" mentioned in this paragraph shall be deemed to include the demise or other charterer, manager or operator of the vessel.

2. No maritime lien shall attach to the vessel securing claims as set out in paragraph 1 (iii) and (iv) of this Article which arise out of or result from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive product or waste.

Article 5

1. The maritime liens set out in Article 4 shall take priority over registered mortgages and "hypothèques", and no other claim shall take priority over such maritime liens or over mortgages and "hypothèques" which comply with the requirements of Article 1, except as provided in Article 6(2).
2. The maritime liens set out in Article 4 shall rank in the order listed, provided however that maritime liens securing claims for salvage, wreck removal and contribution in general average shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.
3. The maritime liens set out in each of sub-paragraphs (i), (ii), (iii) and (iv) of paragraph (1) of Article 4 shall rank *pari passu* as between themselves.
4. The maritime liens set out in sub-paragraph (v) of paragraph (1) of Article 4 shall rank in the inverse order of the time when the claims secured thereby accrued. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was performed; claims for salvage shall be deemed to have accrued on the date on which the salvage operation was terminated.

Article 6

1. Each Contracting State may grant liens or rights of retention to secure claims other than those referred to in Article 4. Such liens shall rank after all maritime liens set out in Article 4 and after all registered mortgages and "hypothèques" which comply with the provisions of Article 1; and such rights of retention shall not prejudice the enforcement of maritime liens set out in Article 4 or registered mortgages or "hypothèques" which comply with the provisions of Article 1, nor the delivery of the vessel to the purchaser in connection with such enforcement.
2. In the event that a lien or right of retention is granted in respect of a vessel in possession of:
(a) a shipbuilder, to secure claims for the building of the vessel, or
(b) a ship repairer, to secure claims for repair of the vessel effected during such possession,

such lien or right of retention shall be postponed to all maritime liens set out in Article 4, but may be preferred to registered mortgages or "hypothèques". Such lien or right of retention may be exercisable against the vessel notwithstanding any registered mortgage or "hypothèque" on the vessel, but shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or ship repairer, as the case may be.

Article 7

1. The maritime liens set out in Article 4 arise whether the claims secured by such liens are against the owner or against the demise or other charterer, manager or operator of the vessel.
2. Subject to the provisions of Article 11, the maritime liens securing the claims set out in Article 4 follow the vessel notwithstanding any change of ownership or of registration.

Article 8

1. The maritime liens set out in Article 4 shall be extinguished after a period of one year from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested, such arrest leading to a forced sale.
2. The one year period referred to in the preceding paragraph shall not be subject to suspension or interruption, provided, however, that time shall not run during the period that the lienor is legally prevented from arresting the vessel.

Article 9

The assignment of or subrogation to a claim secured by a maritime lien set out in Article 4 entails the simultaneous assignment of or subrogation to such maritime lien.

Article 10

Prior to the forced sale of a vessel in a Contracting State, the competent authority of such State shall give, or cause to be given at least thirty days written notice of the time and place of such sale to:

- (a) all holders of registered mortgages and "hypothèques" which have not been issued to bearer;
- (b) such holders of registered mortgages and "hypothèques" issued to bearer and to such holders of maritime liens set out in Article 4 whose claims have been notified to the said authority;
- (c) the registrar of the register in which the vessel is registered.

Article 11

1. In the event of the forced sale of the vessel in a Contracting State all mortgages and "hypothèques", except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature shall cease to attach to the vessel, provided however that:
 - (a) at the time of the sale, the vessel is in the jurisdiction of such Contracting State, and
 - (b) the sale has been effected in accordance with the law of the said State and the provisions of this Convention.

No charter party or contract for the use of the vessel shall be deemed a lien or encumbrance for the purpose of this Article.

2. The cost awarded by the Court and arising out of the arrest and subsequent sale of the vessel and the distribution of the proceeds shall first

be paid out of the proceeds of such sale. The balance shall be distributed among the holders of maritime liens, liens and rights of retention mentioned in paragraph 2 of Article 6 and registered mortgages and "hypothèques" in accordance with the provisions of this Convention to the extent necessary to satisfy their claims.

3. When a vessel registered in a Contracting State has been the object of a forced sale in a Contracting State, the Court or other competent authority having jurisdiction shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all mortgages and "hypothèques", except those assumed by the purchaser, and all liens and other encumbrances, provided that the requirements set out in paragraph 1, subparagraphs (a) and (b) have been complied with, and that the proceeds of such forced sale have been distributed in compliance with paragraph 2 of this Article or have been deposited with the authority that is competent under the law of the place of the sale. Upon production of such certificate the registrar shall be bound to delete all registered mortgages and "hypothèques", except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of re-registration, as the case may be.

Article 12

1. Unless otherwise provided in this Convention, its provisions shall apply to all sea-going vessels registered in a Contracting State or in a non-Contracting State.
2. Nothing in this Convention shall require any rights to be conferred in or against, or enable any rights to be enforced against any vessel owned, operated or chartered by a State and appropriated to public non-commercial services.

Article 13

For the purposes of Articles 3, 10 and 11 of this Convention, the competent authorities of the Contracting States shall be authorized to correspond directly between themselves.

Article 14

Any Contracting Party may at the time of signing, ratifying or acceding to this Convention make the following reservations:

1. to give effect to this Convention either by giving it the force of law or by including the provisions of this Convention in its national legislation in a form appropriate to that legislation;
2. to apply the International Convention relating to the limitation of the liability of owners of sea-going ships, signed at Brussels on 10 October 1957.

Article 15

Any dispute between two or more Contracting Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Article 16

1. Each Contracting Party may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by Article 15 of the Convention. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

Article 17

This Convention shall be open for signature by the States represented at the twelfth session of the Diplomatic Conference on Maritime Law

Article 18

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government.

Article 19

1. This Convention shall come into force three months after the date of the deposit of the fifth instrument of ratification.

2. This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the fifth instrument of ratification, three months after the date of the deposit of the instrument of ratification.

Article 20

1. States, Members of the United Nations or Members of the specialized agencies, not represented at the twelfth session of the Diplomatic Conference on Maritime Law, may accede to this Convention.

2. The instruments of accession shall be deposited with the Belgian Government.

3. The Convention shall come into force in respect of the acceding State three months after the date of deposit of the instrument of accession of that State, but not before the date of entry into force of the Convention as established by Article 19(1).

Article 21

Each Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such Contracting Party. Nevertheless, this denunciation shall only take effect one year after the date on which notification thereof have been received by the Belgian Government.

Article 22

1. Any Contracting Party may at the time of signature, ratification or accession to this Convention or at any time thereafter declare by written notification to the Belgian Government which, among the territories under its sovereignty or for whose international relations it is responsible, are those to which the present Convention applies.

The Convention shall three months after the date of the receipt of such notification by the Belgian Government, extend to the territories named therein.

2. Any Contracting Party which has made a declaration under paragraph (1) of this Article may at any time thereafter declare by notification given to the Belgian Government that the Convention shall cease to extend to such territories.

This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government.

Article 23

The Belgium Government shall notify the States represented at the twelfth session of the Diplomatic Conference on Maritime Law, and the acceding States to this Convention, of the following:

1. The signatures, ratifications and accessions received in accordance with Articles 17, 18 and 20.
2. The date on which the present Convention will come into force in accordance with Article 19.
3. The notifications with regard to Articles 14, 16 and 22.
4. The denunciations received in accordance with Article 21.

Article 24

Any Contracting Party may three years after the coming into force of this Convention, in respect of such Contracting Party, or at any time thereafter request that a Conference be convened in order to consider amendments to this Convention.

Any Contracting Party proposing to avail itself of this right shall notify the Belgian Government which, provided that one-third of the Contracting Parties are in agreement, shall convene the Conference within six months thereafter

Article 25

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the unification of certain rules relating to Maritime Liens and Mortgages and Protocol of signature, signed at Brussels on 10 April 1926.

IN WITNESS WHEREOF the undersigned plenipotentiaries, duly authorized, have signed this Convention.

DONE at Brussels, this 27th day of May 1967, in the French and English languages, both texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

Bibliography

Almén, Lagen om avtal, 8 uppl. Stockholm 1963

Almén, Om köp o byte av lös egendom, 4 uppl. Sthlm 1960

Graeme Bowtle and Kevin McGuinness, The law of ship mortgages, Lloyds Shipping law library, London 2001

Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, Scandinavian Maritime Law, 2nd Ed., Oslo: Universitetsförlaget, 1998

Hammarskjöld, Om fraktaftalet, Uppsala 1886

Knut Rodhe, Obligationsrätt, Lund 1965

Christer Rune, Rätt till skepp, 2 uppl. Göteborg: Akademiförlaget, 1991

Henrik Svensson, Traditionsprincipen - en studie av dess lämplighet i kommersiella förhållanden, <http://www.ep.liu.se/exjobb/eki/2003/ajp/020/>

William Tetley, Maritime liens and claims, 2nd Ed, 1998

Hugo Tiberg, Kreditsäkerhet i fartyg, Stockholm: Norstedt, 1968

Leon Trakman, The Law Merchant: The Evolution of Commercial Law, Littleton, Colorado, 1983

Undén, Svensk sakrätt I, Lös egendom, 5 uppl. Lund 1966

Undén, Svensk sakrätt II:2, Fast egendom, 4 uppl. Lund 1965

Welamson, Konkursrätt, Stockholm 1961

Table of Cases

NJA 1922 p. 360

NJA 1924 p. 581

NJA 1933 p. 632

Rt. 1933.367

NJA 1942 p. 575

NJA 1948 p.10

NJA 1950 p. 308

NJA 1956 p. 562

1953.750 Tercia

T 215/96 Acacia

ND 1922 p. 553

ND 1954.199 NHR

ND 1958.181

ND 1960 p.461

ND 1991.176 *NSC Walker*

Western Bank Ltd v. Schindler (1976) 2 All E.R. 393 (C.A)