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Creditor protection in credit securities typical to ships and competition in its realisation

a rem study under Swedish jurisdiction

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Contents

Summary

Credit securities in ships can be provided for by several different constructions. This thesis focuses on three of these varieties; maritime liens in ships, right to retention and title reservations in ships.

Maritime liens in ships is a legally granted right that principally cannot be obtained by contractual agreements. Maritime liens evolve as a valid right in rem only for such situations specifically granted by 3 chapter 36 § SMC and thereby for; wage for onboard employees, fees for port, pilotage or canal, personal or property damage and for salvage. The paragraph is exhaustive why no other grounds can stipulate a right to hold maritime liens other than those expressively given. A maritime lien is barred after one year which is a very short period of limitation. The limitation period can only be broken by obtaining a court order on ship arrest and a following compulsory sale. If, by new court order, the arrest is repealed the period of limitation will start counting again from where the limitation was broken until the lien is legally barred. Liens are always tied to one specific vessel and never to a ship owner or other personnel onboard the vessel which is why it is totally independent in matters of ownership. If the title to a vessel is transferred the lien will generally follow the vessel into the new ownership. In realisation, liens are given highest possible priority along with air liens. Considering the often not to considerable figures in a lien claim when compared to other creditors, it is, however, reasonable to think that a holder of a lien often may be subjected to a right to redemption by another creditor holding claims towards a debtor.

A right to retention may apply for several different actors following a number of different situations. This thesis is however focused on such retention that can be exercised by a shipyard over a debtor's breach in payment following a repair or new-building. Retention is unlike detention exercised over property that per legal definition belongs to someone else than the retendee and can be exercised from the point that there is something to retend. Building material as well as a vessel. Retention must be exercised on the same vessel from which the right to retention evolved, and thereby not towards a sister ship. The actual area of practice for this comprehensive right is fairly limited. It is intended to serve as a measure to force a debtor into payment by having him refrain from using his vessel rather than as an actual method of realising credit securities by a following compulsory sale.

A title reservation is a very strong protection and gives far reaching rights to a creditor, especially in the possibilities of separating property from a bankrupt's estate. By including and registering a reservation in a contract the debtor's actual ownership becomes conditioned. The debtor will not be allowed to undertake measures with the property that will be unfavourable for the creditor or in any way sets aside his interests in the property. The creditor can obviously approve such disposal of the vessel, but if he allows

comprehensive rights in rem, placing another creditor in a better position than himself, he will risk being considered to have given up his reservation by allowing such a disposal. By including a reservation the parties will have to acknowledge the possibility of the applicability of LIP. This will partially limit the creditor's possibilities in realising the condition – and the property – in event of the debtor's breach of contract.

Sammanfattning

Kreditsäkerheter i fartyg kan upplåtas genom ett flertal olika konstruktioner. Denna uppsats avhandlar tre utav dessa varianter; sjöpanträtt i fartyg, retentionsrätt och ägarförbehåll till helt fartyg.

Sjöpanträtt i fartyg är en legal panträtt som i princip inte kan upplåtas genom avtal. Sjöpanträtt uppkommer som en giltig sakrätt endast för sådan skada som har ett direkt samband med fartygets verksamhet för ett antal givna grunder. Lön för ombordanställd besättning, hamn- lots- och kanalavgifter, person- och sakskada och bärgarlön. 3 kap 36 § SjöL är uttömmande och inga andra omständigheter kan följaktligen föranleda uppkomst av sjöpanträtt. Sjöpanträtten har en mycket kort preskriptionstid om ett år. Denna kan endast bli föremål för preskriptionsavbrott genom erhållande av kvarstad och efterföljande exekutiv försäljning. Erhålls kvarstad och denna upphävs på grund av omständigheterna i målet fortsätter preskriptionstiden att löpa tills dess sjöpanträtt upphör. Sjöpanträtt är alltid knuten till ett specifikt fartyg och aldrig till en viss skeppsredare eller person ombord. En sjöpanträtt anses kunna uppstå från det att ett fartygsbygge har sjösatts. Överlåts fartyget följer sjöpanträtten principiellt med och är därav direkt oberoende av ägarfrågan. I realisering är sjöpanträtt tillerkänd bästa möjliga förmånsrätt tillsammans med luftpanträtt. I och med att beloppen ofta är så pass små i förhållande till övriga fordringar är det dock rimligt att tro att borgenär med sjöpanträtt ofta blir föremål för utlösningsrätt från annan borgenär med krav på gäldenären.

Retentionsrätt kan tillkomma ett flertal olika aktörer. Denna framställning är dock fokuserad på sådan retentionsrätt som tillkommer ett skeppsvarv till följd av gäldenärs bristande betalning följande reparation eller nybygge. Retentionsrätt utövas till skillnad från detentionsrätt över sådan egendom som per juridisk definition inte tillhör retinenten. Denna kan utövas från den tidpunkt det finns något konkret att utöva retentionsrätten emot. Byggnadsmaterial såväl som helt fartyg kan kvarhållas. Retentionsrätten måste utövas mot samma fartyg som vilken rättigheten uppkom och kan inte utövas mot exempelvis ett systerfartyg. Det faktiska användningsområdet för retentionsrätt är i praktiken begränsat till att utgöra ett påtryckningsmedel för att tvinga en gäldenär till betalning genom att denne tvingas avstå från att kunna använda sin egendom snarare än som en faktisk realiseringsåtgärd.

Ägarförbehåll är i sig en mycket stark rättighet för en borgenär och en mycket förmånlig säkerhet i egenskap av berättigandet till separationsrätt i ett eventuellt konkursbo. Genom att inkludera och registrera ett sådant i ett kontrakt blir gäldenärens äganderätt, och därigenom sakrättsliga rörlighet, kraftigt begränsad genom en villkorad äganderätt. Gäldenären är inte tillåten att vidta åtgärder med egendomen på ett sätt som är till nackdel för borgenären eller på något sätt till nackdel för borgenärens intresse i

egendomen. Borgenären kan självfallet godkänna sådana tredjemansintrång i ägandet men riskerar därigenom att bedömas ha avstått från sitt ägarförbehåll genom att godkänna likvärdig eller bättre rätt i egendomen till annan borgenär. Genom att inkludera ett ägarförbehåll måste parterna ta i beaktande att lagen om avbetalningsköps mellan näringsidkare kan komma att bli tillämplig. Denna begränsar på många sätt borgenärens möjligheter i realiseringen av kreditsäkerheten i händelse av gäldenärs bristande betalningsförmåga.

Förord

Med denna enkla uppsats avslutar jag nu min juristutbildning vid Lunds Universitet och även mastersprogrammet i maritime law vilket jag haft den stora förmånen att parallellt få deltaga. Fem år går fortare än man tror inser jag såhär i efterhand men vi vet ju hur det är med tid när man har roligt. Med blandade känslor, men framförallt med stor framtidstro, lämnar jag nu den trygga studietiden bakom mig och går vidare till nästa livskapitel.

Ingen kunde nog ana att detta examensarbete skulle komma att sluta i sjörättsliga kreditsäkerheter, allra minst jag själv. Såhär i efterhand känns det dock väldigt naturligt då det på ett självklart sätt väver samman de juridiska områden som hittills väckt störst nyfikenhet och intresse hos mig. Sjörätten, obestånds-, insolvens- och finansjuridik tillsammans med äganderättsfrågor och konflikt i dessa.

Jag vill tacka min handledare i detta examensarbete, Professor Lars-Göran Malmberg, för sin lugnande attityd och sitt pragmatiskt lugna förhållningssätt då jag själv stressat upp mig över vad jag i efterhand förstått var precis som du sa, hur lugnt som helst.

Jag vill tacka Advokat Rolf Ihre som tog sig tid att hjälpa mig i det initiala skedet av denna uppsats med alternativa problemfrågeställningar. Även universitetslektorer Per Nilsén och Christian Häthén skall ha stort tack för flertalet intressanta och givande diskussioner över sjö- och kredithistoriska perspektiv.

Preface

This thesis concludes my five years as a student in the law program at Lund University, as well as the master program in maritime law that I also have had the great pleasure of participating in. Five years pass faster than you would think, but as we all know time flies when you are enjoying yourself. It is with mixed emotions that I now leave my student years behind me, moving on to the next chapter of my life.

No one, least of all myself, could know that this thesis would come to subject maritime credit securities. Having finalised my thesis, however, it seems obvious as it connects the fields of legal practice that I have found most interesting. Maritime law, credit-, insolvency- and finance law along with ownership issues and conflict in these.

I would like to thank my supervisor, Professor Lars-Göran Malmberg, for his calming attitude and pragmatic tranquillity when having stressed myself up over issues that I retrospectively understand were maybe not that important and of top-priority to consider at that particular time.

I would like to thank Attorney Rolf Ihre for taking his time and helping me with alternative suggestions on topics and problem formulations in the initial stage of this thesis. University lecturers Per Nilsén and Christian Häthén shall also have thanks for several most interesting and rewarding discussions over maritime- and credit historical perspectives.

Abbreviations

BL	Law on Barring (Preskriptionslagen)
BrB	Swedish Criminal Code (Brottsbalken)
CC	Commercial Code (Handelsbalken)
ICA	Insurance Contract Act (Försäkringsavtalslagen)
KonkL	Law on Bankruptcy (Konkurslagen)
LIP	Law on Instalment Purchase (Lag om avbetalningsköp mellan näringsidkare)
LPN	Law on Promissory Notes (Skuldebrevslagen)
LPR	Law on Priority Right (Förmånsrättslagen)
LWG	Law on Wage Guarantee (Lönegarantilagen)
RB	Code of Judicial Procedure (Rättegångsbalken)
SEA	Swedish Enforcement Agency (Kronofogden)
SGA	Sales of Goods Act (Köplagen)
SMC	Swedish Maritime Code (Sjölagen)
TRSA	Traders Right to Sell Goods Act (Lag om Näringsidkares rätt att sälja gods)
UB	Swedish Enforcement Code (Utsökningsbalken)
UF	Swedish Execution Decree (Utsökingsförordningen)
UNCLOS	United Nations Convention on the Law Of the Sea

1 Introduction

1.1 Background

To manage and operate a vessel, credits are usually essential for the continuous travel of the vessel. In the early days of shipping, the short-term credits were the most important. To be able to take onboard provisions, spare parts etcetera they constituted an absolute necessity. With the growth of the shipping business, and in particular the growth of the vessels themselves, the need for the short-term credits have shrunk to a minimum instead making the long-term credits an absolute necessity to be able to secure the well being of the vessel.[1]

Credit securities in ships is not a novel concept and cannot say to having been incorporated, or come in effect, by a single regulation or convention. Already in the days of the Roman's evolved what is known as Foenus Nauticus, a concept of financing particular journeys in the Mediterranean trade with securities in vessels, real estate or by suretyship. A concept taken over and further developed by the Germanic people, having a similar need after the fall of the Roman Empire. With the Hanseatic cities evolved a natural need for providing and obtaining credits. Lex Mercatoria promoted contractual freedom, counteracted complicated regulations and contributed to the establishment of a large number of courts in the trading maritime cities across Northern Europe. Influenced from the previously generally applied Lex Mercatoria, where for the first time a division was made between land- and sea based assets, Lex Hanseatic was developed. With its origin in Lübeck, and its court as something of a Supreme Court, maritime credit law by custom and court practise developed tremendously, mainly applying Lübeck state law in most Hanseatic cities.

The British has ever since the 15th century developed and produced maritime law and literature on the subject following its, actually already then, position as a leading maritime nation. This position was consolidated in the 17th century, and yet today British admiralty law must say to be world leading. They have in a further extent than any other actor applied domestic principles and developed what can be called a pure British system of maritime regulations, even though with an international perspective to it. Most of the contracts on ship credits today will be found applying English law. Swedish maritime law has always been behind in terms of development and cannot say to have conceptually contributed at any further extent from an international perspective. Especially in the beginning of the 20th century. Legislation over credits and hypothecs were more or less totally lacking and is therefore in its present state close to entirely based on international conventions. The Swedish Maritime Code is divided into separate chapters where most of those chapters are individually based on separate conventions

[1] Rune, p 13 ff

with minor deviations.[2] Keeping in mind the international trade and the capital generated from such markets, a nation cannot afford to fall behind in the legislative parts. Especially not when already lost tactile parts of the fleet, risking to lose even more by convenience flagging. In this perspective, it is important to consider that Sweden is a small country very dependent on export in trade. With 54 % of the GDP deriving from export and 90% of the goods consumed within domestically is transported by ship in at least one part of the transportation chain, shipping seems an indispensable industry.[3]

When a need to realise a ship security arises, it usually means that insolvency has occurred within a debtor's business. For the shipping business to evolve, grow and live on it is a necessity that there are instruments available that will allow for ship credits to stimulate the market. For an investor or supplier to grant credits it is obvious that such a party will demand some sort of security and protection for his investment. Such securities can be provided for by several different instruments as well in the credit itself as in its realisation. Some special regulations are to find over ship credits in SMC but generally domestic insolvency, credit and process law will apply also for maritime situations. This may be in the benefit of the business to attract investors from land-based industry as well as not confusing suppliers and credit holders of varied claims derived from the operation of the vessel. It is however always important to keep in mind that shipping is a complicated business often involving colliding jurisdictions and claimants from many different parts of the world why some adjustments occasionally may be called for.[4]

1.2 Purpose

Financial credit securities fill a purpose in serving as security for potential claims towards a ship owner. As is shown in the disposition below several contractual obligations and relations can constitute ground for the foundation of a credit security in a ship. Several varieties can also constitute other claims in rem. The following disposition will clarify what rules a Swedish actor will have to relate to while trying to realise a founded security in a ship and how that particular security is founded. A creditor may use a variety of different securities to secure payment for credits provided to a debtor. This thesis will study a few of these credit securities. The purpose is to describe and analyse a few chosen credit securities typical to ships and the competition in its realisation. Different securities will have different level of prioritisation why, were its possible, the choice of security may be paramount in the realisation as to whether compensation will come in question or not. This thesis will focus on maritime liens in ships, right to retention and a right to separation on contractual title reservations and the internal competition between these securities in the process of realisation of

[2] Tiberg, p 23 ff
[3] Dir. 2010:2, p 1 f
[4] All of the background is in large and relevant parts based on discussions and dialog with university lecturer Christian Häthén at the department of legal history at the Faculty of Law, Lund University

these individual claims. How are these handled in a maritime law perspective and how do they interact with the general public law on insolvency and realisation? Why does an actor chose one of the mentioned, what are the pros and cons of the mentioned and who will get compensated and who will not? In short, what is a credit security, how has the legislator chosen to deal with it and how is it realised? Questions meant to be answered in the following disposition.

1.3 Outline

Chapter 1 sets out the frames and reasons for the following disposition. The reader is in this part introduced to the problematic and discussions that will constitute the basis for the thesis. Going on to chapter two, the first credit security is studied. Maritime liens are thoroughly investigated in a chapter ended with a shorter analysis to summaries some conclusions. Chapter 3 handles the regulation on a creditor's right to retention. Chapter 4 will in a systematic way handle mainly title reservation, going on to rights to separation that is subjected under this chapter. Thereby leading the chapter on to a few ways on how to contractually regulate and stipulate rights in rem and securities for provided credits and obtaining protection in rem towards a debtor's creditors. Chapter 5 deals with the realisation process when a claim has been founded in accordance of the definitions in any of the previous chapters – executive measures and competition regulations connecting the claimants in their realisation process. This chapter will focus on the technical aspects of process and execution law when seeking to realise a credit security, privately or assisted by public authorities. In chapter 6 personal reflections will be given and the material presented in the thesis will be analysed and summarised.

1.4 Method and material

In chapter 2 – 5 a legal dogmatic method is applied using by legal dogmatic approved sources as law text, preparatory governmental material and court rulings. Also doctrine will be indispensable in trying to establish and analyse the applicable and effective law in the stated fields of legal practise and application. The material will be objectively processed trying to systematically determine and interpret the law as it was intended to be practiced from a judge's point of view. Personal reflections are presented in the end of each chapter, with exception for chapter 5. Thereafter follows a summarized analysis and conclusion part in the final chapter where the processed material will be commented and analysed upon personal opinions and reflections from the material presented in the thesis.

1.5 Delimitation

Maritime credit securities' is a subject that can be divided into several subcategories. Many different types of contractual commitments and actions can stipulate a right to hold a claim in rem in a ship or in its cargo, by registered mortgages or on a legal lien based on a previous contractual relation for example. Not all these types of liens and securities will be possible to attend to in this thesis why focus will be directed to a limited selection of credit securities typical to ships. Maritime liens in cargo will be mentioned but only shortly covered by this thesis when specifically addressed since its position as a not very important way of securing credits and from this thesis perspective, a debtor's rather than a creditor's security. With liens are thereby always liens in ships intended as the institution mentioned throughout this thesis. The institute with registration and mortgages is a very important part of ships financing and thereby in security as well as in realisation. This is by far the most common security for long-term financing. It is however not typical to ships even though some special regulations are applicable in this area. For my purpose of this thesis it is however not the most relevant security why no attention will be given to mortgages in ships, even though occasionally referred to considering its value as an irreplaceable security. The jurisdiction of matter will be Swedish but some comparative aspects will be attended to given the nature of the subject. In those cases will however mainly be given an international actor's rights and obligations on how to act while seeking to apply Swedish jurisdiction. Maritime law is an international business connecting many parts of the world with suppliers and contractual relations knowing no national borders. Benefits may therefore be gained by taking advantage of competing jurisdictions just as well as problems usually occur following the involvement of competing jurisdictions. Such realisations will not be a direct part of this thesis but constitutes a large part of the daily work of a maritime lawyer why worth mentioning.

Swedish maritime legislation has much in common with its neighbour Nordic countries and has partly been co-developed in many relevant parts. In some parts, Nordic legislation will therefore have to be referred to in a way to clarify the Swedish legislation and applicable law. Much of the national regulations on this subject has been developed along with the international community and is partly directly incorporated to apply as Swedish legislation. The thesis will however be focused on domestic Swedish legislation and I have chosen not to address the international conventions and applicable regulations by the international community of maritime legal practice and development other than when explicitly mentioned. Financial securities used in ships may occasionally occur in what can be defined as a "boat", a vessel more used for recreational purposes. No attention will be given to such securities under this study. When it comes to jurisdictional matters no concern will be given such cases where the parties involved in a dispute have internally by contractual choice of law and/or forum regulated which jurisdiction is to govern certain disputes over the contract. Further on this thesis will assume that the parties

in contractual relations mentioned under this thesis, have not contractually agreed else than what is stated in mandatory as well as optional legislation other than when explicitly said so in the separate chapters or sections. In the chapter subjecting retention only such retentions deduced from shipbuilding or ship repair will be attended to.

2 Maritime Liens

The Swedish legislation on maritime liens is based on the international convention on the subject, further on referred to as "the Convention"5, and has been incorporated into the SMC in a chapter of its own along with the mortgage regulations.6

2.1 Definitions

2.1.1 Maritime liens in seagoing vessels

A maritime lien occurs in a vessel and serves as a short-term security to secure payments and claims that occur in connection to the vessel in its operation.7. A maritime lien can be founded in the vessel from the point where it has been launched, which in practise means that also a vessel under construction can be subjected to maritime liens.8 The liens are not depending on a certain agreement in order to emerge and do not require any sort of registration or specific legal action to achieve status as a valid maritime lien which is the case in for example the founding of a mortgage.9 It is instead a legal right in the benefit of the entitled as listed in SMC.10 A contractual commitment that maritime liens shall not occur in a vessel is usually taken for valid as long as the non-lien agreement is not over due wages.[11] Non-lien agreements will however not affect a third party in good faith.[12] Governmental ships exclusively engaged in governmental purposes and not commercial purposes have been excepted from the application of the institute of maritime liens and a claimant can therefore not have a maritime lien attached to such a vessel, all on convention model.13 This is primarily based on the internationally recognized rule that a state vessel has unconditional immunity from execution why such vessels are not considered to be able to hold maritime liens.14

36 § A maritime lien upon a vessel shall secure any claim against the vessel owner or operator concerning;

- 1. Wages and other sums due to the master or other person employed onboard on account of his employment on the vessel,
- 2. Port, canal and other waterway dues and pilotage dues,

[5] International Convention on Maritime Liens and Mortgages - 1967
[6] SMC 3 chapter
[7] Svensk juristtidning 1986, p 376
[8] Rune, p 151 and chapter 2.1.4
[9] Ihre, p 445
[10] SMC 3 chapter 36 §
[11] For non-lien clause exemplification, see Supplement A
[12] SOU 1970:74, p 123
[13] Karnov 2009/2010 not 106 and chapter 3.1.2
[14] Rune, p 151

- 3. Compensation for personal injury which has occurred in direct connection with the operation of the vessel,
- 4. Compensation for property damage which has occurred in direct connection with the operation of the vessel, provided the claim is not capable of being based on contract
- 5. Salvage remuneration, compensation for removal of wreck and contribution in general average

2.1.2 Claims of maritime liens

The claims that stipulate grounds to hold maritime liens are listed directly in SMC 3 chapter 36 §. No type of contractual performance can stipulate such right other than those listed. The paragraph is thereby exhaustive. According to the wording of the paragraph the liens will apply as security for a claim from someone listed in the paragraph for a loss or previous expense. The consequence of the regulation is that a ship owner may be held liable for a claim that he in fact was not contractually obliged to compensate initially. This for such claims as wages for restaurant staff in a restaurant operated by an onboard caterer or port fees that by contract was to be paid by a charterer.15 In a realisation of liens situation the liens will have priority in order of the listing in the paragraph above. If a claim relating to point 5 have occurred prior to claims relating to the previous four this will however have priority.16

Maritime liens cannot be contractually granted. A contract stating that maritime liens shall not occur between two contracting parties as a consequence of actions undertaken within the frames of the contract should however most likely be held for valid in a court if not relating to excepting an employee from the right of holding maritime liens as security for wage.17 On the contrary, a "lien-clause" is not unusual in contracts relating to vessels. A clause like this is obviously not invalid but is on the other hand not practically applicable. The right to lien is stipulated in law and will occur whether the clause is there or not why it must be regarded as nothing more than a clarification the parties' in-between.18 If not broken by ship arrest, seizure or compulsory sale, a maritime lien in a vessel will be barred one year from its founding.19 No other claim than those listed in the paragraph can stipulate a right for maritime liens under Swedish law.

2.1.2.1 Claims for wage – SMC 3 chapter 36 § 1 p[20]

Maritime liens will originate for claims for wage or other compensation for employment onboard a vessel. The wage intended is the gross wage why a maritime lien's claim will include taxes and insurance and other benefits

[15] Ihre, Sjöansvar, p 37
[16] SMC 3 chapter 37 § 2 section, further on priority in chapter 5.3.2
[17] SOU 1970:74, p 123
[18] Sandström, p 134
[19] SMC chapter 3 40 § section 1 and chapter 2.5
[20] For further discussion on wage liens see chapter 2.1.3

such as pension according to the contract of employment if the employer has actively as a wage benefit taken on to pay for the employee's private insurance to such an institution.21The party claiming a maritime lien right must have an employee relation to the vessel from which the lien is considered to derive and will thereby not apply for land based personal.22 Outside the applicability of the paragraph is most likely due taxes, employer's contribution taxes and social fees. These are to be deposited by the employer, the ship owner or bareboat charterer for that matter, and thereby not immediately related to the employee's wage as to be carried by the individual employee. Instead, those are regarded as a governmental claim following the employee's employment contract and compensation originating from such. A governmental authority will therefore not be able to invoke maritime liens for such claims. In the application of other benefits should also remuneration for home transportation of onboard personal be included. [23]

2.1.2.2 Claims for canal-, port fees etc - SMC 3 chapter 36 § 2 p

For claims relating to point 2 the claims must be based on a debt relating to the very vessel that is subjected to due debts relating to for instance port fees. A sister vessel cannot in Swedish jurisdictions be targeted on the basis that it has the same owner as is applied in some abroad jurisdictions.24 It is not perfectly clear whether the right to maritime liens shall apply only for such fees that are given in law or similar public regulation, or if likewise shall apply also for private ports and canals – contractually based relations stipulating fees for exertion of private property and facilities. According to the 1926 convention, private operators where not to be entitled the benefit of holding maritime liens. No preparatory work, court case or commentaries deal with the subject. Consequentially it must be assumed that contracts over the exertion of private water ways and ports will not be possible to invoke as a ground to hold maritime liens until the contrary has been established and practically dealt with in a court of law.[25]

2.1.2.3 Claims for inflicted damages - SMC 3 chapter 36 § 3 and 4 p

Property and personal damage is to be compensated for and constitutes basis for the right to hold maritime liens. Damage following an atomic nuclear accident is however excepted from the field of application of the paragraph.26 The claim will have to be an indemnity tort claim, not based on a previous contractual relation, to stipulate ground for a maritime lien

[21] Compare NJA 1988 s 283
[22] Rune, p 154
[23] Exekution i fartyg, p 11
[24] Rune, p 155
[25] Exekution i fartyg, p 12
[26] SMC 3 chapter 36 § section 2 – for nuclear damage liability see SMC 11 chapter and the Law on liability following nuclear damage SFS 2010:950

following property damage.[27] To exemplify, such property damage will include for instance damages inflicted by oil, backwash and collision. Demanding that the claim have to be non-contractually gives that a claim relating to cargo and/or luggage onboard the vessel is not accompanied with rights to maritime liens.[28] According to Rune the formulation shall be interpreted that in event of collision between two ships claimants with property as cargo or luggage on the collided vessel may have maritime liens as security for their claims in the colliding vessel. Claimants with damaged luggage or cargo onboard the colliding vessel will however not have maritime liens in the vessel since they are in a contractual relation of affreightment with the ship owner or an operator in his position.[29] Generally personal damages connected to the vessels loading and discharge, boarding and debarkation or boat transport till and from the vessel constitute rights for maritime liens. This will not apply to property damage since its nature of a contractual relation.[30]

What is actually intended with the formulation "operation of the vessel" cannot say to be fully satisfactory clear. It shall be used in such way that usually requires for the vessel to be equipped and manned but also in its navigation and operation in its, for its purpose, ordinary field of operation and application. 31 Damages inflicted while the vessel is in port, loading or discharging, should be covered by this application since it is the usual purpose of the vessel to transport cargo. This will however not apply for cars in a line waiting to board a vessel or visitors on a ship owner's office since this is not directly connected to the operation of the vessel.[32]

2.1.2.4 Claims for salvage, general average and wreck removal - SMC 3 chapter 36 § 5 p

Salvage, general average and contribution for wreck removal shall grant the right of maritime liens in the object in question, a barge or a vessel for instance. The regulations on distribution and division on salvage can be found in 16 chapter SMC and are constructed to encourage salvage. As customary in international law the regulation follows the "no-cure-no-pay" principle.[33] Maritime liens will be valid towards a debtor from which the vessel can be deduced. The same will not apply towards a governmental institution or authority by which a salvor has been appointed to remove a wreck. Such an authority does not fall within the application of the paragraph as a party that can grant rights to maritime liens by its actions in the same way as the owner of a wreck or a vessel why the institute will not be applicable in such a case. Possibly the government on the other hand could hold a right to maritime liens on a claim corresponding to the cost of

[27] Rune, p 155
[28] Karnov 2009/2010, not 109
[29] Rune, p 155
[30] Exekution i fartyg, p 12
[31] Prop. 1975:68, p 27
[32] Rune, p 155 f
[33] Exekution i fartyg, p 13

the wreck removal that in such a case would have been inflicted to the very same by its commitment to remove the wreck.34 Compensation for salvage shall be distributed to everyone involved in the salvage of the vessel. A salvor is entitled to compensation even if the vessel has not been in imminent danger.[35] The property covered by the regulation is all property in any way attached to the vessel that is not secured by the shore[36] and have been subjected to salvage with a successful outcome.[37]

2.1.3 Governmental wage guarantee

An employee in a bankrupted company is guaranteed by law that the government will compensate the employee for due wages in a debtor's bankruptcy. The guarantee definition intends and includes the full salary without set limitations or maximums.[38] This will not include only such wages that have not been paid for already performed work, but also wages that are to be distributed under a period of notice.[39] LWG is applicable legislation if the bankruptcy was declared in Sweden or another Nordic country and the work to which the due salary was connected was performed in, or was in some way mainly connected to, Sweden.[40] The regulation may also come in effect if an employer has been declared bankrupt in another EES-state and the work was performed mainly in Sweden.[41]

It will come in effect for any employee included in the definition of an employee[42] and only for such wages that are prioritised under LPR. Such boundaries and definitions will be drawn and set by the appointed trustee in a bankrupt's estate. [43] An employee in a company that has been declared bankrupt is as mentioned legally a holder of a maritime lien for due salaries.[44] Due to LWG the government will however have compensated the employee already at the time that estate execution and division is initiated. The government will therefore overtake the maritime lien that stipulated the claim the employee had on his former employer.[45] The claim will not extinguish on a title transition.[46] The government will simply step in the employee's position when overtaking his claim, entitled to claim the due wages corresponding to the compensation they have paid along with interest counted from the day of payment.[47] The ground of the transition is not of

[34] Prop 1973:42,p 335
[35] Exekution i fartyg, p 13 and NJA 1978 s 157
[36] SMC 16 chapter 1 § p 2
[37] SMC 16 chapter 5 §
[38] LWG 1 §
[39] LWG 7a §
[40] LWG 1 § 1 p and 2 §
[41] LWG 2a § and 21 §
[42] Such definitions falls outside the scoop of this thesis but for further reading compare definitions and statements in NJA 1949:159 p 768 and AD1990:116
[43] Exekution i fartyg, p 16 f and LWG 7 §
[44] See chapter 2.1.2.1
[45] LWG 28 §
[46] See chapter 2.3
[47] Exekution i fartyg, p 17

any relevance for the survival of the lien.[48] For instance the realisation of a guarantee or bail is fully valid grounds for the transition and survival of the lien with which the governmental commitment must say correspond to as a legally granted suretyship.[49] The governmental representative in liens cases is the Swedish Enforcement Agency or an attorney appointed by the very same.[50]

2.1.4 Lien objects

The object that is subjected to a maritime lien in a vessel is obviously a vessel. A governmental vessel can, as previously discussed, however never be submitted to maritime liens.[51] To draw the distinction between what is an actual vessel and what is not might be hard to establish. The legislative investigation concludes that the vessel shall be considered as such from the point when it starts performing as a vessel with the features that comes with such. Therefore, a vessel shall be considered as a vessel and thereby as a valid liens object from the point when it has been launched into water, regardless of if a hull or a completed vessel ready for traffic is at hand.[52]

2.1.5 Maritime liens in cargo

A maritime lien in cargo is a legally granted right in rem as maritime liens in ships. Cargo liens are meant to protect the ship owner while the vessel lien is meant to protect a creditor or claimant towards the ship owner.[53] The two have much in common and remind of each other a lot. A few differences that can have paramount affect on the rights and possibilities in realisation must however be pointed out. The regulation covering maritime liens in cargo is located in SMC 3 chapter 43 § but is unlike liens in vessels not based on any international convention.[54]

43 § A maritime lien shall attach to loaded cargo for the security of

- 1. Claims for salvage and contribution in general average or other costs which are to be apportioned on the same basis (13 chapter 15 § section 3, 14 chapter 40 § and 17 chapter 6 §),
- 2. Claims arising from contracts made or other actions taken by a carrier or master within the powers vested in him under this Code[55]

[48] LPR 3 § and SMC 3 chapter 48 §
[49] Exekution i fartyg, p 17
[50] Exekution i fartyg, p 20
[51] See chapter 3.1
[52] SOU 1970:74, p 123 f
[53] Ihre, sjöansvar, p 38
[54] Prop 1970:74, p 126
[55] The master of the vessel is given an extensive competence by a legally granted power of attorney tied to the position as master of the vessel, making him competent to enter, for the ship owner, heavily obliging contracts while operating the vessel. Compare SMC 6 chapter 1 § and Jan Sandström – Befälhavareavtal och sjöpanträtt.

as well as any claim by a cargo owner on account of goods sold for the benefit on another cargo owner,

- 3. A carrier's claims on account of a contract of carriage in so far as they might have been enforced against one requiring delivery of the goods

A maritime lien in cargo is tied to possession. It will only apply for cargo that has been loaded onboard the ship, thereby in possession of the ship owner, and will cease when discharged from the vessel.[56] If the cargo would be stolen or delivered to a person who was not entitled to have the cargo the lien will however endure.[57] Every single object constitutes security for the entire claim and the creditor is free to choose which object he wants to realise his claim from. The lien will expire if the cargo is sold compulsory or in necessity of the vessel and its operation.[58] A lien will also expire due to barring after a period of one year. For liens in cargo the limitation period is however broken if a claim is brought to court.[59]

A maritime lien in cargo differs itself from the lien in ships since it can be subjected to contractual agreements and lien-clauses in another way by express agreement or in a bill of lading combined with general applicable law. This is especially common in time- or bareboat chartering where the ship owner have a lien-clause on onboard cargo to cover potential due costs on freight for underlying bill of ladings or sub-chartering.[60] The substantial meaning of the regulation becomes that the ship owner is entitled to retain the cargo and refuse discharge until the freight has been paid for or security has been deposited equivalent to the amount disputed. It is thereby very much alike the right to retention rather than the maritime lien in a vessel that is in no way depending on possession.[61]

2.2 Liens founded in good faith

A maritime lien is valid in the vessel even if it is founded upon a contractual commitment towards someone who is not legally to be regarded as the ship owner.62 Many ship owners outsource the management and operation of the vessel sometimes making it somewhat unclear for a contractor towards which party he is entering contractual relations. Constructions like this might be even more complicated in situations of bareboat chartering or similar construction when a shipper seemingly steps in as a ship owner when he in fact, per definition, is not. Regarding situations it has been assumed that a supplier or other party that may come to be affected by 3 chapter 36 § SMC has a valid right to maritime liens that occurs unaffected

[56] SMC 3 chapter 45 §
[57] Prop 1970:74, p 127
[58] Exekution i fartyg, p 21 and SMC 6 chapter 8 § section 1 and 2
[59] SMC 3 chapter 46 §, see further chapter 2.5
[60] Gorton, p 216
[61] Ihre, sjöansvar, p 39 and chapter 3
[62] Compare SMC 7 chapter 1 §

of different types of vessel operation constructions. A lien is to be considered as founded and valid when derived from the commercial operation of the vessel, regardless of who is the operator at that specific time.[63] If a ship owner has been illegally deprived of the possession of a vessel, the lien will still be valid if the creditor has been granted the lien entering the contract in good faith.[64] As long as a lien has been founded in good faith it will thereby be realisable as long as a realisation does not contradict with generally applicable legal principles considering the circumstances that stipulated ground for maritime lien.[65]

2.3 Transition of title and recourse

Considering the possibilities of transition of title when it comes to the vessel itself, this will have no effect on the validity of a lien.[66] The lien will stay with the ship if transferred into a new ship owner's possession and also stay effective in event of a change of flag, transferring the vessel into a new nationality and thereby also a new jurisdiction.[67]

The title to a maritime lien can be transferred. Maritime liens are as mentioned attached to the ship and not to the ship owner.[68] When the title to a vessel transfers by purchase or compulsory sale the maritime lien will follow the vessel in the transfer.[69] A clause is often integrated in a contract between the seller and buyer of a vessel that the seller guarantees that no liens are attached to the vessel at the point of transfer of ownership. Such a clause will have no affect on a lien-holding third party if a lien turns out to exist anyhow. The clause can however grant a claim from the purchaser towards the buyer in their internal contractual relation.[70] Likewise the title to the actual lien can be transferred. As described above a maritime lien is founded for port fees and can apply for a private (potentially) as well as a public port operator.[71] If for instance a ship agent obliges to pay for port fees for a client of his, making berth in a port, the right to maritime liens will apply for the ship agent instead of for the port operator. Likewise is the situation when for instance a bank or the government, by the governmental wage guarantee, has stepped in and paid salaries for onboard employees in the employer's insolvency. The employee's right to maritime liens as stated in SMC will then transfer to the party that has actually paid the due salaries who will be the rightful holder of the title.[72]

[63] Rune, p 152 f
[64] Prop. 1973:42, p 264
[65] Prop 17:73:42, p 265 and Rune, p 153
[66] SMC 3 chapter 38 §
[67] Rune, p 152
[68] See chapter 2.1
[69] SMC 3 chapter 48 §
[70] Tiberg & Schelin, p 57
[71] Ihre, sjöansvar, p 37
[72] Ihre, sjöansvar, p 37 and chapter 2.1.3

2.4 Subrogation

The right to subrogation can be defined as a creditors right to claim what have replaced the object in which he had a right in rem. Typically such a claim will constitute insurance that have compensated for an object that has been destroyed in some way, partially or totally. Other issues could be wreckage, partial damage or tort following a collision.[73] This applies for mortgages in general and thereby also mortgages in ships where the creditor will be a beneficiary under the insurance policy. A mortgagee's right to subrogation is given directly by law.[74] Usually this right can be side-stepped by mutual agreement under the insurance policy but when the creditor is a beneficiary under the policy he can claim for the insurance as if his own.[75] Retention constitutes a right to subrogation and will follow the same regulations applied for mortgages.[76] In retention cases, this will apply for the vessel, material meant for a vessel under construction, interest and claims in tort in connection to a ship under repair or construction.[77]

Maritime liens have been excepted from, and not given, a right to subrogation.[78] The convention like the other Nordic countries does not include any right to subrogation for a holder of a maritime lien why the legislator also chose not to include it.[79] It has been argued that it would be too far-reaching since the nature of the silent lien and would result in unforeseeable and not desired effects to insurers and claim adjustors.[80] In doctrine it has been criticised that onboard personal in event of a total loss would be deprived of their liens as a claim for wage.[81] Something that was also criticised by the legislative counsel while reconstructing ICA.[82] Such claims would usually however be covered by the governmental wage guarantee why the seamen themselves typically should not have to bear any effects of this.[83] ICA is optional law and will only apply if the parties have not agreed else. That the parties would actively include maritime liens to constitute a right to subrogation must however be held as highly unlikely.[84]

An issue that could arise and is discussed in Exekution i Fartyg[85] is when a vessel is destroyed while in ship arrest following a claim from a holder of a maritime lien. The claimant has the vessel in arrest and is thereby through LPR[86] given the highest order of priority. In event of a total loss of the

[73] Rune, p 168
[74] SMC 3 chapter 3 §
[75] Rune, p 168 fin and ICA 9 chapter 1 § section 2
[76] Rune, p 169 and ICA 9 chapter 49 § section 2
[77] SOU 1970:74, p 129
[78] ICA 9 chapter 1 § 2 p and SMC 3 chapter 49 §
[79] SOU 1970:74, p 124
[80] Rune, p 168 f
[81] Rune, p 169
[82] Prop 2003/04:150, p 222
[83] Compare chapter 2.1
[84] SOU 1970:74, p 124 and Rune, p 169
[85] Exekution i fartyg, p 15
[86] See chapter 5.3.2

vessel the claimant will most likely have no right under the insurance policy, and expressively not by non-mandatory law, to subrogation. As the claimant of ship arrest and the compulsory sale the lien holder will have an interest in the vessel and its preservation as the claimant and holder of the executive title.[87] The claim itself will not be contested but the priority will drop from top ranked to a very low prioritised right. The claim will have to be enforced upon the right as the holder of the executive title and not on a right to the previously top-ranked maritime lien thereby outranked by potential mortgagees.[88]

2.5 Barring and expiry of maritime liens

Maritime liens expire either by settlement of the claim or by the foreclosing and compulsory sale of the vessel.[89] The right to realise a lien further on expires a year from its founding when it is legally barred unlike mortgages and other institutes of liens that are not subjected to limited barring.90 Maritime liens have intentionally been given a very short period of limitation as a way to stimulate and promote the long-term credits such as mortgages and the security of their long-term investments.91 Other contributing factors to the short limitation period are mainly its secret nature as a silent right in rem. Because of the founding as an invisible right founded by itself without written agreements a maritime lien is a potential risk for a buyer of a vessel.[92] Barring is either broken by ship arrest or by seizure leading up to compulsory sale where after the lien is expired.93 The point where the limitation period is broken is from when execution or ship arrest has been secured, from when the vessel is prohibited to sail any further.[94] If an compulsory sale is not conducted after the approved ship arrest due to the circumstances of that particular case, the breaking affect of the ship arrest will expire.[95] The technical aspects to break the limitation period are complicated, or rather could be complicated. Some aspects that might lead to complications if occurred is that; a following compulsory sale must lead to the execution of the very right that was invoked when the ship arrest won approval, a claimants right to claim realisation in a ship arrest that another claimant won approval on and the need for expeditious proceedings due to the, for the holder of a lien, unfavourable period of barring.96 Swedish legislators has however included a regulation stating that a holder of a maritime lien by accession may join a previous claimant seeking to realise his liens thereby himself obtaining a righteous break in his limitation period, solving two of the three.97

[87] LPR 8 §
[88] Exekution i fartyg, p 15 and ICA chapter 9, see also chapter 5.3.2 section 1
[89] Exekution i fartyg, p 15 and SMC 3 chapter 41 § section 1
[90] SMC 3 chapter 40 § section 1
[91] Svensk juristtidning 1986, p 376
[92] Tiberg & Schelin, p 57 and chapter 3.4
[93] SMC 3 chapter 40 §, section 2
[94] Exekution i fartyg, p 16
[95] Rune, p 159
[96] Svensk juristtidning 1986, p 377
[97] UB 10 chapter 5 §

A court order on confiscation and forfeiture of property due to criminal involvement of the vessel could in theory lead to the expiry of maritime liens. This will however demand for also a separate court order or the forfeiture of the maritime lien to extinguish the lien in the vessel.98 The barring cannot be either prolonged or disrupted in itself but will not leap if legal obstacles prohibit an arrest or a seizure.99 Such a legal obstacle would be for instance that the vessel following a transfer in ownership, a sale, has been transformed into a governmental vessel thereby not acting in commercial purposes.100 Consequentially a maritime lien that cannot be realised after such a transition will remain inactive, but still valid, until the vessel is transferred again into a private operator's commercial operation when the barring time will start leaping again. It does not cease to exist.101 The construction of the regulation implies that only the filing of a lawsuit in a Swedish court cannot break the barring,102 which generally is the principle rule under Swedish civil law.103 When it comes to a commercial transaction of the vessel such will not affect the validity of the lien that will follow the vessel into the new owner's possession. This is contrary to prior legislation where the lien expired upon a sale and was transformed into a legal right to a share of the purchase sum.104

The Swedish government drew attention to the problem with the very limited period of barring after a verdict in the Swedish Supreme Court.[105] Since neither an acknowledgement by the debtor or a claim in itself breaks the limitation period the debtor in practice only have to contest a claim and thereafter neglect to undertake further actions, to act in a passive way, and wait for the claim to be barred.[106] A regulation was therefore implemented stating that the criteria for obtaining ship arrest according to RB 15 chapter 1 § was not to be applied when seeking to ensure a claim relating to maritime liens.[107] The claimant should no longer have to show that the debtor is likely to withdraw himself from payment, ship arrest should be possible to obtain from a claim anyway.[108]

Because of the very short period of limitation it may occasionally be required from the creditor to quickly obtain a court order on ship arrest to be able to claim his rightful payment. Such a procedure can be costly and not desired by any of the parties. The maritime lien itself cannot be prolonged, but the debtor, the ship owner, with consent of the mortgage holders may by a certain agreement contractually oblige himself to consent to an existing

[98] Prop 1773:42, p 265 and BrB 36:4
[99] SMC 3 chapter 40 §
[100] Karnov 2009/2010, not 114 and chapter 3.1
[101] Rune, p 152
[102] SOU 1970:74, p 127
[103] BL 5 § point 3
[104] Prop 1973:42, p 266
[105] NJA 1986 s 450
[106] Prop. 1987/88 p 4 f
[107] Compare chapter 2.1.2
[108] Prop. 1987/88 p 5 and chapter 5.2

debt and this debt to hold the priorities given by LPR and to exist through an compulsory sale. The lien will still be barred from a legal perspective but the debtor will be contractually bound by this letter of consent to pay and the debt will thereby be treated as a contractual obligation in a claim of payment and not as a, by law given, right in rem as to maritime liens.[109] By such a construction the parties will avoid a costly and lengthy undesired process of ship arrest which can be useful, especially if the ship owner knows that means will be available in a not too distant future but still outside of the period of limitation. [110]

2.6 Realisation in international affairs in Swedish jurisdiction

In general, Swedish law will be applicable legislation if a claim is brought before a Swedish court in a maritime lien case even though the parties both originate from another state and the maritime lien itself was founded in accordance with another jurisdiction.[111] If a claim is filed over something else than a lien it shall be processed under the jurisdiction of the flag state of the vessel. If such a right that is claimed can be determined to equal a maritime lien according to the Lien Convention of 1967, and thereby also according to Swedish law, it will be treated as a maritime lien as defined in Swedish legislation even though domestic legislation of the founding state say else.[112] If treated as a right in rem under another state's jurisdiction such a right will have to be superseded by maritime liens in the process of realisation and execution as per their definition and can never be given a better right than a maritime lien as defined under Swedish legislation when given priority under LPR.[113]

2.7 Analysis

As shown above a maritime lien gives a claimant a very strong position in a bankrupt's estate division and actually in any claim where the creditor can show that a lien is at hand. If the same claimant does not wish to realise his lien he is instead given a valuable asset that can be sold or in another way transferred. On the down side the value can be questioned considering the one year period of limitation that cannot be broken other than in actual realisation. Liens are granted by law and contractual agreements over liens in ships will usually be disregarded from in a court of justice. While researching material on maritime liens I realised that the amount of court practice is very limited in this field of maritime law. This may depend on

[109] Compare LPN 11 and 26 §§
[110] Exekution i fartyg, 15 f
[111] SMC 3 chapter 51 § 1 section
[112] SMC 3 chapter 51 § 2 section
[113] Rune, p 170 and SMC 3 chapter 51 §

several factors. First, a very likely scenario is that a holder of a maritime lien is actually not aware of that he is a holder of such due to its nature as a silent legally granted right, the very same intending to secure payment for a creditor. This will most definitely apply for instance for a supplier of a vessel.[114] Secondly, a maritime lien claim is often not over considerable amounts of money. To realise a claim based on a lien you will usually have to seek for the vessel to be placed in ship arrest, something that may be very costly and not worth the risk if a verdict potentially will not fall out in the benefit of the claimant.[115] It does secure due salaries in an effective way. This would probably however not be the case if the wage guarantee did not overtake the liens from the employees. The government have recourses, competence and time to wait out and claim their right in a completely different way than an employee onboard a vessel. Realisation usually means a very costly procedure often maybe not corresponding to the value of the liens themselves. A more likely scenario is that a holder of a lien will seek realisation in connection to another claimant who will bear the procedural costs over a claim with higher figures. Claimants of interest would be the holder of a mortgage or a retendee seeking to realise their interests, both outranked by a maritime lien holder under LPR. Additionally the ship owner may obviously be bankrupted on his own and a lien holder may then only notify his right in rem and be compensated under general bankruptcy and insolvency law.

Hopefully, the lack of substantial court case material on the other hand shows a will to pay and a solvency within the sector of Swedish ship owners and is not only a matter of cost ineffectiveness.

[114] Ship chandlers and similar are no longer given rights to liens in vessels after a change in regulation. They however for a long time were entitled such why court practise from previous the revision should maybe not be totally absent as is, other than in a few estate divisions as joint claims.
[115] See further on the subject in chapter 5

3 Right to Retention

The motives for recognising such a comprehensive right for a ship builder as retention can be found in the property effects on rights in rem that is given by a ship's registration. The purchaser of a vessel is long before the delivery of the vessel given the right to register mortgages and found liens in a vessel under construction. The ship builder is thereby deprived of any possibility to cancel a purchase of an already begun project, keep the property and sell it in his own business to compensate his losses. This as a consequence of that the vessel is already legally charged and burdened with rightful claims in rem.[116] The following disposition will focus mainly on such retention that will be exploited by a shipyard or a ship builder repairing or constructing a vessel. Retention could come in question also for for instance a salvor, but as a credit security instrument it will mainly come in relevance for someone with a possession and claim as a repairer or builder of a vessel.[117] For subrogation in the execution of retention, see chapter 2.4

3.1 Definitions

A right to retention is a creditor's right to detain a debtors property as a measure to enforce capital performance from the debtor. Principally a party that is exercising retention on someone's property is not seeking to realise the asset into capital. Usually he is instead using the measure as an instrument, forcing his debtor into payment by making him refrain his vessel, why realisation matters are more frequently connected to mortgages and liens.[118] The right to withhold a debtor's property is not absolute. It will have to stand back for execution and the retendee must seek compensation in an compulsory sale following the priority regulations in LPR. A specific regulation upon retention is lacking in Swedish legislation. It is however stated in SMC that someone building, rebuilding or repairing someone else's vessel is entitled to detain the vessel as security for a claim until payment has been deposited.[119] The background to the regulation can be found, except for in the international convention, in the now repealed 17 chapter CC. There was stated a right for an artisan to withhold something manufactured by him to secure payment for his work and for goods that was ordered but never delivered because of a purchaser's fault in picking up the per order manufactured goods.[120] SMC now refer for a retendee to apply the law on trader's right to sell goods that have not been picked up.[121] In those cases is usually what can be defined as a right to detention at hand rather

[116] Rune, p 160 f
[117] Tiberg, p 227
[118] SOU 1970:74, p 127
[119] SMC 3 chapter 39 §
[120] SOU 1070:74, p 128
[121] SMC 3 chapter 39 § section 2 and law TRSA

than a right to retention.[122] In a detention case, neither the possession nor the title has transferred to the purchaser of the goods why title and rightful ownership to the withheld goods still rests with the manufacturer. Ordinary sale and purchase is covered in the sales of goods act and treated under general law on contracts since the ownership usually will transfer with the risk at the point of the transition of the goods itself.[123] In retention cases the ownership, due to the regulations and consequences on a ship's registration thereby also covering mortgages and liens, has never come in the hand of the manufacturer why such a withholdage will be over another party's property. Thereby an extended security is given for a shipyard to protect its interests and investments in for instance building material and work hours.[124] The shipyard is given a high prioritised security and right in rem in the competition with other claimants in the property. A claimant that otherwise would risk being sidestepped by the, to him, most unfortunate position due to the special legal effects on ships registration.[125]

3.1.1 Targets of retention

Retention can be claimed and executed from the point where there is something concrete to retend and is thereby unlike maritime liens not depending upon the vessel to having being launched into water.[126] The right to retention occur in itself, not dependent on any specific contractual agreement covering retention.[127] When a vessel is the target of retention the competence is given explicit by law. The right does obviously depend on a primary agreement entered into either by the ship owner or someone in his place who is competent to enter into such a contract, for instance the master of the vessel in effect of his legally granted power of attorney related to his position as master of the vessel.[128] The parties may on the other hand actively at any time counteract a potential emerge of retention rights in a vessel by contractual means even though they may not agree *on* a potential emerge of the very same.[129]

3.1.2 Governmental vessels

Governmental vessels are usually excepted from any compulsory measures by immunity as discussed above. It is however probable that a governmental vessel under construction could be subjected to retention. The matter was discussed in a court case where it was held that a governmental vessel should not be covered by universal immunity at all times. If the vessel or state was engaged in matters of a commercial character that were not contingent upon the state's judicial supremacy and where commercial actors

[122] Compare Sale of Goods Act 10 §
[123] SGA 10 §
[124] SOU 1970:74, p 128
[125] Rune, p 160 f and chapter 4.2.2
[126] Rune, p 161
[127] Such an agreement would actually not be valid, see further down and CC 10 Chapter 7 §
[128] Tiberg, p 231 and SMC 6 chapter 8 §
[129] Rune, p 162

should be entitled to subject and be subjected to general principles relating to national contract and insolvency law, the very same could, and maybe even should, apply to a state-owned vessel acting in commercial purposes.[130] Retention is not an authority based executive measure but a right given in rem to a private actor as an instrument to secure payment under a contractual obligation. Such an action could therefore probably be undertaken as a measure to enforce payment. That a vessel under construction could be targeted to actual governmental execution by compulsory or similar action is however more doubtful.[131] According to Tiberg the immunity regulations are not to be regarded as to equal that a state party is entitled to escape a verdict or ruling from a domestic court of law, even though protected from events as compulsory measures and the foundation of liens. One can reasonably not be entitled to, by using its own executive powers, extract or repossess property, such as a vessel, under a creditor's protection in another state's jurisdiction without the previous consent of this state if involved in a legal dispute.[132]

In Swedish court practice the definition of international immunity has been extensively interpreted and included a scientific research radio tower. When not invoked by the state party itself, but instead of the Swedish Government's State Department as its representative, it was however decided that retention could not be denied. If the state itself had invoked immunity and immediate extradite the case might however have turned out differently.[133]

3.1.3 Claims stipulating right to retention

The claim entitling retention must be deduced from the vessel that is, or is to be, subjected to retention. A, for instance, shipyard may therefore not execute retention on a sister vessel belonging to a ship owner towards whom the shipyard have a due payment for reparation. Such a payment will instead be handled as a credit, provided by the shipyard from the point where the possession was returned into the ship owner's possession and will therefore not stipulate any rights for executing retention. In such a case a maritime lien could, however doubtfully, potentially be in question.[134] The claim must be connected to the same vessel that is to be subjected to retention. [135]

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[130] Tiberg, p 233 f —. ND 1950 p 181 – this court case related to a vessel heavily bomb damaged and captured by the German state during WWII where the creditor was seeking to retend the vessel. TheThe court held a very negative and doubtful position which probably, and even partly expressively, depended upon the German position as Norwegian occupier during the war. The claim was regarded as possible to invoke towards a debtor, regardless of who was the debtor and as a captured vessel it was not likely to fall under the application of the Paris Convention on state immunity. The court however found it very unlikely for a Norwegian ship repairer to force a vessel belonging to the occupying state of Germany into retention at that particular time.

[131] SOU 1970:74, p 129

[132] Tiberg, p 234

[133] NJA 1965 s 145

[134] Compare chapter 2.1

[135] Exekution i fartyg, p 23

With the claim deduced from a specific contractual agreement the retention right will cover also interest and costs that has evolved due to the debtors breach in the contract. Thereby costs and interest for keeping the vessel, as well as potential torts depended on the shipyard's breach of contract towards a third party following the breached primary contract, will be covered by a security in retention.[136] The vessel must have been under unbroken possession of the retendee from when the right arose until it was placed in retention, which is discussed further down in this chapter.[137]

3.1.4 Expiry of retention

A retention claim expires quite naturally either by realisation of the claim, the cessation of the claim or with the retendee giving up possession.[138] The right will further expire if the vessel becomes immune against claims in rem or if the vessel would ceases to be a vessel by destruction or similar event.[139] A realisation by the TRSA[140] will exhaust the claim as well as an compulsory sale.[141] For the compulsory sale it shall have been lawfully conducted, become legally binding and the purchase sum shall have been deposited. Thereby the right is exhausted whether the capital was sufficient to cover the debt or the property was sold in Sweden or abroad. As for maritime liens a right to retention will also expire with a court order on confiscation and forfeiture of property of the vessel along with a separate court order on forfeiture of the retention claim itself.[142]

3.2 Possessory and title requirements

Unlike other rights in rem under this subject the right to execute retention depends on the creditor's possession of the property and that the ownership legally is in another person's ownership than that of the retendee.[143] In certain cases the ownership will be the shipbuilder's. This shipbuilder's right, if the ownership has not transferred, will be met by the SGA and a right to detention instead.[144] That the right in itself depends on the possession implies a contrario that the right to execute a retention measure ceases with the cessation of the possession. A creditor giving up his possession thereby also gives up his right to retain the vessel. This does obviously not include a cessation of possession due to public authorities' enforcement as a part of a judicial process. A handover to an enforcement officer will be regarded as the authority's disposal of property in the

[136] Rune, p 165
[137] See chapter 3.1.4
[138] See chapter 3.2
[139] Tiberg, p 247
[140] See further 3.3.1
[141] Rune, p 167
[142] BrB 36 chapter 4 § and Rune, p 168
[143] Rune, p 163
[144] SGA 10 § and chapter 4.1

retendee's possession.[145] Not either cessation following a criminal act by a third party will count for. This since such a deprivation is restored by legal means and measures and must therefore constitute ground for continuous possession from a legal point of view.[146] A lawful cessation of the possession can however not be revoked and stipulate a right for continuous retention.[147] When voluntarily giving up the possession the right to retention ceases. The due debt claimed will then instead be regarded as a provided credit from the creditor to the debtor. In order to secure such a debt the creditor should rely on a mortgage or a reservation of title to secure his provided credit before handing over the vessel.[148]

3.3 Retendee's right to sell the retended

A retendee can choose different ways on how to realise a claim from a vessel in his possession. Which law to apply will depend on whether he is the sole claimant or if the vessel has other claims in rem as to mainly liens since this is the only higher ranked right in LPR.[149]

3.3.1 Sale under general contract law

As mentioned the right to retention is more of a lever to enforce payment than an execution ground for compulsory sale.[150] The retendee can apply the TRSA if he have in his possession; something that he was to repair or store within his business or something that he have manufactured for which the debtor have provided the majority of the building material.[151] TRSA is non-mandatory optional law and will not be applicable if the debtor has been declared bankrupt and his business thereby has transformed into a bankrupt's estate.[152] This since a bankruptcy usually involves several claimants, especially in rem, and a claimant shall not be able to set those interests aside just because he has a high-valued property in his possession.[153] The property can be sold if; the contractual obligation of the retendee has been fulfilled, the debtor, after having been urged by notice to pick up his goods and having been informed that the property risks being sold, have not picked up his property after at least three months and the time stated in the notification have expired. In the notification, the amount claimed by the creditor shall be stated.[154] If more than one year has passed since the completion of the contract or the value of the property is less than

[145] UB 6 chapter 7 § section 2
[146] Rune, p 163
[147] SOU 1970:74, p 129
[148] Compare chapter 5.1 on Title reservation
[149] LPR 4 § and chapter 4.4
[150] SOU 1970:74, p 127
[151] SMC 3 chapter 39 § section 2 and TRSA 1 § section 1
[152] See further on executional matters in debtors bankruptcy in chapter 5
[153] TRSA 1 § section 3
[154] TRSA 3 §

1/100 of the base amount[155] the property can be sold without previous notification.[156] The vessel itself can be sold on the creditor's discretion either by himself or on a public auction by an enforcement officer[157] since the demand for a public auction by enforcement officer, as execution in ships generally calls for, does not stand in these cases.[158]

3.3.2 Compulsory sale

The creditor can choose to use compulsory sale to realise his claim in retention. By obtaining a title of execution[159] on his claim he can apply for execution and compulsory sale at the Swedish Enforcement Agency.[160] By monitoring of someone else's claim, as a connected claim on their title of execution, he can also seek compensation in the debtors bankruptcy.[161]

3.4 Conflict of interests

The retendee will have a strong position in a debt's realisation since his position as the possessor of the vessel. This does however not stop a potential enforcement in seeking to realise other debts connected to the same vessel.[162] The retendee does not have to accept that the vessel is compulsory sold if the purchase sum is not sufficient to cover the claims of his.[163] It is a strong protection given to the retendee but will not stand if the retendee's claim is outranked by other claimants according to LPR. Maritime liens hold a higher priority in event of credit realisations by compulsory sale why a claimant holding a lien may therefore demand for the executive process to proceed if the retendee does not seek to redeem the claimants with higher prioritised claims.[164] A claimant with a lien founded according to foreign jurisdiction will not be able to demand such a proceeding and the retendee's right to continuous possession and abortion of compulsory sale will still stand.[165]

3.5 Third party involvement

A retention will be valid also towards a third party turning out to be the actual owner if the retendee was in good faith regarding the retended

[155] One base amount equals approximately 4 000 Euros why naturally this will never apply in a ship repair or ship building situation other than in theory.
[156] TRSA 4 §
[157] TRSA 7 §
[158] See chapter 5
[159] See UB 3 chapter 1 § and chapters 5.3 and 5.4
[160] Rune, p 164
[161] UB 8 chapter 11 §
[162] Rune, p 163
[163] UB 8 chapter 11 § and UB 9 chapter 4 §
[164] Rune, p 164 and UB 10 chapter 4 §
[165] SMC 3 chapter 51 § section 2

property in the first place.[166] In one court case a boat was compulsory sold as a measure in compensating the actual owner instead of the retendee for loss following a leaser's bankruptcy.[167] The Chancellor of Justice determined that the authorities had wrongfully set the retendee's right aside by overlooking the fact that the possession did not cease following the execution officers transition of possession from the retendee to the execution office. A wrongful execution, or if the executed property is already sold then instead the purchase sum, shall in such a case be annulled and not distributed to a third party.[168] Execution shall not affect a retendee's right and would that mean that the third party is deprived by his rightful ownership he will have to be indemnified by the debtor, placing the property in the hand of the retendee, by seeking recourse.[169]

One question of interest is if a party, having purchased a vessel in good faith, may exercise retention on the entire property to secure expenses for improvements and added equipment. Swedish Supreme Court has determined that such a party at all times generally shall be entitled compensation for improvements that are in the benefit of the owner. The ownership will not pass because of the expressed prohibition of good faith purchases if illegally deprived of the property and a right for the actual owner to restore his property – a so called right to vindication.[170] If the owner was illegally deprived of the property, an acquirer may exercise retention to secure expenses of his for the improvement of the property if not obvious that such a right cannot be invoked.[171]

3.6 Analysis

Possession is close to always the best position to hold in terms of possibilities in enforcing payment and being able to achieve compensation. The fact that a shipyard is legally granted a right to retention gives the creditor a very strong instrument if his debtor is ever in contractual breach. As mentioned the only creditor except for the retendee who may force an compulsory sale is the holder of a maritime lien. A maritime lien is usually, not always, far from as valuable in respect of capital credit value when compared to having the whole vessel in your possession. The numbers are simply usually not as high. A retendee, anxious not to have the ship sold by compulsory means, will thereby usually be doing a good affair by seeking to redeem a lien holder, overtaking his right in rem, since no demands are set limiting the holders possibilities of transferring the title. This will fall under general contractual rules stipulating contractual freedom and a debt is

[166] NJA 1936 s 650
[167] JK 1990 C 15
[168] UB 4 chapter 33 §
[169] UB 14 chapter 4 and 5 §§
[170] LGFP 3 §
[171] NJA 2008 s 282 – the case was over a boat that was stolen and later sold on to a third party in good faith. Even though concerning a boat it is of precedent for extensive interpretation of the concept of retention.

always transferrable into another debtor's possession and ownership.[172] When first initiating a right to retention the creditor usually has received payments in some parts from the debtor making it highly unlikely that an compulsory sale would not generate enough capital to cover the remaining debt. In another scenario the shipyard would not have received any compensation but would most likely either by; selling the unpaid for vessel as a whole, using the building material for a new construction or selling the parts and building material, receive full compensation. The shipyard must be said to having been given a fully satisfactory credit protection only by a right to retention. For other purposes, it is most certainly fulfilled by incorporating a title reservation if giving up possession as will be studied in the next chapter of this thesis. Worth to consider is however the possibilities to contractually counteract the emerge of retention rights. A minor shipyard entering agreement with a major ship owner may be tempted, when entering contractual relations with a much stronger party, to waive his right to retention to secure a, to him, most lucrative contract. Such a contract would not be very likely to contain a reservation of title either when the vessel leaves the shipyard and its possession. The shipyard in this case will be left without credit security and in event of bankruptcy he will be considered to have provided a credit without security, an invoice more or less. In an estate execution this would leave the shipyard with the un-prioritised claims in the last section of parties to achieve compensation in the execution of the estate. It will thereby most probable be left without compensation, causing yet another bankruptcy - to the shipyard in this case. Due to its character as a security totally dependent on possession, retention will only serve as a short-term security. None the less, it will most certainly fulfil its purpose with its high priority in realisation and in the possession itself.

[172] Compare LPN 13 and 27 §§

4 Title Reservations and estate separation

In event of bankruptcy, a party that have individualised identifiable property in the estate has a legal right to separate such asset from the estate before the debtors are able to divide the remains by the trustee's execution.[173] The creditor may as well as the debtor have the right to separate assets from the estate before a division of the estate is initiated. A more frequent scenario than debtors' separation is obviously the creditor's by a contractual given right. In the debtor's case it is usually the opposite claim where the trustee demands property to be recovered into the estate. Usually following a faulty or illegal transition or that the transition was undertaken as an action to intentionally separate assets from the estate in an unrightfully way in the detriment of the estate.[174]

A title reservation clause[175] is occasionally also referred to as a repossess clause. Repossess clause and title reservation is in practice the same thing stipulating the same right but will here be referred to exclusively as title reservation.[176] I will expressively point out the fact that in other areas of legal practise, such as in real estate, the different terminologies might have a major impact on ownership and rem affects.[177] Other contractual clauses that in SMC are to be equal to a title reservation is a sellers right to buy back the asset or a seller's right to revoke the contract in event of a buyers fault to deposit payment after giving up possession.[178] Generally, a seller will not be entitled to annul his sell, after giving up possession, due to a buyers breach in payment. By including a reservation of title, the parties will evade this regulation keeping a conditioned right in the benefit of the seller.[179] These different rights will be subjected and analysed under this chapter.

4.1 Definitions

A clause containing a condition on which the transition on ownership depends is commonly known as a suspensive condition. A condition that on the contrary means that the ownership finally and irrevocably transfers is instead known as a resolutive condition.[180] By including a suspensive condition in a contract the grantor reserves himself a right to reclaim, or

[173] KonkL 3 chapter 3 §
[174] Håstad, p 172
[175] For title reservation clause exemplification, see supplement B
[176] Millqvist, p 81
[177] Terminology for those areas of legal expertise have no room within this thesis but for further analysis on this topic see Håstad, p 177 ff, NJA 1960 s 577 and NJA 1982 s 312
[178] Exekution i fartyg, p 6
[179] SGA 54 § section 4
[180] Prop 1973:42, p 232

rather never really transfer, the ownership until full payment has been deposited.[181] These types of transactions shall be thoroughly separated from the practise of optional conditions as in bareboat charter situations where the charterer often have a clause with an option on acquiring the vessel at the expiry of the charter period. Such an optional right does not include a transition of title and ownership which a title reservation actually does. The suspensive condition grants the acquirer full *conditioned* ownership when in the optional contract we are actually dealing with a lease situation.[182]

4.2 Title reservation

Under general contract law, a commonly used security by a manufacturer and/or provider of a credit is to include a title reservation clause in the purchase contract enabling the seller of goods to withhold or repossess the goods in event of the buyers fault to deposit payment. Such a clause would primarily give a seller the benefit that he would be entitled to separate his property, which by the buyer has not yet been paid for, from a potential bankrupt's estate before the division of the estate is initiated.[183] Such a reservation is commonly used in all fields of contract law since it is the only credit security in chattels that does not force the buyer to refrain any possessory rights, even though naturally followed by limitations in ownership.[184] Additionally the buyer would also be entitled to separate the reserved property from a seller's bankruptcy since the suspensive conditioned ownership is mutual.[185] As previously discussed, a ship builder will have the competence to withhold a vessel in his possession and claim retention.[186] A title reservation will, for a ship builder, be used after having given up possession in event of a buyer's delay or fault in payment.[187] Including a title reservation will not imply that the actual ownership is left in the hand of the seller of a vessel. The seller will not be able to in any way dispose of the vessel and will not have any say in the operation of the vessel. Any involvement by the seller, without a previous consent of the buyer, would constitute a direct criminal offence.[188] The reservation is only allowing him to repossess the vessel in event of the buyers fault in payment. The buyer is actually to be in breach of contract but the buyer's main commitment according to the contract is to deposit payment within set periods or dates. The buyer can thereby not be in breach in many more parts than in payment.[189] Property sold under a reservation of title cannot be executed or in any way seized as a way to secure payment for a third party why it is a fairly secure method for a seller to obtain, or rather secure,

[181] Rune, p 46
[182] Rune, p 46 not 6
[183] Millqvist, p 82
[184] Persson, p 84
[185] Håstad, p 180
[186] See chapter 4
[187] Tiberg, p 43 and chapter 3.2
[188] BrB 10 chapter 4 §
[189] Rune, p 46

payment.[190] The parties are connected in a compelling relation. Neither of the parties is able to sell or mortgage the vessel without the other party's consent in the matter. This since each party's right is over the entire vessel in a conditional ownership and the seller is entitled to cancel the purchase contract and regain the entire property if the buyer is at fault. It should then not be burdened in rem by potential claims unknown and unauthorised for by the party with a conditional and potential full ownership interest in the vessel.[191] A conditional ownership like this gives the seller of the vessel a position of power that cannot be compared to a reservation of title in for instance a business/consumer relation. It is a great limitation of the freedom of action to the buyer considering the instrument of the vessel as a financial security in mortgages and equivalent.[192] You can however question what interest a seller would have to object a mortgage on the vessel. The seller's only interest is usually to be compensated financially and the buyer's interest usually limits itself to the disposal of the vessel under full unconditional ownership.[193] Problems could however follow over the validity of the clause after acknowledging such disposal of the vessel.[194]

The core in claims in rem and ownership is to determine and be able to show for which of the claimants that are having the best right to a certain property or asset. This claimant can thereby make this valid towards a debtor's claimants, or in such a purchaser's bankruptcy or execution, by obtaining sole and unconditional protection in his ownership.[195] Even though no actual formal demands are stipulated on the construction of a reservation clause the clause will not be able to invoke if not valid towards the creditors of the debtor. It has to be a valid right in rem.[196]

4.2.1 Validity motives

When including a reservation in a contract it is, by the contracting parties, intended to be valid and binding also towards a third party. In doctrine it has been discussed why such a reservation is and should be binding towards a third party. It has been concluded that by allowing a reservation to be valid an actual public interest as to capital interests is met. A potential buyer will be able to obtain a credit even if this buyer does not have any other security to deposit or present.[197] Criticism was however occasionally raised over the fact that in regular pawn of chattels, as which a vessel is categorised, a demand for possession has always been upheld. This has been motivated by the risk that the debtor may take on new credits for the same pawn and may therefore jeopardise the property in security and its value. For title

[190] NJA 1974 p 376
[191] Rune, p 46 f
[192] Persson, p 367
[193] Rune, p 47
[194] See further on invalidity in chapter 4.2.3
[195] Håstad, p 172
[196] Håstad, p 183 and chapter 4.2.2 and 4.2.4
[197] Håstad, p 177

reservations and credit purchases the opinion has however been that the buyer will by his purchase obtain a valuable property. The aim with the purchase will not be to obtain new credits but simply the purchase itself of which the credit is dependent, while a pawn on the other hand can be undertaken for an old debt as is pawn. The validity towards a third party was however contested and debated for a long time.[198] It was finally in court practice determined that a cancelation clause and a repossess clause as well as a reservation of title was to be a valid right in rem when invoked towards a third party and a buyer's creditors.[199]

4.2.2 Registration

There is a legislated division between completed and conditioned purchases. For a completed purchase to be at hand it shall be clearly stated that the seller have resigned any right on cancelling the contract or taking back the vessel.[200] For a conditioned purchase the seller have, by contractual commitment and incorporation of a reservation clause, the conditional right to repossess the vessel in event of the buyer's failure to deposit payment. A possibility that shall be clearly stated and expressed in the clause of interest leaving no room to interpret the clause in any other way or intent.[201] The registration of a vessel is intended to constitute an action in rem, equivalent to the practise of tradition followed by immediate possession in general law relating to sales and tradition of goods.[202]

When acquiring a vessel, whether under a title reservation or not, the buyer is obliged to seek registration for the vessel he has purchased. He has a registrational duty.[203] He is further on entitled to register a condition on which the contract is depending, a reservation of title or similar, in the ships registry. If he by the condition's realisation would lose his right to the vessel, the condition shall be removed from the registry by application from the seller or the buyer.[204] A registering authority discovering a clause on reservation of title or equivalent while processing an applicant's registration shall by the sole discretion of the registering office include such notice in the registry, why a conditioned purchase will be registered. A notification along with the registration shall be registered, a notification that shall be incorporated also if the buyer's right's in transition, mortgaging or similar are limited or regulated.[205] A buyer shall in event of cessation of a conditional clause register the expiry at the competent authority, the ships registry.[206]

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[198] Håstad, p 178
[199] NJA 1975 p 222
[200] Persson, p 366
[201] SMC 2 chapter 2 § section 1
[202] Persson, p 371
[203] SMC 2 chapter 2 § section 1
[204] SMC 2 chapter 4 § section 3
[205] Ekekution i fartyg, p 7 and SMC 2 chapter 27 § section 1
[206] SMC 2 chapter 2 § section 1

4.2.3 Invalidity

A title reservation is not required to have any certain form or having being established in any certain way in general.[207] As discussed above, in a maritime situation it is however recommended that the condition is registered in connection to the registration of the purchase.[208] It is however a requirement that the condition was incorporated in the contract before, or in connection to, the delivery of the goods, the vessel.[209] An incorporated reservation will not be able to invoke if the grantor have consented for the property to be used by the buyer in a way where he is acting as if his own by consumption or transfer of title. The creditor has thereby consented to a situation where a third party, by his consent, is given an actual better right to the property than the creditor. For such a situation the title reservation can thereby not be recognised since a reservation cannot be legitimate if its only purpose is to grant a right to separation in event of bankruptcy.[210] Allowing the debtor to dispose of property by his sole discretion as his own, while depending upon a suspensive condition in ownership, would by general practice and principles on interactions in rem counteract Swedish legislation. Whether the goods subjected to a title reservation would actually still be within the estate and possible to separate in event of a bankruptcy would be a matter of fortuity since it could be sold at any time. Such a factor cannot allow being valid towards a third party, especially not in good faith.[211] It is the consent to the title transition itself that stipulates the invalidity of the reservation and not the actual transition of possession in the second line since it already by the consent counteracted the intent of a title reservation clause, that a buyer shall not be able to thwart the security.[212]

For invalidity over goods having been mounted to the vessel, please see further down in chapter 4.3

4.2.4 Good faith

By the registration and notification on a burden in rem by a reservation of title the registrar makes the reservation valid towards a third party. By the regulations construction, it is however in theory possible for a purchaser of a vessel to receive registration on a completed purchase instead of a conditioned. Such scenarios will most likely commonly have to be solved by applying general principles relating to SMC on good faith.[213] A registration that has been recorded, thereby violating another party's right in rem or ownership when the conditions stipulated in the registration laid ground for a succession of the vessel, may be declared as invalid and the

[207] Håstad, p 180
[208] See chapter 4.2.2 and 4.2.4
[209] Håstad, p 181
[210] Håstad, p 184 f
[211] Håstad, p 185
[212] Håstad, p 186
[213] Persson, p 371

registration may come to be reviewed.[214] The registration may therefore be changed upon request by the neglected if the clause on title reservation was not incorporated and registered in a proper way. A title reservation thereby makes an absolute right in benefit of the grantor.[215]

4.2.5 Hire / instalment purchase

The parties in a contract relation including a reservation of title clause must foresee the possibility that the law on instalment purchases becomes applicable.[216] Preparatory legislation has advocated that a conditioned purchase shall be treated as a credit instalment purchase if depending on several separate payments and by the existence of LIP those opinions become practise. The only requirement to be treated as such is that part of the purchase sum has been deposited in advance where the remaining part is intended to be deposited after the transition of possession.[217] LIP may not be to the advantage of a creditor since any contractual commitments that are less favourable to the debtor than what is given by LIP becomes invalid.[218] LIP contains very detailed regulations on how to realise a claim over a contested object that is subjected to LIP where of which a few can have a major impact on the contract, drastically changing a process maybe initially intended. A title reservation may only be realised when the debtor is in 14 days of delay in payment and this instalment constitutes more than one tenth of the total amount of the purchase value[219] or if the debtor by his breach of contract, by not fulfilling his contractual obligation on a specific date stated in the contract, would jeopardise the creditors security in the estate.[220] A debtor adjusting his debt of the due amount will be able to keep the goods even if he did so after the 14 days period had passed. If the creditor has not yet repossessed his vessel and the debt is adjusted, along with interest and potential costs inflicted to the creditor, before the repossession the creditor will not be allowed to repossess the vessel.[221] The debtor is always allowed to adjust his debt in advance at any time while the creditor will only be allowed to claim a debt in advance if explicitly expressed in a contractual commitment.[222] Realisation of a claim falling under the application of LIP is conducted by the Swedish Enforcement Agency who will also determine the value of the enforced.[223] Their decision may be appealed to the District Court and thereafter to the Court of Appeal whose verdict cannot be appealed. The construction implies that a clause on arbitration will not be valid for a title reservation claim that can be determined to fall under the application of LIP.[224]

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[214] SMC 2 chapter 8 §
[215] Persson, p 371
[216] LIP 1 § section 2 p 2
[217] Prop 1973:42, p 231
[218] LIP 3 §
[219] LIP 7 § 1 p
[220] LIP 7 § 2 p
[221] LIP 8 §
[222] LIP 4 §
[223] LIP 11 and 15 §§
[224] LIP 16 § section 1

4.2.6 Title reservation alternatives

A title reservation clause is just one legislative acknowledged model but other non-mandatory legislation acknowledges the very same right. A grantor's right to annul a contract and keep the property shall be acknowledged and given the same right as a creditor under a title reservation clause.[225] A seller, or manufacturer, of goods is entitled to withhold his goods and annul the contract before an acquirer has gained possession of the goods and is in fault of payment.[226] Before the possession has transferred, a seller shall be presumed as the holder of the title to the vessel. Reversed presumption shall apply for the time there after.[227] Such a right to annulment can be contractually refrained. When a contractual waiver however is over a ship builder's right to annul the contract and regain ownership, it will not prohibit the ship builder to thereby annul the contract, refusing to complete a shipbuilding under construction. The actual construction will however thereby not be able for the ship builder to claim ownership and withhold possession over.[228]

A more practical, and very likely more common, solution to provide security by clauses on burden in rem is to integrate a reservation clause in a mortgage registration. Contractual freedom includes mortgages in general why the parties in such an agreement can be creative. A notification on a registered mortgage including a clause that the debtor will not be entitled to sell, re-mortgage or in any way burden the vessel in rem will be valid towards a third party by its registration. This will constitute an unconditional transition of title with a conditional mortgage, protecting the creditor and giving an operational freedom to the debtor by a full registered ownership.[229]

4.3 Appurtenances to vessels

The importance of the definition under this heading is that an object that can be classified as appurtenance to the vessel may not be subjected to individual claims or an individual right to separation in a debtor's bankruptcy unlike such equipment that is not a part of the vessel.[230] The regulation on vessel appurtenance originates from the regulations on real estate and the legislator have found it important to base the vessel definitions on related real estate regulations, mainly not to cause confusion in the institutions of pawn and mortgages.[231] Equipment added and mounted

[225] Prop 1973:42, p 231
[226] SGA 54 §
[227] Prop 1973:42, p 232
[228] Rune, p 47
[229] Rune, p 217
[230] Rune, p 27
[231] Persson, p 372, also compare Land Code 2 chapter 4 §

to a real estate in a proper way usually becomes part of the real estate. Consequentially all equipment added to the vessel for permanent use becomes appurtenances to the vessel[232] and in event of a sale of the appurtenance it will lose its character as such at the point that it is separated from the vessel.[233] To a vessel shall belong all mounted interiors and equipment that have been put there for the lasting use in the operation of the vessel. Spare parts and similar that are permanently kept onboard shall be considered to belong to the vessel to the extent it have been added in the ship owner's interest.[234] Spare parts are intended to include propellers and extra shafts kept onboard to exemplify.[235] The vessel and the object mounted to the vessel must be in the hand of the same owner. An object that was added by someone who was not the owner will therefore generally not become appurtenance. Consequentially someone who charters a vessel may remove equipment added for his personal use while onboard.[236]

Such equipment used for navigation or radio communication serving in the nautical safety of the vessel shall however not be regarded as such appurtenance belonging to the vessel if the equipment belongs to someone else than the ship owner who has the actual right to the equipment by a reservation of title, separation or equivalent condition.[237] The legislator meant that it is of great importance that some equipment can be mounted on a credit basis and provided by leasing without depriving the lessor of his right to separation. Radar and communication devises are paramount in the operation of the vessel, and due to its expensive nature usually provided for by leasing. On the same time it is of great importance that equipment that seemingly tends to constitute appurtenance shall to the extent that is possible also constitute such. This to stimulate long-term credits such as mortgages.[238] Question may rise whether what equipment is to fall within the application of 3 § section 2. With the technological development in the last years most systems are computerised onboard a vessel. Guiding cases are lacking, but most likely will all such equipment that is serving in the public interest as to navigational and nautical safety be considered to fall within the definition. Such can be very broad understandably why court practice must establish the legislative interpretation over the technological development at that certain time.[239]

Supplies such as provisions and consumables and equipment not kept onboard for a regular use in the vessels ordinary operation are also excluded from the definition.[240] Other equipment that will not become appurtenances is cranes mounted or taken onboard in a temporary loading or transport operation by a charterer, containers and certain stands or platforms built for

[232] SOU 1970:74, p 77 f
[233] SOU 1970:74, p 80
[234] SMC 1 chapter 3 § section 1
[235] Persson, p 374
[236] Persson, p 373
[237] SMC 1 chapter 3 § section 2
[238] SOU 1970:74, p 79
[239] Persson, p 379
[240] SOU 1970:74, p 78

a specific transportation operation intended to be removed, thereby not put there for lasting use on the vessel.[241]

If a crane on the other hand has been mounted to a vessel by and in the interest of a ship owner this will become appurtenances to the vessel even if a potential lessor has put it there on a title reservation or repossession clause.[242] This is the interesting and tricky legal effect to beware for a creditor. When added equipment has achieved the status of appurtenance, a title reservation clause over the object will lose its binding legal effect between the contractual parties. The validity of the clause itself in the foundation of the contract is not denied but the applicability and its status as possible to invoke in realisation will cease.[243]

That the object has to be for the lasting use of the vessel's operation does not imply that it has to be kept onboard at all times. Certain equipment such as fisheries and similar may only be used on a seasonal basis. Also may equipment that is appurtenances occasionally need repair or maintenance a shore. This will not imply that the equipment will lose its classification as appurtenances for the only reason that it is removed from the vessel for a limited period of time. In this definition, the important part will be that it is put onboard in the interest of the owner and is used on a regular basis in the operation and commercial interest of the vessel.[244]

4.4 Right to separation

No other assets than those actually belonging to the debtor can be claimed and executed to solve a debt of his.[245] A right to separation can be defined as a creditors protection in rem towards the debtor's other creditors and claimants apart from himself. If the creditor has a proven and absolute rightful ownership over assets in the debtor's possession in event of the debtor's bankruptcy, he has a right to separate these from the estate. If the creditor cannot make his claim valid and prove his right to the claimed asset, the estate has no obligation to extradite the property. Such a creditor will instead hold an un-prioritised claim in the bankruptcy.[246] A creditor with a claim over an object that has become appurtenance will not be entitled to separate his claimed object, regardless of title reservations or similar.[247]A title reservation over an entire vessel may absolutely be valid and proven effective to invoke. As a credit security instrument it may in the long run however be difficult to realise the security in such a way.[248]

[241] SOU 1970:74, p 78 f
[242] SOU 1970:74, p 79
[243] SOU 1970:74, p 79 f
[244] Rune, p 28
[245] Håstad, p 141and UB 4 chapter 17 § and KonkL 3 chapter 3 §
[246] Håstad, p 141
[247] Compare chapter 4.2.6 and 4.3
[248] Persson, p 383, For further discussion see chapter 5.3 on compulsory sale

4.5 Analysis

As described above a title reservation over an entire vessel may be practically hard to apply. It may be used as an indication of the intent the parties had at the time of the establishment of the contract. Reservations over specific objects that have been delivered to the vessel may on the other hand be an absolute necessity to be able to repossess computers and/or communication devices, even though always risking such equipment to transform into appurtenances. When applied over entire ship's it cannot be the most effective security to have in a vessel. In a ship's financing it should instead be recommended for a creditor, before giving up possession and thereby entitled to retention, to use a suspensive conditioned ship mortgage instead.[249] A claim on a ship's mortgage is much more convenient when realising into capital assets. The process is adapted and more or less constructed for procurement of arrest and execution over mortgage realisation claims. If on the other hand the creditor is used to repossessing vessels, having much experience in vessel trading and shipping practice, this person may very well prefer a title reservation. Thereby he will be given a, potentially, greater space of action to dispose of the vessel by his own discretion to a further extent without public authority interaction under a reservation of title. A benefit for such an actor will be the absolute right to separation from a debtor's estate with an extremely strong third party protection at hand. The property cannot be subjected to execution and the creditor will have a right and possibility, as to claim in ownership, which can hardly be compared with any other claim in rem. As for all rights in rem the highest priority is to be able to make the reservation valid towards the creditors of the debtor. By notifying the ships registry, obtaining registration in the registry of the reservation, the creditor while achieve more or less absolute protection towards such creditors thereby preventing any future invokes on good faith or similar.

[249] Even though mortgages are not a part of this thesis they do constitute the absolute majority of financial securities in ships, in figures measured, in the international trade with vessels why they cannot be completely disregarded from.

5 Executive Measures

There are different levels of insolvency where which the most drastic is bankruptcy. In some situations, the debtor may be able to handle the situation on his own, clearing himself from debt. In other situations, the society interferes, declaring the debtor in legal bankruptcy, appointing a trustee to handle the bankrupt's estate thereby relieving the company management by all authority and control of the company. The trustee's primary target is not to manage the business thereby leading it back on track, fulfilling its contractual obligations, but instead to liquidate the estate, dividing the assets between the claimants in the bankrupt's estate.[250] If for instance a charterer has already paid for transportation of certain cargo the trustee will have no obligation to conduct the transportation commitment. The charterer will instead, if nothing else was agreed, have an un-prioritised claim in the bankrupt's estate.[251] Reasons for realising maritime securities may differ in various situations but is usually caused by a debtor insolvency or bankruptcy. Other reasons may be that the debtor simply does not wish to pay!

5.1 Ship arrest

It is paramount that a party in a contractual relation is able to secure his payment. The most important institute within the maritime industry to provide such an instrument is the concept of ship arrest. By obtaining a verdict on ship arrest, the owner will be unable and forbidden to dispose over his property, in this case the vessel.252 Arrest can be obtained also on land-based assets and companies but will not be subjected under this thesis. Certain procedures needs to be undertaken to obtain a valid ship arrest and is in Sweden decided by the District Court where after execution is carried out by the Swedish Enforcement Agency.253 The verdict is usually interim meaning that the debtor will have no actual say in the proceedings until the verdict has been affected.254

The fundamental principle for obtaining a court order on ship arrest is that you can show that you have a valid claim and that the debtor is likely to; depart, withdraw the property or act in a way in which he may evade his obligation to pay. If a claim meets these conditions, the court can take a decision on ship arrest for the whole or parts of the asset.255 The demands are seemingly set quite high on the claimant as to burden of proof. To facilitate the procedure an additional paragraph in SMC states that a vessel subjected to maritime liens can be arrested according to RB 15 chapter 1 §

[250] Ihre, sjöansvar, p 49
[251] Ihre, sjöansvar, p 49 and chapter 5.4.1.4
[252] Ihre, Sjöansvar, p 44
[253] Ihre, Sjöansvar, p 45
[254] Ihre, Sjöansvar, p 47
[255] RB 15 chapter 1 §

even though no imminent obvious risk for the evading of payment by the counterparty is at hand.256 The regulation has however been interpreted and given a stringent application in practice why only seldom the regulations in 15 chapter RB are not applied in their full context.[257] Stockholm District Court denied a case on ship arrest over the vessel *Mindaugas* referring to the regulation as a possibility for the court to apply but not a necessity. The claimants had shown that they held valid maritime liens but not that the debtor was likely to evade his obligations.[258] The verdict is a direct contradiction of the motives given when the additional section was implemented where it was stated that it should now be perfectly clear that ship arrest can be obtained and conducted even though no eminent risk for the debtor's withdrawal is at hand.[259] For international vessels where the vessel in question constitutes the debtor's only asset within the state, it has been determined in court practise that an assumption that the vessel may leave the jurisdiction is enough to fulfil the elements for obtaining a ship arrest.[260]

Since court practise has taken this position the ordinary criteria of RB 15 chapter 1 § must be examined since all creditors with a credit claim in a vessel are likely to have to meet the criteria in the generally applied interpretation of RB. Withdrawal or evading of payment must not be a potential criminal action to be undertaken by the debtor but only of blameworthy character.[261] Suspicions that the debtor may use available funds to settle, to him and not by law, more prioritised due debts is generally considered sufficient reasons.262 Possibly could also an intentional failure to act stipulate valid ground for ship arrest if considered as a way to take advantage of the short period of barring in primarily lien claims. This has however not been practically dealt with.[263] It is not sufficient to state that the debtor has slow businesses and use this as a valid ground. Some sort of activity must be excepted by the debtor in the nearby future. Such may be that the debtor is obviously spending beyond his assets, seeks to realise or dispose assets abroad or by similar activity may jeopardise that the company is left in a position where the creditors will not be able to obtain compensations for their claims. A reason for this implementation is that it has been assumed to avoid a race and/or a competition by the creditors in a hunt for different debtors, thereby causing unnecessary filings and processes towards debtors actually willing to settle their dues.264

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[256] SMC 3 chapter 40 § 3 section
[257] Tiberg, Svensk fora och jurisdiktion, p 4
[258] T-111513-02 and Tiberg, Svensk Fora och jurisdiction, p 4 – the case is taken from a District Court, thereby without any judicial precedent. It however clearly demonstrates the courts day to day application of the regulations.
[259] Prop. 1987/88:77, p 6
[260] NJA 1986 s 450
[261] Ekelöf, p 29
[262] Prop. 1980/81:84, p 227 f
[263] Svensk Juristtidning 1986, p 379
[264] Ekelöf, p 28 f

The claim shall be filed at the District Court, showing the disputed claim. Winning approval requires the claimant to deposit security for damage, usually by a bank guarantee, that may be inflicted to the debtor in event of the debtor ending up as proven right. National state institutions and authorities will however not have to deposit any security.265 The size of the security to be deposited is not regulated but it is generally considered to have to correspond to a few days of the vessel's revenues while in operation. The court may decide upon additional security in event of a lengthy process or an initial miscalculation for instance.266 The security will have to be deposited for the original claim of execution and this expense will have to be carried by this party alone as the first claimant. It shall cover such costs as port fees, costs for ship security, monitoring and care, insurance, evaluation and other fees of necessity for the maintenance and arrest of the vessel. The costs can consequentially be significant why there is always a risk in filing for a ship arrest if a party is not totally confident in their claim.[267]

Having a ship in arrest will prohibit the owner from sailing or selling it or at all using it, but other creditors than the applicant will not be prohibited from realising their potential liens or mortgages. A mortgage that has been registered before the registration authority have received information about the ship arrest but after the ship arrest have been effected is generally invalid but will be accepted if the creditor was in good faith.268 Even though establishing new mortgages will not be possible, founding of new maritime liens and a theoretical possibility of an emerge of a right to exercise retention, during a ships arrest will be possible if related to the vessels operation while in arrest.269

5.2 Execution - foreclosure

Execution in a vessel includes the entire property. Appurtenances are not individualised property and can thereby never be subjected to individual claims or individual separation.[270] A vessel under construction equals a vessel when subjected to execution and foreclosure.[271] Claims on foreclosure are filed at the Swedish Enforcement Agency within which district the vessel is located or is presumed to make berth. Further on is remote foreclosure allowed making it possible to foreclose a vessel regardless of its position in the world and is to be seen as a notice on that the vessel will be foreclosed when entering Swedish jurisdiction. In an international realisation the verdict will transform into a legally granted lien

[265] RB 15 chapter 6 § 1 section
[266] Ihre, Sjöansvar, p 48
[267] Riksskatteverket, p 345 f
[268] Rune, p 176 and chapter 3.1.1
[269] Rune, p 176
[270] UB 4 chapter 6 § section 1 and 2 and chapter 4.3
[271] UB 1 chapter 9 §

in the benefit of the creditor to facilitate abroad acknowledgement and realisation.[272]

A ship owner may occasionally be entitled to limit his liability when having been found liable for someone else's actions in for instance personal or property damage.[273] Established liability in such a case will create a maritime lien in benefit of the damaged party.[274] By establishing a imitational fund the ship owner can avoid ship arrest or any sort of execution in the vessel. A imitational fund containing deposited assets up to the imitational boundaries set by SMC, depending on the type of claim in question, will by the establishment prohibit arrest or execution having the fund itself as security.[275]

To enforce execution and having SEA to deliver a decision on foreclosure the claimant needs to obtain a title of execution where the debtor is legally imposed to produce payment.[276] Such a title is obtained by; court verdict, arbitrational award or SEA's decision on junction to pay, for relevant exemplification. Also a court decision given by a foreign court may occasionally be a valid title of execution.[277] A decision on execution shall immediately be reported to the ship registry authority which in practice will exhaust the possibilities of acquiring a vessel under execution in good faith.[278]

Just a decision on foreclosure will neither prohibit the debtor from disposing of the property nor decisions on further foreclosure in the property. The debtor will actually be competent to sell the vessel to adjust his debts on voluntary basis as long as such an action will not set aside the interests of the claimants. He is not allowed to reduce the value of the property or in his company.[279] Even though liens and retention rights may emerge in the vessel, registration of new mortgages are not allowed unless the legally binding act forming a mortgage already at the point of execution was undertaken.[280] Such a transfer will thereby be registered. When the foreclosure has been realised by compulsory sale at a mandatory auction the execution will however preclude registration.[281]

A decision on foreclosure will be executed by SEA by a physical confiscation of the property. A decision on foreclosure will be allocated onboard the vessel and given in writing to the master of the vessel.[282] All

[272] Rune, p 182 and UB 4 chapter 8 §
[273] SMC 9 and 12 chapter
[274] See chapter 2
[275] SMC 9 chapter 7 § section 2 and 8 §
[276] Exekution i fartyg, p 55
[277] UB 3 chapter 1 §
[278] Exekution i Fartyg, p 55 and UF 6 chapter 19 §
[279] Exekution i Fartyg, p 55
[280] SMC 3 chapter 24 § 6 p
[281] SMC 2 chapter 23 § 8 p
[282] Exekution i Fartyg, p 57

matters on foreclosure are noted in the ships registry.[283] The execution does not always mean that the vessel has to be taken out of operation. If it can be determined that the continuous operation of the vessel would be for the benefit of the claimants, thereby enabling the debtor to adjust his debt without an compulsory sale, continuous commercial travel may be allowed.[284] Such an approval may for obvious reasons jeopardise the well being of the vessel as to actual safety, it may wreck, and to the risk of the vessel leaving Swedish jurisdiction thereby making an execution and realisation impossible for the moment. Continuous operation will therefore not be allowed without the expressed consent of the creditor and is for stated reasons rarely seen in practise.[285]

5.2.1 Property excepted from execution

Some property will not be possible for an execution officer to foreclose. The general rule is that all of a ship and its property is a possible target of execution and compulsory sale. Exception is however made for, as above mentioned, governmental vessels.[286] Another principle is that to be subjected to execution the property must be transferable from the debtor. If the debtor is not competent to sell or transfer the property and is prohibited of such disposal by a certain condition the property is not either possible to execute.[287] For validity towards a third party the condition must however be registered in the ships registry.[288] Therefore a vessel acquired under a title reservation that has been registered in the ships registry, thereby valid towards a third party, will be non-executional property.[289] Vessels may in theory be protected from execution by the beneficiary-rules of the debtor in UB 5 chapter. From execution may be excluded tools and equipment essential in the debtor's business.[290] Such exclusion is however in a maritime situation only of theoretical interest. When filing a claim in connection to lien or retention execution will never be prohibited by the beneficiary-rules. A claim secured by retention or maritime liens will automatically set aside any applicable beneficiary rule.[291] Not either may an onboard employee be prevented from leaving port over a due debt or anything he have brought onboard to be seized or executed when the vessel has been cleared and prepared for departure.[292] A foreign vessel can, further on, not be detained under Swedish jurisdiction when exercising its right to innocent passage[293] unless such intervention depends on obligations the vessel has incurred while exercising the innocent passage.[294]

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[283] Rune, p 182
[284] Rune, p 183
[285] Rune, p 183
[286] Compare 1926 International Convention on Governmental Vessels
[287] See chapter 4 on title reservations
[288] Exekution i Fartyg, p 30 and SMC 2 chapter 27 § - also compare good faith in 4.2.4
[289] Exekution I Fartyg, p 30 f
[290] UB 5 chapter 1 § 3 p – for execution in
[291] UB 5 chapter 13 § section 1
[292] SMC 22 chapter 1 §
[293] See UNCLOS article 17
[294] Exekution i Fartyg, p 31

A vessel sold on a suspensive title reservation condition in an instalment purchase may experience some difficulties. Such a vessel does not constitute executional property over a due payment claim from the creditor relating to the vessel in the contract from where the due payment derive.[295] Probably, a creditor meaning to enforce payment from the debtor will have to refrain from the reservation completely since neither the property itself nor the conditioned ownership of the debtor can be subjected to executional enforcement. You cannot foreclose your own property. Another option is obviously to realise the title reservation according to the contract, but then not only as a partial payment but as a contractual terminating action.[296] Following the prohibition of foreclosure in the property, if subjected to a title reservation, and the thereby direct forbidden involvement of SEA in such a matter the due payment cannot be individually executed. Instead the entire property can be foreclosed by SEA based on the termination of the contract and the construction of LIP where SEA will be the only competent authority.[297] A debtor's contractual breach on a title reservation will however constitute a possession disorder if LIP's regulations on timeframes have been acknowledged. For restoring such a disorder, claim can be filed at a District Court that will pass a judgement on possession restoration that can be executed by SEA.[298] For enforcement of a title reservation it is however paramount that the requirements stipulated in LIP, if applicable, are fulfilled.[299] If SEA does not enforce a verdict it is the District Court that will pass a judgement on performance,[300] often followed by a ship arrest to secure the property.[301]

5.2.2 Order of priority

The Law on Priority Right (LPR) governs the order of priority for compensation from a bankrupt's estate. There is a division between prioritised and un-prioritised claims where claims with higher priority will be compensated before claims with lower ranking. The trustee however will have special priority given by mass claim for his work to divide the estate.[302] In the prioritised categories of claims there is a division between special and general priority. Special priority means that the creditor has priority in his claim regarding a specific asset or property within the estate, maybe a vessel. General instead gives priority over all the property in the debtor's ownership and/or possession.[303] Special priority outranks general priority.[304] Thereafter the claimants with lower priority will be compensated

[295] LIP 19 §
[296] Rune, p 173 and NJA 1945 s 160
[297] LIP 11, 17 and 19 §§
[298] Exekution I fartyg, p 39
[299] See chapter 4.
[300] Exekution I fartyg, p 39
[301] RB 15 chapter 2 §
[302] KonkL 11 chapter 1 § and 14 chapter 18 §
[303] Håstad, p 124
[304] LPR 15 §

as per their internal ranking, even though no priority will ever outrank such securities obtained by possession such as pawn in possession or retention.[305] If any means remain in the estate after payments have been distributed to the prioritised claimants the un-prioritised will be compensated proportionally after the remains in the estate. 306 If the means on the other hand not even would be sufficient to cover the trustee's claim, a special regulation allows for the trustee to declare the bankrupt's estate in bankruptcy.[307]

The original claimant of execution, the primary holder of the executional title, will obtain priority in his claim when his filing has been registered in the ships registry.[308]

Worth to point out is additionally that a claimant holding several claims towards a debtor holds, by generally applied insolvency principles, the benefit of himself deciding in what order the claims are to be settled.[309]

5.2.2.1 Maritime liens

Maritime liens have along with air liens been given the highest order of priority in the execution of a bankrupt's estate and will thereby outrank registered mortgages..310 The maritime liens are internally ranked as they are divided in the sections in 3 chapter 36 § SMC giving onboard employees wages the highest priority.311 This however comes with a few exceptions. Generally, the liens compete internally within their own category where a lien of the same rank competes against other liens within the same category according to proportional distribution of available means. By exception, the claimants falling within the category of point 5 will outrank a higher prioritised claim if the point 5 claim was founded before other higher ranked claims in category 1-4. From these superseding point-5-claims, younger claims will also outrank an older founded claim.312

5.2.2.2 Retention

Retention has been given the second best order of priority according to LPR along with the very similar pawn in possession that is not practiced within maritime law.[313] It was discussed what priority retention should be given when LPR was restructured in accordance with the, by then, newly ratified convention. According to the motives, especially reparation was meant to preserve or increase the value of the ship, something of interest to all creditors. It was also in the interest of the legislator to equalise retention

[305] Lien holders may demand for continuous execution but may usually be redeemed.
[306] Ihre, sjöansvar, p 50
[307] KonkL 1 chapter 4 §
[308] LPR 8 § and UB 4 chapter 30 §
[309] NJA 1992 s 574
[310] LPR 4 § 1 p
[311] Compare chapter 3.1
[312] SMC 3 chapter 37 §
[313] LPR 4 § 2 p

with the for other sectors applicable detention.[314] That detention and pawn in possession was to be road models indicated that retention was to be given best possible priority, outranking mortgagees. Retention cannot be given contractually since such a beneficiary position, outranking mortgagees, would be detrimental for the hypothec holders by having a very similar right in rem being contractually granted. A contractual given right to retention would very much like pawn thereby at the same time be contradicting the prohibition of putting seagoing vessels in pawn.[315] The very institute itself promotes that the retendee shall be given a top priority since this party often is in possession of the vessel, not obliged to give up his possession to other than a claimant with higher priority, just as in a case with executive realisation of pawn in possession.[316] Giving retention a lower priority than mortgages would further on erode the very institute itself since it would be ineffective from the point when a ship owner registers mortgages on the vessel. Such mortgage bonds would in practice not even have to be registered upon a mortgagee but only registered and collected as bonds by the ship owner who would possess a superseding right by owner hypothec.[317]

5.2.2.3 Title reservations

As discussed in several chapters above a title reservation will not be invoked as a priority claim as a matter of competition in realisation. When a title reservation is at hand, this will instead be invoked as a separation right from an estate or from the possession of the debtor. Since a prohibition in the free commercial disposal of the vessel is contracted between the parties, SEA will not be able to foreclose it for the debtor's third party debt only on the basis that he is the possessor.

5.2.2.4 Non-prioritised claims

All claims that are not prioritised – special, generally or by mass claim – are non-prioritised.[318] Such claims will fall under the last section, thereby being the last to get compensated, in the division of the estate and will have internally equal right within the division.[319] Non-prioritised claims will usually have little, if any, chance of getting compensated following a bankruptcy. Those claims will usually be held by suppliers of mainly consumables and likewise.[320] A tactile difference for a supplier who previously was granted top ranked maritime liens for his claim.

[314] Compare SGA 10 §
[315] CC 10 chapter 7 §
[316] SOU 1970:74, p 130
[317] Rune, p 166 f
[318] Håstad, p 120 ff.
[319] LPR 18 § section 1
[320] Håstad, p 123

5.2.3 Internal competition in specific cases

As pointed out in 3.1 a maritime lien is founded for compensation for salvage. Such a lien may occasionally be connected to several objects if for example in a situation where the vessel has been salvaged along with its cargo and liens are created in the vessel as well as in the cargo.[321] A creditor with security in several different maritime liens has security for his entire claim in every given lien. This means that he may claim the entire amount out of one of his liens where after the cargo- or ship owners internally will have to settle the economical relation in the following process of recourse where the unfavoured owner will step in the place of the holder of the maritime lien.[322] If a creditor and holder of a lien have realised his right, thereby superseded another lien with better right in the process of realisation,[323] a holder of a lien with higher original priority will step into his place in event of a lack of funds to compensate the superseded creditor with a higher priority.[324] This would apply to for instance a salvor having realised a lien through the vessel, leaving the crew uncompensated with their claims for salary in a situation where the funds are lacking by the compensation of the salvor.[325]

5.3 Compulsory auction

Maritime claims are realised when the creditor get a seizure and a following compulsory sale by compulsory auction approved or by a creditors monitoring by another creditors claim and approval of such.[326] A compulsory auction can be initiated for a few different reasons.[327]

1. *Foreclosure*
    - A Public Court or SEA has in verdict or in a given decision established the existence of a claim, attached with special priority, thereby immediately foreclosing the property. The creditor will have to ask for compulsory sell within two months after the foreclosure.[328]
    - SEA has in a public or private claim foreclosed the property thereby entitling compulsory auction upon request.[329]

2. *Bankruptcy*

[321] Rune, p 154 and SMC 3 chapter 47 § section 1
[322] SMC 3 chapter 47 § section 2
[323] Compare 3.1.4 (Order of Priority)
[324] SMC 3 chapter 47 § section 3
[325] Rune, p 154
[326] Rune, p 153
[327] Compare following chapter in Exekution i Fartyg, p 61 f - from were table cited
[328] UB 4 chapter 27 §
[329] Exekution i Fartyg, p 61

- The trustee has called for compulsory auction.[330]
- A creditor exercising retention has called for compulsory auction.[331]

With the realisation of the claim the claim will cease to exist as deductable to the vessel, i.e. a lien. This will apply even if the funds released following the sale are not sufficient to cover the value of a claim or if a creditor has not been identified and thereby not compensated for a potential claim. The buyer on a compulsory auction will by the registration of his purchase be protected against the creditors of the foreclosed debtor.[332] Such a buyer may voluntarily have taken over existing mortgages or likewise and such a mortgagee will obviously have a right in rem in the vessel, but as a voluntarily legal action of the buyer and not as an affect of the auction.[333] The purchase may in all be compared to an acquisition in good faith.[334] The regulations have intentionally been given such a construction to stimulate the circulation and possibilities of clearing debts whereby a purchaser will need to be confident in his acquisition.[335] For a sale to extinguish a lien it is however necessary that the compulsory auction has been conducted within the jurisdiction of the performing state.[336] The compulsory sale must also have been conducted in a legal manor from the perspective of the executing state. To exemplify from Swedish legislation, compulsory auction, deposit of the purchase sum and notice of auction to the holder of a lien at latest 30 days before the auction are actions legally required to undertake. A realisation in another state is held for valid as extinguishing criteria in Swedish jurisdiction if the realisation have been carried out in accordance with the legislation of that state, regardless of potential deviations from Swedish legislation and whether that state is a party to the 1967 lien convention or not.[337]

A, by public authority, foreclosed vessel is always sold on a public compulsory auction where visitors bid and overbid each other.[338] When a claim has been established as valid by an enforcement officer the vessel is considered as foreclosed whereby auction is the only possible way to sell the vessel.[339] Exception can theoretically be made if an informal sale can be expected to generate more capital into the estate.[340]

For some creditors it may not be desired to compulsory sell the vessel. A claimant who does not wish to see the vessel sold on compulsory auction is entitled to redeem the original claimant, as well as paying for already

[330] KonkL 8 chapter 8 §
[331] KonkL 8 chapter 10 § section 1 and 1 chapter 5 § section 2
[332] Exekution i Fartyg, p 69 and UB 14 chapter 1 and 3 §§
[333] Exekution i Fartyg, p 69 f
[334] UB 14 chapter5 and 20 §§
[335] Exekution i fartyg, p 70
[336] Rune, p 159
[337] Rune p 160 and SMC 3 chapter 41 § section 3
[338] UB 10 chapter 1 §
[339] Walin, p 358
[340] UB 9 chapter 8 §

incurred administrative costs, thereby avoiding a compulsory auction.[341] A creditor with a lower priority than another claimant may be interested to redeem this creditor thereby acquiring, if highest priority, this party's veto.[342] Just as well, a creditor risking his claim being barred is entitled to file for a connected claim in the realisation process, for instance a lien holder, not to lose his right.[343]

Auction is to be held were the best offer supposedly can be received.[344] Auction generally shall be held as rapidly as possible after foreclosure execution.[345] A foreclosed vessel shall additionally be compulsory sold at latest four months after the execution of a decision or verdict or the arrival of an application on compulsory sale at the agency.[346]

An auction shall be announced before its execution. Known lien holders, mortgagees and retendees, and obviously the debtor/owner, shall be addressed and informed at least 30 days before the auction is held.[347] Other creditors are to be urged by the annunciation to report their claim to SEA.[348] An auction that has not been announced in a proper way according to 6 and 7 §§ shall be cancelled unless the fault can be remedied.[349]

The sum of the claims that are outranking the claim that holds the title of execution along with the value of the title-claim constitutes the *protective amount*.[350] If no bid exceeds the protective amount, SEA will not pass the sale without the expressed consent from all parties concerned and registered in the *concerned party list*.[351]

[341] UB 10 chapter 4 §
[342] Exekution i Fartyg, p 63 and UB 10 chapter 19 §
[343] UB 10 chapter 5 §
[344] UF 8 chapter 2 §
[345] UB 8 chapter 10 §
[346] UB 10 chapter 3 §
[347] UB 10 chapter 7 §
[348] UB 10 chapter 6 §
[349] UB 10 chapter 8 §
[350] Exekution i Fartyg, p 65
[351] UB 10 chapter 19 § - The *Concerned party list* lists all creditors with a realisational interest in the foreclosed vessel after their priority in the internal competition.

6 Final analysis and conclusions

Obviously, and fortunately, credit- and insolvency law has evolved tremendously since the days of Roman law, even though the need and core stays the same. A holder of a credit usually has two top priorities to consider. Being able to verify that holding a valid claim and secondly to be able to make his claim valid towards the creditors of the debtor.

Modern court practise concerning ship credits in specific is not very usual and more or less absent. Retention is a most effective legislative recognised right given to a shipyard. The very existence of the institute itself may be sufficient for the lack of need to exercise this comprehensive right. An actor involved in the shipping business will know that he at any time, when in breach of payment, may be subjected to retention. Since the vessel often is the only source of income in a ship owner's business, having to refrain his vessel would be devastating for such a business. Whether or not retention can be exercised at all times must say to be somewhat unclear. It cannot seem very righteous to allow for a shipyard to have a valid right to retention at every given time and literature on the subject advocates that some sort of principle of proportion must be considered even though not practically dealt with in a court of justice. Similar has been discussed concerning maritime liens. Here is from the creditor's point of view a most unfavourable period of limitation. Court practice has anyhow determined that although the period cannot be broken, ship arrest cannot be obtained only as an instrument to delay the period of limitation in benefit of the creditor.[352] If the ship arrest will not lead to the foreclosure and compulsory sale of the vessel the ship arrest will cease and the limitation period will start leaping. Probably with a following claim of indemnification towards the creditor. This is most likely the reason for the restrictive court practice in such cases. The measure will not stand in proportion to the loss and affects of the debtor. For stated reasons should also an exercise of retention need to meet the same proportions of interest. It has also been mentioned that retention shall not be possible to exercise if obviously unfair towards the debtor as to the proportion between the contested claim and the property held in retention.[353] Were such a line is to be drawn is however not possible to either set or sustain since it has to be determined from each individual case. When it comes to retention the absence of court material is natural. Retention is not a measure meant to have to bring to court. Its only purpose is filled by providing an instrument to force a debtor in breach of payment to perform in accordance of the internal contract. As such an institution it is unique and most likely very effective. One is entitled to wonder if a ship owner, with a possibility of being subjected to retention, would even consider placing his

[352] Compare previously discussed NJA 1986 s 450 and Prop. 1980/81:84 p 427
[353] Compare discussion in NJA 1979 s 670

vessel in a shipyard with knowledge that he will not be able to perform payment.

When it comes to maritime liens one is entitled to ask what purpose it serves as a credit security. Maritime liens will usually not be over substantial amounts of money why such credits should be able to secure without granting liens as a right in rem in the vessel, as in other business sectors of export and trade. A vessel is an excellent object to use as security. That is most likely the reason for the development of using it to found legally granted rights and opening up for the possibilities of treating it in another way than what is done with for instance real estate, that are not moveable, or cars that simply are not worth that much. In terms of competition it might seem unfair that a legally granted lien will outrank every contractually given right. This might be motivated by the fact that when the need for a lien to be founded is at hand, it usually means that the ship owner is liable for a wrongdoing in connection to the operation of his vessel. When it comes to liens for wage this will close to always be covered by the governmental wage guarantee. The employee will therefore rarely be affected by the rules on priority and lien realisation. Wage will anyhow have general priority under LPR so the lien is just a further extension of the already prioritised claim.

Several of the credit securities typical to ships is probably a result of a tradition and international regulation rather than an actual need or demand from the credit providers of the business sector. Long-term credits represents the absolute majority of all credits provided and with a very few limited exceptions these are always secured by mortgages. Obviously, a mortgage will rarely secure a ship repair. Therefore retention might be motivated to uphold as the institution it is. One could argue that such a need could very well be met by the institute of detention provided by SGA. There may on the other hand rise a conflict since such a construction might conflict with the prohibition towards having commercial vessels in pawn. Detention is also exercised over property where the title has not yet transferred. Retention is frequently invoked in other areas of commercial law, even though it might occasionally be hard to determine whether the parties refer to a title reservation or an actual right to retention. This suggests that retention itself would be applicable in a contractual commitment whether legislated or not.

If able to execute a reservation of title this is by far the most effective of all securities discussed under this thesis. When registered, it is always valid towards the debtor's other creditors and comes with an absolute right to separation from a potential bankrupt's estate. Limitations may, as pointed out, be inflicted to the creditor as a consequence of the applicability of LIP. LIP has a sort of social perspective incorporated as a support of the debtor. Probably LIP will usually be applicable legislation when a title reservation has been incorporated in a contract including such a suspensive condition. Thereby, the creditor will not be allowed to realise his claim on his own discretion at all times. Also following the indirect prohibition of other

burdens in rem it may be hard for both parties to uphold. A creditor cannot, as described, approve to another parties right in rem thereby competing with the creditor as a holder of the title reservation. Such may be determined to equal a renunciation of his contractually given claim and right in rem. A title reservation in itself is not very hard to apply according to Swedish jurisdiction even though the practical aspects may be extensive. International realisations are not a part of this thesis but a provider of a credit should have in mind that reservations may be dealt with in completely different manors when it comes to abroad jurisdictions.

Being able to obtain a court order on ship arrest is paramount in shipping when seeking to realise a claim. Court practice has determined that even though possible, a ship arrest should not be able to obtain just as a way of prolonging the period of limitation. When studying domestic insolvency and bankruptcy law the maritime perspective is usually not that different from other sectors when it comes to realising credit securities, or really any claims towards a debtor who happens to own a vessel. The differences are instead to be found in how the securities are founded and evolved. No practical need can be said to exist as to handle the actual realisation. Because of the size and nature of a vessel the principle of tradition will be met by a ship's registration. The registration and notifications in the ship's registry are what constitutes the substantive elements as to actions in rem. A credit provider will have to always closely be monitoring the ships registry to never risk being deprived of his rights since good faith will not be a very safe institute as to fall back when having been out-ranked following a registration.

Shipping is a sector with long, internationally recognised, traditions and one of few industries that can be found in practically all parts of the world. This circumstance might be what motivates special regulations separate from generally applicable rem institutes. Many international conventions are to be found in the fields of maritime law, most likely because of the fact that the vessels move and a mutual interest may be found in having similarities in the regulations by the international community. Governmental preparatory work indicates that this is the case, usually advocating for their different opinions from perspectives presented by the international community rather than a motivated domestic request for the very same. Swedish legislating committees have been appointed mainly as a consequence of the ratification of an international convention why SMC basically constitutes of a number of chapters directly incorporated as and following an international convention.

When studied in detail, a will to have the ship credit securities as far as possible connected to similar institutions in land based industry is clearly visible. Such an approach may also be the right path, not to frighten but instead stimulating investors and the inflow of capital that otherwise might not find its way into the shipping business. Whether this development is continuous, further bringing land- and sea based operation closer together towards from where it once evolved in the first place, is for the future to tell.

With the international community growing further closer, not having the limitations of not being able to communicate with travelling vessel and for creditors not being able to locate their debtors, might speak for such a development and approach also by legislative committees to come.

A new convention on hypothecs, mortgages and liens was presented in 1993 but has not been ratified by enough states to come into force. Therefore Swedish legislation over those credit institutions is based on the 1967 convention. With this borderless business, advantages can obviously be gained by having conformed international rules. A creditor will know his protection and the value of his credit security regardless of in which state he might realise, or have to realise, his security. From that perspective maybe a development of more clearly separating the maritime credits from their land-based similarities might facilitate many of the practical aspects of also domestic credit realisation since usually several international actors will be involved anyhow. Hopefully the subject for a future thesis on the, then newly ratified, international conformed and adapted credit regulations on ship securities where the analysis of a separate Swedish perspective will be nothing but superfluous.

Supplement A

Non-lien clause – Gentime 14

(d) Lien – The Charterers warrant that they will not suffer, nor ermit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel. In no event shall the Charterers procure, nor permit to be procured, for the Vessel, any supplies, necessaries or services without previously obtaining a statement signed by an authorized representative of the furnisher thereof, acknowledging that such supplies, necessaries or services are being furnished on the credit of the Charterers and not on the credit of the Vessel of the Owners and that the furnisher claims no maritime lien on the Vessel therefore.

The Owners shall have a lien on all shipped cargo before or after discharge and on all sub-freights and/or sub-hire including dead freight and demurrage, for any amount due under this Charter Party including but not limited to unpaid charter hire, unreimbursed Charterers' expenses initially paid by the Owners, and contributions in general average properly due.

The Charterers shall ensure that such lien is incorporated in all documents containing or evidencing Contracts of Carriage issued by them or on their behalf.

- The clause is not intended not to stop the potential emerge of liens, which is not always possible. The intention is for the charterer to redeem the ship owner in event of a claim related to emerge liens in the operation of the vessel while in control of the charterer.[354]

[354] Ihre, Sjöfraktavtal, p 83 f

Supplement B

Title reservation clauses[355]

"[1] It is expressly agreed and declared that the tile of the subject goods/product shall not pass to the [Buyer] until payment in full of the purchase price. The [Buyer] shall in the meantime take custody of the goods/product and retain them as the fiduciary agent and bailee of the [Seller].

[2] The [Buyer] may resell but only as a fiduciary agent of the [Seller]. Any right to bind the [Seller] to any liability to any third party by contract or otherwise is however expressly negatived. Any such resale is to be at arms length and on market terms and pending resale or utilisation in any manufacturing or construction process, is to be kept separate from its own, properly stored, protected and insured.

[3] The [Buyer] will receive all proceeds whether tangible or intangible, direct or indirect of any dealing with such goods/product in trust for the [Seller] and will keep such proceeds in a separate account until the liability to the [Seller] shall have been discharged.

[4] The [Seller] is to have power to appropriate payments to such goods and accounts as it thinks fit not withstanding any appropriation by the [Buyer] to the contrary.

[5] In the event that the [Buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [Buyer] shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the [Seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [Buyer] to the [Seller] at the time of the receipt of such proceeds

An example of a successful Romalpa Clause is:
"Unless the company shall otherwise specify in writing, all goods sold by the company to the purchaser shall be and remain the property of the company until the full purchase price there of shall be paid to the company. In the case of default in payment by the purchasers, the company shall have the right to retake possession of and permanently retain any unpaid for goods and to revoke any liability of the company to the purchaser on the contract of sale and delivery of such goods."[356]

[355] The clauses and texts of this supplement are taken from the Australian law firm Jones King Lawyers. The perspective in the thesis is Swedish but the clauses are well written and relevant for this thesis perspective why they are cited even though from another jurisdiction.

[356] Hendy Lennox (Industrial Engines) Ltd v Graham Puttick Ltd (1984) WLR 485 and Jones King Lawyers

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