Updated Rules of Maritime Privilege and Mortgage (Comparative Study of Iranian, English, and American Law)

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Abstract

A maritime mortgage contract is created by agreement between the parties and has a contractual origin. A maritime lien is created by law and arises upon the creation of certain maritime claims. One of the common features of a mortgage contract and a maritime lien is that both are Maritime securities that give rise to the right to sue and priority for the creditor over the maritime property. There is no explicit definition of a maritime lien or the type of debt in a maritime lien in Iranian law. It is not helpful for the legislator to introduce claims without reason as giving rise to a lien and to attribute the contract to maritime characteristics simply because the mortgaged property is a ship, but rather the basis and nature of the determination must first be explained, and then the conditions and provisions must be explained. In this article, while examining the position of American and English law, the basis and nature of the right of privilege and maritime mortgage are examined using a descriptive-analytical method, and with an emphasis on the special characteristics of ships and shipping commercial activity, an approach is presented to explain the provisions and principles of the right of privilege and maritime mortgage. The requirements of maritime trade have led to the emergence and acceptance of the theory of the legal personality of ships, and the provisions of objective rights against ships should be explained in the light of this theory. In scattered articles of the Iranian Maritime Law of 1964, referring to the liability of ships, there are signs of the implicit acceptance of the legal personality of ships by the legislator. The capacity to explicitly recognize the legal personality of ships in Iranian law is comparable to the acceptance of the legal personality of endowment property.

In light of the theory of the legal personality of a ship, the right of lien is a right based on the concept that the ship itself has caused damage to others or their property and must compensate for that loss. The goods or services provided to carry out shipping activities and provide the ship's needs, in addition to the owner, cause the ship itself to be liable to the provider of services and goods, and therefore create a maritime privilege on the ship. In the new maritime law, the injured party's claim arising from General average should be excluded from the category of claims creating a maritime lien; because the injured party did not provide any goods or services to the ship and was not directly harmed by the ship.

A maritime mortgage contract is a contract in which the builder or buyer of a ship or

the owner of a ship, to cover the cost of construction or purchase, or the financial needs of shipping, places a ship under construction or ready for operation in mortgage to the creditor. Therefore, a mortgage contract in order to finance non-maritime needs (such as the cost of making a film or treatment), a non-maritime mortgage contract is considered a subject of civil law and is ranked after the maritime mortgage contract in terms of ranking and priority.

If the holder of a maritime lien seizes a sister ship instead of the offending ship (the ship that caused the creditor to suffer loss or the creditor to whom the creditor has provided services or goods), his maritime lien is downgraded to a statutory right in rem and his claim is paid after the claims of the maritime mortgagees and those who have a preferential right on the sister ship. A sister ship is a ship to which the creditor has not provided services or goods or has not directly caused loss to the creditor, but is linked and related to the offending ship through having an official or beneficial owner. When a ship is present in the ports of a country where neither the plaintiff nor the defendant has a domicile, residence or immovable property and the court's jurisdiction to hear claims against individuals cannot be established through ordinary cases, providing the legal possibility of filing a direct claim against the ship, while establishing a dedicated maritime court with special procedures, will protect the rights of maritime creditors. Limiting the possibility of arresting a ship to maritime claims and limiting the arrest of only one ship (whether the offending ship or a sister ship) for each maritime claim, in accordance with the International Conventions on Arrest of Ships of 1952 and 1999, will protect shipowners, preserve the position of maritime creditors and, as a result, strengthen and develop commercial shipping activities.

Keywords: Maritime Lien, maritime court, action in rem, maritime mortgage, legal personality of the ship.

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