

# MARITIME PRIVILEGES IMPOSED ON SHIPS IN THE MARITIME DOMAIN. TRANSCRIPTION AND MOVABLE PUBLICITY THESE PRIVILEGES

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## **Abstract**

*Our paper is an empirical study that analyzes the notification to the persons concerned of the precautionary measures, such as privileges/liens, which can be taken on vessels/ships, the latter being regarded as movable property. Based on legal relationships of civil law, which have the nature of the common law in this area, as well as on the fact that vessels/ships are regarded as movable property, we considered interesting to analyze the privileges/liens which may establish thereon. Once the privilege/lien has been established, it must be brought to the knowledge of any person concerned because, otherwise, any such privilege/lien cannot be enforceable to any person, generating thus disputes between parties, whether or not they are contractual partners. The main idea of our approach is represented by the legal relationship, seen, on the one hand, as a social patrimonial relationship regulated by the rule of law typical of the analyzed field, and, on the other hand, as a real legal relationship, as it regards a specific category of goods, namely, the movable property. Under the incidence of the old Civil Code (1864), the pledge with or without dispossession was established on movable goods. The mortgage was specific to immovable property. The new Civil Code (2009) comes with a legislative amendment allowing the establishment of several types of privileges/liens over movable property, including mortgages. As previously mentioned, after taking the measures that establish the liens on property, these formalities should be brought to the knowledge of the persons concerned in order to ensure the legal balance at social level.*

**Keywords:** maritime privileges, movable publicity, ship.

**JEL Classification:** K11, K33

## **1. Introduction**

In maritime law, both nationally and internationally, there are situations where it is desirable to establish some privileges/liens or precautionary measures, without which one cannot carry out certain legal relationships or extinguish certain obligations. This is the starting point of the analysis that we carried out throughout this study.

We started with the concept of privilege/lien, as defined by the Romanian doctrine and jurisprudence, in order to compare it with the definition of the same term by the national legislation. It is noteworthy that, from the point of view of the Romanian legislation, there are two moments regarding the enforcement of law in time, respectively, prior to 01.10.2011 (when both the Civil Code and the Commercial Code were in force, along with the related legislation – the Government Ordinance no. 42/1997 on maritime navigation played an important role), and after that date, when we speak of a unified legislation, in the new Civil Code.

However, as a complementary approach, after the establishment of a privilege/lien, we also have to talk about its disclosure to third parties. This operation takes place via transcription and advertising, in our case movable property advertising, since ships/vessels are considered movable property within the mixed criterion for the classification of goods by their nature, and the classification under the law.

The novelty of this study resides, firstly, in the analysis based on legislative comparisons, but also in bringing to the attention the laws and rules applicable to maritime legal relationships, which should be taken into account when establishing legal relationships and concluding legal documents, including in the event of disputes.

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## 2. The concept of privilege in maritime law

The notion of privilege/lien, in the legal sense, is a right sprang from an express provision of law, granting the creditor, under its claim, the guarantee of the satisfaction of its claim as a priority over the claims of other creditors of the same debtor. However, the quality of the claim designates the case or the legal fact entailed by the claim.<sup>3</sup>

The Romanian doctrine and jurisprudence tackle the legal fact from several perspectives, namely:

- broadly, as a manifestation of human will, made with or without the intent to produce legal effects (i.e. to entail, amend or extinguish a real civil legal relationship), as well as a natural event or fact, onto which the human being has no influence;
- in the narrow sense, as a manifestation of human will, made without the intent to produce the legal effects described above, as well as an event.

In our opinion, legal privileges/liens involve legal facts viewed broadly, namely, human facts produced intentionally. This type of legal fact corresponds to the concept of legal act, within the meaning prescribed by the Romanian private law. This distinction is necessary because we need to know exactly the provisions of law and the qualification of legal transactions in order to act in complete legality.<sup>4</sup>

In connection to the above-mentioned issues, we should also mention that privileges/liens were established for the benefit of creditors and that they confer the creditors a preemptive right over other unsecured creditors or mortgagees. Unlike privileged creditors, mortgagees have a preemptive right only in relation to unsecured creditors (which the Romanian doctrine and legislation also call creditors benefitting from a general privilege/lien, i.e. enjoying a general guarantee, being able to satisfy their claim only after the claims of preferential creditors are covered) and to subsequent mortgagees.

It is noteworthy that all these privileges/liens are set only on ships/vessels belonging to the private domain<sup>5</sup>, whereas only these fall within the category of seizable goods (which can make the object of forced execution). We are not going to discuss within our paper the legal situation of the ships/vessels from the public domain (such as warships, etc.), as they cannot be subject to any privilege/lien in private law relationships.<sup>6</sup>

### 2.1 Privileges in Romanian civil legislation – the Codes

Under the Civil Code, liens are classified as follows:

- a) general privileges/liens, which are distinguished by the fact that they concern the debtor's assets (movable and immovable);
- b) general privileges/liens on movable property, which cover all of the debtor's movable property;
- c) special privileges/liens on movable property, which concern only some movable property of the debtor, under the law;
- d) special privileges/liens on immovable property, on a certain real estate or on a certain immovable property of the debtor, being privileged mortgages.

We presented this classification provided by the doctrine because this distinction has a practical importance since general privileges/liens are preserved without any formality, whereas the preservation of special liens imperatively requires advertising formalities.

<sup>3</sup> Baias, Flavius-Antoni, Chelaru, Eugen, Constantinovici, Rodica, Macovei, Ioan, Noul Cod civil. Comentariu pe articole [The New Civil Code. Comments by articles], 2012, edition 1 revised, C.H. Beck, Bucharest, p. 2414 ff.

<sup>4</sup> Boroi, Gabriel; Ilie, Alexandru, 2012, *Comentariile codului civil – Garantiile personale. Privilegiile si garantiile reale*, Hamangiu, Bucharest, p. 109 ff.

<sup>5</sup> Government Ordinance [O.G.] no. 42/1997, republished, regarding maritime and inland waterway transport.

<sup>6</sup> Cristea, Adrian, 1998, *Privilegii și ipotecă maritime*, in „Revista de Drept Comercial”, no. 10, pp. 171-181.

We consider that the distinction between movable and immovable liens is particularly important because, under the civil law, the liens on movable property grant the creditor only preemptive rights, while the privileges/liens on immovable property grant both preemptive rights and the right to forced execution.<sup>7</sup>

In maritime law, the Romanian legislation provides for a variety of liens and protective measures, such as mortgage/pledge, seizure, privilege/lien, etc.

Under the old Civil Code, regarded as common law in relation to private law branches, usually, the mortgage was specific to real estate/publicity (immovable) and the pledge, with or without seizure, was specific to movable property (movable). By way of exception, in the matter of maritime law, the mortgage or the pledge without seizure could be established on ships/vessels (which are movable property). With the advent of the new Civil Code, the Romanian legislation broadened the applicability of the mortgage on movable property, regardless of the matter/branch covered by law.<sup>8</sup>

The old Romanian Commercial Code lists the privileges/liens that could be set over vessels, in art. 687, as follows:

The following claims are preemptive over the ships/vessel and accepted for payment of price, in the order shown in this article:

1. *Trial expenses occurred in the common interest of creditors for ships/vessel preservation deeds and suit documents;*
2. *Expenses and compensation payable for relief, due for the last voyage;*
3. *Navigation taxes established by law;*
4. *The pilots' salaries, the custodian's salary and the expenses for guarding the ships/vessel, after its entry into the port;*
5. *The rent of warehouses for storage of ship/vessel tools and instruments;*
6. *The expenses incurred by the maintenance of the ship/vessel and of its tools and instruments after its last voyage and entry into the port;*
7. *The salaries, retributions and indemnities which, under the stipulations of Title III of this book, are due to the captain and to the other crew members for the last voyage;*
8. *The amounts due as a contribution to joint damage;*
9. *The capital and the percentage due to the obligations contracted by the captain to the needs of the vessel, under art. 519 and the formalities prescribed;*
10. *The money for the insurance of the ship/vessel and of its accessories, for the last voyage, if the insurance was concluded for a fixed time or journey, and, for steam ships/vessels that make regular insured journeys for a fixed time, the insurance premiums corresponding to the last six months, and, apart from these, in mutual insurance associations, the reparations and contributions for the last six months;*
11. *The indemnities due to tenants for fail to deliver the loaded item or for their damage due to the fault of the captain or crew, during the last voyage;*
12. *The ship/vessel price still due to the seller;*
13. *The claims stipulated by 9 above, which were transcribed and annotated later, any other maritime loan claim on the ship and the claims for which the vessel was given in pledge. If several claims from those listed by 13 are in competition, preemption is determined according to the transcription date of the title and to the annotation date on the nationality document.*

## 2.2 Related Romanian legislation

In addition to the regulations of the old Commercial Code, as mentioned at the beginning of this study, the Romanian legislation included, among other things, GO no. 42/1997 regulating maritime navigation. This law specifically regulated the rights, acts and deeds benefiting from the

<sup>7</sup> Boro, Gabriel; Ilie, Alexandru, op. cit., pp. 126 ff., 464 ff.

<sup>8</sup> Voicu, Marin, 2002, *Instituții de drept maritim*, Ex Ponto, Constanța, pp. 165-212.

transcription in port records, respectively that the acquisition and transmission of property rights on ships/vessels and the establishment, transmission or extinction of other real rights on these ships/vessels are registered in the registry books or records referred to in art. 18, held by the port master, and also in the ship/vessel nationality document or book.

In its turn, art. 18 of GO no. 42/1997 stipulate that Romanian ships/vessels fall into I-st category in registry books.

It is also noteworthy that the Romanian legislation prior to the entry into force of the new Codes (01.10.2011) distinguished between the legal operation for the establishment of the pledge and that of its enforceability against third parties. In this regard, the establishment of the pledge was required in order to ascertain this legal operation through a written document; for the enforceability against third parties, the law imposed mandatory formalities on movable property advertising.

A special case is the one in which the guarantee is established as long as the ship/vessel is not in Romania, requiring the annotation of the nationality document of the ship/vessel. In this circumstance, knowing that the ship/vessel was in a foreign port or that it is to arrive at such a port, the creditor in whose favor the privilege/lien was established is required, primarily, to demonstrate the transcription of this privilege/lien in the registry book that is in the custody of the port master's office for the registration of the ship/vessel and then to ask the competent Romanian diplomatic authority to proceed to the annotation of the nationality document of the ship/vessel.

We specify that the data regarding the establishment of the lien registered in the nationality document cannot be entered by another person or authorities except for the Romanian competent diplomatic/consular staff. The latter is competent for the application of certain terms of the release date, i.e. the attestation of parties, the legal situation and the factual status at the time of the registration of these data.<sup>9</sup>

As far as terminology is concerned, the Romanian legislation uses phrases and terms such as: notation and annotation or registration of data in the nationality document, in order to designate the legal operations that can be performed on the privileges/liens imposed on ships/vessels.

## 2.2 Privileges under Brussels Convention (1926)

The English terminology used in international law knows only a generic mortgage term without making the difference between several varieties of privileges/liens. The applicable law, i.e. the notion of law within the meaning of written law, is represented by Brussels Convention of 04/10/1926 (ratified by Romania by Law no. 43/1937). This Convention governs only the privileges/liens on the ship/vessel in the relationships between the states that have ratified or acceded to it and it regulates differently the matter of privileges/liens in national law.

With respect to the privileges/liens that do not involve foreign elements, the national law (Romanian law) is applied. In relation to the States-Member to Brussels Convention (1926) or to their nationals, the national law is also applied, if the contracting parties choose the Romanian law as *lex causae*, under the rules of private international law.<sup>10</sup>

Brussels Convention (1926) stipulates that privileges/liens can be exercised over the ship/vessel, the freight, for the voyage during which the preemptive claim was established, as well as over the ship/vessel accessories and freight. At the same time, it also covered two types of privileges/liens as follows: on the one hand, the priority privileges/liens, that have priority over mortgages; on the other hand, the subsequent privileges/liens, in relation to which mortgages have priority. The States that adopted this convention tended to recognize the mortgage and the limitation of the number of priority privileges/liens.<sup>11</sup>

<sup>9</sup> <http://www.rna.ro/Noutati/Cerinta%20suplimentara%20nave.html>, last consulted on November 1, 2015.

<sup>10</sup> Braşoveanu, Florica, *Dreptul european al mediului* [European environmental law], 2013, Pro Universitaria Press, Bucharest, p. 32 ff.

<sup>11</sup> Voicu, Marin, *op. cit.*, p. 32.

### 3. Transcription and movable property publicity of the privileges imposed on ships, in the maritime field

#### 3.1 The concept of movable property advertising

The legislation governing advertising, in general, as well as the literature in the field, reveals that advertising has not been organized for the transmission and encumbrance of all movable and immovable, tangible and intangible property. The law generally distinguishes between immovable and movable property, since, in this former situation, advertising remains and will remain a difficult issue.

Regarding movable property, it is well-known that the attribute of possession, understood as a status quo, is the best mean of advertising, and the need to advertise movable operations has an exceptional nature. Advertising movable transfers should be limited to certain categories of movable property, susceptible to individualization.

As previously stated, regarding movable property advertising, the creditor's real security interest is enforceable against third parties only by fulfilling publicity formalities. The advertising requirement is deemed met upon the registration of the security interest notice in the Electronic Archive of Real Security Interests, a computer tracking system of the priority of security interests structured on persons and assets. It is a public system which can be accessed free of charge.

The archive is an electronic registry, accessible to all persons through an internet connection, which is managed only by authorized operators. The time of the registration of the security interest grants its degree of priority over the security interests registered subsequently, even on the same day. Regarding the advertising in the maritime field, it is noteworthy that the transcription of the right to property entails a specific procedure. Thus, the transcription of the right to property over a ship/vessel requires the following documents:

- a) an application for the transcription of the right to property, where three names should be listed, in the preferred order, where the change of the name of the ship/vessel is also taken into consideration;
- b) the property deed, in legalized copy;
- c) the registration certificate of the owner-legal person, in legalized copy, or the normative act establishing the legal person, in simple copy, or the identity card or any other official document showing citizenship, in legalized copy, for natural persons.

The operations of registration, inscription, transfer of property, transcription of tasks or change of the technical features of the ship/vessel (such as vessel type, engine power and tonnage or load capacity of the ship/vessel) entail the fulfillment of standard requests.

The request for any operation shall be made by the owner/operator of the ship/vessel or, where appropriate, by the interested parties. The related documents, in the Romanian language, shall be submitted in one copy, in original or legalized copy, except for the maritime ships/vessels that fall under the provisions of international conventions and that carry out international voyages, submitted in view of granting, suspending or withdrawing the right to fly the Romanian flag, which shall be submitted in two copies.

The legal documents concluded abroad are not enforceable against third parties unless transcribed in the registers of Romanian diplomatic missions. The documents concluded in Romania, in a foreign language, shall be translated by an authorized translator whose signature shall be certified by a public notary.

Where it is requested to perform operations for a ship/vessel currently carrying out an international voyage, the data in the nationality document shall be entered diplomatically, through the consular office of the state on whose territory the ship/vessel is found.

### 3.2 Advertising privileges in the maritime field

Since 23 October 2009, the Romanian legislation provides that, for the registration or entry of ships/vessels, for the transcription of the transmission of the right to property and for the changes in the ship's/vessel's technical features, such as ship/vessel type, engine power, tonnage or cargo capacity of the ship/vessel, the owner or, where appropriate, the operator shall attach to the appropriate application, the document for the registration, entry or transfer of the right to property, and the transcription of the tasks or changes in the ship's/vessel's features.

It should be noted that, in maritime law, preemptive claims are usually registered in the registers kept by the port master. Also, the operations entailing, modifying or extinguishing maritime privileges/liens are also entered in these records.

In terms of international law, the legal basis is represented Brussels Convention (1926). Under the provisions of art. 11 of the Convention, in principle, the maritime liens established by this legal act shall not be subject to any formality and to any special condition of proof. Notwithstanding, each Contracting State shall be entitled to maintain within its legislation express provisions regarding the captain's obligation to carry out certain special formalities in the situation of certain loans over the vessel or if the cargo is sold.

The Old Romanian Commercial Code, in the provisions of art. 602, provided for an *ad validitatem* condition for the existence of the maritime loan contract, which is a distinct contract entailing specific effects. A written document prepared for the purpose of proving a maritime loan contract shall imperatively include the amount of money borrowed and the amount of money due as maritime interest or use, the items over which the loan is insured, the name of the ship/vessel, the full name of the captain or owner, the person who gives the money and the one who receives the loan, the journey and the time period of the loan, the time and place of payment, the applicable law and the obligation of transcription of the maritime loan in the registers of the port master where this maritime loan was made. The operation shall be also registered in the nationality document of the ship/vessel. If the maritime loan is performed abroad, it shall be entered in the Romanian consulate records of that place, with the annotation on the nationality document of the vessel. Maritime and consular authorities of that country shall send a copy of the maritime loan document to the maritime office (port master) where the ship/vessel is registered.

If the maritime loan is performed in a foreign country where there is no Romanian consular authority, the master of the ship/vessel shall request the annotation of the loan agreement in the nationality document of the ship/vessel to the competent local authority which can give this authorization or to any other public officer in that locality.

Starting with the annotation date on the nationality document of the ship/vessel, the maritime loan agreement becomes enforceable against third parties. Under the provisions of art. 12 of the Convention, national laws shall have to determine the nature and the form of the documents on board the ship/vessel, which shall include the data on the mortgages over the respective ship/vessel and on the existing maritime privileges/liens. However, the creditors who have asked this registration in the forms provided cannot be held responsible for omissions, errors or delays in the registration of these documents.

The Romanian national law determines that the ship/vessel document that shall include data on the establishment, transmission or extinction of real rights on vessels is the ship/vessel nationality document or book.

The Convention also provides for the application of its provisions on the ships/vessels operated by a non-proprietary owner or by a principal charterer, unless the owner has been dispossessed by an unlawful act or if the creditor did not act in good faith. The status of real right of these maritime privileges/liens results from this legal provision. According to art. 14 of the Convention, it is to be applied by each of the Contracting States when the burdened ship/vessel belongs to one of the Contracting States, as well as in all other cases provided for by national law.

However, the Convention excludes from its scope of application warships and state ships/vessels affected only to public service, according the provisions of art. 15.

Regarding the Romanian legislation, Ordinance no. 42 of 28 August 1997 on civil navigation divided ships/vessels into two categories, according to the knowledge or transmission of real rights and to the establishment of the onboard documents that ships/vessels must possess, as follows:

- a) ship/vessel I-st category, including self-propelled vessels with a power greater than 45 hp, sailing ships designed for long journeys and ships with or without propulsion with a loading capacity over 10 metric tons, including floating equipment without propulsion with displacement of over 15 tons;
- b) ship/vessel II-nd category, including all the other ships/vessels.

Romanian vessels falling in I-st category are registered in the registry books and Romanian ships/vessels falling in II-nd category are registered in registry records. According to art. 20 of the Ordinance, the system of ships'/vessels' registration and transcription of their transmission and the establishment or extinction of real rights on ships/vessels are also applied to floating equipment, the former being considered as falling in I-st category if they exceed 15 tons (displacement), and in category II if their displacement is up to 15 tons inclusively.

#### 4. Conclusions

Since this topic deals with institutions typical of property advertising – in our case, movable property advertising – but also since maritime law has certain specific features and exceptions to civil law, regarded as common law in this matter, we considered interesting to conduct a parallel approach of the old and new Romanian legislation, and of the national and international law in the field.

In addition, the analysis conducted within this paper reveals the legal path to be followed in movable property advertising, especially in Romanian maritime legislation, as far as it concerns Romania as a European country, but also in terms of the international legal relationships under private international law.

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