

**The administration of maritime liens in a European maritime  
insolvency**

***Man overboard?***

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## Table of Contents

<b>Introduction .....</b>	<b>3</b>
<b>1 The maritime lien: a maritime security interest.....</b>	<b>6</b>
1.1 A peculiar maritime law concept.....	6
1.2 The operation of maritime liens .....	7
1.2.1 Three core security mechanisms by operation of law.....	7
1.2.2 Counterbalances for the shipowner .....	9
1.2.3 A remarkable difference in classification.....	9
1.3 The common law – civil law dichotomy in classification of maritime liens ...	10
1.3.1 A historically grown perception .....	10
1.3.2 The variety of classifications in the civil law tradition .....	11
1.4 Conclusion: maritime liens seem to be rights <i>in rem</i> .....	14
<b>2 The dogmatic classification of maritime liens .....</b>	<b>16</b>
2.1 Maritime liens under the common law and the civil law tradition .....	16
2.1.1 Similar operation and rationale .....	16
2.1.2 Differences in procedure.....	16
2.1.3 Differences in categories and priority ranking.....	17
2.1.4 The similarities overshadow the differences.....	18
2.2 Maritime liens compared to traditional rights <i>in rem</i> .....	19
2.2.1 The pledge as comparison standard .....	19
2.2.2 <i>In rem</i> characteristics of maritime liens.....	19
2.2.3 <i>In personam</i> characteristics of maritime liens.....	20
2.2.4 A <i>sui generis</i> maritime security.....	22
2.3 Maritime liens and fundamental principles underlying rights <i>in rem</i> .....	23
2.3.1 Rights <i>in rem</i> and the <i>numerus clausus</i> rule.....	23
2.3.2 Fundamental theories underlying rights <i>in rem</i> .....	24
2.3.3 Two-step access test.....	25
2.4 Conclusion: maritime liens are rights <i>in rem</i> .....	26
<b>3 The administration of maritime liens under the EIR .....</b>	<b>28</b>
3.1 Article 8 EIR .....	28
3.2 Uncertainty reigns .....	29
3.2.1 Autonomous EU concepts .....	29
3.2.2 Diverging language versions .....	29
3.2.3 Diverging case law .....	30

3.3	<i>Senior Home</i> criteria .....	31
3.3.1	<i>A two-step test</i> .....	31
3.3.2	<i>The national classification test</i> .....	31
3.3.3	<i>The independent limitation test</i> .....	32
3.4	Conclusion: maritime liens are potentially rights <i>in rem</i> under the EIR .....	36
<b>4</b>	<b>The priority ranking of maritime liens over ship mortgages under the EIR</b>	<b>37</b>
4.1	Priority ranking of maritime liens .....	37
4.2	Reversing the priority ranking by inadequate maritime lien protection .....	37
4.2.1	<i>Maritime liens vs. extensive protection for ship mortgages</i> .....	37
4.2.2	<i>Extensive protection for ship mortgages</i> .....	38
4.2.3	<i>A perverse reversal of the priority ranking</i> .....	38
4.3	Fundamental issues related to the EU legal order .....	39
4.3.1	<i>Conflicts between different legal orders</i> .....	39
4.3.2	<i>The principle of conform interpretation</i> .....	40
4.3.3	<i>Member States not adhering to international conventions</i> .....	41
4.4	Conclusion: maritime liens need <i>in rem</i> protection.....	42
	<b>Conclusion: bringing maritime liens aboard the EIR</b> .....	<b>43</b>

## Introduction

### *Background*

Recent examples of cross-border insolvency of shipping companies<sup>1</sup> (“maritime insolvencies”) illustrate the complex legal questions that arise in the administration of maritime liens in maritime insolvencies. In the EU, the legal framework for cross-border insolvency, and hence for maritime insolvencies, is the European Insolvency Regulation (“EIR”).<sup>2</sup> Under the EIR, all assets of the debtor are in principle administered under a single regime,<sup>3</sup> accorded to the Member State in which the centre of main interests (“COMI”) of the debtor is located. That Member State has jurisdiction over the entire estate of the debtor,<sup>4</sup> and the domestic insolvency laws of this Member State, the *lex concursus*, govern the entire insolvency.<sup>5</sup>

Because of the generic nature of the EIR, the administration of peculiar claims, like maritime liens, within this instrument is not self-evident. It is crucial, however, for maritime liens to retain their secured position in a European maritime insolvency, because these maritime liens protect crucial maritime interests, hereby facilitating maritime commerce.<sup>6</sup> Arguably, the insolvency of the shipowner is even the moment at which the lienholder needs this security the most, because the financially precarious situation of the shipowner in insolvency and the straitjacket of insolvency proceedings excludes alternative ways of recovery for the lienholder’s claim.

Appropriately, the EIR contains several exceptions to the general principle of a single regime to protect specific interests.<sup>7</sup> Among these exceptions, the right *in rem* exception of Article 8 EIR seems most eligible to adequately protect maritime liens.

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<sup>1</sup> Most notably, the insolvency of Hanjin Shipping, formerly the seventh largest container shipping line in the world. See *inter alia*: In re Hanjin Shipping Co 2016 AMC 2126 (US Bankruptcy Court D NJ); Hanjin Shipping Co, Re, 2016 BCSC 2213 (British Columbia Supreme Court) (2018) 3287 1; Martin Davies, ‘Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity’ (2018) 66 Am J Comp L 101, 102–104; In Hyeon Kim, ‘Legal Implications of Hanjin Shipping’s Rehabilitation Proceeding’ (2017) 47 Hong Kong LJ 915; Thomas Peter Myers. ‘Hung up on Hanjin: Universalism and Bareboat Charter Hire Purchase Agreements Leave Maritime Lienholders Adrift’ (2017) 42 Tul Mar LJ 195; Cameron W Roberts, ‘Hanjin ’ s Legacy - Two Cents on the Dollar A Case for Reforming Chapter 15 of the Bankruptcy Code and Enforcement of Maritime Liens’ (2017) 30 USF Mar LJ 1; Eugene YC Wong, Jacky CK Yeung and Linsey Chen, ‘Modified Universalism and the Proposed Adoption of the Uncitral Model Law on Cross-Border Insolvency in Hong Kong-from the Hanjin Shipping Bankruptcy Case’ 21. Some issues in Hanjin’s insolvency were also introduced earlier by the author of this contribution in Warren de Waegh, ‘Hanjin’s insolvency in the EU and the United States’ (2019) 25 JIML 21

<sup>2</sup> Council Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings OJ L141/19 (“EIR”)

<sup>3</sup> See EIR, Recital 23; Gabriel Moss, Ian Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency proceedings* (3<sup>rd</sup> ed, Oxford University Press 2016) 58; ‘Council Report 6500/96 of 3 May 1996 on the Convention of Insolvency Proceedings [1996]’ (‘Virgos-Schmit Report’) para 73 (The Virgos-Schmit Report was drafted in preparation of the initial Convention on Insolvency Proceedings in 1996, but remains widely accepted as an authoritative source for the interpretation of the EIR.)

<sup>4</sup> EIR, Article 3(1) and Recitals 23-33

<sup>5</sup> EIR, Article 7 and Recital 66

<sup>6</sup> *Infra* 1.1

<sup>7</sup> EIR, Articles 3(2) and 8-18

This is because the maritime lien has strong ties with the *res*, i.e. the ship, just like a traditional right *in rem* has strong ties with the asset that it encumbers.<sup>8</sup>

This exception provides that rights *in rem* on the assets of a debtor located in a Member State shall not be affected by the opening of insolvency proceedings in another Member State. As such, the answer to whether maritime liens are to be considered rights *in rem* can be determinative for the course of a maritime insolvency as, on the basis of Article 8 EIR, maritime lienholders could be able to evade the single insolvency regime. Hence, liens could be administered separately to the benefit of the maritime lienholders in case the ships are located in a different Member State than the Member State where the insolvency proceedings are opened.<sup>9</sup> As such, maritime lienholders could retain the security that they expected before the insolvency in the Member State where the ship is located, instead of being left to the mercy of foreign insolvency proceedings and foreign insolvency law.

However, the conclusion that maritime liens fall within the scope of the *in rem* exception of Article 8 EIR is questionable. This conclusion seems to be primarily deduced from the traditional view held in common law jurisdictions that maritime liens are rights *in rem*.<sup>10</sup> However, most EU Member States are part of the civil law tradition which are traditionally thought to classify maritime liens as rights *in personam*.<sup>11</sup> Moreover, domestic concepts, like the *in rem* classification of maritime liens in common law jurisdictions, cannot always simply be transposed to the EU legal order.<sup>12</sup>

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<sup>8</sup> Case law and doctrine also hints at the eligibility of *in rem* protection for maritime liens, see Court of Appeal Antwerpen, 4 March 2009, *RW* 2009-10, 882 (*BV K-W v GmbH CS & Co KG*); District Court Arnhem, 3 december 2008, (*X Reederei GmbH v FLB SPRL*); *Puglia di Navigazione S.p.a. v. Cambiaso & Risso Marine S.p.a.*, *Il Diritto Marittimo* 2013, 198; Giorgio Berlingieri, 'Defaulting Shipowners and the Regulation of Their Insolvency Status' 4–6 <<https://comitemaritime.org/work/cross-border-insolvencies/>>; Maurizio Dardani, 'Recent Developments of European Law in the Matter of Insolvency Law and the Treatment of Rights in Rem: A Difficult Marriage', *Yearbook CMI 2017-2018*; Davies (n 1) 124-125; Alfred Joseph Falzone III, "'Two Households, Both Alike in Dignity': The International Feud between Admiralty and Bankruptcy' (2014) 39 *Brook J Int'l L* 1175. Erik Göretzlehner, *Maritime Cross-Border Insolvency. An Analysis for Germany, England & Wales and the USA* (Springer 2019) 134–135; Sarah C Derrington, 'The Interaction between Admiralty and Insolvency Law' (2009) 23 *Austl & NZ Mar LJ* 30, 37; Julie Soars, 'Cross-Border Insolvency and Shipping – a Practical Guide', *Admiralty and Maritime seminar hosted by the Federal Court of Australia on 23 April 2015* (2016) 46

<sup>9</sup> Virgos-Schmit Report (n 3) para 97; See also Gerard McCormack and Reinhard Bork, *Security rights and the European Insolvency Regulation* (Intersentia 2017) 35-36 qualifying Article 8 EIR as a 'hard and fast rule.'

<sup>10</sup> Davies (n 1) 124-125; Göretzlehner (n 8) 134; For *contra*, see Lia Athanassiou, *Maritime Cross-Border Insolvency* (Informa 2018) 201-202 only discussing ship mortgages in the context of Article 8 EIR

<sup>11</sup> Berlingieri (n 8) 5; Rudolph Cleveringa, *Zeerecht* (4th ed, WEJ Tjeen Willink 1961) 121; René Flach, *Scheepsvoorrechten* (Kluwer 2001) 25; Leo Delwaide, *Scheepsbeslag* (Kluwer 1988) 137; Eric Van Hooydonk (ed), *Derde Blauwboek over de Herziening van Het Belgisch Scheepvaartrecht* (Commissie Maritiem Recht 2012) 166

<sup>12</sup> CJEU Case C-6/64, *Costa v Enel* [1964]; Jan Willem Van Rossem (2013) 'The Autonomy of EU Law: More is Less?' in Ramses Wessel and Steven Blockmans (eds) *Between Autonomy and Dependence* (TMC Asser Press 2012) 13-46

## *Research design*

In light of this background, the present contribution evaluates how maritime liens are administered in a European maritime insolvency. More specifically, this contribution analyses whether maritime lienholders retain their secured position in a European maritime insolvency by virtue of Article 8 EIR.

The legal doctrinal method is employed for this purpose as to evaluate the adequate protection of maritime lien security in a European maritime insolvency in light of its rationale, the protection of crucial maritime interests to facilitate maritime commerce.

Additionally, the functional comparative law method<sup>13</sup> is employed to more pertinently assess the most suitable option which can be employed to administer maritime liens in a European maritime insolvency. The focus in this comparative assessment is mostly on four Member States which are crucial for maritime commerce in the EU: Belgium, France, Germany, and the Netherlands.<sup>14</sup>

For this purpose, this contribution is divided into four chapters. The first chapter introduces the concept of maritime liens and its significance for maritime commerce. Chapter 2 continues by nuancing the dichotomy between common law and civil law and searches for a dogmatic classification of maritime liens. This dogmatic analysis on the classification of maritime liens is a crucial prerequisite to subsequently assess whether maritime liens can fall under the *in rem* exception of Article 8 EIR (chapter 3). Fourthly and finally, the most detrimental consequences of inadequate administration of maritime liens under the EIR are discussed as to emphasise the need for their adequate protection in a European maritime insolvency (chapter 4). At last, recommendations are presented in order for maritime liens not to be the proverbial *man overboard* of the EIR.

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<sup>13</sup> As in Mark van Hoecke 'Methodology of Comparative Legal Research' (2015) Law and Method 8-10, 18-20

<sup>14</sup> Numerous maritime interests are located in these Member States, as illustrated by the presence of the four busiest container ports of Europe in these countries (Rotterdam, Antwerp, Hamburg, and Bremerhaven), one of the largest ports in the Mediterranean area (Marseille) and other important ports for specific types of transport (e.g. Zeebrugge for roro transport, Le Havre for container transport, and Amsterdam for dry bulk) (see European Commission Study on the Analysis and Evolution of International and EU Shipping, <https://ec.europa.eu/transport/sites/transport/files/modes/maritime/studies/doc/2015-sept-study-internat-eu-shipping-final.pdf>)

# 1 The maritime lien: a maritime security interest

## 1.1 A peculiar maritime law concept

The maritime lien can be described as a security interest on the ship, granted to specific maritime claims.<sup>15</sup> This peculiar maritime security interest originates from the *lex maritima*, the *ius commune* of maritime merchants throughout medieval Europe,<sup>16</sup> and can nowadays be found in the domestic laws of all countries with a maritime tradition.<sup>17</sup> As such, maritime liens have provided specific maritime claims with strong security in relation to the ship ever since the Middle Ages.

The need for this peculiar maritime security interest originates from the inherently international and dynamic character of maritime commerce. Creditors and debtors are scattered across jurisdictions; contractual relationships are often volatile; time is of the essence; ships are in need of maintenance or repair at different ports around the world; the ship crew needs to be compensated and changes regularly, etc. These dynamic conditions require stronger guarantees for creditors at the ship's different ports of call and this is where maritime liens come into play.<sup>18</sup>

Without maritime liens, creditors would have the burdensome task of locating the debtor in a possibly remote jurisdiction and, consequently, of finding the correct forum to bring their claim. Creditors would have to rely more on payment in advance or immediate payment of their claims, because once the ship has left the port, their chances to enforce their claims become precarious. Such immediate payment would be irreconcilable with the inherently mobile nature of maritime commerce, in which the operation of the ship is guaranteed via sundry small credits. Therefore, some maritime claims are granted additional security by virtue of the maritime lien, in order to facilitate the operation of the ship and, by extension, to facilitate maritime commerce.<sup>19</sup>

However, maritime lien security is not granted to all claims in connection with the operation of the ship. This would be a too excessive burden on the shipowner. This is why maritime lien security is only granted to claims that are considered crucial for the operation of the ship. Claims that are typically granted maritime lien status are salvage claims, collision claims, and master's and crew's wages.<sup>20</sup> Hence, the underlying

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<sup>15</sup> *The Bold Buccleugh* 13 ER 884, 850–851

<sup>16</sup> See Flach (n 11), 21; Andreas Maurer, *Lex Maritima. Grundzüge eines transnationalen Seehandelsrechts* (Mohr Siebeck 2012); William Tetley, *Maritime Liens and Claims* (International Shipping Publications 1998) 12-13, 56; Lijun Zhao, 'Lex Maritima in a Changing World: Development and Prospect of Rules Governing Carriage of Goods by Sea' in Proshanto Mukherjee, Maximo Mejia and Jingjing Xu (eds), *Maritime Law in Motion* (Springer 2020) 761-762

<sup>17</sup> Although the term '*maritime lien*' is only used in common law countries (rather '*maritime privileges*' in civil law countries), the choice is made to consistently refer to this concept as *maritime lien* in this contribution. This is not only for the sake of simplicity, but also because it is submitted that this concept is similar across borders (see *infra*. 2.1.1)

<sup>18</sup> Comité Maritime International ("CMI"), 'Essays on Maritime Liens and Mortgages and on Arrest of Ships' (1984) 10-11; Flach (n 11) 17-20

<sup>19</sup> CMI (n 18) 10-11, 31–32

<sup>20</sup> These are claims that have unequivocally been granted maritime lien protection under the 1926, 1967, and 1993 Maritime Liens and Mortgages Convention and in domestic laws of non-adhering countries. In what follows, the 1993 Maritime Liens and Mortgages Convention, as the latest attempt at

rationale of maritime liens is to protect crucial maritime interests, hereby guaranteeing the operation of the ship and facilitating maritime commerce.<sup>21</sup> This rationale of facilitating maritime commerce<sup>22</sup> while protecting crucial maritime interests is demonstrated by the following illustration of how a maritime lien scenario can typically unfold.

Thanks to the maritime lien, the lienholder is granted strong security on the ship to whose operation the maritime claim is connected.<sup>23</sup> As such, the maritime lienholder can hold the ship as basis to commence court proceedings at the ship's port of call and as primary collateral for its claim.<sup>24</sup> To secure or enforce its claim, specific procedures are in place like ship arrests, which then possibly lead to a judicial sale of the ship.<sup>25</sup> A ship arrest is, however, usually lifted by a letter of undertaking by the shipowner's insurer.<sup>26</sup> This allows the ship to resume her commercial activities as quickly as possible instead of lying idle at port, while the lienholder's claim is guaranteed.<sup>27</sup>

## 1.2 The operation of maritime liens

### 1.2.1 Three core security mechanisms by operation of law

To ensure the protection of maritime lienholders and, consequently, the facilitation of maritime commerce, maritime lien security is provided by operation of law. This implies that only the claims that are explicitly granted maritime lien security by the law are protected as such and that the law also delineates the content and operation of these maritime liens. In other words, no new maritime liens can be created by agreement, nor can the content or operation of maritime liens be altered by agreement. In addition, this operation by law characteristic of maritime liens also implies that maritime liens arise automatically at the occurrence of one of the protected maritime claims.<sup>28</sup>

Thus, the law not only sets out which maritime claims are granted maritime lien status, but also how exactly maritime lien security operates. Three core security mechanisms underlie the operation of maritime liens: direct enforceability; *droit de suite*; and the

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unification, is used as illustration in case the rules in this convention are a reflection of international principles. (see also notes 83 ff)

<sup>21</sup> Flach (n 11) 17-20; Neill Hutton, 'The Origin, Development, and Future of Maritime Liens and the Action in Rem' (2003) 28 Tul Mar LJ 81, 91 ff

<sup>22</sup> Or as described in *St Jago de Cuba* (1824 US) 9 Wheat 409: "The vessel must get on; this is the consideration which controls every other."

<sup>23</sup> CMI (n 18) 10; Flach (n 11) 17-18; Nigel Meeson and John Kimbell, *Admiralty Jurisdiction and Practice* (5<sup>th</sup> ed, Informa Law 2018) 19

<sup>24</sup> CMI (n 18) 31-32; Flach (n 11) 19

<sup>25</sup> See e.g. 1999 International Convention on Arrests of Ships, Article 1 and 3(1), e; CMI (n 18) 99-150; Francesco Berlingieri, *Berlingieri on Arrest of Ships* (6<sup>th</sup> ed, vol I, Informa 2017) 80-83

<sup>26</sup> Usually provided by the shipowner's P&I Club see Davies (n 1) 110. For an example of a P&I letter of undertaking see <https://www.itic-insure.com/knowledge/letter-of-guarantee-2980/>.

<sup>27</sup> CMI (n 18) 39; Davies (n 1) 116

<sup>28</sup> CMI (n 18) 6; Meeson (n 23) 23

priority ranking of the maritime claim connected to the lien.<sup>29</sup> These three security mechanism unequivocally form the operational core of maritime lien security, regardless of the relevant domestic law.

Firstly, *direct enforceability* implies that the claims underlying the maritime lien can be directly enforced on the ship, notwithstanding the initial debtor of the underlying claim. Creditors do not have to locate their debtor in a possibly distant country, but they have the ship as primary collateral to their claim.<sup>30</sup> Even when no enforceable judgment has been obtained yet, the lienholder can secure his maritime lien claim on the ship by virtue of ship arrest procedures.<sup>31</sup> Importantly, this direct enforceability also implies that the initial debtor of the lienholder does not necessarily have to be the shipowner. The lien generally also sticks to the ship when the debtor is merely chartering the ship from which the maritime claim arose.<sup>32</sup>

Secondly, lienholders are also protected against the removal of the ship from their debtor's estate thanks to their *droit de suite* on the ship. Maritime liens "stick", as it were, to the ship from the moment they arise. This entails that the lienholder can still enforce his claim on the ship, notwithstanding the ship having passed to a third party. Only after the judicial sale of a ship,<sup>33</sup> after the expiration of the statutory limitation periods linked to maritime liens,<sup>34</sup> or after the extinguishment of the underlying claim which the maritime lien secures,<sup>35</sup> does the maritime lien extinguish. To the contrary, *droit de suite* guarantees that the private sale of the ship does not extinguish the maritime lien.<sup>36</sup>

Thirdly and finally, the claims secured by a maritime lien also have a high *priority ranking* over other claims on the ship. In fact, they usually rank over all other claims on the ship, including, most notably, ship mortgages.<sup>37</sup> Thus, in concurrence with other creditors, the claims of maritime lienholders are generally paid out first.

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<sup>29</sup> CMI (n 18) 34, 57-58; Philippe Delebecque, *Droit Maritime* (14<sup>th</sup> ed, Dalloz 2020) 184-185; Flach (n 11) 129-135; Meeson (n 23) 19; Dieter Rabe and Kay Uwe Bahnsen, *Seehandelsrecht* (5<sup>th</sup> ed, Verlag CH Beck 2018) 1561-1564

<sup>30</sup> CMI (n 18) 32, 43, 56-57; Delebecque (n 29) 184; Flach (n 11) 128-129, 132; Van Hooydonk (n 11) 222

<sup>31</sup> Francesco Berlingieri, *Berlingieri on Arrests of Ships. Volume I* (6<sup>th</sup> ed, Informa Law 2017) 57-66

<sup>32</sup> CMI (n 18) 43, 57-58; Rabe (n 29) 1561-1563

<sup>33</sup> Lief Bleyen, *Judicial Sales of Ships* (Springer 2016) 153; *The Cerro Colorado* [1993] 1 Lloyd's Rep 58

<sup>34</sup> *Infra* 1.2.2

<sup>35</sup> Maritime Liens and Mortgages Convention 1993, Article 9; Meeson (n 23) 23; Rabe (n 29) 1563

<sup>36</sup> Cass 27 maart 2003, EVR 2003, 326 (Belgian Court of Cassation); CMI (n 18) 24-26, 43, 57-58 (*droit de suite* is called "*indelibility*" under the common law); Flach (n 11) 131; Delebecque (n 29) 185; Rabe (n 29) 1563. See also *The Bold Buccleugh* (n 15) 850-851: "*This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches*"

<sup>37</sup> CMI (n 18) 29; Delebecque (n 29) 185; Flach (n 11) 134-136; Meeson (n 23) 224; Rabe (n 29) 1562; Van Hooydonk (n 11) 181

### 1.2.2 Counterbalances for the shipowner

To counterbalance this vigorous security granted to the lienholder, certain safeguards are also accorded to the shipowner. More specifically, the exposure of the shipowner to the strong security provided to the maritime lienholder is counterbalanced by temporal and material limitations to the scope of maritime liens.

Firstly, the limitation periods connected to maritime liens are generally short, hereby limiting the exposure of the shipowner in time. Exposing shipowners for too long a period to maritime liens could deter shipowners from conducting business and, hence, jeopardise maritime commerce. This would be in contrast to the rationale underlying maritime liens of facilitating maritime commerce.<sup>38</sup> Importantly, however, the expiration of the maritime lien does not necessarily imply the expiration of the maritime claim that it secures. Nevertheless, if the lienholder still wishes to enforce its maritime claim after the expiration of the maritime lien, it will not have a secured position anymore.

Secondly, the shipowner's exposure is also materially limited to the value of the ship. This means that if the claim underlying the maritime lien exceeds the value of the ship, the lienholder will have to recollect the remainder of its claim from its original debtor. However, the lienholder will not hold a secured position for the remainder of this claim.<sup>39</sup> Here again, the exposure of the shipowner to maritime liens is limited as to foster maritime commerce; in case a maritime lien could be enforced on the entire fleet of the shipowner, this could deter shipowners from conducting business.

### 1.2.3 A remarkable difference in classification

The operational core of maritime liens, as introduced above by the three core security mechanisms and the counterbalances for the shipowner, applies consistently to all maritime liens, regardless of the relevant domestic law.<sup>40</sup> Nonetheless, traditionally, a remarkable difference between common law and civil law maritime liens is perceived: the classification of the maritime lien as a right *in rem* and as a right *in personam*, respectively under the common law and the civil law tradition.<sup>41</sup>

This dichotomy in the classification of maritime liens could have great ramifications in a European cross-border insolvency of the shipowner, considering that Article 8 EIR

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<sup>38</sup> E.g. 6 months or 1 year under the Maritime Liens and Mortgages Convention 1926; 1 year limitation periods under the Maritime Liens and Mortgages Convention 1993, Article 9; under the common law, this is traditionally achieved by the equitable doctrine of laches (see CMI (n 18) 32. and *The Kong Magnus* [1891] P 223), while in the civil law and under the conventions statutory limits exist; CMI (n 18) 25

<sup>39</sup> CMI (n 18) 26; Delebecque (n 29) 185

<sup>40</sup> E.g. under Belgian and French law by virtue of the 1926 Maritime Liens and Mortgages Convention, Articles 2, 3, and 8 (In Belgium, the new Maritime Code intends to denounce the 1926 Convention by a mostly similar domestic regime, but this has not been officialised yet); under Dutch law by virtue of Civil Code, Articles 8:204, 8:210, 8:215, and 8:216; under German law by virtue of German Commercial Code ("*Handelsgesetzbuch*"), § 597; under English law by virtue of a line of established case law following landmark case *The Bold Buccleugh* (n 15). See also *The Ship "Sam Hawk"* [2015] FCA 1005

<sup>41</sup> Van Hooydonk (n 11) 166-168; CMI (n 18) 33. Flach (n 11) 21-23; Hutton (n 21) 107-109; Meeson (n 23) 21; Tetley (n 16) 27

only protects rights *in rem*. There is a risk that because of the different classifications of maritime liens across borders, conceptually similar maritime liens could be treated differently under the EIR. Moreover, the diverge in classifications of maritime liens poses a risk that, under the EIR, maritime liens lose their secured position altogether. Solely depending on the court deciding on the matter or on the relevant applicable law, maritime liens could as such lose their secured position. Thus, as a prerequisite to *in rem* protection under the EIR, it is pivotal to dogmatically align how maritime liens should be classified. Before doing so, the following paragraphs examine more closely the perceived dichotomy in classification between common law and civil law.

### 1.3 The common law – civil law dichotomy in classification of maritime liens

#### 1.3.1 A historically grown perception

The historical *lex maritima* on maritime liens has over time dissolved into different domestic conceptions on maritime liens.<sup>42</sup> The core security mechanisms of maritime liens - direct enforceability, *droit de suite*, and priority ranking – have however remained the same across borders. Traditionally, however, a dichotomy is presented between common law and civil law jurisdictions on their respective *in rem* and *in personam* classification of maritime liens.<sup>43</sup> In the following paragraphs, a historical explanation is sought for this perceived dichotomy.

In 17<sup>th</sup> century England, the conflict between admiralty courts and common law courts led to the jurisdiction of admiralty courts being confined to “actions *in rem*.” To keep matters of maritime law within the jurisdiction of this court, it was imperative to link the remedy of an action *in rem* to maritime liens. Since then, the remedy for maritime liens under the common law has consistently been the action *in rem*, explaining the *in rem* classification of maritime liens. Nevertheless, this procedural feature typical to common law maritime liens has not altered any of the core protection mechanisms of maritime liens substantially.<sup>44</sup>

In the absence of a similar conflict between different courts in the civil law tradition, no similar developments took place as in the common law and, hence, the action *in rem* is foreign to the civil law tradition. Therefore, maritime liens in the civil law tradition could be perceived as *in personam* claims against the debtor, notwithstanding the strong ties between the lien and the ship. Nonetheless, the core security mechanisms of civil law maritime liens – the three core security mechanisms – have always remained identical to the core security mechanisms of common law maritime liens.<sup>45</sup>

The perceived *in personam* classification of maritime liens under civil law can also be seen as a by-product of the rigidity of the *numerus clausus* rule of rights *in rem*, prevailing under this tradition. The *numerus clausus* rule implies that only rights that

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<sup>42</sup> *Supra* note 16

<sup>43</sup> *Supra* note 41

<sup>44</sup> Hutton (n 21) 106-109; Tetley (n 16) 27-36

<sup>45</sup> See *supra* 1.2.3; Flach (n 11) 25 “een persoonlijk recht waaraan in enig opzicht zakelijke werking is toegekend”

are expressly classified by law as rights *in rem* are to be considered as such. Other rights are by default considered as rights *in personam*. Historically, it has proven difficult to enter this closed system of rights *in rem*, especially for concepts outside of traditional property law, like maritime liens. The strong connection between the lien and the ship as prime collateral, illustrated by the three core security mechanisms, could, however, also suggest an *in rem* classification.<sup>46</sup>

Whatever the historical reasons for this perceived dichotomy, the question is whether this strict dichotomy currently has any legal basis. The following paragraphs demonstrate that the assumption that civil law maritime liens are generally classified as *in personam* rights is not entirely correct. Whereas common law maritime liens are indeed generally classified as rights *in rem*, more variety exists in the classification of maritime liens between civil law countries.

### 1.3.2 The variety of classifications in the civil law tradition

#### German law

Under German law, maritime liens are qualified as “maritime pledges” (“*Pfandrecht der Schiffsgläubiger*”).<sup>47</sup> The term “pledge” in this sense is not to be considered as a traditional right of pledge, because under the latter concept the pledgee generally takes possession of the pledged asset. To the contrary, German “maritime pledges” do not require the lienholder to take possession of the asset. Moreover, these German “maritime pledges” arise by operation of law, which is again to be contrasted to traditional pledges which generally arise by agreement.<sup>48</sup>

Nevertheless, by characterising maritime liens as maritime pledges, German law categorically classifies maritime liens as *in rem* rights. Pledges are undoubtedly rights *in rem* and, by linking maritime liens to this concept, liens are accordingly classified as *in rem* rights as well. This classification of maritime liens as rights *in rem* under German law was only established after a notoriously intense debate about the nature of maritime liens at the beginning of the 19<sup>th</sup> century,<sup>49</sup> proving that the classification of maritime liens as either *in rem* or *in personam* rights is not self-evident.

In other European civil law countries, the classification of maritime liens is not as clear as in Germany. Nevertheless, it is at least debatable whether an *in personam* classification of maritime liens is upheld in other civil law countries.

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<sup>46</sup> *Infra* 2.3

<sup>47</sup> German Commercial Code, § 597

<sup>48</sup> Rabe (n 29) 1563

<sup>49</sup> In the words of Hans Wüstendörfer, *Neuzeitliches Seehandelsrecht* (Wede 1947) 139: “*Ströme von Tinte zur Rechtsnatur der Schiffsgläubigerrechts in Deutschland verschrieben sind, Rechtstheoretiker allzu leicht von Irrlichtern in Moorgründe gelockt wurden*” („Streams of ink have been written on the legal nature of maritime liens in Germany, and legal scholars have too easily been lured into the swamp.”)

## French law

The provisions of the French Transport Code (“*Code des transports*”) are silent about the exact classification of French maritime liens (“*privilèges sur le navire*”).<sup>50</sup> By default, it seems logical for maritime liens to be classified as rights *in personam* under French law.

However, French law has a long tradition of recognising “*privilèges*” or priority rights to different socio-economic stakeholders and classifying these *privilèges* as rights *in rem*. Generally, however, holders of these *privilèges* only enjoy a right of priority ranking over other creditors on the relevant asset(s), but nevertheless in France these instruments are considered rights *in rem*.<sup>51</sup>

In addition to priority ranking, maritime lienholders also enjoy the two other core protection mechanisms, i.e. direct enforceability and *droit de suite*, making the tie between maritime lien and the ship even stronger than the tie between other *privilège* holders and the relevant asset(s). *A fortiori*, therefore, maritime liens under French law should be classified as rights *in rem*. This has also been affirmed in French case law<sup>52</sup> and doctrine.<sup>53</sup>

## Belgian law

The classification of maritime liens under Belgian law (“*scheepsvoorrechten*” or “*privilèges sur navires*”) is not clear-cut either. The recent implementation of the new Maritime Code does not include an explicit provision classifying Belgian maritime liens either as rights *in rem* or as rights *in personam*. Although the preparatory works point out the similarities between maritime lien enforcement and the English action *in rem*,<sup>54</sup> no direct legal consequences have followed from this observation in the new provisions of the Maritime Code.

However, another recent reform in Belgian Law, the new Book 3 of the Civil Code on property rights, sheds some more light on the classification of maritime liens. Article 3.3 of this new Book 3 reaffirms the *numerus clausus* rule on rights *in rem* expressly<sup>55</sup> and consolidates all statutorily recognised rights *in rem*,<sup>56</sup> including special priority rights (“*bijzondere voorrechten*” or “*privilèges spéciaux*”).

Similarly as French maritime liens, Belgian maritime liens are a stronger priority right than these traditional special priority rights<sup>57</sup> because of the two protection

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<sup>50</sup> See French Transport Code, Articles L5114-7 – L5114-19

<sup>51</sup> See Dominique Legeais, *Sûretés et garanties du crédit* (5th ed, LGDJ 2006) 441-454

<sup>52</sup> Com 21 févr 1995, DMF 1995 713; Com 14 oct 1997, DMF 1997 1094

<sup>53</sup> Delebecque (n 29) 184: “*Le privilège donne au créancier un droit réel sur le navire.*”

<sup>54</sup> Van Hooydonk (n 11) 166-168; Eric Van Hooydonk (ed), *Vierde Blauwboek over de Herziening van Het Belgisch Scheepvaartrecht* (Commissie Maritiem Recht 2012) 126-127

<sup>55</sup> Belgian Civil Code (“*Burgerlijk Wetboek*”/“*Code Civil*”), Article 3, para 1 Book 3 (see Vincent Sagaert, Joke Baeck, Nicolas Carette, Pacale Lecocq, Mathieu Muylle en Annelies Wylleman (eds), *Het nieuwe goederenrecht* (Intersentia 2021) 29-50)

<sup>56</sup> Belgian Civil Code, Article 3, para 2-4 Book 3

<sup>57</sup> See Ruud Jansen, ‘Algemene systematiek van voorrechten’ TPR 2008, 9 ff

mechanisms that they contain, i.e. direct enforceability and *droit de suite*, in addition to priority ranking. As such, also Belgian maritime liens should be considered as rights *in rem*.

### *Dutch law*

At first sight, Dutch law clearly seems to classify maritime liens (“*scheepsvoorrechten*”) as rights *in rem*, as Article 8:197 Dutch Civil Code (“*Burgerlijk Wetboek*”) explicitly provides that “*the only rights in rem are ownership, mortgage, usufruct, and the liens in Articles 8:211 and 8:217, para. 1, b.*”<sup>58</sup> The latter two provisions refer to the Dutch “*in rem* maritime liens”: ship arrest costs, seamen’s wages, salvage claims, port fees,<sup>59</sup> and collision claims.<sup>60</sup> Consequently, other Dutch maritime liens are by default to be qualified as rights *in personam*.<sup>61</sup>

Despite this seemingly explicit qualification, Dutch doctrine contests the *in rem* nature of these Dutch “*in rem* maritime liens”. The parliamentary history of Article 8:197 Civil Code suggests that this “classification” as a right *in rem* under Article 8:197 Civil Code merely implies that the liens possess certain characteristics that are typically associated with rights *in rem*,<sup>62</sup> but that no other conclusions can be drawn from this wording about the legal nature of these liens.<sup>63</sup>

The Dutch legislator inserted this provision with the goal of improving international legal certainty and uniformity, by copying the relevant provisions of Protocol nr. 1 to the Geneva Convention of 1965.<sup>64</sup> However, this provision, with its seemingly *in rem* classification of maritime liens, has in fact decreased instead of increased legal certainty and uniformity, for the following four reasons.

First and foremost, the interpretation of Article 8:197 Civil Code followed in doctrine is simply contradictory to a plain reading of the provision. If the legislator did not intend to classify maritime liens as rights *in rem*, a more appropriate wording could have been chosen, e.g. by pointing out the *in rem* features of maritime liens without actually classifying them as such.

Secondly, not only are these maritime liens in Article 8:197 Civil Code explicitly qualified as *in rem* rights, they are also listed together with the right *in rem* par excellence, ownership.<sup>65</sup> This again implies the *in rem* nature of these liens. A division

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<sup>58</sup> In the original Dutch language: “*De enige zakelijke rechten, waarvan een in de openbare registers teboekstaand zeeschip het voorwerp kan zijn, zijn de eigendom, de hypotheek, het vruchtgebruik en de in artikel 211 en artikel 217 eerste lid onder b genoemde voorrechten.*”

<sup>59</sup> Dutch Civil Code, Article 8:211

<sup>60</sup> Dutch Civil Code, Article 8:217, para 1, d

<sup>61</sup> See Teun Struycken, *De Numerus Clausus in Het Goederenrecht*, vol 13 (2018) 11-16

<sup>62</sup> As per Flach (n 11) 25; “*een persoonlijk recht waaraan in enig opzicht zakelijke werking is toegekend*”

<sup>63</sup> Parl Gesch NBW Boek 8, 730

<sup>64</sup> Protocol No 1 annexed to the Geneva Convention on the registration of inland navigation vessels 1965 concerning the rights in rem in inland navigation

<sup>65</sup> Dutch Civil Code, Article 8:197 (see Dorothy Gruyaert, *De exclusiviteit van het eigendomsrecht* (Intersentia 2016) 11-26)

between actual rights *in rem* and rights *in personam* with some *in rem* features would have been more appropriate, if the legislator did not intend to classify maritime liens as rights *in rem*.

Thirdly, the Protocol no. 1 to the Geneva Convention, from which Article 8:197 Dutch Civil Code is derived, regulates inland shipping and not *maritime* shipping.<sup>66</sup> Therefore, the Netherlands, as a contracting state to this Convention, is only bound by it as far as inland shipping is concerned and not on the matter of maritime shipping. Moreover, the Netherlands stand alone in expanding the scope of this convention to maritime shipping, hence, decreasing the international uniformity of maritime liens rather than increasing it as presupposed.<sup>67</sup>

Fourthly and most importantly for this contribution, the ambiguity under Dutch law also complicates the assessment of Dutch maritime liens under Article 8 EIR. In other words, the uncertainty in national Dutch law is transposed to the European level in case of a maritime insolvency.<sup>68</sup>

#### 1.4 Conclusion: maritime liens seem to be rights *in rem*

The analysis in this chapter demonstrates that, across borders, maritime liens are characterised by the same three core security mechanisms, counterbalanced by certain safeguards for the shipowner. Despite this similarity across borders, a dichotomy between the civil law and common law tradition on the classification of maritime liens is often inferred from the absence of the action *in rem* under the civil law tradition. However, this dichotomy should be nuanced.

Based on the brief comparative overview above, it seems that civil law countries tend to classify maritime liens as rights *in rem* as well. The absence of the action *in rem* as a specific remedy for rights *in rem* in civil law countries might be misleading in concluding that civil law maritime liens are considered rights *in personam*. Nevertheless, ambiguity still persists in certain countries on the exact classification of maritime liens.

Thus, at this point, the only conclusion can be that maritime liens generally *seem* to be classified as rights *in rem*, but this is not unequivocally the case in all countries. This conclusion is not founded enough, however, to conclude that maritime liens are dogmatically rights *in rem*, let alone to deduce from it that for the *in concreto* purpose of Article 8 EIR maritime liens are to be classified as rights *in rem*.

Therefore, in the following chapter, a more rigorous comparison between civil law and common law maritime liens is conducted to assess whether other aspects can nonetheless defend differences in classification. Subsequently, maritime liens are compared to traditional rights *in rem* and are assessed on the basis of theories underlying rights *in rem*, as to determine the most suitable dogmatic classification of

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<sup>66</sup> Protocol No 1 annexed to the Geneva Convention on the registration of inland navigation vessels 1965 concerning the rights in rem in inland navigation, Article 2

<sup>67</sup> Flach (n 11) 10-11; Van Hooydonk (n 11) 172-173

<sup>68</sup> *Infra* 3.3.2

maritime liens. This dogmatic classification of maritime liens is instrumental as a starting point and evaluation standard for the assessment of maritime liens under the *in rem* exception of Article 8 EIR, conducted in chapter 3.

## 2 The dogmatic classification of maritime liens

### 2.1 Maritime liens under the common law and the civil law tradition

#### 2.1.1 *Similar operation and rationale*

Besides the perceived difference in classifications of maritime liens, other differences between maritime liens across domestic laws can be distinguished. Nevertheless, the operation of maritime lien security by virtue of its three core security mechanisms is widely accepted across borders.<sup>69</sup> The same public policy generally also underlies maritime liens, i.e. the facilitation of maritime commerce.<sup>70</sup>

In the following paragraphs, other remarkable features of maritime liens are discussed as to determine whether a difference in classification between maritime liens under the common law and the civil law tradition can yet be explained by other elements.

#### 2.1.2 *Differences in procedure*

Procedurally, the differences between common law and civil law maritime liens are also rather limited. Ship arrests under common law and ship attachments under civil law serve the same purpose: swiftly securing maritime claims.<sup>71</sup> Moreover, relatively successful international conventions have been concluded, unifying the prerequisites for ship arrests across common law and civil law jurisdictions.<sup>72</sup> Another similar procedural element under both traditions, introduced above, are the short statutory limitation periods in which to invoke a maritime lien.<sup>73</sup>

Nevertheless, one important difference in procedure deserves more attention. The action *in rem*, the prime remedy for maritime lienholders in common law countries, is unknown in the civil law tradition.

As introduced above, the non-existence of the action *in rem* under the civil law can lead to the conclusion that civil law maritime liens should be rights *in personam*. Admittedly, the action *in rem* gives the lienholder a stronger procedural basis to secure and enforce his lien directly against the ship itself without any involvement of the shipowner.<sup>74</sup> Nevertheless, the action *in rem* does not substantially improve the

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<sup>69</sup> *Supra* 1.2

<sup>70</sup> *Supra* 1.1

<sup>71</sup> See Francesco Berlingieri, *Berlingieri on arrests of ships* (6th ed, vol I, Informa 2017) 9; Walter Verstrepen, "Bewarend beslag op zee- en binnenscheper" <https://www.law.kuleuven.be/apps/jura/public/art/25n1/verstrepen.pdf>

<sup>72</sup> The Ship Arrest Conventions of 1952 and 1999 provide for uniform law on these procedures of ship arrests. With 71 state parties and 12 state parties adhering to respectively the 1952 and the 1999 Convention, these conventions have been relatively successful (see: <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba> and [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XII-8&chapter=12&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XII-8&chapter=12&clang=_en)). Both common law as well as civil law countries are parties to these conventions, among which Belgium, France, Germany, the Netherlands, and the United Kingdom.

<sup>73</sup> *Supra* 1.2.2

<sup>74</sup> *The Bold Buccleugh* (n 15) 888; Hutton (n 21) 86; Rhidian Thomas, *Maritime Liens* (vol 40 British Shipping Laws Series 1980) 61

secured position of the maritime lienholder.<sup>75</sup> In other words, the action *in rem* does not provide common law maritime liens with an additional fourth substantive security mechanism.

Therefore, the action *in rem* should rather be considered as an instrument facilitating the effective and swift enforcement of the maritime lien and its substantial security mechanisms, rather than an additional security ground. As such, the action *in rem* fails to explain a possible difference in classification between common law and civil law maritime liens.

### 2.1.3 Differences in categories and priority ranking

Another noteworthy difference between national conceptions of maritime liens relates to the recognised categories of maritime liens and their priority ranking. These differences are in fact the cause of most trouble in a maritime insolvency. When insolvency proceedings are opened in a different country than where the ship is located, it is questionable whether maritime liens encumbering this ship will be recognised as such in the insolvency proceedings.

Furthermore, even if these maritime liens are recognised in the insolvency proceedings, it remains uncertain whether they enjoy the same priority status as the lienholders expect abroad. As such, maritime lienholders risk losing their expected protection, jeopardising the protection of these crucial maritime interests. This is exactly why *in rem* protection for maritime liens under the EIR is necessary. If maritime liens fall within the scope of Article 8 EIR, they can still be protected in the country where the ship is located instead of being left to the mercy of the insolvency proceedings.<sup>76</sup>

Initiatives have been taken to (re-)unify the categories of maritime liens and their priority ranking internationally, albeit with limited success.<sup>77</sup> The Maritime Liens and Mortgages Convention of 1926<sup>78</sup> and 1993<sup>79</sup> are both in force in a few countries, whereas the 1967 Maritime Liens and Mortgages Convention<sup>80</sup> has not achieved enough ratifications to enter into force. However, numerous significant maritime countries<sup>81</sup> did not accede to any of these conventions and, hence, embrace their own

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<sup>75</sup> US scholars might disagree with this qualification of the action *in rem* as a procedural right, considering their emphasis on the personification of the ship (Martin Davies, 'Maritime Liens and Choice of Law' (2018) 42 Tul Mar LJ 270-271). Within most other common law countries, however, it is accepted that the action *in rem* is a procedural right. (See *The Halcyon Isle* [1980] 2 Lloyd's Rep 325)

<sup>76</sup> Göretzlehner (n 8) 134-135; Davies (n 1) 124-125

<sup>77</sup> Davies (n 75) 284, 287. Göretzlehner (n 8) 101-102; Thomas (n 74) 331-332

<sup>78</sup> International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926

<sup>79</sup> International Convention on Maritime Liens and Mortgages, Geneva, 6 May 1993

<sup>80</sup> International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 27 May 1967

<sup>81</sup> Within the EU, most notably, Greece, Germany and the Netherlands adhere to none of the conventions. Germany, however, largely follows the regime of the 1967 Convention (Tetley (n 16)). Outside of the EU, most influential maritime countries (UK, USA, Australia, Singapore, Hong Kong) adhere to none of the conventions.

national regime. Currently, ten EU Member States adhere to either the 1926 or 1993 the Maritime Liens and Mortgages Convention.<sup>82</sup>

Despite this variety of countries adhering to either of one Maritime Lien and Mortgage Convention or to none at all, the vast majority of maritime liens<sup>83</sup> are the same across borders. In fact, the most important divergence between countries on the protected categories seems to concern the recognition of a maritime lien for “necessaries.”<sup>84</sup>

The priority ranking between the different categories of maritime liens differs more considerably depending on the relevant applicable law. However, maritime liens consistently rank over most other claims including, most importantly, ship mortgages.<sup>85</sup>

Nevertheless, these differences in categories or priority ranking of maritime liens do not touch the operational core of maritime liens, i.e. the three core security mechanisms.<sup>86</sup> Therefore, these differences also fail to explain a possible divergence in classification between maritime liens internationally.

#### 2.1.4 *The similarities overshadow the differences*

The differences between maritime liens discussed above are not able to explain a possible difference in classification, because they do not touch essential characteristics of maritime liens. Therefore, differences in classification of maritime liens between common law and civil law countries should be considered as a historical dogma, fit for reconsideration.

Thus, at this point in the analysis, the conclusion can be drawn that an identical classification of maritime liens should be upheld internationally. This conclusion can be added to the observation in chapter 1 that countries generally seem to classify maritime liens as rights *in rem*. Taken together, this indicates that an unequivocal *in rem* classification of maritime liens should be upheld across different domestic laws. This is especially true because chapter 1 has demonstrated that certain civil law countries, significant to maritime commerce, seem to incline towards an *in rem* classification of maritime liens as well.

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<sup>82</sup> Belgium, France, Hungary, Italy, Luxembourg, Portugal, and Romania are parties to the 1926 Convention; Estonia, Lithuania, and Spain are parties to the 1993 Convention

<sup>83</sup> See e.g. 1926 Convention, Article 2; 1993 Convention, Article 4, and Dutch Civil Code, Article 8:211 and 8:217, German Commercial Code, § 596 protecting maritime liens for claims for seamen’s wages; for assistance, salvage, and general average remunerations; and for collision costs

<sup>84</sup> I.e. goods and services provided to the ship (see Tetley (n 16) 551-552). See also: 1926 Convention, Article 2(5) and Article 3 which recognises the lien for necessaries with priority ranking over ship mortgages, whereas 1993 Convention, Article 6 does not explicitly recognise this lien. However, if contracting states to the latter convention recognise a claim for necessaries as a maritime lien under their domestic law, it ranks below ship mortgages. (see also Tetley (n 16) 551 ff)

<sup>85</sup> E.g. 1926 Convention, Article 5 *jo* 2 and 1993 Convention Article 5 *jo* Article 4 and Dutch Civil Code; German Commercial Code, § 602-603

<sup>86</sup> E.g. 1926 Convention, Article 3 and 8; 1993 Convention, Article 5 and 8 and Dutch Civil Code, Article 8:213 and 8:215

However, the conclusion that maritime liens are unequivocally rights *in rem* is still quite derivative. The fact that a majority of countries classifies maritime liens as rights *in rem* does not necessarily imply that this is the most adequate choice. To assess more fundamentally whether maritime liens should indeed be classified as rights *in rem*, the remainder of this chapter analyses maritime liens against the background of traditional property law, from which the concept of rights *in rem* originates.<sup>87</sup>

For this purpose, the following part compares maritime liens to traditional concepts of rights *in rem* in property law. Subsequently, the classification of maritime liens is examined more theoretically on the basis of fundamental principles underlying rights *in rem*. As such, a solid dogmatic basis is created on which to classify maritime liens. Accordingly, this dogmatic basis can be employed as a starting point for the *in concreto* assessment of maritime liens under the *in rem* exception of Article 8 EIR.

## 2.2 Maritime liens compared to traditional rights *in rem*

### 2.2.1 *The pledge as comparison standard*

In this part, maritime liens are compared to more traditional rights *in rem* to assess whether maritime liens should in fact be considered rights *in rem*, as the entire analysis above suggests. Based on this comparison, a more substantiated answer can be given to the question whether maritime liens are rights *in rem* dogmatically.

More specifically, this part analyses whether the maritime lien has stronger ties with the *res*, i.e. the ship, or with the *persona*, i.e. the shipowner, on the basis of a comparison with characteristics of traditional rights *in rem*. For this purpose, the right of pledge is used as comparison standard. This is because the pledge is the pre-eminent right *in rem* used for security on moveable objects in general property law. As such, it is most suitable for a comparison with maritime liens, a security mechanism in maritime law on moveable objects, i.e. ships. In addition, priority rights are used as an auxiliary comparison standard, because, similarly to maritime liens, they can be considered as intermediate figures on the border between rights *in rem* and rights *in personam*.

### 2.2.2 *In rem characteristics of maritime liens*

The three core security mechanisms - direct enforceability; *droit de suite*; and priority ranking on the proceeds – all hint at an *in rem* classification of maritime liens. Because maritime liens share this operational core with traditional rights *in rem*, this implies that maritime liens have strong enough ties with the *res* to be classified as rights *in rem*.

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<sup>87</sup> Robert Feenstra, 'Dominium and ius in re aliena: The Origins of a Civil Law Distinction' in Peter Birks (ed), *New Perspectives in the Roman Law of Property; Essays for Barry Nicholas* (Clarendon Press 1989) 111-122

The pledgee generally also has a *droit de suite* on the pledged collateral, as well as priority ranking over most other creditors.<sup>88</sup> Arguably, direct enforceability is even an additional security on the *res* for maritime lienholders which pledgees do not have. This is illustrated by the fact that the initial debtor of the maritime claim underlying the maritime lien is not necessarily the owner of the ship, while the pledgor should always be the owner of the pledged collateral or at least the holder of another right *in rem* on the pledged collateral.<sup>89</sup> This implies that maritime liens have an even stronger tie to the *res* than pledges. Therefore, one could argue that, *a fortiori*, maritime liens should be classified as rights *in rem*.

### 2.2.3 *In personam characteristics of maritime liens*

Nonetheless, certain features of maritime liens question their categorical *in rem* classification. In what follows, five characteristics of maritime liens implying a rather *in personam* classification are analysed in order to determine whether the categorical *in rem* classification of maritime liens should be nuanced.

#### *By operation of law*

Firstly, traditional rights *in rem* like the pledge generally do not arise by operation of law, but they are created by agreement. In fact, protection mechanisms that arise by operation of law, such as priority rights,<sup>90</sup> are often classified as priority rights *in personam*.<sup>91</sup>

Under French and Belgian law, however, certain priority rights are considered rights *in rem*.<sup>92</sup> In fact, when comparing maritime liens with these French and Belgian priority rights, an argument in favour of *in rem* classification of maritime liens instead of *in personam* classification can be developed. By lack of direct enforceability and/or *droit de suite*, these priority rights have weaker ties with the object they are connected to, yet even these priority rights are classified as rights *in rem*. *A fortiori*, it could be said that maritime liens should be classified as rights *in rem* as well.

This ambiguity across domestic laws proves again that the classification of maritime liens is not self-evident, but also that an important factor preventing a self-evident

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<sup>88</sup> French Civil Code, Article 2333 ff; 1104 ff German BGB; Dutch Civil Code, Article 3:227 ff; Belgian Civil Code, Book 3, Titel XVII; Dorothy Gruyaert, *De exclusiviteit van het eigendomsrecht* (Intersentia 2016) 95; Toon van Mierlo and Kasper Krzeminski *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht 3-VI Zekerheidsrechten* (16th ed, Wolters Kluwer 2017) 104; Vincent Sagaert, Joke Baeck, Nicolas Carette, Pacale Lecocq, Mathieu Muylle en Annelies Wylleman (eds), *Het nieuwe goederenrecht* (Intersentia 2021)

<sup>89</sup> Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (2008) 138; Van Mierlo (n 88) 115; *supra* 1.2.1

<sup>90</sup> E.g. priority for claims for costs incurred as a result of work on a certain object based on a contract of work, fiscal claims, claim of unpaid worker, etc.

<sup>91</sup> Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (2008) 298-299; Van Mierlo (n 88) 466

<sup>92</sup> See *supra* 1.3.2; Belgian Civil Code, Book 3, Article 3.3; French Civil Code, Article 2324 ff; Akkermans (n 89) 147; Legeais (n 51) 451

classification of maritime liens follows from the inconsistent classification of similar concepts under different domestic laws.

### *Close connection with the maritime claim*

Secondly, the close connection of the maritime lien with the underlying maritime claim can also indicate an *in personam* classification of maritime liens. The maritime lien is accessory to the maritime claim, but both should be distinguished from each other. The maritime claim as such is an *in personam* claim, which is secured by means of the conceptually different maritime lien. In other words, the maritime lien is only connected accessorially to this *in personam* claim as to provide the maritime creditor with stronger security. This is best illustrated by the fact that the maritime claim does not necessarily extinguish when the maritime lien extinguishes and that maritime liens and maritime claims have different limitation periods.<sup>93</sup>

Even if it is true that the pledge is usually also accessory to the *in personam* claim that it secures, the connection between maritime claim and maritime lien is closer than the connection between secured claim and pledge. Maritime liens arise and extinguish together with the underlying maritime claim. This is in contrast with pledges which generally can even be created before the claim that it secures arises.<sup>94</sup> As such, a maritime lien could be considered as a security tool with strong *in rem* characteristics, albeit remaining totally at the service of the underlying *in personam* claim.

### *Short lifespan*

A third element hinting at an *in personam* classification of maritime liens are the short limitation periods of maritime liens.<sup>95</sup> Such short limitation periods are unusual for traditional rights *in rem*.

Limitation periods also exist for the pledge but these are considerably longer than the limitation periods for maritime liens.<sup>96</sup> Moreover, these limitation periods only start running when the pledgee is entitled to execution of its pledge. This means that a right of pledge might have been in existence for a lengthy (contractually stipulated) period of time, before the limitation period actually starts running. In other words, the moment at which the pledge arises is to be distinguished from the commencement of the limitation period.<sup>97</sup> To the contrary, the limitation period of maritime liens coincides with the emergence of the maritime claim,<sup>98</sup> making the average total lifespan of maritime liens considerably shorter than that of pledges. Other rights *in rem*, which entitle the right *in rem* holder to use and enjoyment of the object rather than to security, often

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<sup>93</sup> CMI (n 18) 33; Grant Gilmore and Charles L Black, *The law of admiralty* (The Foundation Press 1957) 616; Thomas (n 74) 15;

<sup>94</sup> E.g. Akkermans (n 89) 136-142, 292; Dutch Civil Code, Article 3:231

<sup>95</sup> *Supra* 1.2.2

<sup>96</sup> E.g. Belgian Civil Code, Article 2279-2280; Dutch Civil Code, Article 3:81

<sup>97</sup> Van Mierlo (n 88) 114

<sup>98</sup> *Supra* 1.2.1

even have a perpetual or at least a long-lasting life span, totally opposite to maritime liens.<sup>99</sup>

### *Lack of publicity*

Fourthly, no publicity requirements exist for maritime liens to arise, nor to take effect vis-à-vis third parties. As such, the maritime lien is like an invisible cloud following the ship, cloud-bursting only over the shipowner when the lienholder decides to enforce its lien. The lienholder does not need to register his maritime lien, nor does he need to take possession of the ship, nor does he have to give notice to the shipowner or to any other third party of his maritime lien. This is in stark contrast with the pledge which generally requires the pledgee to take possession of the pledged collateral.<sup>100</sup> Other traditional rights *in rem* often impose that the right *in rem* is registered at a public register for the right *in rem* to arise or take effect.<sup>101</sup>

In certain countries, however, the concept of silent or non-possessory pledges is recognised, implying that publicity is not necessarily crucial for *in rem* classification.<sup>102</sup> Nonetheless, the secrecy of this silent pledge is not comparable to the secrecy of maritime liens. Contrary to the total secrecy of maritime liens, certain requirements for the silent pledge to take effect are still imposed, e.g. registration or notice.<sup>103</sup>

### *Absence of right of separation*

Fifthly and finally, after the opening of insolvency proceedings, maritime lienholders are not always entitled to enforce their claim within the insolvency proceedings. In contrast, traditional rights *in rem* like pledges are generally entitled to this “right of separation.”<sup>104</sup> Therefore, the fact that lienholders do not always have the right to enforce their lien separately from the insolvency proceeding could suggest that the enforcement of the lien occurs against the insolvency estate of the debtor rather than against the ship itself. This, in turn, again could imply the *in personam* classification of maritime liens.

## 2.2.4 *A sui generis maritime security*

In summary, the comparison of maritime liens with traditional rights *in rem* does not lead to an unambiguous classification of maritime liens. One could both argue that

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<sup>99</sup> Struycken (n 62) 233, 238 (E.g. Article 3.27 and 3.28 Belgian Civil Code, Article 3:99 and 3:308 Dutch Civil Code)

<sup>100</sup> Akkermans (n 89) 136, 224, 289

<sup>101</sup> Most notably (ship) mortgages, *infra* 4.2.2

<sup>102</sup> E.g. under Dutch law, Civil Code, Articles 3:237 ff; under French law, Civil Code, Article 2337

<sup>103</sup> E.g. French Civil Code, Article 2337

<sup>104</sup> Article 57, lid 1 Dutch Bankruptcy Law; Article XX.193 Belgian Economic Law Code; German 49 InsO jis. § 1147 BGB en § 10 Abs. 1 sub 4 ZVG. Ben Schuijling, Vincent Van Hoof and Tom Hutten, *De positie van pand- en hypotheekhouder tijdens faillissement, een rechtsvergelijkend onderzoek* (Radboud Universiteit Onderzoekscentrum Onderneming & Recht 2017)

maritime liens are rights *in rem* with certain *in personam* features, or that maritime liens are rights *in personam* with certain *in rem* features. Most appropriately perhaps would be to classify maritime liens as a *sui generis* maritime security with both *in rem* and *in personam* features. However, the prevailing dichotomy between rights *in rem* and rights *in personam* in most domestic property laws does not leave room for such intermediate *sui generis* concepts. Therefore, a choice needs to be made for either of both classifications. Because of the similarity of maritime lien security across borders, this choice should be identical regardless of the relevant domestic law.

Even if the above comparison with traditional rights *in rem* does not lead to an unambiguous classification of maritime liens, the arguments affirming an *in rem* classification of maritime liens are more convincing. While it is true that certain *in personam* features characterise maritime liens, these features do not touch the operational core of maritime liens. This operational core of maritime liens, i.e. direct enforceability, *droit de suite*, and priority ranking, is identical to the operational core of traditional rights *in rem*, strongly indicating the *in rem* nature of maritime liens. The *in personam* characteristics of maritime liens, by contrast, seem to be more incidental.

Thus, the entire assessment up to this point hints strongly at an unequivocal *in rem* classification of maritime liens. Before turning to the question of whether maritime liens should also be classified as rights *in rem* under the EIR, the final part of this chapter assesses more fundamentally whether maritime liens should indeed be classified as rights *in rem*. As such, the indications in this contribution of an *in rem* classification of maritime liens can be supported theoretically. This, in turn, creates a more solid dogmatic basic which can be used as the evaluative framework for the assessment of maritime liens under the EIR in chapter 3 and 4 of this contribution.

## 2.3 Maritime liens and fundamental principles underlying rights *in rem*

### 2.3.1 Rights *in rem* and the *numerus clausus* rule

Fundamental theories underlying rights *in rem* are often intrinsically linked to the *numerus clausus* rule. In order to assess the suitability of a *numerus clausus* rule and of the inclusion of new rights *in rem* into this *numerus clausus*, several scholars<sup>105</sup> have construed fundamental theories underlying rights *in rem*. In what follows, firstly, the *numerus clausus* rule and how this rule has led to theories underlying rights *in rem* is discussed. Thereafter, maritime liens are assessed against the criteria of one of these theories.

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<sup>105</sup> *Inter alia*: Jan Dalhuisen, "European Private Law: Moving from a Closed to an Open System of Proprietary Rights" 5 *Edinburgh L Rev* (2001) 14; Frédérique Dahan, 'Secured transactions law in Western advanced economies, exposing myths' *BJIBFL* 2001; Vincent Sagaert, 'Het goederenrecht als open systeem van verbintenissen? Poging tot een nieuwe kwalificatie van de vermogensrechten' *TPR* 2005 983-1086 Struycken (n 62); Sjef Van Erp, 'A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of Future European Property Law?', *Het plezier van de rechtsvergelijking - Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof.mr. E.H. Hondius* (2003)

The *numerus clausus* rule might be a factor explaining the *in personam* classification (whether or not perceived) of maritime liens in certain civil law countries.<sup>106</sup> This closed system of rights *in rem* is a keystone of property law, providing that no right *in rem* exists unless classified as such by law.<sup>107</sup> Not only are rights *in rem* limited to rights recognised as such by law, these rights *in rem* can also only operate as provided by law. In other words, no other rights *in rem* than the recognised rights *in rem* can be created by agreement, nor can the modalities of the recognised rights *in rem* be altered by agreement.<sup>108</sup> By default, all other legal relationships in private law are classified as rights *in personam*.<sup>109</sup>

Although the *numerus clausus* rule has been praised for its legal certainty and its adequate protection of property rights, the *numerus clausus* rule has also been the subject of criticism by scholars across different countries.<sup>110</sup> Shortly put, the essence of their criticism is that the *numerus clausus* is inflexible and, hence, unable to respond pertinently to novel and intermediate legal instruments, like maritime liens.

The inflexibility of the *numerus clausus* is illustrated by the catalogue of currently accepted rights *in rem* which, in essence, is still a reflection of the post-feudal societal needs on which this system was based. Societal needs have evolved since then, but this has not led to many substantial changes in the composition of the *numerus clausus* in most jurisdictions, nor in the system of the *numerus clausus* as such.<sup>111</sup> As such, the rights *in rem* within the *numerus clausus* currently seem the product of a rigid system, lacking a strong theoretical basis.

Therefore, a stronger theoretical basis of what the criteria are to be classified as a right *in rem* (and to accordingly) enter the *numerus clausus* could be helpful in assessing which legal relationships should be considered rights *in rem*. It is within this context that several scholars have construed a theory on fundamental principles underlying rights *in rem*.

### 2.3.2 Fundamental theories underlying rights *in rem*

The fundamental principles underlying rights *in rem* can be used as a guideline for the legislator to include intermediate instruments, like maritime liens, more pertinently into the *numerus clausus* of rights *in rem*. Legislators can admit intermediate instruments

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<sup>106</sup> *Supra* 1.3.1

<sup>107</sup> This characteristic of the *numerus clausus* rule is also known as *Typenzwang*. See: Akkermans (n 89) 7

<sup>108</sup> This characteristic of the *numerus clausus* rule is also known as *Typenfixierung*. See: Akkermans (n 89) 7

<sup>109</sup> Struycken (n 61) 1–2

<sup>110</sup> In Belgium: Sagaert (n 105); In France: Frédérique Dahan, 'Secured transactions law in Western advanced economies, exposing myths' *BJIBFL* 2001; In the Netherlands: Van Erp (n 105); Generally: Jan Dalhuisen, "European Private Law: Moving from a Closed to an Open System of Proprietary Rights" 5 *Edinburgh L Rev* (2001) 14

<sup>111</sup> Steven Bartels and Michael Milo, *Open normen in het goederenrecht* (Boom Juridische Uitgevers 2000); Hendrik Heyman, "Contents of the Real Right: Dogmatic Rigidity and Pragmatic Flexibility of Dutch Property Law" in Steven Bartels and Michael Milo, *Contents of Real Rights* (Wolf Legal Publishers 2004) 71-81; Struycken (n 62) 308–309; Van Erp (n 105) 45

into the *numerus clausus* simply by assessing whether these novel instruments are based on the fundamental principles underlying rights *in rem*. Hence, the *numerus clausus* would be more pertinent and responsive to present day needs.<sup>112</sup>

Applied to maritime liens, if the fundamental principles on rights *in rem* underlie maritime liens as well, maritime liens should dogmatically be classified as rights *in rem* and, hence, be included in the *numerus clausus*. However, this assessment is not as simple as presented here. An important hurdle in this regard is that the fundamental principles underlying rights *in rem* are not consistently aligned in doctrine.

For this contribution, the choice is made to assess maritime liens on the basis of the theory construed by AKKERMANS, for the following two reasons. Firstly, most scholars have focused on domestic property laws and their domestic *numerus clausus*.<sup>113</sup> AKKERMANS, by contrast, construes a theory for European property law to which concepts across different domestic laws in Europe can be assessed to determine their *in rem* classification. Secondly, this theory is, in fact, built on both traditional theories<sup>114</sup> as well as more modern theories underlying rights *in rem*.<sup>115</sup> As such, this theory can be regarded as a culmination of a variety of other theories on rights *in rem*, complimenting rather than overturning these theories. Therefore, a positive assessment on the basis of AKKERMANS' theory implies a positive assessment on these other theories as well, which should lead to an unambiguously dogmatic *in rem* classification.

### 2.3.3 Two-step access test

AKKERMANS construes a two-step access test, which can be utilised to determine whether a certain legal relationship should be classified as a right *in rem* and, accordingly, should be included in the *numerus clausus*.<sup>116</sup>

Under the first test, the objective test, the question to be answered is whether the legal relationship in respect of the object can be expressed in terms of one of the rights usually granted to the primary right holder, i.e. the owner of the object.<sup>117</sup> Maritime liens can be expressed as such, because they accord lienholders with the right to the proceeds of the ship. This is pre-eminently a right usually allocated to the owner.<sup>118</sup> Therefore, maritime liens pass the first test.

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<sup>112</sup> Struycken (n 62) 779–794

<sup>113</sup> E.g. Sagaert (n 105) for Belgium, and Struycken (n 62) for the Netherlands

<sup>114</sup> *Classical* property law theory as in Sagaert 992; and *relationist* property law theory as in Struycken (n 62) 707

<sup>115</sup> Sagaert (n 105); Struycken (n 62); Van Erp (n 105),

<sup>116</sup> In fact, Akkermans construes a three-step test, but the third step is only auxiliary. After having passed the first two steps, a legal relationship is already classified as a right *in rem*. The third step subsequently only *defines* in which category of rights *in rem*, the new right *in rem* should be included. (Akkermans (n 89) 557)

<sup>117</sup> Akkermans (n 89) 556

<sup>118</sup> *ibid* 417–420

Secondly, the subjective test, analyses whether third-party effect is provided to this legal relationship and whether this is sufficiently expressed.<sup>119</sup> The combination of three core security mechanisms – direct enforceability, *droit de suite*, and priority ranking - allows maritime liens to have third party effect.<sup>120</sup>

Furthermore, despite the secretive nature of maritime liens, their third party effect is sufficiently expressed. Usually, this “sufficient expression” is achieved thanks to publicity requirements. Importantly however, AKKERMANS emphasizes that “*the subject of numerus clausus should be distinguished from that of the publicity of property rights... Because there are property rights that have effect against third parties, in some cases the legal system demands publicity in order to justify the effect of these property rights against third parties.*”<sup>121</sup> In other words, this sufficient expression can also be achieved by different means, as long as third parties are able to take note of this third party effect.

For maritime liens, this is achieved by virtue of the long-established stance of maritime liens in maritime commerce and in the *lex maritima*. By these means, shipowners are well aware of the risk of maritime lien encumbrance. This is proven by the fact that shipowners generally protect themselves from maritime lien encumbrance through insurance cover<sup>122</sup> and through covenants in ship purchase contracts which guarantee that the ship is sold free of any liens.<sup>123</sup> Therefore, maritime liens pass this second test as well and should dogmatically be classified as rights *in rem*.

#### 2.4 Conclusion: maritime liens are rights *in rem*

The assessment of maritime liens to fundamental principles underlying rights *in rem* has confirmed the indications that maritime liens should be classified as rights *in rem*. Therefore, one main conclusion can be drawn from this chapter: maritime liens should dogmatically be classified as rights *in rem*. This *in rem* classification should be upheld unequivocally, regardless of the relevant domestic law. Hence, domestic laws that still uphold an *in personam* classification of maritime liens (or that are still ambiguous about the exact classification of maritime liens) are in need of re-evaluation.

However, the recommended dogmatic classification of rights *in rem* does not automatically lead to the conclusion that maritime liens should be classified as rights *in rem* under Article 8 EIR. As will be seen in the next part, the CJEU has developed its own classification criteria to assess what rights *in rem* are for the purpose of Article 8 EIR. Nevertheless, the conclusion that maritime liens should be classified dogmatically as rights *in rem* forms an unambiguous starting point to the assessment of maritime liens under Article 8 EIR. Furthermore, this dogmatic classification also

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<sup>119</sup> ibid 556

<sup>120</sup> *Supra* 1.2.1

<sup>121</sup> Akkermans (n 89) 452

<sup>122</sup> CMI (n 18) 39; Davies (n 1) 116; Hebert (n 24)

<sup>123</sup> See e.g. the standard form BIMCO SHIPLEASE, Standard Ship Sale and Leaseback Transaction Indicative Term Sheet, clause 17, a, vii (Incidentally, such a covenant between the parties to the ship purchase contract does not affect the position of the lienholder as a third party to that contract)

helps evaluating the *in concreto* fate of maritime liens in a European cross-border insolvency.

### 3 The administration of maritime liens under the EIR

#### 3.1 Article 8 EIR

In this chapter, it is analysed whether maritime lien security, as given effect by the three core security mechanisms, is adequately upheld in a maritime insolvency in the EU. This analysis is crucial because one could say that the litmus test for the effectiveness of maritime lien security is the moment in which the shipowner finds itself in financial distress. As such, this chapter discusses the crux of this contribution, building on the conclusions of chapter 1 and 2.

The international mobility of ships implies that maritime insolvencies are usually of a cross-border nature. Hence, the EIR, as the instrument regulating cross-border insolvency instrument within the EU, generally applies to European maritime insolvencies.<sup>124</sup>

Within the EIR, the *in rem* exception of Article 8 EIR seems the most suitable provision to protect maritime liens.<sup>125</sup> If maritime liens do not fall under this exception, they are left to the mercy of the insolvency proceedings and lienholders risk losing their security status. Thus, the classification of maritime liens as *in rem* or *in personam* rights under this instrument could have crucial implications for the course of a maritime insolvency.

Within this background, Article 8(1) EIR is phrased as follows:

*“The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.”*<sup>126</sup>

Thus, if maritime liens fall under this *in rem* exception, they will be excluded from the insolvency proceedings and lienholders will be able to enforce their lien as if no insolvency proceedings are taking place.<sup>127</sup>

Importantly, this exception only applies when the relevant asset is not located in the Member State where the insolvency proceedings are opened. Applied to maritime liens, Article 8 EIR would only apply to ships located in the territorial waters of another Member State than the one where the insolvency proceedings have been opened.

It is adequate for these “foreign” maritime liens to fall under this exception because of the context in which maritime liens arise, i.e. the operation of the ship. As such, maritime liens usually arise at the ports of call of the ships and, as such, maritime liens have a strong connection with that forum.<sup>128</sup> Therefore, it is undesirable to leave maritime liens to the mercy of the insolvency regime in another Member State,

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<sup>124</sup> EIR, Article 1(2), Bob Wessels, *International Insolvency Law Part II. European Insolvency Law* (4<sup>th</sup> ed, Kluwer 2017) 32

<sup>125</sup> *Supra* Introduction and note 8

<sup>126</sup> EIR, Article 8(1)

<sup>127</sup> Virgos-Schmit Report (n 3) para 97, McCormack (n 3)

<sup>128</sup> *Supra* 1.1. This is also evidenced by the application of the *lex fori* to maritime liens, amongst under English law, French law and Dutch law.

because, under this insolvency regime, maritime liens risk losing the substantial and procedural guarantees that they had at the forum of the ship's port of call.

## 3.2 Uncertainty reigns

### 3.2.1 *Autonomous EU concepts*

It is not immediately obvious whether maritime liens fall within the scope of article 8 EIR. While the analysis in chapter 1 has demonstrated that, currently, domestic laws differ on the classification of maritime liens, this does not necessarily have direct consequences for the classification of maritime liens under Article 8 EIR. This is because both the European concept of rights *in rem* and of maritime liens could be construed autonomously from these national law concepts.<sup>129</sup>

This also implies that the conclusion of chapter 2 - that maritime liens should unequivocally be classified as rights *in rem* under domestic laws – cannot simply be transposed to the possibly autonomous *in rem* concept under Article 8 EIR. Therefore, the conclusions on domestic classifications of maritime liens from the previous chapters of this contribution cannot simply be used *mutatis mutandis* to determine the fate of maritime liens under the EIR. In other words, the classification of maritime liens under the EIR should be done independently from domestic classifications.

### 3.2.2 *Diverging language versions*

Unfortunately, however, Article 8 EIR is notoriously complex.<sup>130</sup> In the words of MANKOWSKI, “*nearly everything in [Article 8 EIR] is controversial or surrounded with uncertainties.*”<sup>131</sup> This, in turn, impedes a clear assessment of maritime liens under this provision. A plain reading of Article 8 EIR does not lead to a clear-cut answer to the question what rights *in rem* are, let alone whether maritime liens should be considered as rights *in rem* under the EIR.

Particularly, the second paragraph of Article 8 EIR is worrisome in this regard. This provision lists certain rights that should be classified as rights *in rem*. The right “*by virtue of a lien...*”<sup>132</sup> is included in that list. Based on this phrase, maritime liens seem to fall under the *in rem* exception.

However, other authentic language versions of this same phrase have a different meaning. These versions refer to rights “*by virtue of a pledge*” as a particular kind of

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<sup>129</sup> CJEU Case C-6/64, *Costa v Enel* [1964]; Jan Willem Van Rossem (2013) ‘The Autonomy of EU Law: More is Less?’ in Ramses Wessel and Steven Blockmans (eds) *Between Autonomy and Dependence* (TMC Asser Press 2012) 13-46

<sup>130</sup> See also the extensive discussion about the *in rem* exception in preparation of the Insolvency Regulation recast of 2015: Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer, ‘External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (Heidelberg-Luxembourg-Vienna Report)’ 440, 257–285; Reinhard Bork, *Principles of cross-border insolvency* (Intersentia 2017) 6.12;); Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Thomas Reuters 2016) 5-008.

<sup>131</sup> As quoted in Wessels (n 124) 307

<sup>132</sup> EIR, Article 8(2), a.

rights *in rem*, instead of to rights “*by virtue of a lien*”. Literally following the latter versions, the *in rem* exception cannot apply to all maritime liens.<sup>133</sup> These diverging authentic versions only complicate the classification of rights *in rem* under the EIR, hereby jeopardizing legal certainty.

### 3.2.3 Diverging case law

Moreover, case law in the Member States illustrates that the fate of maritime liens in a European maritime insolvency is far from clear. In Belgium and the Netherlands, for instance, two similar cases concerning maritime liens under Article 8 EIR were decided differently.

In Belgium, the Antwerp Court of Appeal inclined towards granting maritime liens *in rem* protection under Article 8 EIR. Because the Court of Appeal had to decide by interim judgement, however, it did not decide conclusively on whether maritime liens enjoy *in rem* protection under Article 8 EIR.<sup>134</sup> Importantly, nonetheless, the Court’s reasoning in this case illustrates the difficulty of the legal question at stake.

At first, the Court points out that, at first sight, it is disputable whether maritime liens are rights *in rem* “*in a traditional sense*.” Neither are they “security rights *in rem*” like mortgages or pledges, the Court continues.<sup>135</sup> Later, however, the Court discusses that the right to install arrest procedures through which the lien can be secured, implies the *in rem* nature of maritime liens.<sup>136</sup> By interim order, at last, the Court decides in favour of *in rem* classification of maritime liens under the EIR, hence not releasing the ship to the benefit of the foreign insolvency proceedings.<sup>137</sup>

In the Netherlands, to the contrary, the Arnhem District Court was more categorical on possible *in rem* classification of maritime liens under Article 8 EIR. The Court decided that “*there is nothing to suggest that a maritime lien contains a right in rem.*”<sup>138</sup> Therefore, the ship was released to the benefit of the insolvency proceedings in Germany.

Unfortunately, this court decision is very brief, making it difficult to identify the exact reasons for the categorical dismissal by the Arnhem District Court. It can only be suspected that the District Court transposed to Article 8 EIR the classification that maritime liens are rights *in personam* followed by Dutch doctrine.<sup>139</sup> Regardless of whether this classification under Dutch law is normatively desirable, it is reductive to directly transpose this domestic classification to the European context.<sup>140</sup>

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<sup>133</sup> Berlingieri (n 8) 5; In Dutch “*pand*”, in French “*gage*”, in Spanish “*prenda*”, in Italian “*pegno*”, in German “*Pfandrechts*”, etc.

<sup>134</sup> Court of Appeal Antwerpen, 4 March 2009, RW 2009-10, 884, para 30 (*BV K-W v GmbH CS & Co KG*)

<sup>135</sup> *ibid*

<sup>136</sup> *ibid*

<sup>137</sup> *ibid* para 31

<sup>138</sup> District Court Arnhem, 3 december 2008, 2.2 (*X Reederei GmbH v FLB SPRL*): “*Uit niets blijkt dat zo’n voorrecht een zakelijk recht inhoudt*”

<sup>139</sup> See *supra* 1.3.2

<sup>140</sup> *Supra* 3.2.1

In any case, what these two court decisions illustrate mostly is the legal uncertainty surrounding the *in rem* classification of maritime liens under the EIR. Not only do both courts clearly struggle in applying the *in rem* exception to maritime liens, but even the outcome in both court decisions is contradictory. Therefore, maritime lien security is currently at risk of being administered unsatisfactorily in a European maritime insolvency.

### 3.3 *Senior Home* criteria

#### 3.3.1 *A two-step test*

Fortunately, the CJEU has somewhat alleviated the reigning uncertainty on the scope of the *in rem* exception, by clarifying the criteria to determine which instruments fall within the scope of Article 8 EIR. In *Senior Home*,<sup>141</sup> the CJEU decided on the question whether a German “*public charge*” based on a tax claim should be qualified as a right *in rem* under the EIR.<sup>142</sup> Maritime liens were not the subject matter of this case, but nevertheless, *Senior Home* is useful for the current contribution as it lays out general criteria to assess which legal instruments fall within the scope of Article 8 EIR.

Essentially, *Senior Home* follows a two-step test for this purpose, originating from the Opinion of Advocate General SZPUNAR.<sup>143</sup> If a legal relationship complies with the criteria set out in both steps, it is to be considered a right *in rem* under Article 8 EIR. Consequently, the obligations arising out of this legal relationship can be enforced regardless of insolvency proceedings being opened in another Member State.<sup>144</sup> The two steps of this test can be described as the “national classification test” and “the independent limitation test.”<sup>145</sup>

Accordingly, if maritime liens pass this two-step test, they evade the single insolvency regime to be administered independently to the benefit of maritime lienholders. In the following paragraphs, maritime liens are put to both these tests as to determine whether under, the current state of law, maritime liens can adequately enjoy *in rem* protection under the EIR.

#### 3.3.2 *The national classification test*

The first step in *the Senior Home* two-step test, “the national classification test”, provides that the domestic classifications by the Member States are determinative for *in rem* protection under the EIR. In other words, the EIR does not provide for an autonomous or independent definition of rights *in rem*. Instead, Article 8 EIR refers to the domestic law that would have been applicable pre-insolvency.

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<sup>141</sup> Case C-195/15 *Senior Home* [2016] ECLI 804 (*Senior Home*)

<sup>142</sup> *Senior Home*, para 7-9: Grundsteuergesetzes § 12 („Dingliche Haftung“)

<sup>143</sup> Case C-195/15 *Senior Home* [2016], Opinion of AG Szpunar ECLI 369, para 37 ff (Opinion *Senior Home*)

<sup>144</sup> EIR, Article 8, para 1; Opinion *Senior Home*, para 37

<sup>145</sup> Opinion *Senior Home*, para 38-39

The classification of legal relationships under this domestic law is determinative in the classification of rights *in rem* under Article 8 EIR. If the pre-insolvency applicable law qualifies the contentious right as a right *in rem*, the same *in rem* classification should in principle be upheld for the purposes of Article 8 EIR.<sup>146</sup> As such, the analysis in chapter 2 concerning the dogmatic classification of maritime liens in EU Member States increases even more in importance. Following the national classification test, legal uncertainty on the domestic level on the classification of maritime liens stretches to the European level in case of maritime insolvency. Thus, this is a reason the more to strive for an unequivocal *in rem* classification of maritime liens across borders, as recommended in chapter 2.

Nevertheless, chapter 1 of this contribution has demonstrated that, under the current state of law, not all domestic laws classify maritime liens unambiguously as rights *in rem*. Therefore, *de lege lata*, not all maritime liens pass the first test of the *Senior Home* two-step test. Depending on the relevant pre-insolvency applicable law, certain maritime lienholders are not adequately protected under the EIR.

In other words, some maritime liens can currently enjoy *in rem* protection under the EIR, whereas other maritime liens fall off the wagon and are left to the mercy of insolvency proceedings in another Member State. Because of the similarity between maritime liens across borders,<sup>147</sup> this leads to a different treatment of similar concepts. This, in turn, affects the effectiveness of maritime lien security in a European maritime insolvency, impacting maritime commerce in the EU.

Nevertheless, the conclusion of the dogmatic analysis of maritime liens in chapter 2 of this contribution was that an identical *in rem* classification should be upheld across borders. Thus, *de lege ferenda*, all maritime liens should be able to pass the national classification test, making all maritime liens admissible to be put to the second test.

### 3.3.3 *The independent limitation test*

#### *Limiting the national classification test*

The second test construed in *Senior Home*, the independent limitation test, is closely connected to the national classification test, because it limits the discretion granted to the Member States by the national classification test. Advocate General SZPUNAR phrases it as follows: “*Those independent classification criteria ... limit the national classification of a subjective right as a right in rem for the purposes of applying Article [8] of that EIR.*”<sup>148</sup>

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<sup>146</sup> Opinion *Senior Home*, para 36-38; Virgos-Schmit Report para 100; McCormack (n 3) 16; Thomas Ingelmann, “Article 5 EIR Third parties’ rights *in rem*” in Klaus Pannen, *European Insolvency Regulation* (De Gruyter Recht 2007) 252-253; Gabriel Moss, Ian Fletcher, and Stuart Isaacs, *Moss, Fletcher and Isaacs on the EC Regulation on Insolvency Procedures* (3<sup>rd</sup> ed, Oxford University Press 2016) 8.88

<sup>147</sup> *Supra* 2.1

<sup>148</sup> Opinion *Senior Home*, para 39

Accordingly, an unreasonably wide interpretation of rights *in rem* by the Member States is avoided. If Member States classified rights *in rem* without limitation, Article 8 EIR would be rendered unworkable. As such, the insolvency proceedings risk becoming pointless when important assets are too easily left unaffected by the opening of insolvency proceedings following a wide interpretation of rights *in rem* by Member States under their domestic laws. Thus, leaving the classification solely to the Member States could thwart the general spirit of universalism underlying the EIR.<sup>149</sup>

In light of this rationale, the independent limitation test consists of two criteria: the holder of the right *in rem* must have a *direct and immediate relationship with the asset* to which the right *in rem* is linked and the allocation of this right to the holder must be of an *absolute nature*.<sup>150</sup> Incidentally, the illustrations of particular rights *in rem* under Article 8(2) EIR introduced above should also be seen within the context of this second test. For the particular rights *in rem* of Article 8(2) EIR, the criteria of the independent limitation test are presumed to be met.<sup>151</sup>

#### *Direct and immediate relationship with the asset*

Firstly, the direct and immediate relationship criterion requires the asset to remain linked to the holder of the right *in rem* until its satisfaction, notwithstanding the asset forming part of another person's estate, and notwithstanding the holder's relationship with any third person.<sup>152</sup>

Maritime liens comply with this requirement thanks to the combination of two of its core security mechanisms: direct enforceability on the ship and *droit de suite*. These two characteristics allow the maritime lien to "stick" to the ship, regardless of the shipowner being the actual debtor and regardless of a transfer in ownership or possession of the ship.<sup>153</sup> As such, the maritime lien undoubtedly has a direct and immediate relationship with the ship, and accordingly complies with the first criterion of the independent limitation test.

#### *Absolute nature*

The second criterion under the independent limitation test, i.e. the absolute nature criterion, comprises, in turn, of three requirements: (i) the holder should be able to enforce his rights against any third party breaching it; (ii) he should be able to enforce his right *erga omnes*; and (iii) the right should be able to resist individual enforcement and collective insolvency proceedings.<sup>154</sup>

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<sup>149</sup> Opinion *Senior Home*, para 41-43; 'Virgos-Schmit Report' (1996) 102; McCormack (n 3) 18

<sup>150</sup> Opinion *Senior Home* para 44

<sup>151</sup> Opinion *Senior Home* para 41 and 44

<sup>152</sup> Opinion *Senior Home*, para 44; Virgos-Schmit Report, para 103; Gabriel Moss, Ian Fletcher, and Stuart Isaacs, *Moss, Fletcher and Isaacs on the EC Regulation on Insolvency Procedures* (3<sup>rd</sup> ed, Oxford University Press 2016) 173

<sup>153</sup> *Supra* 1.2.1

<sup>154</sup> Opinion *Senior Home*, para 44

The combination of all three security mechanisms allows maritime liens to be enforced against any third party breaching this right and to be enforced *erga omnes*. Therefore, maritime liens comply with requirement (i) and (ii) of the absolute nature criterion.<sup>155</sup> A few examples illustrate this.

When the initial debtor transfers his ship to a third party, the lienholder can still enforce his claim because of the *droit de suite* linked to the ship against the third party purchaser possibly breaching the maritime lien (requirement (i)). The lienholder can also enforce his claim directly on the ship even if the shipowner was not his initial debtor but the charterer of the ship was (requirement (i)). In addition, the priority ranking of maritime liens generally assures that the lienholder has priority over any third party, i.e. *erga omnes* (requirement (ii)).<sup>156</sup> Thus, maritime liens definitely comply with at least two out of three requirements of the absolute nature criterion.

### *Right of separation?*

More uncertain, however, is the compliance of maritime liens with the third and final requirement of the absolute nature criterion, i.e. that the right should be able to resist individual enforcement and collective insolvency proceedings. Recital 68 EIR adds to this requirement that the holder of a right *in rem* “*should be able to continue to assert its right to segregation or separate settlement of the collateral security.*”<sup>157</sup> This means that, regardless of insolvency proceedings being in place, holders of rights *in rem* must be able to enforce their claim outside of the insolvency proceeding.<sup>158</sup> Maritime lienholders, by contrast, do not always enjoy such a right of separation,<sup>159</sup> hereby possibly compromising their *in rem* classification under Article 8 EIR.

However, it is submitted that having this right of separation as an essential requirement for rights *in rem* to be of an absolute nature is questionable. Even if a certain right cannot be enforced by virtue of separate procedures, this does not necessarily undermine their absolute nature. As such, the lack of a right of separation should not prevent *in rem* classification under article 8 EIR. Therefore, the possible lack of a right of separation for maritime lienholders does not necessarily deprive maritime liens of their absolute nature and *in rem* classification under the EIR.

In his Opinion, Advocate General SZPUNAR quoted the Virgos-Schmit Report by stating that the final requirement of the absolute nature criterion is complied with if “*the right can resist individual enforcement by third parties and in collective insolvency proceedings (by its separation or individual satisfaction).*”<sup>160</sup> The fact that “*by its separation or individual satisfaction*” is put in parenthesis by the Virgos-Schmit Report questions, for one, the importance that the drafters of the EIR attached to this right of

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<sup>155</sup> *Supra* 1.1.2

<sup>156</sup> See e.g. *The Father Thames* [1979] 2 Lloyd's Rep 364; *The Ship “Sam Hawk”* [2015] FCA 1005

<sup>157</sup> EIR, Recital 68

<sup>158</sup> Opinion *Senior Home* para 43

<sup>159</sup> *Contra*, under German law, maritime lienholders have an unambiguous right of separation (German § 597 HGB; Flach (n 11) 25))

<sup>160</sup> Opinion *Senior Home*, para 43; Virgos-Schmit Report, para 102

separation.<sup>161</sup> The right of separation seems merely to be an illustration to the main part of this requirement.

Moreover, the this main part of this requirement only provides that the right should “*resist individual enforcement by third parties and in collective insolvency proceedings.*” The term “*resist*” again questions directly linking the right of separation to this requirement. This is because this term does not imply that right *in rem* holders should have a right of initiative to pre-emptively counter third party enforcement, which is achieved by a right of separation. Teleologically interpreted, right *in rem* holders should simply be able to resist third party enforcement, whether by a right of separation or otherwise. Therefore, the emphasis in recital 68 EIR on the right of separation in connection with the absolute nature requirement does not seem to correspond with the intention of the drafters.

Following this teleological interpretation, the absence of a right to initiate separation procedures does not necessarily prevent maritime lienholders from resisting individual or collective enforcement. In fact, two interconnected reasons, different from the right of separation, still allow maritime liens to comply with this third and final requirement of the absolute nature criterion.

Firstly, the priority ranking makes maritime liens substantially resistant to other creditors. In case of concurrence with other creditors, the maritime lienholder is paid out first on the proceeds of the ship.<sup>162</sup>

Secondly, if other creditors try to individually enforce their claim on the ship through separate procedures, procedural safeguards are in place to guarantee that these other creditors do not circumvent the priority ranking of maritime lienholders. In other words, maritime lienholders are able to *resist* such enforcement by third parties when these third parties initiate separate procedures. This is illustrated below by the safeguards in place for maritime liens to resist enforcement by the ship mortgagee.<sup>163</sup>

The ship mortgagee is the most notable creditor than can generally enforce its mortgage on the ship by means of separate procedures. However, maritime liens generally have priority ranking over ship mortgages. In order to prevent ship mortgagees of circumventing the priority ranking of maritime lienholders by this separate enforcement, notification requirements allow lienholders to join this procedure and to enforce their claim over the mortgage within this procedure. Similar notification requirements also guarantee the effective enforcement of maritime liens within collective proceedings like insolvency proceedings.<sup>164</sup>

As such, this combination of substantial and procedural safeguards allows maritime liens to resist individual enforcement by a third party and in collective proceedings,

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<sup>161</sup> For a linguistic analysis of the use of parentheses: Mark De Vries, “Invisible constituents? Parentheses as B-versed adverbial phrases” in Nicole Dehé and Yordanka Kadalova (eds), *Parentheticals* (John Benjamins Publishing Company 1984) 203-236

<sup>162</sup> *Supra* 1.1.2

<sup>163</sup> E.g. Belgian Maritime Code, Article 2.2.6.52; French Décret n°67-967 du 27 octobre 1967 relatif au statut des navires et autres bâtiments de mer, Article 21; Dutch Civil Procedure Law, Article 571 (“Placement and advertisement”),

<sup>164</sup> E.g. Article 57, para 2-4 Dutch Bankruptcy Code

even without a right of separation. Accordingly, after having complied with the two first requirements of the absolute nature criterion, maritime liens should also be able to comply with the third and final requirement of the absolute nature criterion in *Senior Home*. In conclusion, after also having complied with the direct and immediate relationship requirement, maritime liens can pass the independent limitation test.

### 3.4 Conclusion: maritime liens are potentially rights *in rem* under the EIR

Putting maritime liens to the *Senior Home* two-step test demonstrates that maritime liens at least have the potential to fall within the scope of the *in rem* exception of Article 8 EIR. Most importantly, however, certain national legislators would have to re-evaluate their classification of maritime liens for maritime liens to pass the *Senior Home* test unequivocally, regardless of the relevant pre-insolvency applicable law. Hence, the need for an unequivocal *in rem* classification of maritime liens, as recommended in chapter 2, only increases.

Furthermore, the absence of the right of separation for maritime lienholders can currently cause maritime liens to fall off the wagon of Article 8 EIR. However, an interpretation of the *Senior Home* test that is more in line with the teleological context of the *in rem* exception nuances the importance of separation procedures for this test. Such an interpretation befittingly allows maritime liens to pass this test and, accordingly, to be protected as rights *in rem* under Article 8 EIR.

In conclusion, maritime liens can and should be eligible for *in rem* protection under Article 8 EIR. As it stands today, however, the ambiguities in domestic laws and in the EIR pose a risk that (certain) maritime liens fall off the wagon of adequate *in rem* protection. The legal uncertainty that this creates is not only detrimental to maritime lienholders, but to maritime commerce as a whole. As such, this disrupts maritime commerce at the moment where the financial distress of the shipping company already puts considerable pressure on the protection of crucial maritime interests as guaranteed by maritime liens. For this reason, it is vital that the existing hurdles are eliminated for maritime liens to unequivocally get adequate protection as rights *in rem* under Article 8 EIR.

To further illustrate how inadequate administration of maritime liens under the EIR affects maritime lien security at its core, the following chapter analyses the most detrimental consequence of maritime liens falling off the wagon of *in rem* protection: the possible reversal this can cause in the priority ranking of maritime liens over ship mortgages. As such, the need to eliminate the existing hurdles preventing adequate protection of maritime liens under the EIR is emphasised.

## 4 The priority ranking of maritime liens over ship mortgages under the EIR

### 4.1 Priority ranking of maritime liens

Although the conclusion of the previous chapter was that maritime liens should fall under the *in rem* exception, it is also clear that certain hurdles still exist preventing this. In other words, there is a risk that maritime liens currently do not receive the appropriate protection under the EIR. The most detrimental consequence of this inadequate administration of maritime liens is that it creates a perverse effect in the priority ranking of maritime liens over ship mortgages. This chapter explains this perverse effect and its impact on maritime lien security as to illustrate and emphasize why the recommendations in chapter 2 and 3 for adequate *in rem* protection of maritime liens should be adopted.

As introduced in chapter 1 of this contribution, one of the core protection mechanisms of maritime liens is its priority ranking over ship mortgages. Both the Maritime Liens and Mortgages Conventions as well as the national laws of countries that are not a party to these conventions generally prioritise maritime liens over ship mortgages when they are in concurrence.<sup>165</sup>

The limited success of the 1967 and 1993 Maritime Liens and Mortgages Conventions compared to the more successful 1926 Convention can even partially be explained by the reluctance of countries to substantially alter the priority ranking in favour of ship mortgages. Although the differences in priority ranking between the three different conventions are rather limited, the differences in their degree of success are remarkable. This demonstrates the fragility of this priority ranking, which has grown over time as to satisfactorily regulate the relationship between different maritime interests. Therefore, it should always be reconsidered cautiously.<sup>166</sup>

By contrast, this priority ranking can perversely be reversed by excluding maritime liens from *in rem* protection under Article 8 EIR. As such, this touches the very core of maritime lien security and accordingly jeopardises the facilitation of maritime commerce. This illustrates that the need for adequate *in rem* protection for maritime liens under the EIR is high. The following paragraphs lay out how exactly the priority ranking of maritime liens over ship mortgages is reversed in case maritime liens do not fall within the scope of Article 8 EIR.

### 4.2 Reversing the priority ranking by inadequate maritime lien protection

#### 4.2.1 *Maritime liens vs. extensive protection for ship mortgages*

As laid out in Chapter 3, under the current state of law, maritime liens are at risk of holding no special position under the EIR, leaving them to the mercy of the insolvency proceedings and their *lex concursus*. As such, maritime liens risk losing the security that they had pre-insolvency.

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<sup>165</sup> *Supra* 1.1.2

<sup>166</sup> CMI (n 18) 16-17, 58–60

By contrast, ship mortgages are most probably granted extensive security under the EIR. Because the focus of this contribution lies on maritime liens, the following paragraphs merely introduce ship mortgage protection under the EIR. The discussion on ship mortgages under the EIR does not pretend to be exhaustive but simply illustrates the strong contrast between maritime lien and ship mortgage protection under the EIR in case maritime liens do not fall under Article 8 EIR. Subsequently, it is laid out how this difference in protection can reverse the priority ranking of maritime liens over ship mortgages.

#### 4.2.2 Extensive protection for ship mortgages

Most importantly, Article 8(2) EIR explicitly includes “*mortgages*” as a particular kind of rights *in rem*. Contrary to “*liens*”,<sup>167</sup> this is confirmed in all authentic language versions of Article 8(2) EIR. As such, ship mortgagees can unequivocally enjoy *in rem* protection under the EIR.<sup>168</sup>

Moreover, Article 14 EIR also accords special protection to the ship mortgagor, i.e. the shipowner. This provision protects the rights of a debtor subject to registration by derogating from the general rule under the EIR that the *lex concursus* is the law applicable in the insolvency proceedings. By virtue of this exception, the law of the Member State where the register is located, i.e. the *lex loci registri*, is the applicable law on the effects of insolvency proceedings on these rights subject to registration.<sup>169</sup> Ship mortgages are generally subject to registration and, therefore, ship mortgagors can make use of the exception.<sup>170</sup>

#### 4.2.3 A perverse reversal of the priority ranking

Thus, shortly put, Article 8 and Article 14 EIR provide ship mortgages with a “double-edged sword”, guaranteeing that both the rights of the ship mortgagee as well as of the ship mortgagor/shipowner are protected in case of a European maritime insolvency. This is in stark contrast with maritime lienholders which risk losing their security in the absence of adequate protection by Article 8 EIR. This can *de facto* lead to a reversal of the priority ranking between maritime liens and ship mortgages. This

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<sup>167</sup> *Supra* 3.2.2

<sup>168</sup> David Osborne, Graeme Bowtle, and Charles Buss, *The Law of Ship Mortgages* (2<sup>nd</sup> ed, Taylor & Francis 2016) 415-416

<sup>169</sup> Virgos-Schmit Report, 130; Miguel Virgós and Francisco Garcimartín, *The EC Regulation on Insolvency Proceedings: A Practical Commentary* (Kluwer 2004) nr 226; Kolja von Bismarck and Kirsten Schüman-Kleber, “Insolvenz eines deutschen Sicherungsgebers – Auswirkungen auf die Verwertung im Ausland belegener Kreditsicherheiten” *NZI* 2005, 92; Kolja von Bismarck and Kirsten Schüman-Kleber, “Insolvenz eines ausländischen Sicherungsgebers – Anwendung deutscher Vorschriften auf die Verwertung in Deutschland belegener Kreditsicherheiten” *NZI* 2005, 149; Heidelberg Luxembourg Vienna Report (n 130) 303; Wessels (n 124) 372-274

<sup>170</sup> David Osborne, Graeme Bowtle, and Charles Buss, *The Law of Ship Mortgages* (2<sup>nd</sup> ed, Taylor & Francis 2016) 22-24; CMI (n 18) 75

reversal infringes maritime lien security at its heart, hereby jeopardising the facilitation of maritime commerce.

The drafting process of the different Maritime Liens and Mortgages Conventions has proven that such an alteration of the priority ranking of (certain) maritime liens over mortgages is a delicate exercise.<sup>171</sup> Thus, considerate legislative preparation is required to alter this priority ranking because of the impact this has on maritime commerce.

By contrast, there is nothing to suggest that this reversal of the priority ranking of maritime liens is the product a deliberate choice by the drafters of the EIR. Therefore, it seems that the reversal of the priority ranking under the EIR has emerged perversely and perhaps even accidentally. To avoid this perverse reversal of the priority ranking, the best option currently is to include maritime liens within the scope of Article 8 EIR, as recommended in Chapter 3.

As such, avoiding this perverse reversal of the priority ranking of maritime liens could act as a catalyst to re-evaluate the requirement of a right of separation in the context of Article 8 EIR.<sup>172</sup> Besides, this should incite Member States to align their classification of maritime liens as *in rem* rights, as suggested in chapter 2.<sup>173</sup>

Furthermore, even fundamental issues related to the EU legal order can arise when the priority ranking of maritime liens is reversed in a European maritime insolvency. This is the subject matter of the following part and should be a reason the more to grant maritime liens the adequate *in rem* protection under the EIR.

## 4.3 Fundamental issues related to the EU legal order

### 4.3.1 Conflicts between different legal orders

In addition to the normative reasons elaborated on above, excluding maritime liens from the scope of Article 8 EIR also leads to conflicts between different legal orders. This is because the reversal of the priority ranking of maritime liens under the EIR comes into conflict with rules on the priority ranking arising from different legal orders than the EU legal order. In the following paragraphs, first, the possible conflicts between the EIR and domestic laws on this subject are analysed, after which the possible conflicts between the EIR and the Maritime Liens and Mortgages Conventions follow.

In a first possible scenario, the priority ranking of maritime liens over ship mortgages simply originates from the domestic laws of the Member States. In case the exclusion of maritime liens under Article 8 EIR overturns these domestic laws, no fundamental issues related to the EU legal order arise. Although this inversion of domestic laws

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<sup>171</sup> CMI (n 18) 82; Van Hooydonk (n 11) 182

<sup>172</sup> *Supra* 3.3.3

<sup>173</sup> *Supra* 2.4 *jo.* 3.3.2

causes a reversal of the priority ranking and this is normatively undesirable, the primacy of EU law over domestic law<sup>174</sup> does not preclude the EIR of doing so.

In a second possible scenario, the priority ranking of maritime liens over mortgages originates from the adherence by Member States to one of the Maritime Liens and Mortgages Conventions. Contrary to the first scenario, the inversion by the EIR of this priority ranking can in fact cause fundamental issues related to the EU legal order. This follows from the ambiguous relationship between the EU legal order and international conventions, as introduced below.

The EU can be defined as an autonomous legal order, distinguishable from more traditional international institutions because of its advanced constitutional nature. Therefore, EU instruments are on a different, but not necessarily higher, level than international instruments in the hierarchy of rules within EU Member States. As such, it is questionable whether rules arising from EU instruments can overturn rules arising from international instruments and vice versa.<sup>175</sup>

Therefore, it is uncertain whether the EIR can legally overturn the priority ranking of maritime liens over ship mortgages if this clashes with the priority ranking protected in a Maritime Liens and Mortgage Convention to which Member States are parties. The following paragraphs analyse this matter in more detail.

#### 4.3.2 *The principle of conform interpretation*

International conventions to which Member States are state parties, in principle only have direct effect in the domestic legal orders of the Member States. This implies that Maritime Liens and Mortgages Conventions only have effect in the domestic orders of the Member States that are a state party to them, but not in the EU legal order.<sup>176</sup> Therefore, it seems logical to conclude that the EIR can also overturn the priority rankings arising from the Maritime Liens and Mortgages Conventions, by virtue of the primacy of EU law over domestic law.

However, the principle of sincere cooperation is also explicitly protected by the constitutional treaties of the EU.<sup>177</sup> According to this principle, the EU should take account of international obligations that Member States have on account of international conventions. This means that when the EU regulates matters which overlap with international obligations for the Member States, the EU provisions should

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<sup>174</sup> CJEU Case C-6/64, *Costa v Enel* [1964]; Cass 27 mei 1971, *Arr Cass* 1971, 959 “*Smeerkaasarrest*”; Cour de cassation, Chambre mixte, arrêt du 24/05/1975 “*Arrêt Jacques Vabre*”; Beschluss vom 22. Oktober 1986, Az 2 BvR 197/83 “*Solange II*”

<sup>175</sup> Cases C-402&415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union* [2008] ECR I-6351 (“*Kadi I*”) para 371; Katja S Ziegler, ‘The Relationship between EU Law and International Law’ [2016] in *A Companion to European Union Law and International Law* 42

<sup>176</sup> Cases C-402&415/05 *Kadi I* [2008] para 306

<sup>177</sup> Treaty on European Union, Article 4(3)

as far as possible be interpreted in line with these international obligations. This is known as the principle of conform interpretation.<sup>178</sup>

The EIR itself expresses this principle of conform interpretation in Article 85(3) EIR, providing that the EIR should be overturned on matters that are irreconcilable with international obligations by Member States which have been concluded before the entry into force of the original EIR.<sup>179</sup> The Virgos-Schmit Report further clarifies how international conventions should be assessed under Article 85(3) by stating that:

*“To determine if the application of [the EIR] is or not irreconcilable with the obligations arising out of another existing Convention, it should be examined whether they entail legal consequences which are mutually exclusive.”<sup>180</sup>*

A reversal of the priority ranking under the EIR is such a legal consequence that is “*mutually exclusive to obligations arising out of another existing convention.*” More precisely, this reversal is mutually exclusive to the priority ranking of maritime liens over mortgages in the Maritime Liens and Mortgages Conventions. Therefore, Article 85(3) EIR precludes an interpretation of Article 8 EIR excluding maritime liens from its scope, when the EIR comes in conflict with the domestic laws of Member States which have adhered to a Maritime Liens and Mortgages Convention before the entry into force of the EIR.

#### 4.3.3 Member States not adhering to international conventions

In short, reversing the priority of maritime liens and ship mortgages is not only undesirable normatively to protect maritime lien security in a European maritime insolvency; in Member States that have implemented a Maritime Liens and Mortgages Convention, this also violates fundamentals of the EU legal order as expressed by the conform interpretation principle and Article 85(3) EIR.

This, however, implies that, in Member States not adhering to any convention, Article 85(3) EIR cannot be directly invoked to preserve the priority ranking of maritime liens. Nonetheless, the same principle of conform interpretation, which underlies Article 85(3) EIR, might indirectly prevent a reversal of the priority ranking of maritime liens in these Member States. This is because the principle of conform interpretation also applies to obligations from Member States arising from customary international law.<sup>181</sup> In light of the origins of maritime liens in a common *lex maritima* and the constancy of

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<sup>178</sup> Case *Kadi I*, para 296 Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communication and Others* [1996] ECR I-3953, para 13; Pieter Jan Kuijper, “Customary international law, decisions of international organisations and other techniques for ensuring respect for international legal rules in European Community law” in Jan Wouters and André Nollkaemper (eds), *The Europeanisation of international law* (TMC Asser Press 2008) 100

<sup>179</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ L106/1

<sup>180</sup> Virgos-Schmit Report (n 3) para 310

<sup>181</sup> Case *Kadi I*, para 296 Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communication and Others* [1996] ECR I-3953, para 13; Pieter Jan Kuijper, “Customary international law, decisions of international organisations and other techniques for ensuring respect for international legal rules in European Community law” in Jan Wouters and André Nollkaemper (eds), *The Europeanisation of international law* (TMC Asser Press 2008) 100

the priority of maritime liens over ship mortgages across borders, one could argue that this priority is an obligation arising from customary international law.<sup>182</sup>

Thus, in Member States that do not adhere to any of the Maritime Liens and Mortgages Conventions, this customary international law nature of the priority ranking of maritime liens could be used as an argument to prevent Article 8 EIR from overturning the priority of maritime liens. As such, even in Member States that do not adhere to any of the Maritime Liens and Mortgages Conventions, a too strict interpretation the *in rem* exception reversing the priority ranking of maritime liens can be prevented.

#### 4.4 Conclusion: maritime liens need *in rem* protection

In chapter 1 of this contribution, the priority ranking of maritime liens over ship mortgages was presented as one of three core security mechanisms of maritime liens. By contrast, this chapter demonstrates that this priority ranking risks being reversed when maritime liens are excluded from *in rem* protection under Article 8 EIR.

This reversal of the priority ranking of maritime liens affects maritime lien security at its heart and, hence, also maritime commerce. Moreover, such reversal risks causing fundamental issues related to the EU legal order as the EIR would come into conflict with international obligations of the Member States on the priority ranking of these maritime liens.

These two perverse effects following inadequate administration of maritime liens illustrate the need for *in rem* protection of maritime liens under Article 8 EIR. As such, this chapter emphasises the need to implement the recommendations in chapter 2 and 3 to classify maritime liens adequately as rights *in rem*, both in domestic laws as under the EIR.

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<sup>182</sup> See Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010) Chapter 4

## Conclusion: bringing maritime liens aboard the EIR

### *Main findings and recommendations*

In 1910 already, Louis FRANCK, one of the founders of the CMI, remarked that,

*“Rien n’a autant nui au droit maritime que l’influence du droit civil.”*<sup>183</sup>

*(“Nothing has ever harmed maritime law more than the influence of the civil law field”)*

One could say that, nowadays, this quote still applies when considering the impact that insolvency law (as part of the civil law field *sensu lato*) has on maritime liens. In the EU, the influence of the EIR risks making maritime liens the proverbial *man overboard* in a European maritime insolvency.

Nevertheless, the conclusion of this contribution is less dramatic than FRANCK’s remark, because adequately protecting maritime liens in a European maritime insolvency is in fact achievable under the EIR. In summary, the following four conclusions have been presented in this contribution to prove that *maritime liens can be brought aboard the EIR*.

Firstly, the dichotomy between the common law and civil law tradition on the classification of maritime liens is fit for reconsideration. In fact, several civil law countries also classify maritime liens as rights *in rem*, implying at least that the dichotomy is not as strict as presented.

Secondly, an internal comparison of maritime liens across borders leads to the conclusion that maritime liens should in fact be classified identically, regardless of the relevant domestic law. Subsequently, an external comparison with traditional rights *in rem* and an assessment of maritime liens on fundamental principles underlying rights *in rem* demonstrates that this identical classification should be an *in rem* classification.

Thirdly, the recommendation above on the classification of maritime liens on the domestic level would also benefit the adequate protection of maritime liens in a European maritime insolvency. This is because the domestic *in rem* classifications by Member States of maritime liens are determinative for *in rem* protection under the EIR. Besides, a more teleological interpretation of the criteria of *Senior Home*, nuancing the requirement of a right of separation to be protected under Article 8 EIR, would help in protecting maritime liens adequately under the EIR.

Fourthly and finally, it is crucial for the existing hurdles leaving maritime liens as the *man overboard* of the EIR to be eliminated. The consequences thereof for maritime lien security and, accordingly, for maritime commerce are considerable. Most detrimentally, the priority ranking of maritime liens over mortgages risks being reversed, which is not only normatively undesirable, but which can even cause fundamental issues related to the EU legal order.

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<sup>183</sup> Civil law in the sense of the field of law and not in the sense of the civil law tradition see *Le Droit Maritime*, 1910, n° 1, 8

### *The way forward*

The conclusions drawn above mostly consist of recommendations *de lege ferenda*. This implies that, nowadays, maritime liens still risk slipping through the net of adequate *in rem* protection under the EIR, accordingly affecting maritime commerce in the EU. In order to eliminate the hurdles preventing maritime liens of currently receiving adequate protection, the following paragraphs suggest how to turn the recommendations presented above into concrete action.

Firstly, the debate on the classification of maritime liens should be revived, especially in these countries with ambiguous laws on the exact classification of maritime liens. This can form a first step towards a unified *in rem* classification of maritime liens across borders and, as such, of adequate *in rem* protection under the EIR.

Secondly, the requirement presented in recital 68 EIR and in *Senior Home*, that right *in rem* holders under Article 8 EIR should have a right of separation, should be re-evaluated. The question that needs further analysis is whether *in rem* rights can resist enforcement by third parties by different means than by a right of separation, e.g. by means of procedural safeguards like notification requirements. If so, maritime liens can more adequately fall within the scope of Article 8 EIR.

Thirdly, it must be noted that this contribution does not comprehensively discuss the exact operation of Article 8 EIR. In the absence of alternatives under the current state of law, Article 8 EIR is currently the most eligible provision to protect maritime lien security in a European maritime insolvency. Further research will have to demonstrate whether the protection provided by Article 8 EIR – rights *in rem* being “*not affected by the opening of insolvency proceedings*” - is actually the most adequate one for maritime liens. Possible alternatives are the categorical application of a different law than the *lex concursus* to maritime liens; a carve-out of maritime liens depending on the initiation of ship arrest procedures; or a total carve-out of all maritime liens from the scope of the EIR.

Especially at a moment in which the UK, the most influential maritime country in Europe (and arguably even worldwide), has recently left the EU, it is crucial for the EU to reposition itself as a maritime-friendly jurisdiction. Adequately protecting maritime security interests, like maritime liens, in a maritime insolvency is instrumental in this regard. Within this context, this contribution can hopefully serve as a stepping-stone towards a more adequate administration of maritime insolvencies in the EU.