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Merchant Shipping (Amendment) Act, 2004

**An Act to Amend Articles 50 to 54A of the Merchant Shipping Act,
Relating to Special Maritime Privileges**

**A Legislation Drafting Project Submitted in Partial Fulfilment of the Degree of
Master of Laws in International Maritime Law**

Tutor: Dr Ivan Vella

Maria Depasquale – Malta

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1993 International Convention on Maritime Liens and Mortgages, Geneva, May 6, 1993

EXPLANATORY NOTE

Introduction

It must be stated at the outset that the proposed amendments to the Maltese Merchant Shipping Act (hereinafter referred to as "the MSA") in relation to special maritime privileges¹ have been heavily influenced by the provisions of the "International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926" (hereinafter referred to as "the 1926 Convention"). The "International Convention on Maritime Liens and Mortgages, 1993" (hereinafter referred to as the 1993 Convention) has also played a minor role in influencing these amendments. Although the 1926 Convention is considerably old, it has received wider recognition by States than the more recent 1993 Convention. Indeed, the former Convention has been adhered to by twenty-five States (which is admittedly a low figure), whereas the latter, which (unlike the 1926 Convention) has not yet entered into force, has been adhered to by a mere five States.² Malta is not a party to any of these Conventions. For this reason it was thought that a strict adherence to any one of these Conventions would be unnecessarily restrictive.

In the field of maritime privileges, international uniformity may be said to be almost inexistent, as attested by the following passage:

"In the realm of maritime liens the disharmony in the various maritime jurisdictions has centred not around the existence or absence of the concept but in the diversity of its ambit of operation and in the ranking of claims in the nature of maritime liens. The concept of a maritime lien is one which is widely recognised in the principal maritime jurisdictions of the world. The range of claims which assume the character of maritime liens may nevertheless vary enormously as between different legal systems. Significant differences may also exist in the manner in which maritime liens are ranked between themselves and in relation to other competing claims."³

Although there is little uniformity in this field across the world, there exists some uniformity among civil law countries, most of which have adopted the 1926 Convention. The provisions in the Maltese Merchant Shipping Act relating to special maritime privileges are more akin to the position in civil law countries than to that at common law. Thus, at least, by bringing the Maltese provisions more or less in line with the 1926 Convention, the Maltese position will be similar to that of civil law countries such as France and Italy.

¹ The terms 'privilege' and 'lien' are very similar in meaning, the former being the nomenclature adopted in civil law jurisdictions and the latter being that adopted in common law jurisdictions in order to denote a privileged or priority right over property. Maltese law speaks in terms of 'privileges'. Hence it is the term that shall be used throughout this work.

² It would be pertinent to point out that another Convention also entitled the "International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages" was concluded in 1967. However, this Convention never entered into force as only five countries adhered to it. For this reason, no influence was drawn from this convention in the amending provisions to the MSA.

³ Thomas, D.R., "Maritime Liens", in *British Shipping Law Series*, Vol. 14, edited by Colinvaux, R., London, Stevens & Sons, 1980, p. 332.

It is now proposed to examine individually each provision that has been amended in order to give a brief explanation of the need for or desirability of such amendments.

Article 37D (3)

Article 37D (3) has been deleted. Nevertheless its contents have not been altogether done away with as the first part of this article is now contained in the new article 51, whereas the second part has been rendered superfluous by the introduction of article 54B. This change has been effected because it was felt that the matters dealt with in article 37D (3) should be found under the heading "Special Privileges", rather than under the heading "Maritime privileges and mortgages".

Article 37D (3) postulates as follows:

Without prejudice to any other cause which may at law extinguish an obligation the special privileges specified in article 50 are not extinguished by the sale of the vessel, except in case of a sale made pursuant to an order or with the approval of a competent court made according to the forms prescribed by law, or where, subsequent to a voluntary sale a period of one year has elapsed from the date of the registration, recording or annotation of that voluntary sale in the registry to which the ship belongs or where no such registration, recording or annotation are entered in that registry from the date of closure of the register of the ship in such registry subsequent to such voluntary sale, unless within such period of one year an action for the recovery of the claim secured by such privilege has been brought before a competent court.

The reader is referred to the comments made with regard to article 54B at a later stage of this Explanatory Note.

Article 50

In order to assimilate, as much as possible, the order in which privileged claims are set out in the MSA with that in which they are found in the 1926 Convention, certain alterations to the order of the existing list of privileged claims are required. Moreover, a small number of privileged claims are being introduced and some existing ones are being somewhat altered. Furthermore, article 50 now consists of five subarticles, four of which are entirely new additions. It has therefore been considered more adequate to delete article 50 and substitute it with a new article.

The opening sentence of the new article 50(1) is wider than the corresponding provision in the unamended article 50, which provides that the debts listed in that article are secured by a special privilege

"upon the vessel, as well as any proceeds from any indemnity arising from collisions and other mishaps as well as any insurance proceeds".

The new provision reflects the wording of the opening paragraph of article 2 of the 1926 Convention and it also introduces the 'wreck' as constituting property to which the privilege attaches. Under the 1926 and 1993 Conventions, there is no mention of the

'wreck' in this context. Although there exists English jurisprudence to the effect that the remains of a wreck are lienable in the same way as the sound ship, it does not seem as though civil law countries follow this reasoning. In fact, article 549 of the Italian *Codice della Navigazione* specifically provides that "In case of deterioration or diminution of the thing over which the privilege exists, the privilege is exercisable over the remaining or salvaged or recovered property" (my translation). The term 'wreck', therefore, would not fall within the definition of 'vessel' in the Italian Code and this provision has been introduced for this purpose. The introduction of a privilege over the wreck in the Maltese MSA is also warranted.

The unamended law provides that the privilege also extends over 'any insurance proceeds'. This is not found in the 1926 or 1993 Convention. On the contrary, article 4 of the 1926 Convention (which explains what is meant by "the accessories of the vessel and the freight") expressly excludes 'payments made or due to the owner on policies of insurance'. Moreover, article 10(2) of the 1993 Convention postulates that "[c]laimants holding maritime liens may not be subrogated to the compensation payable to the owner of the vessel under an insurance contract." In order to bring the new law in line with the said Conventions, the privilege no longer extends over 'insurance proceeds'.

Article 50(1)

Paragraphs (a) to (d) of the new article 50(1) reflect article 2(1) of the 1926 Convention. Although the 1926 Convention condenses these privileged claims in one paragraph (meaning that should there be competing creditors these claims rank *pari passu*, as shall be seen later), it was not felt necessary to carry out such a change.⁴ One may note that France, for instance, which ratified the 1926 Convention in 1935, divided article 2(1) of the Convention into two subarticles in its implementing Act.⁵

Of the four paragraphs under discussion, it is only paragraph (d) that has undergone change. Paragraph (d) previously created a privilege in favour of salvage and pilotage dues. Although both these privileges are listed in article 2 of the 1926 Convention, the privilege for salvage dues does not feature at such an early stage but it only appears in article 2(3) of the Convention. Hence the privilege for salvage claims has been transferred from the old paragraph (d) to the new paragraph (g) in order to maintain the order set out in the 1926 Convention. The new paragraph (d), whilst retaining the previous position as regards pilotage dues, also includes a privilege in respect of "the cost of watching and preserving the vessel from the time of her entry into the last port." In effect, this new wording combines the provisions of the old paragraphs (e), (f) and (g) and places them within one single paragraph. In this manner, the amended law is more faithful to the position under the 1926 Convention and it removes the archaic wording used in the old paragraphs (e), (f) and (g).

⁴ The Protocol of Signature of the 1926 Convention provides, in article I that "It is understood that the legislation of each State remains free

(1) To establish among the claims mentioned in paragraph (1) of Article 2, a definite order of priority with a view to safeguarding the interests of the Treasury..."

⁵ *Vide* article 31 of Law no. 67-5 of January 3, 1967.

The new paragraph (e) of article 50(1), which creates a privilege in favour of claims for wreck removal expenses where such removal is carried out in accordance with article 339 of the MSA, has no counterpart in the lists of privileged claims found in either the unamended MSA or in any of the Conventions. However, article I of the Protocol of Signature of the 1926 Convention allows signatories to the Convention to provide legislation granting the administrative authorities "who have caused a wreck or other obstruction to navigation to be removed, ... the right, in case of non-payment, to detain the vessel, wreck or other property, to sell the same, and to indemnify themselves out of the proceeds in priority to other claimants." Article 339 of the MSA grants such right to the Minister responsible for Shipping. By virtue of paragraph (c) of article 339, the Minister who causes the raising or removal of a wreck that is, or is likely to become an obstruction or danger to navigation may sell the vessel or recovered property "and out of the proceeds of the sale reimburse himself for the expenses incurred by him in relation thereto.. and the Minister shall hold the surplus, if any, of the proceeds for the benefit of the persons entitled thereto...". Article 339 creates a special legislative right in favour of the Minister responsible for Shipping. Upon a reading of this article, it is not quite clear whether the position of other claimants who are granted a privilege under article 50 of the MSA is subordinated to that of the Minister. The introduction of a privilege for wreck removal expenses within the list of privileged claims removes any doubt as to the ranking of the Minister's wreck removal claim in relation to other claims enjoying a special privilege.

The choice of ranking the privilege for wreck removal expenses after the privilege for expenses for the preservation of the vessel (sometimes referred to as *custodia legis*) was influenced by both the 1993 Convention and by the French position. Tetley⁶ submits that "wreck removal, in most jurisdictions, results in a first right, or special legislative right, in favour of the government against the wreck. ... It ... is permitted under the 1993 Convention only for the removal of the wreck 'in the interest of safe navigation or the protection of the marine environment ...'. Such a right ranks before 'all claims secured by a maritime lien', but after *custodia legis*, as defined in art. 12(2) [of the 1993 Convention]." Likewise, the wreck removal privilege under French law, ranks after *custodia legis* but before all other special maritime privileges, in accordance with article I of the Protocol of Signature of the 1926 Convention.⁷

The privilege now listed under paragraph (f) of article 50(1) corresponds to that found in paragraph (h) of article 50 (unamended law) and has not been amended in any other manner. The wording of this provision follows article 4(1)(a) of the 1993 Convention. However, its position as regards ranking is based on the 1926 Convention (article 2(2)).

Article 2(3) of the 1926 Convention grants special maritime privilege status to claims for 'remuneration for assistance and salvage, and the contribution of the vessel in general average'. The new paragraph (g) reflects this provision. A minor difference between the

⁶ Tetley, W., *Maritime Liens and Claims*, 2nd edition, International Shipping Publications, Canada, 1998, p. 125.

⁷ *Vide ibid.*, pp. 902-904.

wording of article 2(3) of the 1926 Convention and that of the amended MSA relates to the fact that the term 'assistance' has been dropped in order to bring the law in line with modern trends. For this reason, the wording of article 4(1)(c) of the 1993 Convention has been adopted in relation to salvage claims. As regards claims for general average contributions, it must be stated that the unamended article 50 of the MSA does not grant maritime privilege status to such claims. Tetley⁸ holds that "general average is an anachronism which unrealistically favours shipowners, while its adjustment is expensive and time-consuming... it should not be honoured by a maritime lien. The 1993 Liens & Mortgages Convention was correct in this respect". Tetley is of the opinion that general average should be eradicated "until the York/Antwerp Rules have been reformed". However, the question remains, how can a privilege over the vessel for the contribution of the vessel in general average favour the shipowner? No doubt, such a privilege would favour the claimant and not the shipowner. Consequently, although general average may be anachronistic, there would be no harm in introducing a privilege for the general average contribution of the vessel, especially since other jurisdictions such as the United States⁹, France¹⁰ and Italy¹¹ have retained it.

The three paragraphs that feature next on the list of privileged claims, that is paragraphs (h), (i) and (j) of the new article 50(1), have a rather convoluted reasoning to them as they partake from the 1993 and, to a lesser extent, the 1926 Convention, as well as from paragraphs (i), (n) and (o) of the unamended article 50 which they replace.

Paragraph (h) of the new article 50(1) partly reflects paragraph (i) of the unamended article 50 and is partly innovative. Paragraph (h) has been drafted in conformity with article 4(1)(b) of the 1993 Convention as the wording adopted in this Convention is more satisfactory than that used in the corresponding article 2(4) of the 1926 Convention¹². The old paragraph (i) grants a privileged status solely to claims of seamen (for damages, interest and expenses) relating to death or personal injury. No privilege was granted in favour of passenger claims or third party claims for death or injury. The new paragraph (h) is innovative in that it does not differentiate between claimants and therefore all personal injury and death claims are privileged, whether the claimant happens to be a seaman, a passenger or a third party whose claim arises from the operation of the vessel.

As regards the new paragraph (i) of article 50(1), it may be said that this provision is largely based on article 4(1)(e) of the 1993 Convention as, once again, its drafting is preferable to that of the corresponding article 2(4) of the 1926 Convention. The

⁸ *Ibid.*, p. 453.

⁹ Commercial Instruments and Maritime Liens Act, 1998, [46 U.S. Code section 31301 (5)(E)].

¹⁰ Law No 67-5 of January 3, 1967 (article 31(4)).

¹¹ Codice della Navigazione (article 552(4)).

¹² As Tetley points out, article 2(4) of the 1926 Convention, which creates a privilege in favour of 'indemnities for personal injuries to passengers or crew', "is restrictive and does not cover injuries to a third person on a pier ashore or on a non-ship afloat ... Nor does a swimmer struck by a ship benefit (not being a 'passenger' or 'crew member')." On the other hand, article 4(b) of the 1993 Convention makes it clear that "the personal injuries may be inflicted either on land or on water and although the damage must arise from the 'operation' of the vessel, it need not be due to direct contact with the vessel". (Tetley, *op. cit.*, pp. 388, 339).

difference between article 4(1)(e) of the 1993 Convention and paragraph (i) of the new article 50(1) lies in the fact that whereas the second part of the former specifically excludes the creation of a privilege for claims for "loss of or damage to cargo, containers and passengers' effects carried on the vessel", the latter does not. On the contrary, the new article 50(1)(j) specifically grants privileged status to "claims in respect of loss of, non-delivery or damage to cargo or luggage". This has been done because the unamended article 50, besides providing a privilege for debts due to other vessels as damages in cases of collisions of vessels in paragraph (o), also provides a privilege for "damages and interest due to the freighters for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master and the crew" in paragraph (n). Thus, it was felt that this privilege should not be deleted to the detriment of freighters. The new article 50(1)(j) grants a privilege not only to freighters but also to any person who suffers loss, non-delivery or damage to cargo or luggage. One may also point out that article 2(4) of the 1926 Convention also grants privileged status to "indemnities for loss of or damage to cargo or baggage" and because this provision makes no reference to "the fault of the master or crew" (as is the case under paragraph (n) of the unamended article 50 of the MSA), this phrase has not been included in the new article 50(1)(j) because nowadays it may be too restrictive.

As one may have noticed, the claims corresponding to those mentioned in the new paragraphs (h), (i) and (j) are placed within one subarticle of the 1926 Convention (article 2(4)). Nevertheless, it was thought preferable to separate the various claims into three different paragraphs in order to avoid complications with respect to their ranking.

The last privilege listed in the 1926 Convention is that relating to the master's disbursements in relation to necessities for the ship (whether the claim is his own or of other creditors) and is found in article 2(5) of the Convention. The privileges granted by paragraphs (j), (l) and (m) of the unamended article 50 of the MSA are similar in effect. Nevertheless, it was thought preferable to adopt the wording of the Convention provision not only because the MSA wording is considerably out-dated (as it uses such words as "victuals, outfit and apparel"), but also to ensure uniformity with the laws of other civil law countries that have adopted the 1926 Convention.

Paragraphs (l) and (m) of the new article 50(1) correspond to paragraphs (k) and (p) respectively of the unamended law. They are not derived from any one of the Conventions but have been introduced by the Maltese legislator¹³. It is only the old paragraph (k) (now paragraph (l)) that has undergone some substantive changes. Article 50(k) (unamended) reads as follows:

"Ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in paragraphs (a) to (i), though in any case for a sum in the aggregate not in excess of four thousand units".

¹³ The addition of other privileges to those listed in any one of the Conventions would have been possible even if Malta had been a party to any one of them by virtue of article 3 of the 1926 Convention or article 6 of the 1993 Convention.

This provision may be criticised on two counts. Firstly, the privilege should not only attach to agency fees and disbursements due after the vessel's last entry into port but to any accrued fees and disbursements, regardless of when they arose. There normally exists a fiduciary relationship between the ship agent and the principal as the same ship agent will normally act on behalf of the principal on a continuous basis. Although "very often the ship agent will demand and receive funds on account from his principal so as to enable him to cover disbursements necessary to carry out the agency,"¹⁴ it is not uncommon for the ship agent to make disbursements on behalf of his principal for a number of consecutive returns to the port without his having been placed in funds. The ship agent should not be denied a special privilege for fees and disbursements relating to earlier arrivals in the port simply because he trusted his principal.

The second criticism relates to the fact that a cap is placed on the privileged amount. The Malta Maritime Authority Act¹⁵ places a considerable amount of responsibility on the ship agent. For instance, article 39 of the Act lists the ship agent as one of the persons liable for the payment of any dues, charges or fees levied under the Act on the ship. Article 38 of the Act "prevents the ship agent from relinquishing his agency whilst the vessel is still in Malta. ... In limited and specific circumstances, this provision can be extremely unfair and unjust on the ship agent. These circumstances include, particularly, situations when the ship is abandoned by owners who are not in a position to pay debts relating to the vessel or to continue running the vessel. The ship agent... remains personally liable for such payments without the possibility of recovery from his principals. In addition the ship agent continues to incur all other expenses and fees relating to the vessel's stay in Malta."¹⁶ It appears that "the instances of owners going bankrupt and abandoning their vessels in Malta leaving a spate of debts has been quite significant."¹⁷ These debts would, in such cases, undoubtedly exceed four thousand units, which is the limit above which the ship agent's claim is not privileged under the unamended article 50(k) of the MSA.

It was felt that the unamended article 50(k) does not grant an effective remedy to ship agents. For this reason, the amended article 50(1)(l) now reads:
"Ship agency fees due for the vessel, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in paragraphs (a) to (k);"

Nevertheless, this provision now has a lower ranking than that it previously enjoyed under the unamended law. Having such a low ranking in comparison to other privileged

¹⁴ Borg Barthet, M., *Ship Agency: Proposal for Legislative Reform*, LL. D. Thesis, University of Malta, 2002, p. 81.

¹⁵ Cap. 352 of the Laws of Malta.

¹⁶ Borg Barthet, M., *op. cit.*, pp. 128, 129.

¹⁷ *Ibid.*, p. 90. The author analyses two Maltese judgements involving ship agents who were held liable for the debts of their bankrupt principal: "Charles Schembri nomine v. Frederick Frendo nominee", Court of Appeal, 14th January, 2002 and "Palm Shipping Agency Limited v. Georgios Skandalos nomine, First Hall, Civil Court, 23rd April, 1999.

claims, the other privileged claimants have no reason to be annoyed at the removal of the cap previously placed on the privileged amount.

Article 50 subarticles (2), (3) and (4)

These new subarticles are based on article 4 of the 1926 Convention. Subarticle (2) is being introduced in order to define what is meant by "the accessories of the vessel and the freight", found in the opening sentence of the new article 50(1). As the latter sentence is also based on the 1926 Convention, it is only logical that the meaning given to the above-quoted phrase in the Convention should be reproduced in the amended article. The proviso to subarticle 2 makes it clear that the privilege no longer extends over insurance proceeds.

Article 50(5)

The new article 50(5) is derived from article 4(2) of the 1993 Convention. Article 50(5) specifically excludes oil pollution claims falling within other Conventions and claims based on the use of radioactive materials from being granted a privileged status under paragraphs (h), (i) and (j) of article 50(1). The said paragraphs are based on article 4(1)(b) and (e) of the 1993 Convention respectively. Thus, in line with the reasoning put forward in the previous paragraph, the exclusion made in the 1993 Convention should be reproduced in the amended article.

Article 51

The unamended article 51 broadly expresses the same rule as that found in the new article 54A(3), which is based on article 6 of the 1926 Convention. However, the language used in the old article 51 is considerably awkward and convoluted. In contrast, article 6 of the 1926 Convention adopts a much more practical approach in conveying the same concept. It was therefore felt that the clarity and simplicity of the terms used in Article 6 of the 1926 Convention should be substituted for the old wording. Moreover, the proviso is not found in the unamended article 51. Its introduction is warranted in order to clarify the position of crew members who perform a number of voyages within their period of employment. The reason for moving this provision to article 54A(3) is that as article 54A regulates the ranking of creditors, it is appropriate for a provision that deals with the priority of claims attaching to the last voyage to be found within article 54A.

The new article 51A

Under the unamended law, the privilege does not extend over the 'freight' and 'accessories', as it does under the amended version. Consequently, a new provision setting the parameters within which a privilege on the freight and accessories may be enforced is required. The new article 51A serves this end. It is based on article 10 of the 1926 Convention.

Article 54

Article 54 has not undergone any substantive changes. Amendments have only been carried out in relation to the terminology adopted in the said article. The marginal note of article 54 states "possessory lien or privilege" and the term is used throughout the article. The common law concept of a "possessory lien" is translated in civil law countries as a "right or retention", rather than as a "possessory privilege". Since the Maltese MSA provisions dealing with special privileges are closer to the civil law model than to that of common law, it was felt that it would be more appropriate to adopt the civil law terminology. Thus, "possessory lien or privilege" has been substituted by "right of retention".

Article 54 has also undergone another minor change. This article, like most of the articles that have now been substituted, uses the terms "ship" and "vessel" interchangeably. Article 2 of the MSA (the interpretation article), appears to give a wider meaning to the term "vessel" than to the term "ship" and the former term has now been adopted throughout the article relating to special privileges. For the sake of clarity and uniformity, it is now only the term "vessel" that appears within the said articles. One exception is article 52, where the term "ship" has been retained because the term is there used with reference to the articles relating to the ship registration in Part II of the MSA, which articles adopt the term "ship".

Article 54A

Article 54A establishes the order of ranking of competing creditors. The amended article is structured somewhat differently to the one it replaces. Article 54A is now divided into three subarticles. Subarticle (1) establishes the relative priority between different types of security rights. On the other hand, subarticles (2) and (3) deal solely with the priority of claims that are granted special maritime privilege status under article 50(1).

Substantively, article 54A has not undergone much change. However, the change in structure was aimed at clarifying the position as to the manner in which special maritime privileges rank among themselves and the manner in which individual special maritime privileges rank in relation to other security rights. It was felt that in the unamended law, this distinction did not emerge very clearly.

Subarticle (2) is based on article 5 of the 1926 Convention and, as has been explained earlier, subarticle (3) is based on article 6 of the same Convention.

The substantive changes that have been carried out in article 54A(1) are aimed at bringing the Maltese position relating to the ranking of creditors in line with the 1926 Convention. However, although the 1926 Convention does not make provision for a right of retention, the 1993 Convention recognises such a right (as does the Maltese MSA) and it was felt that the Maltese position as regards the ranking of the right of

retention does not require amendment. Thus, the creditor enjoying a right of retention still enjoys a relatively high ranking. The only difference between the unamended article 54A(2) (which deals with the ranking of the "possessory lien") and the corresponding article 54A (1)(b) lies in the fact that the right of retention has now been subordinated to the special privileges relating to the costs of arrest and *custodia legis* (article 50(1)(a) and (d)) as well as to all the special statutory rights listed in the new article 50(1) (article 50(1) (b), (c) and (e)), whereas before it was only subordinated to the special privileges mentioned in paragraphs (a) and (b) of article 50.¹⁸ It is noteworthy that in countries such as the UK and Canada, which countries grant a "possessory lien", the position is that the possessory lien ranks after special statutory rights and the costs of arrest and *custodia legis*.¹⁹

The special privileges that were introduced by the Maltese legislator and that have been retained in the amended version (i.e. those mentioned in the new paragraphs (l) and (m) of article 50(1)) now rank after registered mortgages, in line with both the 1926 and 1993 Conventions which both stipulate that the national maritime liens established by States party to the respective Conventions should rank after mortgages.

Article 54B

As the law stood prior to the amendments under review, there was no general provision setting a time-bar on the right to claim a special maritime privilege. The 1926 and 1993 Conventions, as well as the laws of several other jurisdictions, do make such provision. Article 54B, which is based on article 9 of the 1926 Convention, has been introduced into the MSA as it was felt that precisely because a privilege places its holder in an advantageous position vis-à-vis other claimants, its duration should be limited. Prior to its deletion, article 37D (3) imposed a one year time bar only with regard to special privileges attaching to vessels sold pursuant to a voluntary sale. The time-bars introduced by the new article 54B (which are of one year or sixth months, according to the applicable claim) apply to the special privileges mentioned in article 50(1) generally, regardless of whether or not a voluntary sale has been effected.

Article 54C

Article 54B gives effect to article 13 of the 1926 Convention and has been introduced in order to identify the persons who must be in charge of the vessel in order for a maritime privilege to be validly created.

¹⁸ The right of retention is also subordinated to the special privileges listed in article 50(1) (f) to (k) if the latter arose prior to possession. However, this was also the position prior to the amendments.

¹⁹ *Vide* Tetley, W., *op. cit.*, pp. 884-890 (as regards the UK position) and pp.892-897 (as regards the position in Canada).

MERCHANT SHIPPING (AMENDMENT) ACT, 2004

I assent.

(L.S.)

EDDIE FENECH ADAMI
President

12th April, 2004

ACT No. X of 2004

AN ACT to amend the Merchant Shipping Act, Cap. 234.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled and by the authority of the same, as follows:

1. (1) The title of this Act is the Merchant Shipping (Amendment) Act, 2004 and it shall be read and construed as one with the Merchant Shipping Act, hereinafter referred to as "the principal Act".

Short title and commencement
Cap. 234.

(2) This Act shall come into force on such date as the Minister responsible for shipping may, by notice in the Gazette, establish.

2. In article 37D of the principal Act, subarticle (3) thereof shall be deleted.

Amendment of article 37D of the principal Act.

3. For article 50 of the principal Act there shall be substituted the following:

Substitution of article 50 of the principal Act

"Special privileges on vessels, freight etc.

50. (1) The following give rise to a special privilege on the vessel, on the freight for the voyage during which the claim giving rise to the privilege arises, on the accessories of the vessel and freight accrued since the commencement of the voyage, and on the wreck:

(a) judicial costs incurred in respect of the sale of the vessel and the distribution of the proceeds thereof;

(b) fees and other charges due to the registrar of Maltese ships arising under this Act;

(c) tonnage dues;

(d) pilotage dues and the cost of watching and preserving the vessel from the time of her entry into the last port;

(e) claims in respect of the expenses incurred for the removal of the wreck, where such removal is carried out in accordance with article 339 of this Act;

(f) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(g) claims for reward for the salvage of the vessel and for the contribution of the vessel in general average;

(h) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(i) claims based on tort arising out of physical loss or damage caused by the operation of the vessel;

(j) claims in respect of loss of, non-delivery or damage to cargo or luggage;

(k) claims resulting from contracts entered into or acts done by the Master, acting within the scope of his authority away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the vessel Master is or is not at the same time owner of the vessel, and whether the claim is his own or that of shipchandlers, repairers, lenders or other contractual creditors;

(l) ship agency fees due for the vessel, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in

paragraphs (a) to (k);

(m) the debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a vessel.

(2) For the purposes of this article, the accessories of the vessel and freight shall mean:

(a) Compensation due to the owner for material damage sustained by the vessel and not repaired, or for loss of freight;

(b) General average contribution due to the owner in respect of material damage sustained by the vessel and not repaired, or in respect of loss of freight;

(c) Remuneration due to the owner for assistance and salvage rendered at any time before the end of the voyage, and any sums allotted to the master or other persons in the service of the vessel being deducted.

Provided that payments made or due to the owner on policies of insurance, as well as national subsidies shall not be deemed to be accessories of the vessel or of the freight.

(3) The provision as to freight shall also apply to passage money.

(4) Notwithstanding anything contained in paragraph (f) of subarticle (1) of this article, the privilege in favour of persons in the service of the vessel shall extend to the total amounts of freight due for all voyages made during the subsistence of their period of employment.

(5) No special privilege shall attach to the vessel, freight, accessories of the vessel and freight and to the wreck to secure claims as set out in paragraphs (h), (i) and (j) of subarticle (1) of this article which arise out of or result from:

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to any law providing for strict liability and compulsory insurance or other means of securing the claims; or

(b) damage caused by the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste."

4. For article 51 of the principal Act there shall be substituted the following:

Substitution of article 51 of the principal Act.

"Special privileges follow the vessel notwithstanding any change of ownership.

51. A special privilege over a vessel shall continue to attach to such vessel whatever transfers to other persons take place, except where such transfers take place following a judicial sale by auction."

5. Immediately after subarticle article 51 of the principal Act, there shall be added the following new article:

Addition of new article 51A to the principal Act.

"Special privileges on freight.

51A. A special privilege on freight may be enforced so long as the freight is still due or the amount of freight is still in the hands of the master or agent of the owner. The same applies to a privilege on accessories."

6. Article 54 of the principal Act shall be amended as follows:

Amendment of article 54 of the principal Act.

(a) in the marginal note thereto, for the words "Possessory lien or privilege" there shall be substituted the words "Right of retention".

(b) in subarticles (1) to (4) thereof, for the words "possessory lien" there shall be substituted the words "right of retention", wherever they appear.

(c) in subarticles (1) to (6) thereof, for the word "ship" there shall be substituted the word "vessel", wherever it appears.

7. For section 54A of the principal Act, there shall be substituted the following:

Substitution of article 54A of the principal Act.

"Ranking of creditors.

54A. (1) (a) The debts specified in paragraphs (a) to (e) of subarticle (1) of article 50 shall under all circumstances rank in preference to any claim.

(b) Subject to the provisions of paragraph (a) of this subarticle, any debt secured by a right of

retention over a vessel as stated in article 54 shall rank in preference to all other claims except those specified in paragraphs (f) to (k) of subarticle (1) of article 50 if such claims arose prior to the debt of the creditor enjoying the right of retention.

(c) Any debt secured by a mortgage registered under the provisions of this Act or secured by a foreign mortgage recognised under this Act shall rank after the debts specified in article 54 and in paragraphs (a) to (k) of subarticle (1) of article 50 but in preference to the debts specified in paragraphs (l) and (m) of subarticle (1) of article 50 and in preference to other hypothecary and privileged claims.

(d) The debts specified in paragraphs (l) and (m) of subarticle (1) of article 50 shall rank in preference to other hypothecary and privileged claims.

(2) (a) The debts specified in subarticle (1) of article 50 and relating to the same voyage shall rank in the order therein set out.

Provided that the debts specified under the same heading shall rank *pari passu* as between themselves.

(b) Without prejudice to the generality of the foregoing, the claims mentioned under paragraphs (g) and (k) of subarticle (1) of article 50 shall rank, in each of the two categories, in the inverse order of the dates in which they came into existence.

(c) Claims arising from one and the same occurrence shall be deemed to have come into existence at the same time.

(3) Claims secured by a special privilege and attaching to the last voyage shall have priority over those attaching to previous voyages.

Provided that claims arising from one and the same period of employment extending over several voyages shall all rank with claims attaching to the last voyage."

8. Immediately after article 54A of the principal Act, there shall be added the following new articles:

Addition of new articles 54B and 54C to the principal Act.

"Extinction of privileges by lapse of time.

54B. (1) In addition to the general modes of extinction of obligations, the privileges set out in article 50 of this Act shall cease to exist at the expiration of one year, with the exception of the privileges for supplies mentioned in paragraph (k) of subarticle (1) of the said article, which shall be extinguished by the lapse of six months, unless, prior to the expiry of the relevant period, the vessel shall have been seized, such seizure leading to a forced sale.

(2) The periods for which the privilege remains in force shall begin to run:

(a) as regards privileges securing expenses for wreck removal and for assistance and recovery of salvage, from the day when the services terminated;

(b) as regards privileges securing wages and other sums due in respect of employment on the vessel, from the date of termination of employment;

(c) as regards privileges securing the contribution of the vessel in general average, from the date when the general average act occurred;

(d) as regards privileges securing claims in respect of loss of life or personal injury and tort claims, from the day on which the loss of life, personal injury or loss or damage was caused;

(e) as regards privileges securing claims in respect of loss of, non-delivery or damage to cargo or luggage, from the day of delivery of the cargo or luggage or from the day when they should have been delivered;

(f) as regards privileges mentioned in paragraph (k) of subarticle (1) of article 50 of this Act, from the day on which the claim originates;

(g) in all other cases, from the date on which the claim becomes enforceable.

(3) Any rights to payments in advance or on account shall not render the claims to which such rights relate enforceable.

(4) In addition to the periods of interruption

and suspension provided for in the Civil Code, the said periods shall be suspended where it is not possible to seize the vessel to which a privilege attaches in the territorial waters of Malta.

Provided that such period shall not exceed three years from the day on which the claim arose.

Persons who
bind the vessel.

54C. The provisions of articles 50 to 54B apply to vessels under the management of either the owner, an operator who is not owner, or a principal charterer, except in cases where the owner has been dispossessed by an illegal act or where the claimant is not in good faith."

Passed by the House of Representatives at Sitting No. 225 of the 3rd April, 2004.

ANTON TABONE
Speaker

RICHARD J. CAUCHI
Clerk to the House of Representatives

ANNEX

**ARTICLES 50 TO 54A OF THE MERCHANT SHIPPING ACT
PRIOR TO AMENDMENT**

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