

Security rights over maritime property under Thai jurisdiction

Therdchai Thanapongporn*

There are two types of security rights that can be created over maritime property in Thai jurisdiction. First is maritime liens and another one is a vessel mortgage. Both are regulated by the Vessel Mortgage and Maritime Liens Act B.E.2537 [1994], (VMML). There are two types of maritime liens or maritime privileges, which are recognized in Thai jurisdiction:

- [a] the special (statutory) maritime privilege which is written in the VMML Act;
- and
- [b] the possessory privilege that can see in the Civil and Commercial Code.

A vessel mortgage

The vessel that can be mortgaged must be a ship of sixty tons gross and more, which sail with machinery, whether with or without the help of other force, and which qualities for use in the sea in accordance with the vessel survey rules issued by virtue of the law governing navigation in Thai territorial water as provided by art. 4 and 7 of the VMML Act.

Chapter 2 of the VMML Act which begin from art. 11 to 14 governs the execution of contract and registration of vessel mortgage. General rule of vessel mortgage is found art. 11 which reads a mortgage of a Thai vessel shall be made in writing and registered in accordance with the rule and procedures prescribed in the ministerial regulation. Art. 12 to 13 describes the requirement that the registration process must be met.

After the vessel mortgage contract has been made, it might have a question that what are included in it. Only ship is covered or there are any other things. Art. 9 of the VMML Act answer this issued. It writes:

A vessel mortgage shall embrace all the vessel equipment and other things required by law to be made available on the vessel, whether already existing on the date of the vessel mortgage Registration or subsequently thereto, unless otherwise agreed upon between the mortgagor and the mortgagee and specified in the vessel mortgage contract.

In case of the vessel mortgaged is lost or damaged, the mortgage shall cover claims as follows:

- {1} compensation for a wrongful act which cause the lost or damage of such vessel or things by the mortgage;
- {2} general average which the vessel owner is entitle to receive for the loss or damage of such vessel or things covered by the mortgage under the law governing such matter;

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Judge of The Central Property & International Trade Court, Bangkok, Thailand.

{3} compensation which the vessel owner is entitled to receive for the loss or damage of such vessel and things covered by the mortgage in the use of such vessel in a salvage operation;

{4} compensation under the insurance contract for the loss or damage of such vessel and things covered by the mortgage.[art. 10]

Enforcement of mortgages

The enforcement of mortgages can be made in two ways:

[a] Requesting the court to place the vessel on sale as in art. 17; or

[b] Foreclosing the mortgaged vessel as in art. 18.

When the enforcement of mortgages has been done three possible outcomes will arise by virtue of art. 19.

[1] Where the amount of the enforcement proceeding is more than the amount of the outstanding debt, the mortgagee can get the money only the amount of the underlying obligation.

[2] Where the amount of the enforcement proceeding is equal to the amount of the outstanding debt, the underlying obligation is extinguished.

[3] Where the amount of the enforcement proceeding is less than the amount of the outstanding debt, the shortfall amount will become an ordinary debt.

After the enforcement proceeding, the vessel mortgage contract is extinguished and the mortgaged vessel is free from any obligations.

The acknowledgement of the foreign vessel mortgage

The effectiveness of the foreign vessel mortgage in Thai jurisdiction can be occurred, when the three conditions in art. 21 have been met.

Art. 21 needs three requirements as follows:

[a] the foreign vessel mortgage contract is made with full effect under the law of the country with which a mortgaged vessel was registered;

[b] said contract was duly recorded in the register which the public is permitted to inspect at the office of the State having the duty to register such contract; and

[c] being a case where the plaintiff may file the plaint to the court under the Civil Procedure Code, the law governing arrest of vessels, or other law.

The first two requirements are absorbed by the condition that was provided in art. 1 of the 1967 and 1993 Convention.

Maritime Liens

In Thai jurisdiction, maritime liens are divided into two categories. The first is called statutory liens and the latter is named possessory liens.

The first is originated from art. 22 of the VMML Act. By virtue of this article, the following claims have a maritime lien:

{1} claims arising from the duty performance as the Vessel Master, Vessel Crew or Vessel Personnel;

{2} claims relating to a death or injury of any person caused by the operation of a vessel;

{3} claims for the salvage of a vessel;

{4} claims in respect of a cause of wrongdoing arising from the operation of a vessel, but not including claims for loss or damage to the cargo or belongings of the passengers in such vessel.

But claims pursuant to {2} or {4} arising from pollution by oil, radioactive material, radioactive, and nuclear material shall not create maritime liens over a vessel.

The latter is found in the Civil and Commercial Code art. 241. This right is recognized as preferential right under the Civil and Commercial Code art. 274.

Compared to the Convention relating to the unification of certain rules of maritime liens and mortgage, the list and order of maritime lines in Thai jurisdiction are close to the 1993 Convention, but there are some difference as follow:

[a] Claims for port, canal, and other waterway dues and pilotage dues, which are secured by maritime liens on the vessel as in the 1993 Convention art. 4 paragraph 1 [d], do not have a maritime lien on the vessel in Thai jurisdiction.

[b] A wages lien in Thai jurisdiction is not included cost of repatriation and social insurance contributions payable on their behalf as provided in the 1993 Convention art. 4 paragraph 1 [a].

[c] In the 1993 Convention, art. 4 paragraph 1 [c] is clearly stated that only claims for reward for the salvage of the vessel shall be secured by a maritime lien on the vessel. But the language in art. 22 [3] of the VMML Act is indicated that in salvage claims not only salvage reward but also special compensation can have maritime liens over the vessel.

In contrast, a maritime line for general average contributions does not know in the VMML Act, unlike, the 1926 and 1967 Convention which provide maritime liens as security right for such a claim.

The 1926 Convention maritime liens are on a vessel, on the freight and on accessories of the vessel. But maritime liens, in Thai jurisdiction, are only on a vessel as stated in art.22 of the VMML Act.

Ranking

There are four articles in the VMML Act, which speak about the ranking.

First art. 25 reads

“In enforcing maritime liens, the proceeds from the vessel sale shall be used in paying fees, expenses in the vessel detention or seizure and sale, expenses in the vessel maintenance from the time of detention or seizure, expenses in repatriation of the Vessel personal, and expense in allocating such amount of money in such order, before paying the remaining amount to the maritime liens creditors.”

Second art. 24 says

“Maritime liens hereunder shall be effective without registration and shall take priority before the mortgage rights hereunder, including preferential rights under the Civil and Commercial Code.”

Third art. 23 states

“Maritime liens creditors shall have the right to be repaid debts due and payable to them from the vessel subject to the maritime liens before other creditors, whether the debtors of the claims are owners of the vessel or not.”

The last art. 15 writes

“Subject to art. 24, the mortgagee has the right to repaid the debt before preferential creditors under the Civil and Commercial Code and other creditors of such vessel.”

By virtue of these four articles the ranks can be as follow:

1. the authority claims such as fees, expenses in the vessel detention or seizure and sale, expenses in the vessel maintenance from the time of detention or seizure, expenses in repatriation of the Vessel personal, and expense in allocating such amount of money in such order;
2. maritime liens as in art. 22;
3. mortgage debts;
4. preferential rights under the Civil and Commercial Code including possessory liens;
5. ordinary debts.

Ranking between each maritime liens creditors

Art. 24, paragraph 2-4 governs this regime.

So, in case of several competing maritime liens, such maritime liens shall have effect in priority order according to the sequence arrange in art. 22, except maritime liens in respect of salvage claim shall take priority over other maritime liens over the vessel, which already exists before the commencement of such salvage.

Where there are several persons with maritime liens at the same level, they shall be repaid in an amount proportionate to the respective amount owed them. In case of maritime liens in respect of several salvage claims, a claim for the latest salvage shall be the first in the order, with maritime liens in respect of salvage claim deem to arise on the date of the salvage operation.

This ranking and order look like the position under the 1967 and 1993 Convention.

The nature of maritime liens

Thai jurisdiction distinguishes legal subrogation. Which creditors can assign his right, his right of action, his mortgages and privileges to a person from whom he has been paid.

Thus, in case of a transfer of claims which have maritime liens, the transferee of said claims shall have the same maritime liens as those of the transferor as evidenced in art. 26.

This article is in the same level as art. 9 of the 1967 convention, but does not prohibit maritime lines holders from being subrogated to the compensation payable to the owner of the vessel under an insurance contract as provided in art. 10 [2] of the 1993 convention.

In principle, maritime liens travel with, or follows, the property secretively and unconditionally. The VMML Act absorbed this doctrine as described in art. 27 which reads:

“In case maritime liens over any vessel has arisen, a juristic act transferring ownership of such vessel to any person shall not extinguish such maritime liens, unless the transferee shall have notified the maritime liens creditor to submit his claims to the transferee within a period”

This doctrine had been confirmed by the three conventions. [art. 8 of the 1926, art.7 paragraph 2 of the 1967 and art. 8 of the 1993]

Extinction

The VMML Act distinguishes an extinction of maritime liens as follow:

1. Where the transferee have notified the maritime liens creditor to submit his claims to the transferee within a period which is not less than sixty days from the date of notification but the maritime lines creditor have failed to do so. [art.27]
2. The expiration of maritime liens is one year from the date of occurrence thereof. [art. 28 (1)]
3. When a vessel has been sold under judicial order. [art. 28 (2)]
4. A possession of the foreclosed vessel has taken by the mortgagee. [art. 28 (3)]
5. The vessel in question is seized by a judgment or order. [art. 28 (4)]

Although a time barred of maritime liens in Thai jurisdiction is set for one year as provided in the three conventions, but it does not speak about the interruption period when a vessel has been arrested or seized as the three conventions do.

Possessory liens

Under art. 6(1) of the 1967 Convention, contracting States may establish liens and rights of retention by national law, to secure claims not secured by maritime liens under art. 4. Shipbuilders and ship repairers, in particular, to secure claims for their work, may be granted such a lien or right of retention, ranking after maritime lines and before mortgages, but which right is extinguished when the shipbuilder or repairer parts with possession of the vessel (art. 6(2)). The 1993 convention contains similar provisions (art. 7).

In Thai jurisdiction, the VMML Act does not speak about the right of retention but the shipbuilders and the ship repairers can retain the vessel in order to secure their claims by virtue of art. 273 of the Civil and Commercial Code. This right was regarded as preferential rights, which is placed behind the vessel mortgage in term of ranking.