

SECURITY AND ENFORCEMENT OF MARINA OPERATOR'S CLAIMS: SPANISH LAW PERSPECTIVE



University
Institute for
Transport Law

M^a Victoria Petit Lavall
Full Professor of Commercial Law
Institute for Transport Law
Jaume I-University, Castellon

Legal regime of marinas

Despite:

- Economic importance of pleasure navigation: on the 7,880 kilometres of Spanish coast, there are 375 marinas and 457 nautical concessions.
- Recent Spanish maritime law: Act No 14/2014, of 24 July, of Maritime Navigation (MNA) and Royal Legislative Decree 2/2011, of 5 September, Recast of the State Ports and Merchant Navy Act (SPMNA).

TODAY: Spain lacks a systematic body of rules governing pleasure navigation.

CONCEPT (SLMNA):

“marinas are non-commercial ports, which may be defined as the set of land areas, sea waters and facilities located on the shore of the sea or the estuaries, which meet certain physical, natural or artificial and organizational conditions and allow port traffic operations to be carried out, prior authorization for the performance of such activities issued by the competent Administration [Art. 2 (1)], **and which are intended to be used exclusively or principally by pleasure crafts** [Art. 3 (4) (c)]”.

Legal regime of marinas

HOWEVER: the SPMNA does not contain the legal regime of marinas:

- Spanish Constitution: division of powers between the Spanish State and the “Autonomous Communities” (regions who have their own government and legislative power).
- Spanish Constitution: empowers the Autonomous Communities to assume legislative powers in the field of marinas [Art. 148 (1) (6)];
- All Autonomous Communities situated on the seafront have assumed in their respective Statutes of Autonomy the ownership of marinas and their management or exploitation.

CONSEQUENTLY: marinas are regulated by the respective regional acts, being the State legislation of supplementary application (SPMNA): scattered regulation.

Legal regime of marinas

- Marinas are assets that belong to the public domain: they are owned by the Autonomous Community and built on public maritime-terrestrial real estate that has previously been assigned to the Autonomous Communities by the State Administration (Art. 5 SPMNA and Art. 49 CA).
- Autonomous Communities can manage them directly (in a centralized or a decentralized way) or indirectly.
- Indirect management:
 - A third party is empowered by contract to build and operate, or only to operate, a marina, assuming the economic risk derived from such exploitation.
 - Ownership and management are separated and the latter is privatized (concession).

Legal regime of marinas

The different regional Acts that regulate the ports under the competence of the Autonomous Communities:

- Most Spanish marinas are managed within the framework of a concession agreement by private legal entities: usually associations (yacht clubs or *clubs náuticos*) or commercial (public and private limited) companies.
- Consequently: there is a first legal relationship of public nature between the Autonomous Administration and the marina operator (administrative concession) and a second relationship of private nature between the holder of the marina concession and the person using its installations.
- The *concessionaire*-operator of the marina grants the client the use and enjoyment of a part of the property that is subject to the concession (the marina), as well as the enjoyment of the services the marina operator makes available to him.

Legal regime of marinas

- **NONETHELESS:** the content of the contracts concluded between the marina operator and the users are directly conditioned by the operating and policing regulation of each marina of a public nature; by the content of the concession title; by the administrative legislation of the Autonomous Communities on marinas and, additionally, by State Law.

Available tools for the securing and enforcement of claims by the marina operator: general considerations

- Marinas provide different services to pleasure crafts (e. g. the use of mooring or anchoring places of public use subject to tariffs and of dry-docking places; stranding services; the use of cranes and other transport elements; the supply of water, electricity and fuel; or the use of vehicle parking spaces in port areas).
- The users of the marinas are obliged to pay the corresponding reward for the use of the mooring facilities and for the services provided to them.
- Depending on the legal nature of the marina operator, the prices for port services are considered: taxes (in the case of centralized or decentralized direct management through an autonomous body of an administrative nature); or tariffs, which are private prices (when the marina is managed indirectly or in a direct decentralized way through a public company).

Available tools for the securing and enforcement of claims by the marina operator: general considerations

- In case of default, the different regional acts establish the consequences: they empower the Administration to suspend the provision of such services temporarily and / or to forbid the use of the port areas until payment is made or until the debt that originated the suspension is sufficiently guaranteed.
- Where the marina is managed indirectly the person liable for the payment of the tariffs or taxes for the use of facilities provided by the marina is:
 - Usually the *concessionaire* of the marina (commercial company or yacht club), although they are passed on to the users.
 - However, some regulations assign the status of taxpayer to the owner of the craft or to the holder of a mooring place, while the marina operator (*concessionaire*) is held to be taxable, as a substitute.
 - Some regulations even declare the joint and several tax liability of the shipping agent or, where no ship agency contract has been entered, the master or skipper of the craft.

Available tools for the securing and enforcement of claims by the marina operator: general considerations

- Different Operating and Policing Regulations of marinas also contain, with greater or lesser detail, the consequences of non-payment by the users of the services provided by the marina.
- As a general rule, they empower the *concessionnaire*-marina operator to:
 1. Require payment, sometimes with a surcharge or interest, and to deny or interrupt the provision of new services until the debt is paid.
 2. Termination of the contract of berth.
 3. Declare the secondary civil liability of the craft owners for the debts contracted by the user of the vessel by any title.

Available tools for the securing and enforcement of claims by the marina operator: general considerations

- In addition, the users of the marinas are obliged to employ due diligence when using the mooring place and the facilities of the marina, to maintain the craft in a good state of preservation, presentation, hygiene, buoyancy and safety.
- All marina Operating and Policing Regulations contain detailed guidelines for the use of sports facilities that must be complied with by all crafts: their non-observance empowers the marina operator to seek compensation for damages and even forbid temporary or definitely the access of the craft to the marina's facilities.

Retention of a pleasure craft as a security for the marina operator's claims

- In private Law, the right of retention is envisaged in Civil Code as a right of the lessee in the contract for work and of the depositary in the deposit contract, respectively:
 1. where the marina operator performs reparations to or replaces elements of the craft, he is entitled to retain the vessel in case of default by the user, since the agreement has to be considered a contract for work: this situation is now expressly envisaged by Article 139 (1) MNA, in accordance with Article 7 of the International Convention on Maritime Liens and Mortgages (1993 Geneva Convention), which grants the holder of a credit derived from the construction, repair or reconstruction of a vessel the right of retention recognized by Civil Law.

Retention of a pleasure craft as a security for the marina operator's claims

2. It is more difficult to conclude that the indirect manager, whose relationship with users is governed by private Law, also holds a right of retention of the craft in the event of non-payment for the use of a mooring place: the contract of berth is an atypical contract whose approximation to the deposit contract is debatable.

- Many authors have stated that, as compared to the deposit agreement, the contract of berth is not an *in rem* contract, since the vessel is not “delivered” to the marina operator, so custody is not a main obligation of the latter.
- However, when the moorer agrees with the marina operator the dry-docking of the craft, the contract “*is absolutely coincident with a deposit agreement which, by its very nature (being a feature without which the contract would have no entity at all), entails a liability for custody*” [Judgment of the Court of Appeal of Valencia (Section 7) of 8 November 2010].

Retention of a pleasure craft as a security for the marina operator's claims

- The abandonment of crafts is often regulated by the different autonomic acts and some Operating and Policing Regulations authorize the marina to declare the abandonment of the craft, not only when it shows obvious signs of deterioration, is at risk of sinking or has sunk, but also in case of non-payment of the mooring and the services that have been provided.
 1. In any case, it is the port Administration and not the marina operator who has the power to declare the abandonment, following the procedure established in Act No 39/2015, of 1 October, on the Common Administrative Procedure of the Public Administrations.
 2. Pursuant to the different regional acts, the non-payment of the corresponding taxes or tariffs to the marina operator does not usually suffice to initiate the procedure of abandonment of a vessel: “allow to presume that the vessel has been abandoned for the simple reason that it remains for more than 30 days /3 months without the outstanding amounts having been satisfied when such abandonment is declared by the body with competence in port-related matters”.

Marina operator's claims as maritime claims

- Some Operating and Policing Regulations expressly provide that vessels are liable as *in rem* securities for the payment of the tariffs for the services that have been provided to them, for the payment of the mooring services and for any compensation due for damages to the facilities or to third parties.
- It seems that these regulations are referring to maritime liens.
- Maritime liens are defined in Article 122 (2) MNA as securities that “*encumber the vessel without the need of publicity by registration and follow the asset despite the change of ownership, registration or flag. They shall enjoy preference over ‘hypothèques’, mortgages and other charges, whatever the date of their registration, and no other credit shall take precedence over such liens, except for those mentioned in Article 486 and the expenses that have to be paid to the Maritime Administration for the removal of shipwrecked or sunken vessels*”.

Marina operator's claims as maritime claims

- It should be noted that the regime of maritime liens applies not only to vessels, but also to pleasure crafts [the MNA expressly provides for this in its Article 122 (3)].
- Pursuant to the MNA (Arts. 122 to 125), the legal regime of maritime liens is governed by the provisions of the International Convention on Maritime Liens and Mortgages, made in Geneva on 6 May 1993 [Art. 122 (1) MNA], that entered into force on 5 September 2004.
- This regime applies to vessels registered in a State Party of the Convention, including Spain, as well as to vessels registered in a State that is not a Party, provided that they are subject to Spanish jurisdiction [Art. 13 (1) of the 1993 Convention].
- Under Article 12 (1) MNA, the civil and criminal jurisdiction of Spanish Courts extends to all foreign vessels (except State vessels) while in national ports or inland maritime waters.

Marina operator's claims as maritime claims

- In addition, according to Art. 43 (2) MNA, Spanish Courts may adopt precautionary or enforcement measures with respect to foreign vessels that have voluntarily stopped or anchored during their passage through the territorial sea, as well as with respect to those vessels that navigate through the territorial sea after having abandoned the inland maritime waters of the Spanish State.
- Maritime liens are those listed in the 1993 Convention, as derives from Articles 122 (1) and 124 (1) MNA: *“[i]n addition to the liens listed in the International Convention on Maritime Liens and Mortgages, any other privileges recognized by private law or special acts may also encumber the vessel, but such privileges, whatever the rank of priority granted by the acts that recognize them, will rank after the mortgages and other registered charges”*.

Marina operator's claims as maritime claims

- In accordance with Article 4 (1) (d) of the 1993 Convention:
- “claims for port [...] and pilotage dues” against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel.
- Consequently, the tariffs due for any kind of services provided by the marina, including mooring, anchoring or dry-stay, and payments due for navigation assistance services are secured by a maritime lien.
- legal literature and Courts: broad concept of this particular maritime lien: mooring rights are secured by maritime liens.

[Judgment of the Supreme Court (Civil Chamber) of 31 October 1997; Order of the Court of Appeal of Huelva (Section 2) of 25 June 2015; Judgement of the Court of Appeal of Pontevedra (Section 1) of 5 May 2016]

Marina operator's claims as maritime claims

- The order of priority of maritime liens is established in Article 122 MNA, which refers to the enumeration in the 1993 Convention.
- According to Articles 4 and 5 of the 1993 Convention: the claims for port dues occupy the fourth place after the procedural costs and expenses derived from the arrest of the vessel, the procedural costs and expenses derived from the execution and subsequent sale of the vessel and the expenses to be paid to the Maritime Administration for the removal of shipwrecks or sunken vessels (Arts. 122 and 486 MNA)

Marina operator's claims as maritime claims

- Maritime liens must be differentiated from maritime claims: while all maritime liens secure maritime claims, not every maritime claim is always secured by a maritime lien.
- The arrest of vessels regulated in Articles 470 to 479 MNA —that is governed by the International Convention on the Arrest of Ships, done in Geneva on 12 March 1999, by the provisions of the MNA itself and, additionally, by the provisions of Act No 1/2000, of 7 January, on Civil Procedure (CPA)— allows to adopt this precautionary measure for any maritime claim listed in Article 1 (1) of the 1999 Convention.
- The enumeration contained in this Convention is much broader than that of maritime liens envisaged by Article 4 of the 1993 Convention.
- The arrest of a vessel for maritime claims according to the 1999 Arrest of Ships Convention must be distinguished from the seizure of the vessel derived from a maritime lien as an enforcement measure, which may or may not be the consequence of an arrest of the vessel. This is why the MNA establishes that *“[i]n no case the arrest may be requested to ensure the enforcement of a judgment that has already been delivered or of an arbitration award that has already been issued”* [Art. 470 (2) MNA].

Marina operator's claims as maritime claims

- Article 2 of the 1993 Convention refers the procedure of enforcement to domestic law: the lien creditor can request the forced sale of the vessel to obtain the satisfaction of the claim.
- The forced sale of the vessel is regulated in Articles 480 *et seq.* MNA: it shall be governed by the provisions of the MNA itself and those contained in the CPA or the administrative regulations that apply to the auctioning of moveable property subject to publicity by registration, in all matters not provided for in the 1993 Convention (Art. 480 MNA).
- It should be highlighted that maritime liens cannot be the object of direct enforcement, since they are no enforceable titles (Art. 517 CPA).
- Enforcement requires a prior declaratory procedure conducive to a final judgment that recognizes the claim. Once the judgment has been obtained, the forced sale of the vessel may be initiated through the corresponding enforcement procedure (Arts. 634 *et seq.* LEC).

Marina operator's claims as maritime claims

- BUT: where the port operator is the regional Administration, the vessel can be seized for claims derived from port dues in an administrative procedure of urgency with the sole certification of their amount, since they are considered taxes.
- If the debtor is declared insolvent, the marina operator as the holder of the secured claim is entitled to separate the vessel from the other assets of the bankruptcy estate and bring, through the corresponding procedure, the actions envisaged by special law [Art. 76 (3) of Act No 22/2003, of 9 July, on Bankruptcy (BA)].
- However, if separate enforcement with respect to the vessel has not been initiated within the period of one year from the date of the declaration of bankruptcy, it can no longer be accomplished and the classification of claims will be governed by the provisions of the Bankruptcy Act.

Provisional security measures on pleasure craft under general enforcement law rules

- The arrest of vessels is regulated in Articles 470 to 479 MNA.
- This precautionary measure is governed by the International Convention on the Arrest of Ships, made in Geneva on 12 March 1999, by the provisions of the MNA and, additionally, by the CPA [Art. 470 (1) MNA]. It also applies to pleasure crafts [Art. 470 (3) MNA].

Provisional security measures on pleasure craft under general enforcement law rules

- The legal regime is not uniform: it depends on the flag of the vessel or craft, as well as on the habitual residence or establishment of the claimant (Art. 473 MNA).
- Thus, when the arrest is practiced at the request of persons who have their habitual residence or their main establishment in Spain (which is the case of all Spanish marina operators), the following rules apply:
 - If the arrest is requested for a foreign vessel that flies the flag of a State Party of the 1999 Convention, it is subject to the Convention and the asset may only be seized for maritime claims [Art. 2 (2) of the 1999 Convention and Arts. 472 and 475 MNA];
 - If the arrest is requested for a foreign vessel that flies the flag of a State that is not a party to the 1999 Convention, it is subject to the Convention and the asset may be seized for any claim, whether maritime or not [Art. 473 (3) LNM];
 - If the arrest is requested for a Spanish vessel, the provisional seizure may be agreed either for maritime claims or for any other rights or claims against the debtor who owns the vessel. Moreover, the detention of the vessel may be replaced by the annotation of the arrest and, where appropriate, of a restraint on sale in the Registry of Moveable Property, at the discretion of the competent court or administrative body [Art. 473 (1) and (2) MNA].

Provisional security measures on pleasure craft under general enforcement law rules

- According to Article 472 (1) MNA, “maritime claims” are those listed in Article 1 (1) of the 1999 Convention: among them, it should be noted that port dues and charges (letter n) are secured by a maritime lien.
- Consequently, courts have correctly declared that: claims for port taxes [Order of the Court of Appeal of Las Palmas (Section 1) of 24 May 2006] and maintenance fees for the support of common expenses of the marinas [Order of the Commercial Court Number 1 of Girona, of 27 May 2016] are secured by maritime liens, as they fall under Article 1 (1) of the 1999 Convention (“goods, materials, provisions [...] port dues”).
- However, in order to be able to arrest a ship (offending ship) for a maritime claim, the vessel has to be seizable, which depends on the relationship between the debtor of the claim and the owner of the vessel at the time when the precautionary measure is requested.

Provisional security measures on pleasure craft under general enforcement law rules

Article 3 of the 1999 Convention (referred to in Art. 475 MNA) distinguishes depending on the nature of the claim:

- when the maritime claim of the marina is not secured by a maritime lien, as happens with services rendered to the ship, the arrest may be requested only if the owner or operator of the ship or vessel and the debtor are the same person.
- the vessel or craft is not *per se* subject to arrest: it is only permissible if the vessel is owned or operated by the debtor of the claim or if it is subject to a maritime lien, a mortgage or a “hypothèque” or a charge of the same nature [Art. 3 (1) (c)]; or if the claim relates to the ownership or possession of the ship [Art. 3 (1) (d)].

Provisional security measures on pleasure craft under general enforcement law rules

- MOREOVER: Article 3 (3) of the 1999 Convention also permits the arrest of a vessel which is not owned by the person liable for the claim, but only if “*under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship*”.
- the precautionary measure of arrest of vessels that are not owned by the debtor, apart from the circumstances contained in Article 3 of the 1999 Convention, does not exist under Spanish Law.
- Following the Spanish arrest regime:
 - The owner of a craft may have to face its arrest if the user of the marina or the holder of a mooring who is not the owner of the vessel does not pay the expenses, tariffs or taxes due to the marina. Since port dues are secured by maritime liens, it is enough that the moorer is in possession of the craft and dedicates it to navigation on his behalf and under his liability [Art. 145 (1) MNA].
 - The existence of a maritime lien determines the *in rem* affection of the ship to the payment of the claim.
 - The *in rem* security that the creditor holds over the ship for the collection of his credit implies that the owner who is not the debtor has to face the possibility that the credit is made effective against the ship of his property [Order of the Court of Appeal of Las Palmas (Section 4) of 14 April 2009]

Provisional security measures on pleasure craft under general enforcement law rules

CONCLUSION:

Legal authors and a wide majority of court decisions consider that the current regime contained in the 1999 Convention and the MNA only permits the arrest of ships for debts incurred by third parties who are not the owner of the vessels when they are secured by a maritime lien.

Nonetheless, the available jurisprudence is not unanimous: Order of the Court of Appeal of Las Palmas (Section 4) of 25 February

Provisional security measures on pleasure craft under general enforcement law rules

Procedure:

- In accordance with Article 2 of the 1999 Convention, which refers to the domestic legislation of the States Parties, the procedure relating to the arrest of a ship is contained in the MNA and in the CPA (Arts. 721 *et seq.*).
- Jurisdiction to hear the matter lies with the Court that has objective jurisdiction on the main claim or that of the port or place in which the vessel is located or to which the vessel is expected to arrive, at the applicant's choice [Art. 471 (1) MNA].
- The MNA expressly admits that Spanish ships may be arrested also by the competent administrative body in accordance with the provisions of the applicable specific regulations [Art. 473 (1), para. 2 MNA] (following Article 8 (3) of the 1999 Convention).
- Consequently, where the management of the marina is direct or where, even though it is indirect, the port authority is the creditor of the taxes, it is empowered to retain or immobilize the vessel.

**MANY THANKS FOR
YOUR ATTENTION**



University
Institute for
Transport Law

M^a Victoria Petit Lavall
petit@uji.es