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Security and Enforcement of Marina Operator's Claims: Croatian, Italian and Spanish Law Perspectives

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I
SUMMARY

The authors analyse the legal concepts of retention and arrest of vessels as the most frequently applied legal measures for the purpose of securing and eventually enforcing the marina operators' claims against the owners and operators of vessels, i.e. the marina users. The paper represents a comparative maritime law analysis, with reference to the relevant national legislation, autonomous law, international maritime conventions, judicial practice and legal doctrine of three European Mediterranean countries with a strong

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tradition of pleasure boating and a developed nautical tourism sector (Croatia, Italy and Spain).

II
INTRODUCTION

Marina operators are providers of various specific services to the owners and users of pleasure craft and, as such, they are amongst the most important stakeholders of the nautical tourism market. Besides that, they are entities responsible for the safety and order in the marinas as special purpose ports designated for pleasurecraft, which form part of the wider maritime traffic infrastructure. Due to this dual function devoted to tourism and navigation, their services and activities are specific and complex. The importance of the nautical tourism sector in the EU is reflected in the fact that it creates up to 234,000 jobs and generates approximately EUR 28 billion in annual revenue. About 36 million EU citizens participate regularly in boating activities. In particular, there are over 4,500 inland & coastal marinas in the EU creating up to 70,000 jobs and generating up to EUR 4 billion annual turnover.[1] Most European marinas are small, or micro enterprises, or are managed by non-profit boating associations.[2] Small enterprises are generally considered as important engines of economic development in the EU and are therefore given a special place within the framework of the various EU policies. Considering the economic, cultural and traditional value and role of the marina business in Europe, it is important to ensure legal certainty for all stakeholders as a condition for its further sustainable development. One of the crucial elements of legal certainty in the private law sphere is the security and enforcement of claims.

This paper deals with the legal measures available to marina operators to secure and eventually enforce their claims against the marina users. The analysis is undertaken comparatively from the perspectives of Croatian, Italian and Spanish law. All three of these

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[1]EU Commission, Brussels, 30.3.2017, SWD (2017) 126 final, Commission Staff Working Document on Nautical Tourism, p.2, available from https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/swd-2017-126_en.pdf, as per 05/02/2018.

[2]Ibid, p. 8.

Mediterranean countries are EU Member States with a rich tradition of nautical tourism and boating. The legal systems of the three countries are based on the civil law tradition. Furthermore, there are similarities amongst them in the sphere of maritime law due to the fact that they are parties to certain international maritime conventions. In this context it is important to note that Croatia and Italy are parties to the International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 1952 (the 1952 Arrest Convention), whilst Spain is a party to the International Convention on the Arrest of Ships, Geneva, 1999 (the 1999 Arrest Convention). Furthermore, Italy is a party to the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels, 1926, and Spain is a party to the International Convention on Maritime Liens and Mortgages, Geneva, 1993 (the 1993 Convention), whilst the rules of the Croatian Maritime Code regulating maritime liens are inspired by the 1993 Convention, although Croatia is not a party thereto.

The comparative analysis will primarily focus on the legal concepts of retention, which is similar to the common law concept of a possessory lien, the arrest of sea-going vessels, and maritime liens, but will not deal specifically with the post-judgement enforcement or enforcement based on executive titles. To analyse the specific application of these legal concepts in the context of marina business, yachting and boating, it will be necessary to consider the ambiguous nature of the berth contracts, since the marina services are usually provided on the basis of these contracts. Consequently, most of the typical marina operators' claims arise from the so-called berth contracts.

The right of retention will be studied comparatively as a legal concept recognized by the civil codes of all three of the countries, but also by their special rules of maritime law. In particular, the rights of retention arising *ex lege* will be compared to contractual rights of retention, which are frequently found in the general terms and conditions of the marina operators.

The arrest of sea-going vesels in each of the three countries studied in this article is considered to be a provisional conservatory measure governed by the applicable rules of civil procedure. Each country is a party either to the International Arrest Convention of 1952 or to the International Arrest Convention of 1999, and also all

the countries in question belong to the civil law tradition. With regard to marina operator's claims, apart from the right of retention of the vessel, arrest is not only the most convenient legal measure of security for future enforcement, but also an efficient instrument of pressure on the defaulting owner of the pleasurecraft. The comparative analysis will show how the rules of maritime law regulating ship arrest which have been developed to suit the needs of commercial shipping and sea trade also specifically apply to marina operators' claims and to the arrest of pleasurecraft. It will demonstrate how the judicial practice and legal doctrine of the countries studied here deal with the problematic issues arising in respect thereof. In addition, the relevant national rules of security for claims and their enforcement that apply in addition or as an alternative to the applicable international rules on arrest will also be taken into account.

Considering the fact that pleasure boating and nautical tourism within Europe, and in particular within the EU, are connected and strongly interrelated, and where the laws of different states frequently meet, overlap or collide, we hope that this paper will be a useful tool for academics and practicioners dealing with the subjects analysed herein.

III
CROATIAN LAW PERSPECTIVE

A. General Considerations

Under Croatian law, a marina is a type of a special purpose port[3] dedicated to nautical tourism, i.e. a port serving for the reception and accommodation of vessels, equipped for the provision of services to its users and vessels, and which from a business perspective and from a construction point of view and functionally

[3]Croatian Maritime Domain and Seaports Act (Official Gazette no. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016; hereinafter: the MDSPA) distinguishes between seaports open to public traffic and special purpose ports.

forms a unified whole.[4] It is defined as part of the water space and of the shore specially constructed and arranged for the provision of moorings, accommodation of tourists on the vessels and other services in nautical tourism.[5] The regime of the public maritime domain applies both to the water and the land area of the seaports in Croatia. Marinas as special purpose ports are subject to concessions according to the MDSPA and each is run by a single concessionaire, commonly a commercial company (marina operator).[6] On the other hand, seaports open to public traffic are operated on a landlord model and are run by the port authorities established by the state or regional government, entitled to grant concessions and concession permits to providers of various port services or port facility operators. Most of the berths are located in the marinas and other types of ports of nautical tourism, such as nautical anchorages and nautical mooring areas, but there is also a growing number of berths in the county and local ports open to public traffic, as well as the sport ports.[7] Unlike marinas that are operated commercially, sport ports are given on concession to non-profit sport clubs, and berths therein are designated for recreational vessels owned or used for non-commercial purposes by the members of the club.

This chapter deals with the legal measures under Croatian law available to commercial marina operators for the purpose of security and enforcement of claims arising from the provision of

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[4]Art. 10, Regulation on the Classification of the Seaports Open to Public Traffic and of the Special Purpose Ports, Official Gazette no. 110/2004.

[5]Art. 10, Ordinance on the Classification and Categorisation of the Ports of Nautical Tourism, Official Gazette no. 72/2008.

[6]Other types of special purpose ports are sport ports, industrial ports, military ports, shipbuilding ports and fishing ports.

[7]In Croatia there are about 9,000 berths in the sport ports, about 2,000 berths in the county and local ports and about 17,400 berths in the ports of nautical tourism. However, the actual numbers may vary considerably, due to a large number of administratively unregulated and unclassified nautical berths. See Luković, T. et al., *Nautički turizam Hrvatske*; Redak, Split, (2015) p. 167; Perko, N., *Valorisation of the Maritime Traffic Vessel Impact to the Capacity of the Sea Ports*, Doctoral Thesis, Faculty of Transport and Traffic Sciences, University in Zagreb, Zagreb (2015) (available from https://repozitorij.fpz.unizg.hr/en/islandora/object/fpz%3A820 per 22/06/2018), p. 24; Croatian Bureau of Statistics, *Nautical Tourism: Capacity and Turnover of Ports, 2017*, Zagreb, 27/03/2018, Year LIV, No. 4.3.4., (available from http://www.mint.hr/UserDocsImages/AA_2018_c-dokumenti/180327dzs_nauticki.pdf per 27/04/2018).

various services to their users, primarily the owners and operators of the recreational vessels moored, stored or dry-docked therein. The focus is on:

- the right of retention (lat. *ius retentionis*) as a substantive law measure of security deriving from the law of obligations;
- the arrest of a vessel as a conservatory (or interim) procedural measure, i.e. a pre-judgement seizure of a vessel by a civil court to obtain security for a maritime claim deriving from procedural law and the Arrest Convention 1952; and
- the maritime lien as a specific real security right deriving from maritime law.

The paper does not specifically deal with the post judgement enforcement or enforcement on the basis of an executive title.

Research undertaken in 35 Croatian marinas shows, *inter alia,* that the majority of marina operators face problems relating to the enforcement of their claims. The typical marina operator's claims are claims for berthing or mooring fees and additional related services, in other words claims arising from the marina operators' core business, representing about 70% of the total income of Croatian marinas.[8] In Croatian marinas, the price for the use of a berth usually includes the supply of the vessel with fresh water, electricity and waste disposal service. Other types of marina operator's claims may include claims for dry-docking, use of travel lifts, vessel repair, maintenance, yacht agency or other similar services, all when provided by the marina operator.

Traditionally, more than 50% of the vessels in Croatian marinas fly foreign flags and are in foreign ownership.[9] This fact directly influences the possibility of the enforcement of the marina operators' claims, since the vessel itself is often the only asset of the debtor available in the domestic jurisdiction. The potential negative effect thereof on the claim enforcement has been somewhat neutralised by the accession of Croatia to the EU in 2013, since most of the foreign-flagged vessels in Croatian marinas are registered in EU Member States. In any case, the most attractive legal tools that may be used to secure and enforce marina operators'

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[8]Croatian Bureau of Statistics, 2017, op. cit.
[9]Ibid.

claims against vessel owners are those relating to the vessel herself. This is mostly due to the potentially significant value of the vessels moored in the marinas, their availability in the claimant's jurisdiction and the particular legal regime applicable to ships and vessels, which provides certain benefits to "maritime" claimants.

Generally, the procedural rules of claim enforcement and security over vessels under Croatian law are contained in the Maritime Code[10] (the MC) as *lex specialis* and the Execution Act[11] (the EA) as *lex generalis*. Croatia is a party to the 1952 Arrest Convention, which therefore applies when the vessel that is subject to arrest flies a flag of any of the State Parties to the Convention. Furthermore, the rights of retention that could be exercised over a vessel for the purpose of securing marina operator's claims are contemplated by certain provisions of the general Obligations Act[12] (the OA) and by the special provisions of the MC. Finally, Croatian law recognizes the legal concept of maritime liens, which are regulated under the MC as *ex lege* unregistered real rights in ships for the purpose of securing certain expressly and exhaustively listed privileged maritime claims. The MC provisions on maritime liens largely reflect the provisions of the 1993 Convention, although Croatia is not a party thereto. Maritime liens and the rights of retention are concepts regulated by substantive law, while the arrest of vessels is a matter of procedural law.

It is relevant to note that in the business practice of Croatian marinas, most of the marina operators' services are provided on the basis of berth contracts. The majority of marina operators publish their own general terms and conditions and use their standard contract forms. In practice, transit berth contracts are concluded informally, whilst longer term contracts (annual berth, permanent berth, winter berth or similar) are concluded in a written form. Transit berth contracts normally include only the provision of a safe berth, fresh water, electricity, waste disposal and the use of the common bathrooms and other common areas on the marina premises. The longer-term contracts may include various additional services to be performed by the marina operator, such as

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[10]Official Gazette, No. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015.
[11]Official Gazette, No. 112/2012, 25/2013, 93/2014, 55/2016, 73/2017.
[12]Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018.

the control of the vessel whilst on the berth, dry docking, lifting and launching of the vessel, maintenance works, boat care etc. While, in principle, the transit berth is regarded as a contract similar to a short-term rental of a safe berth, there is a lot of discussion regarding the legal nature and the contents of the permanent berth or annual berth contracts. The main question is whether the contract includes any elements of bailment (deposit) or whether in essence it is an agreement to provide a place for a safe berth with some additional services. In particular, if under the standard terms and conditions of berth contracts a marina undertakes to act as a bailee for the vessels berthed therein, it owes a duty of care to protect the vessels and their equipment from any adverse events. A marina operator opting for a business model based on bailment assumes liability for the care, custody and control of the vessels. On the other hand, a marina providing a safe berth based on a contract similar to berth rental will be liable for the technical soundness and nautical safety of the berth and its equipment and for the safety and good order in the port. Research shows that the majority of marina operators in Croatia apply a model of annual rental of a safe berth including certain level of control of the berthed vessel.[13] On the other hand, the prevailing position established by judicial practice is that a marina's permanent berth contract includes the marina's obligation to exercise custody and control over the vessel and is, therefore, a bailment contract (or a contract of deposit), which is regulated under the OA (arts. 725 et seq.). Therefore, the position of the courts is that a marina is presumed liable for damage caused to the vessel during the contract, unless it proves that as a bailee it performed due care in protecting the vessel from possible accidents, incidents or malicious acts of third parties.[14] However, it is submitted that judicial practice regarding marina operators' berth contracts varies and sometimes incorrectly interprets the relationship as bailment. In our opinion, it is erroneous to conclude that as a rule all marina operators' permanent berth contracts

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[13]The information regarding the marina operators' business practices and their standard terms of berthing contracts was collected through field research in marinas and interviews with marina management staff based on a questionnaire, covering 35 marinas in Croatia.

[14]E.g. Commercial Court in Rijeka, 9-P-4327/11-72, 13/09/2012; High Commercial Court, Pž 3667/02-3, 18/01/2006; Supreme Court, Rev 756/11-2, 30/10/2013.

include the marina's obligation to safeguard the vessel amounting to the obligation of custody in the sense of the provisions of the OA. In our opinion, the mere fact that a vessel is berthed in a marina, combined with the fact that the marina accepted the vessel's documentation and keys, is not enough to establish that the contract is a contract of deposit. In other words, the issue whether the vessel has been delivered into the possession of the marina as a bailee needs to be established in each individual case by a true interpretation of the contract in question.[15]

B. Retention of Pleasure Craft as Security for Marina Operator's Claims

Croatian law recognizes the right of retention as a right of a creditor to detain a thing belonging to his debtor, until the full satisfaction of his outstanding claim, provided that the thing is already in the creditor's legitimate possession. Furthermore, the creditor is entitled to settle his claim from the value of the debtor's thing so detained, in the same way as the creditor whose claim is secured by a real right in the debtor's thing, such as pledge, hypotheque, or lien. The right of retention is expressly prescribed by law. The general provisions on retention are contained in arts. 72–75 of the OA, and accordingly the concept of retention can

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[15]For further discussion on the nature and contents of the berth contract, the relevant judicial practice and autonomous law see A. V. Padovan, *Marina Operator's Liability Arising from Berthing Contracts and Insurance Matters*, COMP. MAR. L., Vol. 52 (2013), no. 167, pp. 1–35; A. V. Padovan, V. Skorupan Wolff, *The Effect of the Craft's Sinking on the Contractual Relationship of the Parties to the Contract of Berth and Custody of a Pleasurecraft*, COMP. MAR. L., Vol. 57 (2018), no. 172, pp. 149–175.; M. Pijaca, *Legal Relationship between Marina Operator and Charter Company Arising from the Contract of Berth – Analysis of Croatian and Comparative Commercial Practice*, COMP. MAR. L., Vol. 57 (2018), no. 172, pp. 253–284.; V. Skorupan Wolff, A. V. Padovan, *Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?* D. Ćorić, N. Radionov, A. Čar (eds.), CONFERENCE BOOK OF PROCEEDINGS OF THE 2ND INTERNATIONAL CONFERENCE ON TRANSPORT AND INSURANCE LAW, INTRANSLAW ZAGREB 2017, Zagreb: Faculty of Law, University in Zagreb, 2017, pp. 313–353; V. Skorupan Wolff, R. Petrinović, N. Mandić, *Marina Operator's Obligations from the Contract of Berth according to the Business Practices of Croatian Marinas*, P. Vidan, N. Račić et al. (eds.), IMSC 2017 BOOK OF PROCEEDINGS, Split: Faculty of Maritime Studies, 2017, pp. 104–111.

generally be applied to all sorts of legal claims (contractual, quasi-contractual or tort). In addition, special rights of retention are prescribed by the provisions of the OA regulating certain types of contracts. In this context it seems relevant to point out the contractor's right of retention over the things produced or repaired and on the other things received from the owner or client in connection with the ordered work or services is covered under art. 618 of the OA, relating to the hiring of labor and services (lat. locatio operis).

Furthermore, in the context of this paper, it is important to point out a special right of retention prescribed by the MC in favour of the shipbuilder and ship repairer (art. 437, the MC). It is prescribed that a shipowner and ship repairer holding a ship under construction or repair in the shipbuilding port has a right to detain the ship until the fulfilment of the claims arising from the shipbuilding contract or the ship repair contract. The right of retention equally applies to the repair of a yacht (art. 2.1, the MC).[16] There is some ambiguity as regards the application of the respective provision on the repair of a pleasure boat.[17] In any case, the contract for ship or yacht repair must be concluded in a written form (arts. 431.1 and 440.1, the MC). Therefore, a written contract is necessary for the repairer's right of retention to accrue under art. 437 of the MC.

If a marina operator performs any yacht repair services, it is submitted that the shiprepairer's right of retention should apply, provided that the marina holds the yacht in its possession. In our opinion, the wording of art. 437 of the MC relating to the possession of the vessel within "the shipbuilding port" should not

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[16]According to art. 2.1. of the MC, the provisions of the MC applying to ships apply equally to yachts unless otherwise expressly prescribed.

[17]The terms yacht and pleasure boat are defined under the MC and the Ordinance on Boats and Yachts, Official Gazette No. 27/2005, 57/2006, 80/2007, 3/2008, 18/2009, 56/2010, 97/2012, 137/2013, 18/2016. The difference between them is in the technical features of these types of seagoing vessels intended for sports and leisure. The main difference is in the length of the vessel, whereby a pleasure boat is up to 12 m in length, whilst a yacht is over 12 m in length. For a more detailed discussion on the legislative definitions of the terms yacht and boat under Croatian law see A. V. Padovan, V. Skorupan Wolff, *The Repercussions of the Legal Definitions of Ship, Yacht and Boat in the Croatian Maritime Code on the Court Competence Ratione Materiae in Disputes Arising from Berthing Contracts*, M. Musi (ed.), THE SHIP: AN EXAMPLE OF LEGAL PLURI-QUALIFICATION, IL DIRITTO MARITTIMO - QUADERNI 3, Bonomo Editore, Bologna, 2016, pp. 249–277.

be interpreted literally, but rather *mutatis mutandis*, as it is prescribed that the MC provisions regulating the shipbuilding contract (arts. 431 – 439, the MC) by analogy also apply to the ship repair contracts (art. 440, the MC). It seems clear to us that the lawmakers' intention is to equally protect the shiprepairer's and shipbuilder's claims. Therefore, a marina operator licenced to perform ship or yacht repair services should be able to rely on this *ex lege* right of retention, although in such case the premises where the yacht repair is actually taking place are not within a "shipbuilding port," but rather within a nautical tourism port.

In our opinion, all works performed on the yacht's hull, machinery or any parts thereof, including not only the extraordinary works for repairs, but also ordinary maintenance, should be treated as repair in terms of the application of the relevant MC provisions regulating ship repair contracts and the respective right of retention.

It should be noted that lifting, docking or launching of the yacht are not included in the application of the MC provisions on ship repair, if those services are performed under a separate contract. Claims for the latter types of services could be secured by the general right of retention prescribed in favour of any creditor according to arts. 72–75 of the OA, or by the right of retention contemplated under the OA provisions on locatio operis. Furthermore, the parties may freely regulate the creditor's right of retention by a contract, since the legislative provisions on retention are dispositive in nature.[18] In fact, it is a common practice of the Croatian marinas to expressly prescribe the right of retention under the general terms and conditions of berth contracts.[19]

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[18]S. Petrić, RIGHT OF RETENTION IN CROATIAN AND COMPARATIVE LAW, Split: Faculty of Law, University in Split, 2004, p. 38.

[19]E.g. arts. 12 and 16 of the General Terms and Conditions of the Marina Trogir regulating the contract of permanent or transit berth, available from https://www.sct.hr/en/media/pdf/GENERAL-TERMS-AND-CONDITIONS-2016-ENG.pdf, website visited 01/10/2017, provide that the marina shall acquire the right to retain the vessel and its equipment to secure all unsettled claims for the services provided, measures undertaken at the expense of the berth user, and for all other claims according to the general terms and conditions, the applicable marina port order regulations and the national legislation. The berth user agrees that the Marina can,

The MC regulates the ranking of creditors against the proceeds of judicial sale of the vessel, whereby the creditors protected by the shiprepairer's or shipbuilder's right of retention rank prior to the hypothecary creditors, but after the creditors whose claims are protected by maritime liens.[20] The creditors whose claims are protected by a general or a special right of retention over a vessel based on the provisions of the OA would rank together with the hypothecary creditors in the chronological order; in other words the earlier existing hypotheques would be given priority.[21] The creditors whose claims are secured by contractual rights of retention are in almost the same position as those protected by the rights of retention arising from the OA, except in the case of bankruptcy proceedings, whereby they are not recognised as privileged creditors, unlike the creditors protected by the rights of retention arising *ex lege*.[22]

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without any further inquiries and approvals, exercise its right to retain the vessel, including also the possibility to place the vessel on land for the purpose thereof, also at the expense of the berth user. Similar provisions can be found in art. 22 of the General Terms and Conditions for the Use of a Berth in the Adriatic International Club (ACI), available from http://www.aci-marinas.com/en/aci_conditions/opci-uvjeti/ published 05/05/2014, website visited 01/12/2017; art. 14 of the General Terms and Conditions of Marina Punat available from http://www.marina-punat.hr/UserDocsImages/dokumenti/Uvjeti%20poslovanja_EN.pdf, website visited 03/10/2017.

[20]The MC, art. 912.

[21]See art. 114 of the EA in connection with art. 297.2 of the Act on Ownership and other Real Rights (Official Gazette, No. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, 152/2014) and art. 75 of the OA. See PETRIĆ, op. cit., p. 38-39. It should be clarified that under Croatian law vessels are subject to registration in the public registry and as such they may not be subject to pledge (lat. *pignus*). The only way to voluntarily establish a real security right (a charge) on a vessel is by way of registration of a hypotheque in the public registry (art. 219, the MC). On the other hand, Croatian maritime law recognises maritime privileges as unregistered real security rights over vessels arising *ex lege* for certain types of maritime claims determined by law and listed as *numerus clausus* (art. 241, the MC). For a more detailed analysis of the Croatian maritime legal regime concerning real rights in ships and other vessels see J. Marin, *Special Property Law Regime for the Seagoing Ships and the Vessels of Inland Navigation*, N. Gavella (ed.), PROPERTY LAW – SPECIAL LEGAL REGIMES, Vol. 3, Narodne novine, Zagreb, 2011, pp. 579–670.

[22]PETRIĆ, op. cit., p. 38.

For the marina operator's right of retention over a vessel to apply, the vessel must be in the ownership of the marina operator's debtor at the moment when the right of retention is exercised.[23] Any later change in ownership is of no relevance to the right of retention.[24] In practice, marina operators' services are usually contracted by or on behalf of the vessel owners, lessors or charterers. Retention is possible only when the contract is concluded with or on behalf of the owner; in other words when the personal debtor is also the owner of the vessel.[25] Under Croatian law, the owner of a vessel is the legal or natural person registered as the owner in the respective public registry of vessels.

Furthermore, to be able to exercise his right of retention, the marina operator must be in direct possession of the vessel. The entry into possession may occur prior to, or after the maturity of the claim.[26] The creditor's possession must be legitimate from the outset, in the sense that it must be acquired in a legal way.

If retention is exercised against the law, it could qualify as a criminal act and result in criminal liability for misappropriation of property under art. 232 of the Criminal Act.[27]

In the context of security for marina operator's claims, there are certain unresolved issues regarding retention. A major one is related to the legal nature and contents of the berth contract as the contract most frequently used by marina operators in the performance of their business. The issue is whether a particular berth contract is a bailment contract or not.[28] If there is bailment, then there is possession of the vessel by the marina operator. However, the prevailing position in the legal doctrine and judicial practice in Croatia is that a right of retention is excluded in all bailment contracts, because of the fiduciary nature of the

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[23]See PETRIĆ, ibid, p. 34.

[24]Ibid, p. 232.

[25]For a more detailed analysis see PETRIĆ, ibid, pp. 230, 231, 236–238. The debtor's ownership of the retained asset is also required in case of the shiprepairer's special right of retention under art. 437 of the MC. See PETRIĆ, op. cit., pp. 495–496.

[26]PETRIĆ, op. cit., p. 34.

[27]Official Gazette, no. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017.

[28]For a discussion on the nature and contents of the marina operator's berth contract under Croatian law, see references cited in fn. 15.

relationship between the owner as the bailor and the safe-keeper, i.e. the bailee. Namely, it has been argued that allowing retention in the case of a bailment contract would be against the proper nature of that contract and would frustrate its main purpose.[29]

On the other hand, if the berth contract is regarded primarily as a contract for the lease or rental of a safe berth there is no bailment and no marina operator's possession over the vessel, and therefore, no right of retention can be exercised over the vessel by the marina operator. The research shows that majority of marina operators in Croatia base their business models predominantly on the contract for the lease or rental of a safe berth, refusing to accept the legal position of a bailee in respect of the vessel, along with the rather burdensome liability that comes with it. On the other hand, many of them in practice keep the keys to the vessels and their documentation, which may imply the marina operator's possession over the vessel, but this is disputable. In respect thereof, some marina operators argue that deposit of the keys and documents is simply an extra service for the benefit of their clients and that it does not amount to possession on the part of the marina operator. However, in many marinas the deposited yacht documentation and keys to the vessel will be detained if there is an unsettled bill, as a means of pressure on the client to pay his debt.

Furthermore, as already mentioned, marinas frequently contract their right of retention over the vessel as a security for the unsettled claims, whereby possession is a condition *sine qua non*. Likewise, they frequently contract for the possibility to move the vessel to a different berth at any time, without any further approval by the client. Finally, it is a public law duty of the marina operator to maintain the safety and good order in the port, which also presumes

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[29]PETRIĆ, op. cit., p. 36. See also the decision of the Supreme Court, VS, Rev-2454/95, 06/05/1999 where the court held that in the case of a bailment contract the creditor had no right of retention because it is the obligation of the bailee to accept the thing from the bailor, to look after it and to return it when the bailor requires. Cited from I. Crnić, THE OBLIGATIONS ACT, Zagreb: Organizator, 2010, p.178. See also Z. Slakoper, V. Gorenc, THE LAW OF OBLIGATIONS: GENERAL PART, Zagreb: Novi Informator, 2009, pp. 364–365. There are many arguments for criticising this position, especially where the bailment is a commercial relationship, and there are different interpretations in comparative law, see PETRIĆ, op. cit., pp. 299–302.

its entitlement and obligation to intervene in case of emergency to prevent loss or damage to the persons, vessels and other property in the port.[30] This means that, in case of an emergency, marina staff will possibly have to lift the sinking vessel into a dry-dock or board the vessel to move it or remove it from the port, to perform firefighting procedures, or undertake other measures in respect of the vessel to prevent or minimize damage. Therefore, even if the berth contract is based on the model of lease or rental, the issue of possession over the vessel and potential elements of bailment are not fully excluded.

In this context, it is submitted that there are no straightforward answers as to the nature of the contract and the issue of possession. The berth contracts are complex atypical contracts containing elements of various contract types regulated under the OA or the MC, including in particular the lease or rental, mandate, *locatio operis*, ship repair or possibly deposit. All of these elements, except the lease or rental of a berth, may potentially imply a bailment relationship in respect of the vessel. Therefore, it is a question of both fact and law to assess on a case-by-case basis whether there is possession over the vessel by the marina operator at the critical time when the right of retention is exercised, depending on the terms of each individual contract and the phase of its implementation.

Considering the above-mentioned ambiguities, it would be advisable to include a detailed provision in the contract regulating the marina operator's right of retention. The provision should in particular determine the moment of entry into possession over the vessel for the purpose of exercising the right of retention. The vessel owner's *a priori* consent should be expressly provided for in the contract allowing the marina operator's entry into possession for the purpose of obtaining security by way of retention for the claims arising from the contract or in relation thereto.

With regard to the actual means of exercising retention, the practice applied in most of the Croatian marinas is to lift the vessel into a dry-dock and keep it on land until the outstanding debts have

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[30]See R. Petrinović, N. Mandić, B. Milošević Pujo, Safety of Navigation Standards in the Ports of Nautical Tourism (Marinas) with a Special Focus on the Maintenance of the Port Order, Conference Book of Proceedings of the 2nd Adriatic Maritime Law Conference - 2nd AMLC 2017, COMP. MAR. L, Vol. 57 (2018), no. 172, pp. 177–204.

been settled. This may be impossible in case of large yachts whose tonnage exceeds the capacity of the marina's travel lift. Another example would be to tow the yacht to a different berth located in the area where the vessel can be physically blocked from sailing out of the port.

The right of retention under Croatian law has two possible functions. First, it is an instrument of pressure used against a debtor in default. Second, it is a measure of security and claim enforcement.[31] Namely, the creditor whose claim is protected by the right of retention is entitled to settle his claim from the value of the debtor's asset retained under the same rules applying to the enforcement of real security rights such as hypotheques and liens, provided that the debtor has been notified about the creditor's intention to enforce the claim. This effectively means that the creditor exercising a right of retention is entitled to enforce the claim by obtaining an executive title based on which he may then initiate a forced judicial sale and settle his claim against the proceeds thereof.[32] Such creditor is in a privileged position compared to all other unsecured creditors, as his claim will rank higher than the unsecured claims. Furthermore, as long as the right of retention is exercised, the creditor is not limited by the prescription period.[33]

Finally, the right of retention is an accessory to the main claim; consequently, both lapse simultaneously. Furthermore, the right ot retention ends with the loss of possession and upon the debtor's providing of an adequate alternative security.[34]

1. De Lege Ferenda Proposals

Currently, the MC is under revision and certain *de lege ferenda* proposals are being discussed that will affect the marina operator's legal position. The drafting committee is considering including new provisions in the MC regulating the berth contract as a part of the new chapter on the contracts in nautical tourism. The proposal basically treats the contract as a contract for the use of a safe berth,

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[31]PETRIĆ, op. cit., p. 33.
[32]Ibid, p. 37.
[33]Ibid.
[34]Ibid, p. 39.

with the possibility of expressly extending the berth provider's obligations to include the additional services in respect of the vessel. The proposed new legislative provisions regulating the berth contract as a nominated contract of Croatian maritime law include, *inter alia,* the berth provider's right of retention over the vessel for the purpose of securing his outstanding claims arising from the berth contract or in relation thereto. *De lege ferenda*, the providers of berths whose claims are protected by the right of retention will have the status of privileged creditors. They will rank before the hypothecary creditors, but after the creditors protected by maritime liens. Namely, they will rank together with the other creditors protected by the special rights of retention prescribed by the MC, i.e. shipbuilders and ship repairers.

2. Abandoned Vessels

A problem periodically faced by marina operators relates to the vessels factually abandoned in the marinas. Attempts to force a sale of these vessels are usually too slow and frequently unsuccessful, mainly due to the difficulties related to the service of writs and to the impossibility of proving ownership over the abandoned vessel.[35] Namely, to enforce a claim against the proceeds of judicial sale of a vessel, it is necessary that the vessel be owned by the personal debtor, or that there be a valid plaintiff's real security right in the vessel.[36] It is usually difficult or impossible to prove the debtor's ownership of the vessel that has been abandoned for a long period. This is due to the debtor's unavailability and the possible

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[35]D. Majstorović, Claims Enforcement Law – Sale of (Abandoned) Vessels, *XXIV Consultations – Contemporary Issues of Croatian Legislation and Legal Practice, Yearbook 16*, Croatian Society for Civil Law Sciences and Practice, Zagreb, 2009, pp. 841–853.

[36]*De lege lata*, security and enforcement over boats is regulated under the EA, whilst security and enforcement over ships and yachts is subject to the special provisions of the MC, with subsidiary application of the EA as *lex generalis*. The competent courts for claim security and enforcement over boats are the courts of general civil jurisdiction (municipal courts), whereas the enforcement on ships and yachts falls within the competency of the commercial courts designated to hear maritime cases (art. 21.1.7 of the Courts Act, Official Gazette, No. 28/2013, 33/2015, 82/2015, 82/2016, in connection with art. 34.b.1.6 of the Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 02/2007, 84/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014).

changes in ownership occurring in the meantime, of which a marina operator has neither knowledge nor proof, especially when the vessel is registered in a foreign registry. As already explained, for the enforcement of a claim secured by the right of retention, there is an indispensable requirement of the debtor's ownership of the vessel. Therefore, retention will most likely not be a favourable legal measure in the case of an abandoned vessel, whose owners are unknown or unavailable in the local jurisdiction.

De lege ferenda, within the current revision of the MC there are proposals to amend the existing provisions on the removal and recovery of wrecks (the MC, arts. 840.a *et seq.*) and the removal of substandard ships (art. 171, the MC) in a way which would allow for an administrative law solution to the problem. According to these proposals, a marina operator would be entitled to remove or recover the abandoned vessel by means of a special, relatively quick, administrative procedure under the authority of the competent harbour master's office, including the possibility of an auction sale of the abandoned vessel.

C. Arrest of Pleasure Craft

As previously explained, arrest refers to a preliminary measure of security over a vessel. As defined under the 1952 Arrest Convention, to which Croatia is a party, arrest is a detention of a vessel by judicial process to secure a maritime claim. It is a conservatory seizure of a vessel, as opposed to the seizure of a vessel in execution or satisfaction of a judgment.[37] The national regime of ship arrest in Croatia is regulated under the MC (arts. 841 *et seq.*, in particular arts. 952–964) subject to the subsidiary application of the EA as *lex generalis*. It applies to ships and all other types of vessels, except boats.[38] *De lege ferenda* proposal, which is currently under consideration by the drafting committee for the revision of the MC, is to extend the application of the MC

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[37]Art. 1.2, the 1952 Arrest Convention.

[38]Boats are smaller vessels intended for private or commercial purposes, including pleasure boats, fishing boats, public boats, cargo or passenger boats, workboats, etc. Pleasure boats are up to 12 m in length. See supra, fn. 17.

provisions on security and enforcement, including arrest, to include boats. This is in order to ensure a uniform system of rules and jurisdiction for all types of vessels, in the interest of legal certainty.[39]

The MC regime of the arrest of vessels is very similar to the regime of the 1952 Arrest Convention and it applies to cases without an international element, i.e. where the plaintiff's habitual residence or principal place of business is in Croatia and the vessel sails under the Croatian flag. The list of maritime claims for which arrest can be made under art. 953.1 and 953.2 of the MC essentially corresponds to the list of maritime claims prescribed under art. 1 of the 1952 Arrest Convention. In addition, the MC expressly includes agency commissions and the claims protected by maritime liens[40] in the list of maritime claims for which arrest can be obtained.

A special situation is if the vessel flies a flag of a State which is not a party to the 1952 Arrest Convention. In such case, the list of claims for which the arrest can be obtained is neither limited to the maritime claims listed under art. 1 of the 1952 Arrest Convention, nor to those listed under art. 953 of the MC. Therefore, a vessel flying the flag of a State which is not a party to the 1952 Arrest Convention can be arrested for the purpose of securing any claim for which it is otherwise possible to obtain an interim security measure over any of the debtor's assets under the general civil procedure rules on claim security and enforcement.[41]

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[39]See supra fn.36. This amendment would automatically bring all civil proceedings relating to the claims security and enforcement over boats under the jurisdiction of the commercial courts competent to hear the maritime cases, as is the case with ships and yachts.

[40]As mentioned above, the list of maritime liens on ships is prescribed under art. 241 of the MC, which largely reflects art. 4 of the 1993 Convention. For a more detailed analysis regarding maritime liens under Croatian law see J. Marin, *Liens on a Ship - Certainty and Uncertainty at the same Time*, LIBER AMICORUM NIKOLA GAVELLA, GRAĐANSKO PRAVO U RAZVOJU, Zagreb: Faculty of Law, University in Zagreb, 2007, pp. 369–409.

[41]A. V. Padovan, *Arrest of a Yacht in a Croatian Court for the Purpose of Securing a Marina Operator's Claim*, D. Ćorić, N. Radionov, A. Čar (eds.), CONFERENCE BOOK OF PROCEEDINGS OF THE 2ND INTERNATIONAL CONFERENCE ON TRANSPORT AND INSURANCE LAW, INTRANSLAW ZAGREB 2017, Zagreb: Faculty of Law, University in Zagreb, 2017, pp. 379–406, at p. 400.

Croatian courts apply the 1952 Arrest Convention only to ships and yachts, whereas in our opinion the Convention rules should equally be applied to boats.[42] It is submitted that the proposed legislative amendments regarding the uniform application of the MC to all types of vessels, including in particular the extended application of its provisions on security and enforcement to boats, would be welcome in the interest of legal certainty and the uniform judicial practice. Such amendments should also resolve the dilemma regarding the applicability of the 1952 Arrest Convention to all types of vessels that are subject to public registration, including pleasurecraft.

Under Croatian law, the following conditions for arrest must be fulfilled in accordance with the MC or the 1952 Arrest Convention, depending on which applies, and with the EA:

a) the claim for which the arrest is sought must be a maritime claim; in other words it must correspond to one of the maritime claims listed under art. 953 of the MC or under art. 1 of the 1952 Arrest Convention, depending on which of the two applies; or
b) the claim must be protected by a maritime lien, as listed under art. 241 of the MC or by a hypotheque or a similar charge; and
c) the claimant must show a *prima facie* case of a valid claim (*fumus boni iuris*) and the likelihood that in the absence of the conservative arrest the debtor would prevent or substantially frustrate the exercise of the claim for which the security is requested (*periculum in mora*);[43] there is an absolute presumption of law (*presumptio iuris et de iure*) of the existence

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[42]Similarly, F. Berlingieri, BERLINGIERI ON ARREST OF SHIPS, 5th Edition, Informa, London, 2011, at p. 454. It is hereby noted that under Croatian law, boats are subject to registration in a public registry and are given Croatian nationality and flag just like ships. For a discussion regarding the applicability of the 1952 Arrest Convention to boats from a Croatian law perspective, see A. V. Padovan, I. Tuhtan Grgić, *Is the Marina Operator's Berthing Fee a Privileged Claim under the Croatian Maritime Code?*, IL DIRITTO MARITTIMO, CXIX (2017), II, pp 366–399, at p. 393–395; See also Padovan, *Arrest of a Yacht* . . . , op. cit. at p. 392–393.

[43]Art. 344 of the EA. Although the 1952 Arrest Convention does not require the element of *periculum in mora*, under Croatian law it is considered as a necessary procedural requirement; in other words a procedural rule of *lex fori* which applies also in case of arrest under the rules of the 1952 Arrest Convention.

of *periculum in mora* if the claim is to be enforced abroad;[44] according to the domestic case law the presumption always applies in case of the arrest in a domestic port of a foreign flag vessel or a vessel in foreign ownership;[45]

d) the purpose of arrest is conservatory, in other words it is a security for future enforcement;[46] this means that if such conservatory purpose may not be achieved by arresting the vessel, because, for example the plaintiff's claim is already sufficiently secured, then arrest should not be allowed due to a lack of legal interest.[47]

1. Marina Operator's Claims as Maritime Claims

Marina operator's claims like the cost of repair or equipment of yachts, and the related costs of lifting, dry-docking and launching of the yacht, may fall under art. 953.1.9 of the MC, or art. 1.1.k) of the 1952 Arrest Convention, relating to construction, repair or equipment of any ship or dock charges and dues.[48] These provisions apply provided that the marina operator is an independent contractor of such repair and docking services, licenced to provide certain vessel repair and maintenance services and issued the bill for the services provided. There is some ambiguity relating to the various categories of maintenance on yachts or their machinery or equipment including, for example, the regular servicing of the engines and devices, work necessary for the winterising or recommissioning of the vessel before or after lay-up respectively, as these services are not strictly repairs. It is submitted that this type of work should be treated as repair for the purpose of the application of the relevant rules on maritime claims and arrest.[49] This issue does not seem to raise any doubts in the case of commercial ships and large dry-docks. However, the respective

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[44]Art. 344.3 of the EA.

[45]J. Marin, ARREST OF SHIPS, Zagreb: Faculty of Law, University in Zagreb, 2003, p. 11.

[46]Art. 344, the EA.

[47]Marin, *Arrest . . . ,* op. cit., p. 12.

[48]Similarly, Berlingieri, op. cit., p. 106, et seq.

[49]See also what was stated supra regarding the ship repairer's right of retention, section II B, Retention of a Pleasure Craft as a Security for Marina Operator's Claims.

analogy in the context of marina business and pleasurecraft has not been settled by judicial practice or legal theory.[50]

There should be no doubt that marina operators' claims for the supply of yachts with electricity, fresh water, fuel, goods and materials fall under art. 953.1.8 of the MC and art. 1.1.k) of the 1952 Arrest Convention relating to the supply of goods and materials for the purpose of maintenance and use of a ship.

The most disputable issue in practice is whether the marina operator's claim for berthing or mooring fees is a maritime claim. In the scarce legal doctrine dealing specifically with this issue, the positions vary.[51] It is submitted that, in accordance with the relevant international legal doctrine, mooring or berthing services fall within the category of maritime services for the regular operation and maintenance of ships, and therefore the respective claims should be treated as maritime claims.[52] The relevant judicial practice in Croatia lacks uniformity in this respect, reflecting an unclear position of positive law and the fact that the concepts of maritime claims and arrest have been created and adapted to commercial vessels, whilst their specific application to yachts and pleasure boats creates a great deal of legal uncertainty. In particular, there is no straightforward answer to the question of subsuming the marina operator's claim for the hire of a berth under one of the maritime claims prescribed by the exhaustive list of claims under art. 953 of the MC or art. 1 of the 1952 Arrest Convention, respectively. The matter is important, especially considering the fact that around 70% of marina operators' income in Croatia comes from the rental of berths.[53]

In practice, the competent first instance courts in Croatia have frequently allowed arrest for the marina operators' outstanding berthing fees, which usually results in out-of-court settlements. Therefore, the arrest warrants have only rarely been challenged in front of the appellate court, i.e. the High Commercial Court of the

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[50]See Đ. Ivković, MARITIME LIENS ON SHIPS, MANUAL. Piran, 2007, p. 115 et seq.

[51]Ivković holds that berthing fees by their legal nature are not maritime claims. See Ivković, ibid, pp. 116–119. A different argument can be found in Padovan, *Arrest of a Yacht . . .* , op. cit. pp. 385, et seq. and Padovan, Tuhtan Grgić, op. cit., pp. 388 et seq.

[52]Similarly, Berlingieri, op. cit. p 105.

[53]Croatian Bureau of Statistics, 2017, op. cit. The total income of nautical tourism ports in Croatia in 2017 amounted to over 114,000,000 EUR.

Republic of Croatia. In the case of the arrest of the M/Y "Crisandra" in a Croatian marina, the High Commercial Court overruled the decision of the first instance court which refused to issue the warrant of arrest. The appellate court held that the marina operator's claim for the hire of a berth was a maritime claim falling under art. 953.1.11 of the MC which corresponds to art. 1.1.n) of the 1952 Arrest Convention relating to the expenses incurred by the master, shipper, charterer or agent for the account of the ship, shipowner or operator.[54] However, it is submitted that this classification of the marina operator's claim for the hire of berth is erroneous. To fall under art. 953.1.11 of the MC the person claiming must be one of those mentioned in the provision.[55] It does not suffice that the expense was made in connection with the vessel's maintenance or operation. A further requirement is that the expense be made on behalf of the vessel and that the claimant, in other words the plaintiff, be the master, shipper, charterer or agent. On the other hand, the marina operator's claim for the hire of a berth arises from the berth contract whereby the marina operator acts in his own name and not as an agent for the yacht, its owner or operator. It is not a claim for the expenses incurred, but for the services provided.[56]

In another case, the M/Y "Topsy" was arrested for the purpose of securing the marina operator's claim arising from the contract of annual berth under art. 1.1.d) of the 1952 Arrest Convention, "agreement relating to the use or hire of any ship whether by charteparty or otherwise."[57] It is hereby submitted that this is an obviously incorrect classification of the marina operator's claim. The cited provision of the 1952 Arrest Convention could be applied to the claims for the yacht charter hire or similar, but certainly not to the hire of a berth in a marina.

In the case of M/Y "Bibich Too," the Commercial Court in Split ordered the arrest of the yacht based on art. 1.1.l) of the 1952 Arrest

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[54]High Commercial Court, XL VII Pž-6486/06-3, 17/1/2007.

[55]Đ. Ivković, International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952. Handbook. Piran, 2005, pp. 95–96.

[56]Padovan, *Arrest of a Yacht*…, op. cit. pp. 386–387.

[57]High Commercial Court, Pž 5043/06-3, 27/9/2006 confirming the decision of the Commercial Court in Rijeka, III R1-102/2006-2, 5/6/2006.

Convention for, "construction, repair or equipment of any ship or dock charges and dues."[58] The arrest was allowed to secure the marina operator's claim for the hire of a berth arising from the marina operator's annual berth contract. The berthing fee, in other words the claim for the hire of berth, was regarded as a claim for port dues, which in the judicial practice of Croatian courts is recognized as a maritime claim based on art. 1.1.l) of the 1952 Arrest Convention.[59] There was no appeal. However, according to the recent practice of the High Commercial Court, the maritime lien for port dues and charges is not applicable to a marina operator's claim for berthing fees, but only to port authorities' claims for port dues. According to this position, marina operators' claims for berthing fees are purely commercial whilst port authorities' fees for the use of berths and other port infrastructures are public dues, and only the latter are protected by a maritime lien under art. 241.1.4 of the MC.[60] Following the same line of reasoning, the High Commercial Court would probably not uphold the position that a marina operator's berthing fee is a maritime claim according to art. 1.1.l) of the 1952 Arrest Convention which "may be considered equivalent to port dues."[61]

2. Considerations Related to the Identity of the Debtor

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[58]Commercial Court in Split, 8. R1-116/2016, 8/8/2016.

[59] The position has been confirmed in the decisions of the High Commercial Court regarding the arrest of ships to secure the port authorities' claims for port dues, including berthing fees: High Commercial Court, PŽ-6297/13-3, 4/9/2013; High Commercial Court, Pž-10848/13-3, 22/1/2014. This interpretation is in line with the relevant international legal doctrine where it has been stated that "[dock charges and dues] may be considered equivalent to the port dues mentioned in article 4.1.d) of the 1993 Convention on Maritime Liens and Mortgages.," Berlingieri, op. cit. p. 171. The cited provision of the 1993 Convention relates to "claims for port, canal and other waterway dues."

[60] High Commercial Court, Pž-263/15-3, 26/1/2015; High Commercial Court, Pž-8720/2012-6, 25/5/2016; For more discussion on the topic see infra, § II D, Marina Operator's Claims and Maritime Liens.

[61] Berlingieri, op. cit. p. 171. See supra, fn. 59.

Under Croatian law, and in accordance with the relevant judicial practice, when a maritime claim is not secured by a maritime lien or some other real right, the yacht that is subject to the arrest must be in the ownership of the personal debtor. In practice, this means that the debtor must be the registered owner of the yacht at the time of the arrest. The position is that, otherwise, the main conservatory purpose of arrest as an interim security measure would not be fulfilled, because the yacht could not be sold in the future enforcement procedure and the claim could not be settled from the proceeds of the forced sale.[62] Enforcement over property is possible only if the property belongs to the personal debtor. The relevant moment for ascertaining the ownership requirement is upon the plaintiff's application for the warrant of arrest.

To secure a marina operator's claim as a maritime claim that is not protected by a maritime lien or some other real right, it is also possible to arrest a "sister ship."[63] This means that any other vessel owned by the same personal debtor at the time of the application for the warrant of arrest can be arrested for the purpose of securing the claim. The personal debtor is the person liable for the claim in respect of which the arrest is applied for, who at the time when the claim arose was the registered owner, bareboat charterer, charterer or operator of the vessel in respect of which the claim arose (art. 954.2 of the MC; art. 3 of the 1952 Arrest Convention).

The circle of the possible personal debtors under art. 954.2 of the MC expressly includes the owner, bareboat charterer, charterer and operator of the vessel. In the context of marina operators' claims and pleasurecraft, the majority of the vessels commonly used in nautical tourism and recreational sailing are privately owned, but there are also many that are subject to lease agreements (financial or operational), and those that are used commercially for chartering by the charter companies holding the yachts based on bareboat charter agreements. In Croatia, the predominant practice in the yacht chartering business is that the vessels are chartered to the end users without professional crew. It is submitted that in practice, the circle of potential personal debtors in this context will

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[62]Marin, *Arrest* . . . , op. cit. p. 148.

[63]Art. 954 of the MC; art. 3 of the 1952 Arrest Convention. For a detailed analysis of the sister ship arrest under Croatian law see Marin, *Arrest* . . . , op. cit. pp. 139–155.

usually include the owner, bareboat charterer or lessee of the yacht, as all these persons may be in the position of a yacht operator. It follows that a marina operator may arrest any vessel which, at the time of the application for the warrant of arrest, is owned by the same personal debtor, provided that the personal debtor was the owner, bareboat charterer or lessee of the yacht in respect of which the maritime claim arose at the time the claim arose (art. 954.2 of the MC; art. 3 of the 1952 Arrest Convention).[64]

It is also possible to conceive a situation in which a yacht charterer is the personal debtor.[65] For example this would be possible in respect of a marina operator's claims for berthing fees for transit berths or for small repairs necessary during the charter period, etc. In addition, if a yacht is chartered without a crew, the yacht charterer may be personally liable for damage caused by the yacht during the charter period, including for example damage to the port structures, whereas a marina operator's claims for such damages would be maritime claims (art. 953.1 of the MC; art. 1.1.a) of the 1952 Arrest Convention). Therefore, if a yacht charterer is the personal debtor who also owns another vessel, such other vessel would be liable to sister ship arrest.

D. Marina Operator's Claims and Maritime Liens

As already explained, Croatian law recognizes the concept of maritime liens as special unregistered real rights in ships, including yachts and boats, arising *ex lege* in favour of the privileged creditors to secure certain types of claims. Maritime liens on ships, yachts and boats are regulated under arts. 241 – 252 of the MC. Art. 241 of the MC contains an exhaustive list of maritime liens on a vessel. Similar to art. 4.1.d) of the 1993 Convention, the list of maritime liens includes, inter alia, the claims for port dues, costs of navigating through canals, and other waterways and pilotage costs

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[64]Padovan, *Arrest of a Yacht* . . . , op. cit. pp. 397–398.

[65]The yacht charterers are most frequently just nautical tourists, natural persons (consumers), who use the chartered yacht only during a relatively short charter period. However, when the charter is without a crew, the yacht charterer holds the yacht in his possession during the charter period and is liable for any damages arising in connection with the use of the yacht, as well as for the expenses related to its regular operation.

(art. 241.1.4, the MC). Compared to other maritime claims, maritime liens have certain important advantages. As real rights, in other words rights in the property, they attach to and follow the vessel in respect of which they arose regardless of the change of ownership or registration (fr. droit de suite).[66] Therefore, they can be enforced on the vessel regardless of the fact that at the time of enforcement the vessel is no longer owned by the personal debtor.

For a claim to be protected by a maritime lien, it must be a claim against the registered owner, bareboat charterer or operator of the yacht as personal debtors. Furthermore, maritime liens rank prior to claims protected by the rights of retention and claims protected by hypotheques or mortgages (art. 912, the MC). Maritime liens remain attached to the vessel for a maximum period of one year (art. 246.1.2, the MC). A maritime lien is a matter of substantive law, and according to the applicable conflict of law rules, the relevant law for ascertaining the existence of a maritime lien is the law of the vessel's flag (art. 969.1.2, the MC). Art. 953.2 of the MC prescribes that maritime liens can be enforced by way of arresting the encumbered vessel.

In judicial practice it is disputable whether marina operators may rely on the maritime lien for port dues and charges in respect of their claims for berthing fees. The position reflected in the previous court practice seems to be that a marina operator's claim for a berthing fee is protected by a maritime lien under the MC.[67] However, the recent practice of the High Commercial Court shows

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[66]Art. 243, the MC.

[67]In a decision on the merits, where the claim was for the unpaid berthing fees, the court held that the legal nature of the berthing fees earned in the nautical tourism ports by the commercial marina operators is analogous to the nature of the berthing fees earned in the ports open to public traffic by the port authorities (High Commercial Court, XLVII Pž-8130/03-3, 11/22/2006). In a case relating to the arrest of the M/Y "Topsy" the court treated the marina operator's claim for the annual berthing fee as a maritime claim and not as a maritime lien, but in its reasoning the court explained that, in principal, a marina operator may earn port charges which are protected by a maritime lien. However, it remains unclear which claims of a marina operator would qualify as such port charges in the opinion of this court (High Commercial Court, XLIII Pž-5043/06-3, 09/27/2006). In a case of insolvency proceedings against a boat owner, the Commercial Court in Zagreb recognised the ranking priority of the maritime lien for port charges in favour of the marina operator (3 St-1098/11-85, 02/08/2016).

a very clear move towards the position that a marina operator's claim for a berthing fee does not qualify as a maritime lien for port charges, because port charges as public dues can only be earned in the ports open to public traffic, and not in the special purpose ports such as the ports of nautical tourism.[68] The unfortunate result of this practice, in our opinion, is an unjust discrimination between the ports open for public traffic and nautical tourism ports, whereby the port authorities' claims for berthing fees as public dues are protected by a maritime lien whilst the marina operators' claims are not, simply because of the fact that they are earned by the private concessionaires.[69]

It follows that a number of legal uncertainties surround the issue of marina operators' claims arising from the berth contracts. *De lege lata*, the issue of whether a marina operator's berthing fee is a maritime claim and, if so, based on which legal provisions, is a highly arguable one. In our opinion, the claim is certainly maritime in nature and the provisions of the 1952 Arrest Convention should be interpreted broadly to include it under art. 1.1.l). On the other hand, our *de lege ferenda* proposals are aimed at revising the relevant provisions of art. 241.1.4 of the MC to clearly protect by means of a maritime lien all sorts of port dues, charges and fees, public and commercial. Furthermore, art. 953.1.8 of the MC relating to supply of the vessel for its maintenance and operation should be revised to expressly include services to the vessel. In our view, a berthing fee is a maritime claim for a service necessary for the regular maintenance,

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[68]The first instance court's arrest warrant against the M/Y "Saray" was overruled, because the appellate court held that the marina operator's berthing fee may not be secured by the maritime lien for port charges (High Commercial Court, Pž-263/15-3, 01/26/2015). In the case of the M/Y "Just for Fun," the High Commercial Court deciding on the merits of the marina operator's claim for berthing fees held that the claim was not protected by a maritime lien and that, therefore, it could not be held against the leasing company as the registered owner of the yacht in respect of which the claim arose, since the lessor was not the personal debtor (High Commercial Court, Pž-8720/2012-6, 05/25/2016). The practice is now followed by first instance courts, e.g. the Municipal Court in Dubrovnik held that the marina operator's berthing fees were not protected by a maritime lien and that, therefore, in the execution proceedings the marina operator did not have a status of a privileged creditor (17. Ovr. 227/2015, 02/17/2017).

[69]For a detailed discussion on the topic see Padovan, Tuhtan Grgić, op. cit.

use and operation of a yacht,[70] and the proposed revision of art. 953.1.8 of the MC to expressly include the supply of goods and services to the ship would be the most logical solution, inspired by the one adopted under art. 1.1.l) of the 1999 Arrest Convention.[71]

IV
ITALIAN LAW PERSPECTIVE[72]

A. General Considerations

Marinas provide a wide range of services to pleasure craft such as: docking and mooring, custody and surveillance, supply of water, power, provisions and fuel, garbage disposal, shipping agency, haulage, dry-docking, repair and maintenance.

The relationship between the marina operator and the owner of the pleasure craft is governed by an atypical contract, known as "*contratto di ormeggio*," whose basic content consists in providing berths and port infrastructures to the user.[73]

This chapter contains a practical analysis of how, under Italian law, the remedies of right of retention and arrest may assist the

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[70]In an older decision of the Commercial Court of Croatia, II Pž-1257/90-2, 29/5/1990, the court held that a yachting club's claim for various services and expenses for the maintenance of a fleet of vessels was a maritime claim. In this decision, the court widely interpreted the relevant legal provision qualifying the claim for the supply of a ship as a maritime claim.

[71]Croatia is not a party to the 1999 Arrest Convention. Politically, because of the benefits of reciprocity, the decision makers are still not keen on abandoning the regime of the 1952 Arrest Convention, despite the fact that there is awareness of the improvements implemented in the wording of the 1999 Convention.

[72]Fabio Cerasuolo is the author of paragraphs III, A and B. Angelo Merialdi is the author of paragraph III, C.

[73]This definition is provided by the Italian Court of Cassation: see Court of Cassation no. 3554/2013. For an analysis of the berth contract see: Bagliadacca, M., *Il contratto di ormeggio*, DIR. MAR., 2014, p. 229 et seq.; Corrado, A., *Il contratto di ormeggio*, in Morandi, F. (ed.), *I contratti del trasporto*, Bologna, 2013, p. 947 et seq.; Gaggia, A., *Il contratto di ormeggio*, in Antonini, A. (ed.), *Trattato breve di diritto marittimo,* vol. IV, Milan, 2013, p. 173 et seq.; ANTONINI, A., *Il contratto di ormeggio*, DIR. MAR., 1999, p. 1067 et seq.

marina operator in securing and enforcing its rights against a defaulting user.

The right of retention can be defined as a private means of self-redress whereby the creditor can detain the goods of the debtor until its claim has been satisfied.[74] As a statutory remedy, it can be asserted only in relation to a restricted number of claims specifically identified by the law. In addition, a "conventional right of retention" may be established by agreement between the parties.[75]

Often the right of retention is connected with a statutory lien on the retained goods (so called "privileged right of retention"). A privileged right of retention can be relied upon against any third party and allows the creditor to sell the retained goods pursuant to the rules established by the Civil Code for the sale of the pledged goods.[76] The conventional right of retention instead has no effects *vis-à-vis* third parties.[77]

Arrest of a pleasure craft in Italy is governed by a number of different sources, in particular the Civil Code, the Code of Civil Procedure, the Code of Navigation and the 1952 Arrest Convention.

1. Retention of a Pleasure Craft as Security for Marina Operator's Claims

Under art. 2756 of the Civil Code, claims related to the preservation and improvement of a movable asset are assisted by a lien and a right of retention on the said asset, as long as the same remains in the possession of the creditor. Under art. 2761 para. 3

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[74]Galgano, F., TRATTATO DI DIRITTO CIVILE, vol. II, Padua, 2009, p. 1155.

[75]Clauses providing a right of retention are considered valid by the Italian Court of Cassation: see Court of Cassation no. 2643/1975, *Foro Italiano*, 1976, p. 401 et seq. This view is supported by scholars: Bianca, C., *Diritto Civile*, Vol. 7, Milan, 2012, p. 300; Bassoli, E., *Il diritto di ritenzione*, in Clarizia R. (ed.), GARANZIE REALI E PERSONALI, I ed., Padua, 2011, p. 707–708.

[76]Court of Cassation no. 3842/1956, *Foro Italiano*, 1957, I, p. 35. Scholars have upheld this view: see Bianca, C., *Diritto Civile*, Vol. 7, Milan, 2012, p. 300; Galgano, F., *Trattato di diritto civile*, vol. 2, Padua, 2009, p. 1155; Semiani Bignardi, F., *La ritenzione nell'esecuzione singolare e nel fallimento*, Padua, 1960, p. 26.

[77]Bassoli, E., *Il diritto di ritenzione*, in Clarizia R. (ed.), GARANZIE REALI E PERSONALI, I ed., Padua, 2011, p. 708.

and 4 of the Civil Code, the same rules apply to claims arising from the deposit of movable assets.

Whether a marina operator enjoys a lien on the yacht, and hence the right of retention associated thereto, will depend in principle on whether the specific content of the contract stipulated with the user includes any of the services specifically envisaged by art. 2756 or 2761 of the Civil Code. But the applicability of these provisions to a pleasure craft (and vessels more in general) is not straightforward. In particular:

- Being associated to a lien, the right of retention on the yacht is subject to the rule of conflict of laws of art. 6 of the Code of Navigation, which provides that the right of ownership and rights *in rem* on ships are governed by the law of the flag. Hence, while articles 2756 and 2761 of the Civil Code may be held applicable to Italian flagged craft, for foreign craft the existence of a lien, and possibly of a right of retention associated thereto, is to be assessed in the light of the law of the respective flag State;
- There are some reported cases where Italian courts have affirmed that articles 2756 and 2761 of the Civil Code apply to pleasure craft.[78] However, only the Court of Cuneo has extensively analyzed this issue and in this regard stated that the reference to movable assets in the aforesaid provisions is wide enough to cover any movable assets, including those subject to registration, such as ships and pleasure craft.[79] This view has been supported by some scholars.[80] However, other scholars have questioned the applicability of art. 2756 of the Civil Code to vessels in general, on the ground that the lien envisaged thereunder should be assimilated to a pledge which, as such, cannot be established on a registered movable asset;[81]

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[78]Court of Cuneo 26.04.1999, *Foro Italiano*, 2000, p. 2707 et seq.; Court of Salerno 24.06.1994, *Dir. Mar.*, 1996, p. 1055; Court of Venice 22.05.1948, *Dir. Mar.*, 1949, p. 91; Court of Appeal of Trieste 24.05.1953, *Dir. Mar.*, 1955, p. 573.

[79]Court of Cuneo 26.04.1999, *Foro Italiano*, 2000, p. 2707 et seq.

[80]Sarfatti, G., Sul diritto di ritenzione in materia navale, *Dir. Mar.*, 1949, p. 92–93.

[81]Berlingieri, F., I diritti di garanzia sulla nave, l'aeromobile e le cose caricate, Padua, 1965, p. 236; Berlingieri, F., Privilegi sulla nave per crediti derivanti da riparazioni e diritto di ritenzione, *Dir. Mar.*, 1955, p. 576; Andrioli, V., Dei privilegi, Comm. Scialoja-Branca, Roma-Bologna, 1955, p. 105.

- The applicability of articles 2756 and 2761 of the Civil Code to pleasure craft (and vessels in general) has also been questioned on the ground that the aforesaid provisions partially overlap with art. 552 no. 1) of the Code of Navigation, which provides that claims in relation to custody and preservation of the vessel are secured by a maritime lien on the vessel, but without a right of retention. In a case dating back to 1958 the Court of Appeal of Florence, and more recently the Court of La Spezia, affirmed that art. 2761 of the Civil Code cannot be applied to cases which fall within the scope of art. 552 of the Code of Navigation.[82] The consequence of this reasoning is that the right of retention envisaged by the above provisions of the Civil Code would not arise in relation to the specific claims covered by art. 552 of the Code of Navigation;
- In light of this somewhat uncertain scenario, it is common practice for marina operators to include in their contracts with users a clause stating that the claims of the marina are secured by a conventional right of retention on the yacht. However, such contractual provisions are effective only between the stipulating parties, and marina operators will not be able to enforce the contractual right of retention against third parties.

Quite apart from the above legal issues, the applicability of articles 2756 and 2761 of the Civil Code to pleasure craft can be problematic also in view of other form of restraints, in that:

- A right of retention can be enforced effectively only if the pleasure craft is dry-docked. When, instead, the pleasure craft is manned or moored it may be difficult to prevent the vessel and the respective crew from setting sail, without the assistance of public authorities;
- In the event that the right of retention is held to be wrongfully enforced, the management and personnel of the marina may face criminal charges for misappropriation pursuant to art. 646 of the Criminal Code.[83]

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[82]Court of Appeal of Florence 06.05.1958, *Dir. Mar.*, 1959, p. 99 et seq.; Court of La Spezia 10.02.2004, *Dir. Mar.*, 2006, p. 861.

[83]See Court of Cassation no. 24487/2009 and Court of Camerino 07.01.2005, Overlex.

B. Arrest of Pleasure Craft: "Sequestro Conservativo" and Arrest under the 1952 Arrest Convention

1. Marina Operator's Claims as Maritime Claims

Art. 2905 of the Civil Code provides that "the creditor can request the "*sequestro conservativo*" of the debtor's assets pursuant to the rules of the Code of Civil Procedure." The purpose of a "*sequestro conservativo*" can be assimilated to that of the French law concept of the "*saisie conservatoire*." It allows the creditor to provisionally seize one or more goods or assets of the debtor as security for the future enforcement of a claim.

Art. 671 of the Code of Civil Procedure states that the judge, on application by the creditor who is in danger of losing the security for the claim, can grant "*sequestro conservativo*" of any good (movable or immovable assets) of the debtor, to the extent that the law allows their future attachment ("*pignoramento*").[84]

The express reference to "*pignoramento*" underlines the aim of the "*sequestro conservativo*" contemplated by art. 671 of the Code of Civil Procedure; in other words, preserving the debtor's goods as security until the case reaches its conclusion on the merits so that afterwards it is possible for the creditor to attach such goods. This is to be read in combination with art. 2740 of the Civil Code according to which "the debtor is liable with all his present and future assets."

As a rule, pursuant to art. 671 of the Code of Civil Procedure, the creditor must meet two requirements in order to obtain an order of "*sequestro conservative;*" he must provide evidence of *fumus boni iuris* (*prima facie* evidence that the claim is well grounded); and *periculum in mora* (danger of losing the security for the claim). However, if the claim is secured by a lien *periculum in mora* is not

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[84]Under art. 492 of the Code of Civil Procedure "*pignoramento*" consists of an injunction whereby the bailiff orders the debtor to refrain from any activity aimed at disposing of the specific assets which are subject to execution. As such, "*pignoramento*" is the initial step in the process of execution.

required as "*sequesto conservativo*" is the ordinary means to exercise and preserve a lien.[85]

In the maritime law domain, *periculum in mora* is assumed to exist *in re ipsa* when the pleasure craft or the ship (either flying the Italian flag or a foreign flag) is the only asset owned by the debtor in the Italian territory.[86]

Procedural rules applicable to "*sequestro conservativo*" are provided by articles 669*bis* - 669*quaterdecies* of the Code of Civil Procedure mentioned above. This is a body of procedural rules applicable to the generality of provisional pre-judgment remedies.

In the case of ships these provisions are complemented by the specific procedural provisions of articles 682 – 686 of the Code of Navigation. Namely art. 682 provides that the judicial order granting the arrest shall contain;

- the order to the owner of the vessel not to transfer its property rights on it;
- the order to the master not to set sail; and
- the details of the vessel.

One of the peculiarities of a "*sequestro conservativo*" of pleasure craft or ships is that the order of arrest relates to a specific and clearly identified asset and not all the assets of the debtor. As a consequence, according to art. 683 of the Code of Navigation a "*sequestro conservativo*" is executed by serving the order of arrest on the registered owner and the master.

The decision granting the arrest of a pleasure craft will often also contain the order to the competent public authority, namely the local Harbour Master Office, to take any measure necessary to

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[85]Case law: *ex multis* Court of Genoa 11.07.2011, *Dir. Mar.*, 2012, p. 924; Court of Ravenna 17.07.2004, *Dir. Mar.*, 2006, p. 546; Court of Appeal of Lecce 11.04.1996, *Dir. Mar.*, 1997, p. 464; Court of Genoa 11.01.1994, *Dir. Mar.*, 1995, p. 1060. Scholars: Berlingieri, F., *Conservazione dei privilegi e sequestro conservativo*, *Dir. Mar.*, 1962, p. 74–75.

[86]Court of Genoa 30.03.2015, not published; Court of Sanremo 17.10.2005, *Dir. Mar.*, 2007, p. 220; Court of Genoa 02.11.2005, *Dir. Mar.*, 2007, p. 228; Court of Genoa, 12.11.2002, *Dir. Mar.*, 2004, p. 1465; Court of Lucca 31.07.2001, *Dir. Mar.*, 2002, p. 1016.

prevent the vessel from setting sail pursuant to art. 646 of the Code of Navigation. In practice these measures consist of collecting the ship's certificates and documentation onboard and rarely involve the application of material hindrances to navigation, such as chains or padlocks.

The above domestic regime is complemented by the 1952 Arrest Convention. This does not contain a definition of "sea going ship" and does not specifically provide that pleasure craft fall within its scope. However, Italian courts routinely apply the 1952 Arrest Convention to cases involving pleasure craft[87] and this is also accepted by scholars.[88]

The 1952 Arrest Convention governs the arrest[89] of ships in relation to maritime claims as defined in art. 1.1. a) – q). According to well-established Italian case law, if the 1952 Convention applies, it is not necessary for the creditor to prove the existence of *periculum in mora* (danger of losing the security for the claim) which is otherwise normally required under Italian law as explained above.[90]

The 1952 Arrest Convention provides a differentiated regime for ships flying the flag of Contracting States and ships flying the flags of non-Contracting States:

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[87]Case law: e.g. Court of Livorno 24.06.2014, *Dir. Mar.*, 2014, p. 203 et seq.; Court of Naples 28.03.2006, *Dir. Mar.*, 2008, p. 979 et seq. Scholars: Berlingieri, F., ARREST OF SHIPS, vol. I, VI ed., London, 2017, p. 39; Berlingieri, F., *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, Milano, 2009, p. 758 et seq.

[88]Berlingieri, F., ARREST OF SHIPS, vol. I, VI ed., London, 2017, p. 39; Berlingieri, F., *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, Milano, 2009, p. 758 et seq.

[89]The nature in the Italian legal system of the concept of the arrest contemplated by the Brussels Convention is debated, with some assimilating this to "*sequestro conservativo*" and others who attribute to the arrest the nature of a specific, and different, provisional measure. This will be dealt with in the forthcoming subparagraph "Considerations related to the identity of the debtor."

[90]Ex multis Court of Naples 28.03.2003, *Dir. Mar.*, 2008, p. 979; Court of Genoa 04.10.2002, *Dir. Mar.*, 2004, p. 1463.

- according to art. 2 of the 1952 Arrest Convention, ships flying the flags of Contracting States can be arrested only in relation to maritime claims but no other claim;
- according to art. 8.2 of the 1952 Arrest Convention, ships flying the flags of non-Contracting States can be arrested in relation to maritime claims and any other claim for which the law of the Contracting State where arrest is requested permits it.[91]

Pursuant to art. 8.4, Italian courts do not apply the 1952 Convention to purely domestic cases, i.e. where the vessel flies the Italian flag and the person requesting the arrest has his or her habitual residence or principal place of business in Italy. In such cases the domestic provisions on "*sequestro conservativo*," as illustrated above, apply.[92]

In a number of instances, services provided by marina operators to users will be considered as maritime claims pursuant to art. 1 of the 1952 Convention, under letters k) "goods or materials wherever supplied to a ship for her operation or maintenance," l) "construction, repair or equipment of any ship or dock charges and dues" and n) "Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner."

In particular, it is undisputed that the supply of water, power and fuel falls within the scope of art. 1.1.k)[93] and that repair costs fall within the scope of art. 1.1.l).[94] Haulage and dry-docking may fall under both the aforementioned paragraphs depending on the services to which they are connected (maintenance or repair).

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[91]In Italy the courts have repeatedly held that the 1952 Arrest Convention shall apply also to ships flying the flags of non-contracting States: ex multis Court of Trieste 16.11.2010, *Dir. Mar.*, 2011, p. 972; Court of Salerno 09.11.2010, *Dir. Mar.*, 2011, p. 604; Court of Genoa 28.10.2005, *Dir. Mar.*, 2007, p. 223; Court of Appeal of Rome 16.07.2003, *Dir. Mar.*, 2005, p. 200; Court of Appeal of Genoa 12.02.2000, *Dir. Mar.*, 2001, p. 1113. However, contra: Court of Venice 29.05.1998, *Dir. Mar.*, 1999, p. 1232; Court of Ravenna 12.02.1996, *Dir. Mar.*, p. 1165; Court of Cassation no. 5848/1993, *Dir. Mar.*, 1994, p. 157.

[92]Court of La Spezia 10.02.2004, *Dir. Mar.*, 2006, p. 861.

[93]Court of Genoa 26.04.2013, *Dir. Mar.*, 2014, p. 194; Court of Genoa 19.02.2010, *Dir. Mar.*, 2011, p. 225; Court of Genoa 22.03.1994, *Dir. Mar.*, 1994, p. 531.

[94]Court of Lecce 24.12.1994, *Dir. Mar.*, 1996, p. 1064.

There is some controversy as to whether agency, mooring, custody and surveillance fees should be considered maritime claims pursuant to art.1.1.l).

Some scholars are inclined not to consider agency fees as maritime claims under 1.1.l),[95] but case law is unsettled, with decisions qualifying agency fees as a maritime claim and others expressing the opposite view.[96]

As for berthing, custody and surveillance fees, some scholars are of the view that the expression "dock charges" under art. 1.1.l) is sufficiently wide to cover them, while others, in the light of the "*traveaux préparatoires*," give a narrower reading to the wording of art. 1.1.l) to limit its scope to claims for repairs.[97]

C. Considerations Related to the Identity of the Debtor

Art. 3.4 of the 1952 Arrest Convention states:

> When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

In spite of having been extensively "psychoanalyzed"[98] by scholars and case law, in Italy the construction and application of

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[95]Berlingieri, F., ARREST OF SHIPS, V ed., London, 2011, 118.

[96]Agency fees were treated as maritime claims by the Court of Bari 19.07.2002, *Dir. Mar.*, 2004, p. 1424; the Court of Genoa 20.05.1995, *Dir. Mar.*, 1995, p. 768. More recently, the opposite view was affirmed by the Court of Genoa 20.07.2013, not published.

[97]For the former approach see: Berlingieri, F., ARREST OF SHIPS, V ed., London, 2011, p. 107. For the latter approach see: Lobietti, C., *Il sequestro di nave nel diritto italiano*, Ravenna, 2014, p. 46.

[98]Siccardi, F., Il debitore, la nave ed il sequestro dalla convenzione del 1952 alla convenzione del 1999, *Dir. Mar*., 2011, p. 1158.

art. 3.4 still presents unresolved issues. Two different views, which will be hereby referred to as the "broad approach" and the "restrictive approach," have been envisaged.

According to the "broad approach," when the debtor is not the owner of the pleasure craft, under the terms of art. 3.4 the arrest can be granted even if the maritime claim is not secured by a lien. Such approach is based on a literal interpretation of art. 3.4 and has been upheld by scholars and by the Italian courts.[99]

The consequence of the "broad approach" is that arrest under the 1952 Convention can be granted on a ship or pleasure craft, based on art. 3.4, irrespective of whether the creditor may eventually be empowered to subject the arrested unit to "*pignoramento*" and subsequent execution.

In supporting the "broad approach," an interesting decision of 2010 of the Court of Genoa affirmed that the arrest under the 1952 Arrest Convention is an autonomous and empirical judicial remedy whose goal is to make sure the creditor obtains a form of guarantee as security for its maritime claim.[100] According to this construction, the arrest under the Brussels Convention should then be treated as a remedy having a different nature and purpose from "*sequestro conservative.*"

According to the "restrictive approach," when the debtor is not the owner of the pleasure craft, the arrest should be granted only if this may eventually result in "*pignoramento*" of the unit, due to the fact that the maritime claim is secured by a lien. Those supporting the "restrictive approach" often rely on art. 31 of the 1969 Vienna Convention on the Law of Treaties which states that the ordinary meaning of the terms must be established in their context and in the

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[99]Case law: Court of Gorizia 12.02.2016, *Dir. Mar.*, 2017, p. 499; Court of Genoa 19.02.2010, *Dir. Mar.*, 2011, p. 222; Court of Venice 21.12.2010, *Dir. Mar.*, 2011, p. 607; Court of Genoa 02.11.2005, *Dir. Mar.*, 2007, p. 228. Scholars: Tassinari, G., "La sequestrabilità della nave di proprietà di soggetto diverso dal debitore del credito marittimo nel sistema della Convenzione di Bruxelles del 10 maggio 1952 sul sequestro conservativo delle navi," *Dir. Mar.*, 2001, p. 996; Righetti, G., *Trattato di diritto marittimo*, vol. IV, Milan, 1997, p. 451 et seq.; Silingardi, G., *Sequestro della nave e dell'aeromobile*, in ENCICLOPEDIA DEL DIRITTO, 1990, p. 184–186.

[100]Court of Genoa 19.02.2010, *Dir. Mar.*, 2011, p. 222. This decision has been harshly criticized by Berlingieri, F., Quale è l'utilità per il creditore del conduttore a scafo nudo o del noleggiatore a tempo (o anche a viaggio) del sequestro della nave se il suo credito non è privilegiato?, *Dir. Mar.*, 2011, p. 222 et seq.

light of the object and purpose of the treaty. Art. 3.4 should then be interpreted in light of;

- art. 1.2 of the 1952 Arrest Convention which defines the arrest as the detention of a ship by a judicial process "to secure a maritime claim;"
- art. 9 of the 1952 Arrest Convention which states "nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable."

Read in the context of the above provisions, art. 3.4 is construed to imply that arrest granted thereunder must necessarily satisfy the purpose of a "*sequestro conservativo*" under art. 671 of the Code of Civil Procedure; in other words ensuring that the ship or pleasure craft remains available as security for the creditor's claim until the time when the same can be enforced through "*pignoramento*" and, then, judicial sale. The French version of the 1952 Arrest Convention supports this reasoning by using the term "*saisie conservatoire.*"

Under this narrow reading, art. 3.4 does not entail, in itself, a right of the claimant to arrest a pleasure craft that is not owned by the person who is liable. Therefore, the arrest of a pleasure craft which is not owned by the debtor will be allowed only when the claim is secured by a lien on that specific unit.

The restrictive approach is supported in a number of court decisions and by some scholars[101] and the true construction of art.

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[101]Case law: ex multis Court of Ravenna 22.03.2016, *Dir. Mar.*, 2016, p. 503; Court of Lucca 10.07.2014, *Dir. Mar.*, 2014, p. 684; Court of Bari 12.08.2011, *Dir. Mar.*, 2012, p. 930; Court of Ravenna 04.08.2001, *Dir. Mar.*, 2002, p. 1017; Court of Venice 05.06.1998, *Dir. Mar.*, 1999, p. 438; Court of Venice 29.05.1998, *Dir. Mar.*, 1999, p. 1232; Court of Latina 09.11.1996, *Dir. Mar.*, 1998, p. 430;. Court of Genoa 24.03.1995, *Dir. Mar.*, 1997, p. 1063. Scholars: Franchina, F., *Il nodo interpretativo dell'art. 3.4 della Convenzione sul sequestro di nave del 1952 ed i crediti marittimi*, *Dir. Mar.*, 2017, p. 505 et. seq.; Berlingieri, F., ARREST OF SHIPS, vol. I, VI ed., London, 2017, p. 264–265; Berlingieri, F., INTERNATIONAL MARITIME CONVENTIONS: VOL. 2, London, 2015,

3.4 of the 1952 Arrest Convention is likely to remain a debated issue in the years to come.

V
SPANISH LAW PERSPECTIVE[102]

A. General Considerations

The definition of "sports" or "recreational navigation" is contained in article 252 (2), paragraph 3 of the Recast of the State Ports and Merchant Navy Act (*Ley de Puertos del Estado y de la Marina Mercante*), approved by the Royal Legislative Decree 2/2011, of 5 September (the SPMNA). According to this provision, recreational navigation is a type of navigation, "the exclusive object of which is recreation, the practice of sport for non-profit purposes or non-professional fishing, by the owner [of the vessel] or by other persons entitled [to navigate therewith], by way of charter, contracts for the carriage of passengers by sea, assignment or any other title, provided that, in these cases, the vessel or craft is not used by more than 12 people, excluding the crew."

It should be noted that even today Spain lacks a systematic body of rules governing pleasure navigation. Despite its undoubted economic importance[103] and the recent significant modification of

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p. 226–227; Berlingieri, F., *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, Milan, 2009, p. 834 et seq.; Berlingieri, F., *Ancora sul sequestro di nave non appartenente al debitore, Dir. Mar.*, 1999, p. 441.; Berlingieri, F., *Note sull'ambito di applicazione della Convenzione di Bruxelles del 1952 sul sequestro di navi e sulla sequestrabilità di navi non appartenenti al debitore*, *Dir. Mar.* 1988, p. 804 et seq.

[102]The present study has been carried out in the framework of the research project "Transport as a Motor of Socio-Economic Development: Protection of the Weak Contracting Party and Progress as regards Transport Sector Regulation" (Ref. DER2015-65424-C4-3-P MINECO/FEDER), financed by the Spanish Ministry of Economy and Competitiveness and the European Regional Development Fund (ERDF) (main researcher: M.V. Petit-Lavall).

[103]Statistical data, albeit referred to 2015, shows that, on the 7,880 kilometres of Spanish coast, there are 375 marinas and 457 nautical concessions, 55 of which are listed as anchorages or dry marinas with a total number of 134,725 moorings,

Spanish maritime law by Act No 14/2014, of 24 July, of Maritime Navigation (the MNA)[104] and by the SPMNA, both acts contain only some specific references thereto.

In particular, the concept of "marina" is contained in the SPMNA. Pursuant to this provision, 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,[105] and which are intended to be used exclusively or principally by pleasure craft.[106] Consequently, the element that differentiates marinas from other ports is their main purpose or designation, i.e. to be used exclusively or principally by pleasure craft, even if they can carry out other activities (commercial cargo and passenger transport or non-commercial activities such as unloading and handling of fresh fish), albeit in an accessory way.[107] However, the SPMNA does not contain the legal regime of marinas.

This is a consequence of the division of powers between the Spanish State and the so-called "Autonomous Communities" (in other words, the regions who have their own government and legislative power) in the Spanish Constitution, which empowers the Autonomous Communities to assume legislative powers in the field of marinas,[108] a faculty that has been widely used in practice. As of today, all Autonomous Communities situated on the seafront have

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http://www.naucher.com/es/actualidad/la-feapdt-presenta-un-completo-informe-anual-de-puertos-deportivos-en-espana-2015/_n:4385/.

[104]Most of its content applies to vessels and pleasure craft and, furthermore, it regulates the craft charter party for the first time in Spain.

[105]Art. 2 (1), the SPMNA.

[106]Art. 3 (4) c) of the SPMNA.

[107]Arroyo Martínez, I., CURSO DE DERECHO MARÍTIMO, 3rd ed., Civitas-Thomson Reuters, Cizur Menor, 2015, p. 886; Pulido Begines, J. L., INSTITUCIONES DE DERECHO DE LA NAVEGACIÓN MARÍTIMA, Tecnos, Madrid, 2009, p. 699.

[108]Art. 148 (1) (6), Spanish Constitution.

assumed such powers in their respective Statutes of Autonomy and have promulgated their own acts for ports and marinas.[109]

Empowered by the Spanish Constitution, all Autonomous Communities with access to the sea have furthermore assumed in their respective Statutes of Autonomy the ownership of marinas and the activity developed therein, that is, their management or exploitation. Consequently, at present, marinas are regulated by the respective autonomous or regional acts, being the State legislation of supplementary application, namely the SPMNA and Act No 22/1988, of 28 July, on Coasts (the CA).[110] In short, the regulation of marinas in Spain is scattered and has to be dervived from many different acts and regulations.

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,

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[109]Act No 5/1998, of 17 April, on the Ports of Catalonia (B.O.E. No 127, 28 May 1998); Act No 14/2003, of 8 April, on the Ports of the Canary Islands (B.O.E. No 134, 5 June 2003); Act No 10/2005, of 21 June, on the Ports of the Balearic Islands (B.O.E. No 179, 28 June 2005), as amended by Act No 6/2014, of 18 July (B.O.E. No 202, 20 August 2014); Act No 5/2004, of 16 November, on the Ports of Cantabria (B.O.E. No 298, 11 December 2004); Act No 21/2007, of 18 December, on the Legal and Economic Regime of the Ports of Andalusia (B.O.E. No 45, 21 February 2008); Decree No 130/2013, of 1 August, on the exploitation of the marinas and the port areas designated to be used by pleasure craft, the regulation of which corresponds to the Autonomous Community of Galicia (D.O.G. No 153, 12 August 2013); Act No 2/2014, of 13 June, on the Ports of the Generalitat Valenciana (Government of the Valencian Autonomous Community) (B.O.E. No 165, 8 July 2014); Act No 3/1996, of 16 May, on the Ports of the Region of Murcia (B.O.E. No 238, 2 October 1996), as amended by Act No 3/2017, of 14 February (B.O.E. No 57, 8 March 2017). In the Basque Country, the Autonomous Government has recently sent to the regional Parliament a Draft Act on the Ports and Maritime Transport of the Basque Country, which is intended to replace the—very fragmentary—regulation currently in force.

[110]The derogatory provision of the former Act No 27/1992, of 24 November, on the State Ports and Merchant Navy expressly abrogated Act No 55/1969, of 26 April, on Marinas, and tacitly repealed the Royal Decree No 2486/1980, of 26 September, approving the Regulation of the Act on Marinas. However, Zambonino Pulito, M., *El nuevo marco de los Puertos deportivos: el régimen de las concesiones*, REVISTA ANDALUZA DE ADMINISTRACIÓN PÚBLICA, nº 77, 2010, pp. 46, 47 and 54, considers that the Regulation of the Act on Marinas is still in force.

the SPMNA and art. 49, the CA).[111] However, the Autonomous Communities can manage them directly (either in a centralized or a decentralized way) or indirectly. Indirect management implies that 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 can thus be separated and the latter is privatized,[112] whereby the concession is the formula most frequently employed in practice. In fact, most Spanish marinas are managed—and they provide their services to pleasure craft—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.[113]

Consequently, first there is a legal relationship of a public nature between the Autonomous Administration and the marina operator (administrative concession), and second, a relationship of private nature between the holder of the marina concession and the person using its installations. By virtue of the latter, 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.[114] This derives from the various regional acts that

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[111]Zambonino Pulito, M., *Puertos y costas: régimen de los puertos deportivos*, Tirant lo Blanch, Valencia, 1997, pp. 93 et seq. and 116 et seq.; id., *El nuevo marco de los Puertos deportivos: el régimen de las concesiones*, cit., pp. 50 et seq.; Arroyo Martínez, I., COMPENDIO DE DERECHO MARÍTIMO (LEY 14/2014, DE NAVEGACIÓN MARÍTIMA), 6th ed., Tecnos, Madrid, 2017, p. 394; Pulido Begines, J. L., INSTITUCIONES DE DERECHO DE LA NAVEGACIÓN MARÍTIMA, cit., p. 701.

[112]With detail, Zambonino Pulito, M., PUERTOS Y COSTAS: RÉGIMEN DE LOS PUERTOS DEPORTIVOS, cit., pp. 252 et seq.; id., *El nuevo marco de los Puertos deportivos: el régimen de las concesiones*, cit., pp. 59 et seq. See also Pulido Begines, J. L., INSTITUCIONES DE DERECHO DE LA NAVEGACIÓN MARÍTIMA, cit., p. 702.

[113]As regards the different types of management, the percentages are as follows: State Port Authority (4.7%); Autonomous Community (18.5%); Local government (0.8%); Yacht Club (43.7%) and Commercial Company (31.7%). See *Amarres y puertos deportivos*, in http://www.nauticalegal.com/en/articulos/ports-and-moorings-in-spain/60-amarres-y-puertos-deportivos.

[114]If the marina is managed directly by the Administration, there is no more than one single relationship, between the marina and the user of the berth. The berth contract is then of a public nature, as the assignment of the berth takes place by virtue of an administrative authorization (e.g. arts. 63 and 64 Act No 10/2005, of 21 June, on Ports of the Balearic Islands). See Zambonino Pulito, M., *El nuevo marco de los Puertos deportivos: el régimen de las concesiones*, cit., p. 92.

regulate the ports under the competence of the Autonomous Communities. In this sense, art. 54 (6) of Act No 2/2014, of 13 June, on the Ports of the *Generalitat Valenciana* (Valencian Autonomous Community) states that, "the relationship between the providers of port services in indirectly managed ports and the users of these services shall be governed by private law, subject to the terms and conditions of the licence or concession for the provision of services as well as the port operating and policing regulations."

In similar terms, art. 60 (1) of Act No 5/1998, of 17 April, on the Ports of Catalonia, establishes that the "contracts entered into by the *concessionaire* and other natural or legal persons, the purpose of which is the temporary assignment of the use and enjoyment of port elements not reserved for public use, shall be governed by private law as regards the relationship between the contracting parties." In the same way, art. 39 (2) of Act No 21/2007, of 18 December, on the Legal and Economic Regime of the Ports of Andalusia, provides that the "contracts for the assignment of port elements shall be governed by private law as regards the rights and obligations of the parties," and requires their formalisation by a public deed.

Nonetheless, one should not overlook that the content of the contracts concluded between the marina operator and the users is directly conditioned by, (1) the operating and policing regulation of each marina, which are of a public nature; (2) by the content of the concession title; as well as (3) by the administrative legislation of the Autonomous Communities on marinas and, (4) additionally, by the State Law.[115]

Marinas provide different services to pleasure craft, among which the following are worth mentioning: signalling, beaconing and other aids to navigation for the approximation and access to the port, as well as the beaconing therein; general surveillance; lighting of common areas; cleaning of common areas on land and on the water; civil protection, emergency management, monitoring of the compliance with the obligations as regards the protection of vessels

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[115]Zambonino Pulito, M., El nuevo marco de los Puertos deportivos: el régimen de las concesiones p. 93.

and port facilities, fighting of pollution and environmental management; pilotage; port towage; docking and mooring; supply of water, electric power and fuel to the vessels; or removal of solid and liquid waste (art. 53, Act No 2/2014, of 13 June, on the Ports of the *Generalitat Valenciana*).[116]

The users of the marinas are obliged to pay the corresponding charges for the use of the mooring facilities and for the services provided to them. In this regard, regional acts establish, with greater or lesser detail, the consequences in case of default. They empower the Administration to suspend the provision of such services temporarily, or to forbid the use of the port areas until payment is made or until the debt that originated the suspension is sufficiently guaranteed.[117] Depending on the legal nature of the marina operator,[118] the prices for port services are considered either as (1) taxes, as in the case of a centralized direct management;[119] or (2) decentralized direct management through an autonomous body of an administrative nature;[120] or, (3) on the contrary, tariffs, which are considered private prices when the marina is managed

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[116]Pursuant to art. 59 of Act No 5/1998, of 17 April, on the Ports of Catalonia, port services are, among others; 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 the port areas.

[117]For example: arts. 54 (5) and 103 of Act No 2/2014, of 13 June, on the Ports of the Generalitat Valenciana; art. 75 (1) of Act No 21/2007, of 18 December, on the Legal and Economic Regime of the Ports of Andalusia; art. IX of Act No 3/1996, of 16 May, on the Ports of the Autonomous Community of the Region of Murcia.

[118]Zambonino Pulito, M., Puertos y costas: régimen de los puertos deportivos, cit., p. 326.

[119]This is the case of the Community of Murcia, where the competence lies with the Ministry of Territorial Policy and Public Works (Consejería de Política Territorial y Obras Públicas), under art. 5 of Act No 3/1996, of 16 May, on the Ports of the Autonomous Community of the Region of Murcia, and similarly of the Valencian Autonomous Community under art. 3 (5) of Act No 2/2014, of 13 June, on the Ports of the Generalitat Valenciana.

[120]This is the case of the Balearic Islands, with the creation of the public entity "Ports of the Balearic Islands" (art. 21 of Act No 10/2005, of 21 June, on the Ports of the Balearic Islands); and similarly in Andalusia, with the "Public Ports Agency of Andalusia" (art. 3 of Act No 21/2007, of 18 December, on the Legal and Economic Regime of the Ports of Andalusia).

indirectly or in a direct decentralized way through a public company.[121]

Where a marina is managed indirectly, the person liable for the payment of the tariffs or taxes for the use of the facilities dedicated to sport and pleasure navigation, or for the enjoyment of the services provided by the marina with respect to such navigation, is usually the *concessionaire* of the marina (commercial company or yacht club), although those charges are generally passed on to the users.[122] However, some of the regulations assign the status of taxpayer to the owner of the craft or to the holder of a mooring place (berth), while the marina operator (*concessionaire*) is held to be taxable, as a substitute, where a facility is exploited under a concession in respect of the public land.[123] They even declare the joint and several tax liability of the shipping agent or, where no ship agency contract has been entered into, the master or skipper of the craft (art. 56 of Act No 21/2007, of 18 December, on the Legal and Economic Regime of the Ports of Andalusia).

In any case, the different operating and policing regulations of marinas envisage, with greater or lesser detail, the consequences of non-payment by the users of services provided by the marina. Thus, as a general rule, they expressly empower the *concessionaire*-marina operator to require payment, sometimes with a surcharge or interest, and to deny or interrupt the provision of new services until the debt is paid.[124] In addition, where a berth contract has been

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[121]Art. 20 (a) of Act No 5/1998, of 17 April, on the Ports of Catalonia.

[122]This is the case, e.g. in the Valencian Community. See the Judgment of the Court of Appeal of Alicante (Sentencia de la Audiencia Provincial de Alicante) (Section 5) of 20 May 2009 (JUR 2009, 303037).

[123]Order of the Court of Appeal of A Coruña (Auto de la Audiencia Provincial de A Coruña) (Section 3) of 9 March 2007 (JUR 2007, 238220).

[124]Arts. 14 and 41 of the Operating and Policing Regulation of the Marina of Gijón (available from http://www.puertodeportivogijon.com/wp-content/uploads/2016/01/Reglamento-Explotacion-y-policia_PDG_Ed02.pdf); Arts. 15 and 27 of the Operating and Policing Regulation of the Real Club Marítimo del Abra y Real Sporting Club de Getxo (available from http://www.rcmarsc.es/PDF/El-puerto/Normativas-de-uso/Normativas-de-uso.pdf); art. 9 of the Annex II to the Operating and Policing Regulation of Puerto Blanco, Calpe (available from http://www.puertoblanco.es/reglamento_22OCTUBRE2008.pdf); Arts. 29 (2), 78 and 129 of the Operating and Policing Regulation of the Marina Canal de la Fontana (Marina Nou Fontana) (available

entered into, the marina operator is empowered to proceed with its termination.[125] Other operating and policing regulations declare the secondary civil liability of the craft owners for the infractions or debts contracted by the user or skipper of the vessel by any title.[126]

In addition, the marina users are obliged to employ due diligence when using the mooring place (berth) and the facilities of the marina, as well as to maintain the craft in a good state of repair, presentation, hygiene, buoyancy and safety. In this regard, all marina operating and policing regulations contain detailed guidelines for the use of sports facilities that must be complied with by all craft. Their non-observance empowers the marina operator to seek compensation for damages and even to forbid, temporarily or definitely, the access to the marina facilities.[127]

B. Retention of Pleasure Craft as Security for the Marina Operator's Claims

The different regional legislative acts empower the port administration to immobilize or remove moored or anchored crafts and regulate the causes and the procedure, regardless of the form of the marina management, that is, regardless of whether the management is direct or indirect.[128] Within the framework thereof, some marinas' operating and policing regulations grant the marina operator (*concessionaire*) the right to immobilize or dry-dock the

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from http://marinanoufontana.es/wp-content/uploads/2015/06/ReglamentoDEFINITIVO.pdf); Arts. 7 and 8 of the application tariffs that accompany the Operating and Policing Regulation of Marina Alcudiamar, S.A. (available from https://www.alcudiamar.es/control/Descargas/D_3_65211.pdf).

[125]Art. 41 of the Operating and Policing Regulation of the Marina of Gijón; art. 28 of the Operating and Policing Regulation of the Real Club Marítimo del Abra y Real Sporting Club de Getxo; art. 9 of the Annex II to the Operating and Policing Regulation of Puerto Blanco, Calpe; art. 129 of the Operating and Policing Regulation of the Marina Canal de la Fontana (Marina Nou Fontana).

[126]Art. 36 (1) of the Operating and Policing Regulation of the Real Club Marítimo del Abra y Real Sporting Club de Getxo; art. 46 of the Operating and Policing Regulation of Puerto Blanco, Calpe.

[127]Art. 29 of the Operating and Policing Regulation of the Real Club Marítimo del Abra y Real Sporting Club de Getxo.

[128]See articles 111 et seq. of Act No 2/2014, of 13 June, on the Ports of the Generalitat Valenciana.

craft in the event of non-payment of tariffs for the services that have been rendered. The expenses of the transfer and the manoeuvres of the craft, as well as the costs related to the occupation of the surface of water or land generated thereby shall be assumed by the user in default.[129] In other words, the operating regulations of marinas assign the operators a right of retention over the crafts.

In private law, the right of retention is envisaged in articles 1600 and 1780 of the Civil Code as a right of the lessee in the contract for work[130] and of the depositary in the deposit contract,[131] respectively.

It can certainly be said that where the marina operator performs repair work on, or replaces parts of the craft, it is entitled to retain the vessel in case of default by the user, since the agreement has to be considered a contract of works.[132] In fact, this situation is now expressly envisaged by article 139 (1) of the MNA, in accordance with article 7 of the 1993 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.[133]

On the contrary, it is far more difficult to conclude that the indirect manager-private *concessionaire* of a marina, whose relationship with users is governed by private law, also holds a right of retention of the craft in the event of non-payment of the services and expenses related to the use of a berth. The berth contract is an

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[129]Art. 25 (2) and art. 9 of the Annex II to the Operating and Policing Regulation of Puerto Blanco, Calpe; Arts. 29 (2), 39 and 129 of the Operating and Policing Regulation of the Marina Canal de la Fontana (Marina Nou Fontana); art. 8 of the application tariffs that accompany the Operating and Policing Regulation of Marina Alcudiamar, S.A.

[130]"The person who has executed a work in a moveable asset is entitled to retain it in pledge until payment is made" (art. 1600, the Civil Code).

[131]"The depositary shall be entitled to retain in pledge the asset received in deposit until full payment is made of what is owed due to the deposit" (art. 1780, the Civil Code).

[132]Judgment of the High Court of Justice of Catalonia (Civil and Criminal Chamber, Section 1) of 23 June 2014 (RJ 2014, 4500); Judgment of the Court of Appeal of Valencia (Section 8) of 4 October 2005 (AC 2005, 2175).

[133]Arroyo Martínez, I. & Rueda Martínez, J.-A., Comentarios a la Ley 14/2014, de 24 de julio, de navegación marítima, Civitas-Thomson Reuters, Madrid, 2016, p. 400; Gabaldón García, J. L., Curso de Derecho marítimo internacional. Derecho marítimo internacional público y privado y contratos marítimos Internacionales, Marcial Pons, Madrid, 2012, pp. 430 and 431.

atypical contract whose qualification or approximation to the deposit contract is debatable. Indeed, the major controversy which has not yet been resolved revolves around the determination of whether a berth contract results in the marina operator's obligation of custody of the moored craft and its component parts, belongings and other assets. In this sense, many authors have stated that, as compared to the deposit agreement, the berth contract is not an *in rem* contract (which would be binding from the moment of the delivery of the asset to the depositary), since the vessel is not "delivered" to the marina operator, so custody is not a main obligation of the latter.[134] However, this possibility does exist, as will be seen later in the text, in those cases in which the marina management is direct.[135]

However, when the user of a berth agrees with the marina operator to dry-dock 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 existence at all), entails a liability for custody."[136]

Some operating and policing regulations authorize the marina to declare the abandonment of the craft, not only when it shows

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[134]Legal authors have considered that the existence of an obligation of custody does not necessarily imply the assimilation of the berth contract with the deposit contract, since this obligation would be the only common element of both contracts. See Comenale Pinto, M. M., *In torno alla natura e al contenuto del contratto di ormeggio*, DIRITTO DEI TRASPORTI, 2000, p. 899; Rodríguez Ruiz De Villa, D., *El contrato de amarre en Puerto Deportivo*, UNED. BOLETÍN DE LA FACULTAD DE DERECHO, No 25, 2004, p. 123. See also Álvarez Lata, N., *Depósito civil*, in TRATADO DE CONTRATOS (ed. Bercovitz Rodríguez-Cano, R.), Vol. III, 2nd ed., Tirant lo Blanch, Valencia, 2013, pp. 3371 et seq. In this sense, the Judgment of the Court of Appeal of A Coruña (Section 4) of 19 February 2003 (JUR 2003, 185444) has declared that "it cannot be deduced therefrom that the Club assumes or commissions the obligation to maintain a service of custody or surveillance of the partners' vessels that remain on its facilities. Therefore, it is not possible to infer the existence of a deposit contract, the essence of which is custody and whose legal nature is that of an *in rem* contract that is binding from the moment when one of the parties receives the asset from the other party, with the obligation to keep it and to restore it, free of charge, unless otherwise agreed by the parties (art. 1758 of the Civil Code)."

[135]See art. 473 (1), para. 2 of the MNA.

[136]Judgment of the Court of Appeal of Valencia (Section 7) of 8 November 2010, JUR 2011, 164081.

obvious signs of deterioration, is at risk of sinking or has sunk, but also in the case of non-payment of the berthing fees and the services that have been provided. Furthermore, the abandonment of craft is often regulated by regional acts. In this sense, art. 101 of Act No 2/2014, of 13 June, on the Ports of the *Generalitat Valenciana*, requires an abandonment procedure to be initiated that the vessel is not registered, or sufficient data for the identification of its owner or shipping agent is missing, and that it remains in the marina without the mandatory authorization, or that it shows obvious signs of deterioration, is at risk of sinking or has sunk.[137] 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.

However, according to the relevant 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.[138] Accordingly, those operating and policing regulations providing for a presumption that the vessel has been abandoned for the simple reason that it remains for more than 30 days without the outstanding amounts having been satisfied,[139] are in contradiction with the legal framework.[140]

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[137]See also art. 73 of Act No 21/2007, of 18 December, on the Legal and Economic Regime of the Ports of Andalusia.

[138]On the contrary, article 32.ter of Act No 3/2017, of 14 February, which modifies Act No 3/1996, of 16 May, on the Ports of the Autonomous Community of the Region of Murcia, considers as "abandoned those vessels that remain moored or anchored in the same place within the port for more than three months, without externally appreciable activity, and without having paid the corresponding tariffs, when such abandonment is declared by the body with competence in the port-related matters."

[139]See for example art. 25 (2) and art. 9 of the Annex II of the Operating and Policing Regulation of Puerto Blanco, Calpe.

[140]See art. 6 of the Organic Act No 6/1985, of 1 July, of the Judiciary.

C. Arrest of Pleasure Craft

1. Marina Operator's Claims as Maritime Claims

Some operating and policing regulations expressly provide that vessels are liable, where appropriate, as *in rem* security for the payment of the tariffs for the services that have been provided to them, for the payment of the berthing services and for any compensation due for damages to the facilities or to third parties[141]

Therefore, it seems that these regulations are referring to maritime liens, that is, *in rem* rights that encumber the vessel as a security for the payment due, regardless of whether it is owned by the debtor or not.[142]

Currently, maritime liens are defined in article 122 (2) of the 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.

In Spanish law, pursuant to the MNA (arts. 122 to 125), the legal regime of maritime liens is governed by the provisions of the 1993 Convention (art. 122 (1) of the MNA), that entered into force on 5 September 2004.[143] This regime applies to vessels registered in a State Party to 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).

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[141]For example, arts. 31 (II) and 41 of the Operating and Policing Regulation of the Marina of Gijón; arts. 28 and 36 (2) of the Operating and Policing Regulation of the Real Club Marítimo del Abra y Real Sporting Club de Getxo; art. 46 of the Operating and Policing Regulation of Puerto Blanco, Calpe; art. 50 of the Regulation on the Exploitation of Installations dedicated to Pleasure Navigation in Pedreña (http://marinapedrena.es/descargas/REP_180393.pdf).

[142]On the legal nature of maritime liens see Alonso Ledesma, C., *Los Privilegios Marítimos*, Civitas, Madrid, 1995, pp. 263 et seq.

[143]Spain is a party to the Convention by virtue of the Accession Instrument of 31 May 2002 (B.O.E. No 99, of 23 April 2004).

Under article 12 (1) of the MNA, the civil and criminal jurisdiction of Spanish Courts extends to all foreign vessels (except the State vessels) while in the national ports or inland maritime waters. And such jurisdiction continues to exist "even after the foreign vessels have left the inland maritime waters and are navigating the territorial sea, as well as when they are detained elsewhere in the exercise of the right of hot pursuit." (art. 12 (3), the MNA). In addition, according to article 43 (2) of the 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.

On the other hand, it should be noted that the regime of maritime liens applies not only to vessels, but also to pleasure craft. The MNA expressly provides for this in its article 122 (3), which extends the application of the legal regime on maritime liens to vessels, crafts and naval artefacts,[144] a principle that has already been affirmed by the courts.[145]

Maritime liens are those listed in the 1993 Convention, as derived from articles 122 (1) and 124 (1) of the MNA, pursuant to which, "[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." 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

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[144]A broad interpretation of the term "seagoing vessels" in the 1993 Convention is supported by Pulido Begines, J. L., *Curso de Derecho de la Navegación Marítima*, Tecnos, Madrid, 2015, p. 134; Rueda Martínez, J.-A., *Los privilegios marítimos*, in COMENTARIOS SOBRE LA LEY DE NAVEGACIÓN MARÍTIMA (eds. Emparanza/Martín Osante), Marcial Pons, Madrid, 2015, p. 186.

[145]Judgment of the Court of Appeal of Pontevedra (Section 1) of 5 May 2016, AC 2016, 1010.

due for any kind of services provided by the marina, including mooring, anchoring or dry-stay, as well as the payments due for navigation assistance services are secured by a maritime lien. This is the conclusion reached in the legal literature,[146] and by the Courts, who opt for a broad concept of this particular maritime lien.[147] In particular, the Court of Appeal of Pontevedra (Section 1) established in its judgment of 5 May 2016[148] that mooring claims are secured by a maritime lien.

Nonetheless, it should be taken into account that, as mentioned above, the amounts payable by users for the provision of port services are in many cases considered a tax. In this regard, the SPMNA (Additional Provision 21) states that,

> [i]n case of judicial sale of a vessel for the payment to creditors, among which is the Port Authority, taxes accrued for the special use of port facilities shall be considered as credits in favour of the State Treasury, as envisaged by art. 580 (1) of the Commercial Code, provided that they are justified by way of a certification issued by the Director of the Port Authority. Credits for taxes accrued for commercial services rendered to the vessel shall have the priority that results from article 580 (3) of the Commercial Code.

The abrogation of Book III of the Commercial Code, including art. 580, by the MNA implies that the taxes for port rights are now integrated into the category of maritime liens as envisaged by article 4 (1) (d) of the 1993 Convention.[149]

The order of priority of maritime liens is established in art. 122 of the MNA, which refers to the enumeration in the 1993

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[146]Berlingieri, F., INTERNATIONAL MARITIME CONVENTIONS: VOL. 2, NAVIGATION SECURITIES, LIMITATION OF LIABILITY AND JURISDICTION, Informa Law from Routledge, Oxon, 2015, pp. 142, 173 and 174; Gabaldón García, J. L., *Curso de Derecho marítimo internacional* . . . , cit., p. 418; Pulido Begines, J. L., *Curso de Derecho de la Navegación Marítima*, cit., pp. 132 and 133; Casas, J., *Los privilegios marítimos*, in COMENTARIOS A LA LEY DE NAVEGACIÓN MARÍTIMA, Dykinson, Madrid, 2015, p. 103.

[147]Judgment of the Supreme Court (Civil Chamber) of 31 October 1997, RJ 2002, 973; Order of the Court of Appeal of Huelva (Section 2) of 25 June 2015] JUR 2015, 243631.

[148]AC 2016, 1010.

[149]Casas, J., *Los Privilegios Marítimos*, cit., pp. 104 and 105.

Convention and not to their seniority date. Consequently, according to articles 4 and 5 of the 1993 Convention, the claims for port dues occupy 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, the MNA).[150]

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.[151] Indeed, the arrest of vessels regulated in articles 470 to 479 of the MNA—that is governed by the 1999 Arrest Convention,[152] by the provisions of the MNA itself and, additionally, by the provisions of Act No 1/2000, of 7 January, on Civil Procedure (the CPA)—allows the use of this precautionary measure for any maritime claim listed in article 1 (1) of the 1999 Convention. The enumeration contained in the latter Convention is much broader than that of maritime liens envisaged by article 4 of the 1993 Convention. In short, the arrest of a vessel for maritime claims according to the 1999 Arrest Convention (see *infra*) 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 may the arrest 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), the MNA).[153]

According to article 122 (1) of the MNA, the extinction of maritime liens is governed by the 1993 Convention, pursuant to

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[150]Arroyo Martínez, I. & Rueda Martínez, J.-A., Comentarios a la Ley 14/2014, de 24 de julio, de navegación marítima, cit., p. 374.

[151]Gabaldón García, J. L., *Curso de Derecho marítimo internacional* . . . , cit., p. 910; Rueda Martínez, J.-A., *Los Privilegios Marítimos*, cit., p. 177.

[152]Spanish Accession Instrument, B.O.E. No 104, of 2 May 2011.

[153]Arroyo Martínez, I., *Curso de Derecho Marítimo,* cit., p. 475; Rueda Martínez, J.-A., *Los Privilegios Marítimos*, cit., pp. 178, 181 and 182; Arroyo Martínez, I. & Rueda Martínez, J.-A., *Comentarios a la Ley 14/2014, de 24 de julio, de navegación marítima*, cit., p. 1424.

which they shall be extinguished after a period of one year from the date on which the claim for port and pilotage dues has arisen, unless the vessel has been arrested or seized, leading to a forced sale, prior to the expiry of such period (art. 9 of the 1993 Convention). As a matter of fact, arrest is usually requested in practice to safeguard a maritime lien, thus avoiding its expiry.[154]

With regard to the procedure of enforcement, article 2 of the 1993 Convention refers to domestic law.[155] Thus, 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.* of the MNA. It is governed by the provisions of the MNA itself and those contained in the CPA or the administrative regulations that apply to the auctioning of movable property subject to publicity by registration, in all matters not provided for in the 1993 Convention (art. 480, the MNA). It should be highlighted that maritime liens cannot be the object of direct enforcement, since they are not enforceable titles (art. 517, the CPA). Enforcement thus 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*., the LEC).[156] On the contrary, 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 (e.g. art. 105 of Act No. 2/2014, of 13 June, on the Ports of the *Generalitat Valenciana*).

2. Considerations Related to the Identity of the Debtor

Only credits—as listed in article 4 of the 1993 Convention—against the owner, demise charterer, manager or operator of the

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[154]Alonso Ledesma, C., *Viejos y nuevos problemas de los privilegios marítimos*, in ESTUDIOS DE DERECHO MARÍTIMO (ed. García-Pita y Lastres), Thomson Reuters-Aranzadi, Cizur Menor, 2012, p. 311.

[155]Gabaldón García, J. L., Curso de Derecho marítimo internacional. . . , cit., p. 891.

[156]Pulido Begines, J. L., Curso de Derecho de la Navegación Marítima, cit., p. 135.

vessel shall be secured by a maritime lien on the vessel. Thus, in the event of non-payment of the services provided by the marina operator, the latter enjoys a maritime lien on the vessel if the debtor, in other words the user of a marina or holder of a mooring, is the owner[157] or demise charterer thereof (art. 308 (1), the MNA).[158]

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 the special law.[159] If during enforcement the vessel is sold, the balance in favour of the insolvent party, if any, shall be returned to the bankrupt estate. 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. It should be noted that article 76 (3) of the BA does not establish a genuine right to "separate" the asset from the estate,[160] but it envisages a right of separate enforcement, allowing the holders of maritime liens to seize the vessel. This special enforcement procedure may not be paralyzed,

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[157]Under Spanish law, the English term "owner" refers to both the proprietor of the vessel and the so-called "armador," i.e., the "person who, being or not the proprietor of the ship or vessel, has the possession thereof, either directly or through his servants or agents, and engages it in navigation on his own behalf and responsibility" [art. 145 (1), the MNA]. The above rule applies to both the proprietor and the *armador*, because the latter is the one who really owns and uses the vessel. See Arroyo Martínez, I. & Rueda Martínez, J.-A., *Comentarios a la Ley 14/2014, de 24 de julio, de navegación marítima*, cit., p. 375; Rueda Martínez, J.-A., *Los Privilegios Marítimos*, cit., p. 184.

[158]The MNA now regulates lease agreements over vessels the exclusive use of which is related to recreation, the practice of sports without a lucrative purpose or non-professional fishing, that is, the delivery of a vessel or a craft to the lessee for reward, during a period of time and with an exclusively sports-related or recreational purpose (art. 307, the MNA).

[159]Art. 76 (3) of Act No. 22/2003, of 9 July, on Bankruptcy (hereinafter: the BA).

[160]Pursuant to art. 80 (1) of the BA, assets that belong to a third party different from the debtor and with respect to which the latter has no right of use, guarantee or retention shall be separated from the estate and delivered to their owners, at their request.

even if the vessel is a necessary asset for the professional activity of the debtor (art. 56, the BA).[161]

The arrest of vessels is regulated in articles 470 to 479 of the MNA. This precautionary measure, consisting of the immobilization of a national or foreign vessel ordered by a court at the request of a creditor[162] is governed by the 1999 Arrest Convention, by the provisions of the MNA and, additionally, by the CPA (art. 470 (1), the MNA). It also applies to pleasure craft (art. 470 (3), the MNA).

Nonetheless, the legal regime is not uniform, as it depends on the flag of the vessel or craft, as well as on the habitual residence or establishment of the claimant (art. 473, the MNA). Thus, when the arrest is requested by 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 Arrest Convention and arts. 472 and 475 of the 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 Arrest Convention, it is

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[161]See Alonso Ledesma, C., Viejos y nuevos problemas de los privilegios marítimos, cit., pp. 303 et seq.; Baena Baena, P., La Separatio Ex Iure Crediti del buque y la aeronave en la Ley Concursal española, ANUARIO DE DERECHO MARÍTIMO, No 30, 2013, pp. 125 et seq.

[162]However, where the order for arrest refers to a Spanish ship that is physically within the Spanish jurisdiction, at the request of a person who has his or her habitual residence or principal place of business in Spain (or a person who has acquired the claim by virtue of assignment or subrogation from such person), the immobilization may be replaced, at the competent jurisdictional or administrative body's discretion, by the annotation of the measure and, where appropriate, of a restraint on sale in the Registry of Moveable Property (art. 473 (1) and (2), the MNA). This is logical because such annotation cannot be made with respect to ships that do not fly the Spanish flag (cfr. art. 69, the MNA). See Gabaldón García, J. L., *Curso de Derecho marítimo internacional* . . . , cit., p. 907.

subject to the Convention and the asset may be seized for any claim, whether maritime or not (art. 473 (3), the LNM);[163]

- 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), the MNA).[164]

According to article 472 (1) of the MNA, "maritime claims" are those listed in article 1.1 of the 1999 Arrest Convention. In particular, the extensive list of maritime claims includes port, canal, dock, harbour and other waterway dues and charges (art. 1.1.n, the 1999 Arrest Convention); goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance (art. 1.1.l, the 1999 Arrest Convention); or repair of the ship (art. 1.1.m, the 1999 Arrest Convention). Among them, it should be noted that, as mentioned above, port dues and charges (art. 1.1.n, the 1999 Arrest Convention) are secured by a maritime lien. Consequently, courts have correctly declared that claims for port taxes[165] and maintenance fees for the support of common

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[163]It should be noted however that the Kingdom of Spain, upon accession to the Convention, had reserved the right to exclude the application of the Convention in the case of ships that do not fly the flag of a State Party, in accordance with article 10, paragraph 1 (b) of the Convention. See Portales, J., *El embargo preventivo de buques en la Ley de navegación marítima*, in COMENTARIOS A LA LEY DE NAVEGACIÓN MARÍTIMA, Dykinson, Madrid, 2015, pp. 444 and 445.

[164]The provision is in line with article 8.6 of the 1999 Arrest Convention, pursuant to which "[n]othing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise."

[165]Order of the Court of Appeal of Las Palmas (Section 1) of 24 May 2006, JUR 2006, 20030.

expenses of the marinas[166] 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.[167] In this sense, art. 3 of the 1999 Arrest Convention (referred to in art. 475, the MNA) draws a distinction depending on the nature of the claim. Thus, when a maritime claim of the marina is not secured by a maritime lien, as happens with goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship, the arrest may be requested only, (1) if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is the owner of the ship when the arrest is effected; or (2) if the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected (art. 3.1.a and b, the 1999 Arrest Convention). In short, it is required that the owner or operator of the ship or vessel and the debtor are the same person.[168]

On the contrary, the debtor is not required to be the owner or operator of the vessel if the maritime claim is secured by a maritime lien. In fact, pursuant to article 3.1.e) of the 1999 Arrest Convention, the arrest of the vessel is permissible if the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien.[169] In other words, the vessel or craft is not *per se* subject to the arrest.[170] Rather, it is only

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[166]Order of the Commercial Court Number 1 of Girona, of 27 May 2016, AC 2016, 1673.

[167]Gabaldón García, J. L., Curso de Derecho marítimo internacional. . . , cit., p. 910.

[168]Arroyo Martínez, I., *Curso de Derecho Marítimo,* cit., p. 476.

[169]In accordance with article 3 (1) of the 1999 Arrest Convention, the same is true if; . . . c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or d) the claim relates to the ownership or possession of the ship.

[170]Arroyo Martínez, I. & Rueda Martínez, J.-A., Comentarios a la Ley 14/2014, de 24 de julio, de navegación marítima, cit., p. 1429; Arroyo Martínez, I., Compendio de Derecho marítimo . . . , cit., p. 229.

permissible if the vessel is owned or operated by the debtor 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, the 1999 Arrest Convention), or if the claim relates to the ownership or possession of the ship (art. 3.1.d, the 1999 Arrest Convention).[171]

Moreover, article 3.3 of the 1999 Arrest 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." In this regard, it should be noted that 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 Arrest Convention, does not exist under Spanish Law.[172]

In short, as a result of the arrest regime the owner may suffer the arrest of his craft if the user of the marina or the holder of a berth 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 user of a berth is in possession of the craft, that he engages it in navigation and is responsible for its operation (art. 145 (1), the MNA). The existence of a maritime lien amounts to *in rem* security over the ship for the payment of the claim, the origin of which derives precisely from the ship herself, regardless of whether the owner of the vessel at the time it is encumbered is or is not the person liable for the claim. Indeed, the *in rem* security that the creditor holds over the ship for the

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[171]Albors, E. & Portales, J., *Embargo preventivo de buques. Comentarios prácticos al régimen de la Ley de Navegación Marítima*, in COMENTARIOS SOBRE LA LEY DE NAVEGACIÓN MARÍTIMA (eds. Emparanza/Martín Osante), Marcial Pons, Madrid, 2015, p. 733; Quirós De Sas, A., *El nuevo régimen de embargo preventivo de buques en el Derecho español*, REVISTA ACTUALIDAD JURÍDICA URÍA MENÉNDEZ, nº 32, 2012, p. 139; Martín Osante, J. M., *Arrest of Ships: Geneva Convention 1999 and Lex Fori, in Particular, Spanish Law*, in NEW TRENDS IN MARITIME LAW. MARITIME LIENS, ARREST OF SHIPS, MORTGAGES AND FORCED SALE, Thomson Reuters Aranzadi, Madrid, 2017, p. 142.

[172]In this sense, Albors, E. & Portales, J., *Embargo preventivo de buques. Comentarios prácticos al régimen de la Ley de Navegación Marítima*, cit., pp. 734 and 735, consider that the arrest of vessels has little relevance as a measure of coercion or pressure.

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.[173] In other words, "the immobilization of the ship is an appropriate measure to compel the debtor to provide a guarantee, because if for any reason he does not do so, a possibility exists that it is the owner himself who, albeit alien to the contractual relationship that gave rise to the claim, provides such guarantee, which in any case must cover the possible liability of the debtor, in order to proceed with the release of the vessel."[174]

In conclusion, legal authors[175] and a wide majority of court decisions consider that the current regime contained in the 1999 Arrest Convention and the MNA only permits the arrest of ships for debts incurred by third parties who are not their owner when they are secured by a maritime lien.[176] Nonetheless the available jurisprudence is not unanimous.[177] In this sense, the Order of the Court of Appeal of Las Palmas (Section 4) of 25 February 2011[178] is worth noting, because of its different interpretation of the law:

> At first glance, it seems that the 1999 Convention limits the number of third parties whose credits permit the vessel to be arrested [. . .]. However, [. . .] in reality there is no such limitation and the measure is available to any third party holding a maritime claim over a ship. On the one hand, this is so because, applying a logical criterion, it does not make sense in principle to limit the cases of debts incurred by third parties to the demise charterer, because the maritime claims derived from the operation of the ship—one of the main concepts of

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[173]Order of the Court of Appeal of Las Palmas (Section 4) of 14 April 2009, JUR 2009, 284235.

[174]Order of the Court of Appeal of Cadis (Section 5) of 3 July 2012, JUR 2012, 350159.

[175]Berlingieri, F., International Maritime Conventions . . . , cit., p. 307; Arroyo Martínez, I. & Rueda Martínez, J.-A., Comentarios a la Ley 14/2014, de 24 de julio, de navegación marítima, cit., p. 1425; Gabaldón García, J. L., Curso de Derecho marítimo internacional . . . , cit., p. 917; Albors, E. & Portales, J., Embargo preventivo de buques. Comentarios prácticos al régimen de la Ley de Navegación Marítima, cit., pp. 735 to 737.

[176]Order of the Court of Appeal of Huelva (Section 2) of 25 June 2015 (JUR 2015, 243631).

[177]The Order of the Commercial Court Number 2 of Malaga of 10 March 2015 (JUR 2015, 155690) adopts the arrest of a vessel against the shipping company derived from the non-payment of supplies.

[178]JUR 2011, 342928.

> the 1999 Convention to define maritime claims—may belong to operators other than the charterer. Such a solution would lead to a duality of regimes applicable to third parties, and the creditors of demise charterers would enjoy an enhanced status. On the other hand, this follows from a systematic approach, since the rule is contained in article 3 the opening part of which provides that '[a]rrest is permissible of any ship in respect of which a maritime claim is asserted.' The mention of 'any ship' makes it clear that it is not referring only to the vessels owned by the debtor—ordinary case—but to any ship that directly or by its operation generates the maritime claim, regardless of the possession or ownership thereof. Letters (a) and (b) of paragraph 1 do not have a general but rather a specific nature—they do not require that the claim belongs to the owner or the charterer—and seek to specify what happens when the person obliged to satisfy the claim is the owner of the vessel or the demise charterer. In that sense, they only expressly recognize the interpretation given by the courts on the basis of the 1952 Convention. In addition, letter (e) extends the categories of third parties in those cases in which the claim is secured by a maritime lien; something that would not make much sense because such liens already attribute a right *in rem*, whoever the holder of the credit may be. And finally, Article 3.3 of the 1999 Convention makes a generic reference to the 'arrest of a ship which is not owned by the person liable for the claim.' [. . .] the 1999 Convention does not contain a specific section that admits the arrest for third party debts because it presupposes it. For that reason, it only conditions the arrest when the debtor is the owner of the vessel or the demise charterer and requires that certain circumstances are met at the time of the request for arrest [para. 1, letters (a) and (b)]. On the contrary, outside these assumptions no circumstances are required that condition the granting of the arrest of 'any' ship nor does it require that the party liable for the claim owns the vessel.

In accordance with Article 2 of the 1999 Arrest 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,[179] or that of the port or place in which the vessel is located or where the vessel is expected to arrive, at the applicant's choice (art. 471 (1), the MNA). However, the Maritime Navigation Act 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, the MNA). Indeed, Article 8.3 of the 1999 Convention allows any government or its departments, or any public authority, or port authority, under a domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.[180] Consequently, where the management of the marina is direct or where, even though it is indirect, the port authority is the creditor in relation to the taxes, it is empowered to retain or immobilize the vessel. Such a rule is envisaged, for example, by Act No 2/2014, of 13 June, on the Ports of the Generalitat Valenciana (arts. 111 et seq.); and by Act No 5/1998, of 17 April, on the Ports of Catalonia (art. 106 (6)).

VI
CONCLUSIONS

The comparative analysis of the legal concepts of retention and arrest from the Croatian, Italian and Spanish law perspectives, particularly in the context of security and enforcement of marina operators' claims, points to certain problematic issues appearing in a similar way in all three jurisdictions studied.

First, there are several ambiguities regarding the legal nature and contents of the so-called berth contract as the most common contract used in the marina business, giving rise to the majority of the typical marina operators' claims. In all three jurisdictions

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[179]In the case of a non-Spanish debtor and a creditor-operator of a Spanish marina, Spanish Courts have jurisdiction as Spain is the "Member State where, under the contract, the services were provided or should have been provided," see art. 7.1 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia") (DOUE L 351, 20.12.2012).

[180]Quirós De Sas, A., *El nuevo régimen de embargo preventivo de buques en el Derecho español*, cit., p. 138; Martín Osante, J. M., ARREST OF SHIPS: GENEVA CONVENTION 1999 AND LEX FORI, IN PARTICULAR, SPANISH LAW, cit., p. 139.

studied, the berth contract is currently an atypical innominate contract, but in Croatia the introduction of express legislative provisions regulating the berth contract is being considered by the drafting committee for the revision of the Maritime Code. Indeed, the major controversy which has not yet been solved in any of the legal systems studied, revolves around the determination whether a berthing contract results in the marina operator's obligation of custody over the berthed vessel, or whether it is basically a contract of lease, hire or rental of a safe berth with no elements of bailment. The controversy leads to the next issue, and that is whether the marina operator is in possession of the vessels berthed or moored within the marina, as the exercise of the right of retention over the debtor's vessel is impossible without the creditor's legitimate possession of the vessel.

In relation to the concept of retention, all of the legal systems studied recognize the right of retention of the debtor's assets by the creditor under their civil law rules. It is a self help remedy whereby the creditor can detain the assets of the debtor until the claim has been satisfied, provided that he is in possession thereof. As a statutory remedy it can be asserted only in relation to a restricted number of claims specifically identified by law. In addition, a contractual right of retention may be established by agreement between the parties. Such contractual stipulations are commonly implemented in marina operators' general terms and conditions. The contractual rights of retention are of a lower ranking than those arising by statute. However, the statutory rights of retention do not seem to be well-adapted to the specific nature of berthing contracts which results in legal uncertainty. Therefore, it is certainly advisable to precisely define by contract the marina operator's right of retention.

Regarding the arrest of a pleasure craft by a marina operator, the common feature of the legal systems studied is that such provisional measure of security is generally possible. Italy and Croatia are parties to the 1952 Arrest Convention, whilst Spain is a party to the 1999 Arrest Convention. In principle, the rules set out in the Arrest Conventions apply to pleasure craft in all of the three countries, provided that the vessel flies a flag of a State Party to the respective Convention. Exceptionally, in Croatia the 1952 Arrest Convention is currently not applied to smaller pleasure boats of up

to 12 m (i.e. 39 feet) in length, but this will be subject to revision in the near future. In respect of purely domestic disputes and in relation to vessels sailing under the flags of non-parties to the respective Conventions, the courts of the countries in question apply the relevant national law rules of civil procedure. Most of the marina operators' claims fall under the exhaustive list of maritime claims for which an arrest can be obtained. However, in Croatia and in Italy there are certain ambiguities regarding marina operators' claims for berthing fees, as it is not clear whether they can be classified as one of the maritime claims listed in art. 1.1 of the 1952 Arrest Convention.

The comparative analysis also shows that in the countries in question, the judicial practice and legal doctrine are not settled in respect of the issue of the identity of the personal debtor in connection with the ownership of the vessel subject to the arrest. In particular this ambiguity follows from the unconsolidated judicial interpretation of art. 3 of the 1952 Arrest Convention, and art. 3 of the 1999 Arrest Convention respectively. However, the prevailing position is that the arrested vessel must be in the ownership of the personal debtor, or alternatively the creditor must have a lien or another limited real right over the vessel.