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ARREST OF A YACHT IN A CROATIAN COURT FOR THE PURPOSE OF SECURING A MARINA OPERATOR'S CLAIM

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Marinas - Enhancing Competitiveness, Safety, Security and
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INTRODUCTION



- Research on 38 marinas in Croatia – the majority has had the problems of claim enforcement
- Marina operator's claims: **berthing/mooring (core business)**, supply of the vessel, repair, maintenance, conservation, etc. (additional services, if provided)
- Most vessels in Croatian marinas – foreign flag, foreign ownership (implications on enforcement of claims)
- Claim enforcement measures on a vessel under Croatian law – Maritime Code (lex specialis), Enforcement Act (lex generalis), Arrest Convention 1952
- Various tools for enforcement – retention (possessory lien), execution + forced sale, **arrest** (interim measure of security of a **maritime claim**, i.e. interlocutory injunction, under Croatian law corresponds to *fr. saisie conservatoire*)
- Arrest – particularly adequate when there is a risk of change of ownership or of the yacht leaving the jurisdiction, especially for foreign flags

INTRODUCTION



- Maritime Code + 1952 Convention Relating to the Arrest of Sea-Going Ships
– specific application to the arrest of yachts and to marina operator's claims
- Domestic case law
- Are the typical marina operator's claims maritime claims (MC/1952 Arrest Convention)?
- Are the typical marina operator's claims protected by a maritime lien/privilege?
- Comparative law solutions, 1999 Arrest Convention?
- De lege ferenda?

ARREST UNDER THE MARITIME CODE

- Enforcement over a ship and ship's cargo – MC, Arts 841 et seq ; arrest – MC, Arts 952-964
- Applying to ships, and all „maritime objects“, except boats
- Yachts – MC, courts competent to hear maritime cases (1st instance commercial courts + High Commercial Court)
- Boats – Enforcement Act, courts of general civil jurisdiction (municipal and county courts)
- Yacht ≠ pleasure boat
- Legal uncertainty – *de lege ferenda* include the boats in the same regime

ARREST UNDER CROATIAN LAW

- Conditions for arrest (MC/Arrest Convention 1952 + Enforcement Act):

- a) maritime claim (exhaustive list of claims under MC/AC1952) or maritime lien/privilege (exhaustive list of claims under MC)

- b) the claimant must show *fumus boni iuris* (prima facie case of a valid maritime claim) and *periculum in mora* i.e. 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 (Enforcement Act, Art. 344)

- c) conservatory purpose of the arrest - security for the future enforcement (Enforcement Act, Art. 344)

- *Periculum in mora* – *presumptio iuris et de iure* if the claim is to be enforced abroad (Enforcement Act, art. 344.3)
- Case law – the presumption always applies in case of arrest in a domestic port of a foreign flag vessel or a vessel in a foreign ownership



ARREST UNDER CROATIAN LAW

Maritime claims under MC, art.
953.1.

8. Supply for the purpose of maintenance
and use of a ship (AC1952. art.1.1.k)

9. Construction, modification, repair,
equipping, docking (AC1952. art.1.1.k)

11. Expenses incurred by the master, shipper,
charterer or agent for the account of the
ship, shipowner, operator (AC1952. art.
1.1.n.)

Marina operator's claims

- Repair, equipping, docking
- Supply of goods and materials for the regular use, exploitation and maintenance of the yacht (electricity, water, fuel, oil, parts, paint, antifouling, etc.)
- Supply of services for the regular use, exploitation, operation and maintenance of the yacht (engines, batteries, protection against freezing, tarpoulin, airing, cleaning, regular antifouling and painting, storage of equipment on land, etc.)
- **Berth/mooring** (service...)

IS BERTHING FEE A MARITIME CLAIM?

- Marina operator's core business, main income
- No clear position under positive law
- No uniform court practice, nor legal doctrine
- Maritime claims and maritime liens primarily created and adapted to commercial vessels
- Specific application to yachts and pleasure boats – legal uncertainty
- In my view: it is a maritime claim for a service necessary for the regular maintenance and use/operation of a yacht (MC, art. 953.1.8. - „supply“)
 - Commercial Court of Croatia, II PŽ-1257/90-2, 29.05.1990. (claim of the Sports club P., Split for the various services and expenses for the maintenance of vessels is a maritime claim)
 - *Berlingieri* – mooring is a service necessary for the normal operation and maintenance of a ship
 - counter arguments?
 - de lege ferenda?
 - But what about Arrest Convention 1952?



IS BERTHING FEE A MARITIME CLAIM...

Under Arrest Convention 1952?

(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;

(n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;



ARREST CONVENTION 1952 – application to pleasure craft?

- Applies to yachts
- and to boats (contrary to the current position under domestic case law) – under MC, pleasure boats are subject to registration and have nationality (flag)
- If AC1952 applies (1952 flag) – pleasure boat is subject to arrest, competent court is commercial court specialised to hear maritime cases
- If MC, arts. 952-964 (no international element) – pleasure boat is not subject to arrest but to general Enforcement Act, competent court is court of general civil jurisdiction
- Legal uncertainty – *de lege ferenda* subject all pleasure boats to the same ship arrest regime as yachts
- * ** Arrest of a foreign flag yacht (not a 1952 flag) – if no reciprocity regarding the limited list of maritime claims – interim measures available under general Croatian enforcement law for any civil claim

CASE LAW

Prevailing position:



Marina operator's claim for berthing fee is a „**maritime claim**“ that can be secured by arresting the yacht in respect of which the claim arose (conservative arrest).

- Ruling of the High Commercial Court PŽ-6486/06-3, 01/17/2007 (arrest of a yacht)
 - marina's claim fell under MC, art. 953. 1.11. „expenses incurred by a master, shipper, contracting party, or agent on behalf of the ship, her owner or the operator, in connection with a ship“
- Ruling of the High Commercial Court XLIII PŽ-5043/06-3, 09/27/2006 (arrest of a yacht)
 - marina's claim fell under Arrest Convention 1952, art. 1. 1. d) „agreement relating to the use or hire of any ship whether by charterparty or otherwise“
- Ruling of the Commercial Court in Split 8.R1-116-2016, 08/08/2016 (arrest of a yacht)
 - marina's claim fell under Arrest Convention 1952, art. 1.1.1) „construction, repair or equipment of any ship or dock charges and dues“

IS MARINA'S CLAIM A MARITIME LIEN?

- MC, art. 953.2. - arrest to enforce a maritime lien (applies to yachts, not to pleasure boats)
- MC recognizes maritime privileges – arts. 241-252 (applies to yachts and pleasure boats)
- Advantage – property right, droit de suite (change of ownership or registration), identity of the debtor, priority in ranking
- List of privileges on a vessel – art. 241 (similar to art. 4.1. of the 1993 Convention on Maritime Liens and Mortgages):
 - Crew wages, repatriation costs, social insurance contributions;
 - Loss of life or personal injury claims;
 - Ship salvage award;
 - Claims for **port charges**, costs of navigating through canals, and other waterways, costs of pilotage;
 - Tort claims for physical loss or damage (excl. cargo, containers and passengers' effects carried on the vessel).
- Port charges ≠ port dues; MC ≠ Maritime Domain and Seaports Act; port authority's revenues vs. private concessionaire's revenues
- Can a marina operator earn port charges or port dues?
- Berthing fee in the port open for public traffic vs. berthing fee in a marina – is it fair to discriminate?

CASE LAW



- The position reflected in the previous court practice seems to be that marina operator's claim for a berthing fee is protected by a maritime lien under MC
 - High Commercial Court, XLVII Pž-8130/03-3, 11/22/2006 (decision on the merits, MO's berthing fee)
 - High Commercial Court, XLIII Pž-5043/06-3, 09/27/2006 (arrest, yacht)
 - Commercial Court in Zagreb, 3 St-1098/11-85, 02/08/2016 (insolvency, priority of a maritime lien)
- Recent court practice - marina operator's claim for a berthing fee does not fall under the maritime lien for port charges – port charges can be earned only in the ports open to public traffic, not in the special purpose ports (ports of nautical tourism)
 - High Commercial Court, Pž-263/15-3, 01/26/2015 (arrest of a yacht)
 - High Commercial Court, 72 Pž-8720/2012-6, 05/25/2016 (decision on the merits, MO's b.f.)
 - Municipal Court in Dubrovnik, 17. Ovr. 227/2015, 02/17/2017 (enforcement over a boat)

Comparative law solutions?

- Canada:
 - marina has a statutory right in rem under section 22(2)(m) of the *Federal Court Act* for the supply of "services wherever supplied . . . for the maintenance of the ship" – mooring is such service
 - statutory right *in rem* does not give any priority greater than that of a general unsecured creditor.
- USA: 2012 US Code §§ 31341 - 31343
 - a person providing necessities to a vessel on the order of the owner or a person authorized by the owner—
 - (1) has a maritime lien on the vessel;
 - (2) may bring a civil action in rem to enforce the lien; and
 - (3) is not required to allege or prove in the action that credit was given to the vessel.
 - a manager at the port of supply (marina operator) is listed as a person presumed to have authority to procure necessities for a vessel.
- Slovenia: AC1952, MC, Enforcement Act
 - MC – extended list of maritime claims as under AC1999
 - But AC1952 & MC apply only to commercial ships and yachts of LOA 24m or more
 - Otherwise general Enforcement Act applies

Arrest Convention 1999?

- The list of maritime claims includes:
 - goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance

Art. 1.1.I)



CONCLUSIONS

- Positive law
 - Maritime claim (MC, Arrest Convention 1952) – dubious
 - Privilege for the port charges (MC) – dubious
- Case law
 - Croatian High Commercial Court acknowledges the marina operator's claim for berthing fee as a maritime claim – the correctness is questionable;
 - The court practice is inconsistent regarding the question whether the marina operator's claim for berthing fee is a privileged claim (port charges)
- The prevailing position in the professional circles seems to be that arrest should be allowed for securing marina operator's claims
- Economic importance of the marina operators' business (strategic)
- *De lege ferenda*
 - marina operator's claims under contracts of berth are maritime claims – claims for services as under AC 1999
 - charges for port services in the special purpose ports are protected by a maritime privilege
 - pleasure boats are brought under the same regime as yachts i.r.o. arrest

